

Series of Questions Addressed to Eminent Scholar Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his Facebook Fiqhi Page

Answer to Question

Business Assets and How to Deal with them

To: Najmeddine Khcharem

(Translated)

Question:

Our honourable Sheikh, Assalamu Alaikum Wa Rahmatullah Wa Barakatuh

I would like to ask about the ruling on a transaction that takes place here in Tunisia, it has become a custom throughout the country as well as a legal one:

A person rents out a shop to trade in it, and after years, the owner of the shop cannot take back his shop except for a fee, and sometimes it is estimated at a large amount. Likewise, the tenant can offer what is expressed by us as 'the business asset' for sale to another tenant, and the owner of the shop cannot prevent that unless he pays a compensation for the business asset. Note that the tenant may suffer a loss if the landlord evicts him from the shop / venue.

May Allah bless you and make haste for us the establishment of the second Khilafah Rashida (rightly-guided Caliphate) on the method of Prophethood.

Answer:

Wa Aaikum Assalam Wa Rahmatullah Wa Barakatuh,

First: to Answer this question, we first must consider the following points:

1- A lease is a contract based on the benefit in return for a compensation. The lease is for objects such as a property for housing, commercial shops and the like, in return for a compensation paid by the tenant to the owner of the property. If the lease contract is according to the Shariah law, the benefit from the rented object will go to the tenant for the rental period, the tenant will have the right of disposal of the property according to Shariah.

2- The lease contract is a binding contract, i.e., none of the parties to the contract (the tenant and landlord) cannot terminate it and cancel the contract except with the consent of the other party. Neither the tenant nor the landlord are allowed to make a unilateral decision to terminate the lease contract before the end of its period.

3- The lease contract is a temporary contract with a specific time. The lease term must be specified by day, month, or year...etc. It is not permissible for the lease to be absolute without specifying a known period of time.

4- If the lease contract expires and it is not been renewed between the tenant and landlord, the tenant must return the leased property to its owner, who is the lessor, because the lease contract did not remove the leased item from the ownership of the lessor. Only the benefit from the rented property is removed from the owner of the property and is given to the tenant during the time of the lease. If the lease term ends, the tenant must return the leased property with its benefit to its owner, i.e., to the lessor.

Second: Based on the matters mentioned in the previous item, the answer to your question will be as follows:

1- If the term of the lease contract has not yet expired and the tenant wants to rent the leased property (the commercial shop in question), to another lessee, he may do so without taking the permission of the original lessor, because the benefit of the leased property is for the lessee, and he may obtain the benefit himself and he may lease it to someone else, whether the compensation is the amount of the rent that he paid to the first lessor, or less or more, because the benefit of the leased property is for the first lessee, so he has the right to dispose of it in the Shariah manner according to what he deems appropriate... In the book of the Islamic Personality Volume Two, Chapter: Leasing of Objects, it states:

[If the contract refers to the benefits of the objects such as renting houses, cattle, cars and the like, then the contract is for accessing the benefit from the object, and the estimation of the similar rental price is by looking at the thing whose benefit is equal to the benefit of the leased one. When the object is rented, it becomes for the lessee to obtain the benefit of the property that he rented. If he rented a house, he can live in it, or a cattle or car, he can ride it. The lessee may rent the leased property if he takes possession of it for the same amount as what he leased it for, or for more or less, because the receipt of the leased asset took the place of receiving the benefits, with evidence that it is permissible to dispose of it, so the contract is permissible on it, and because it is a permissible contract with the capital, so it is permissible with an increase or a decrease. However, if he rents the object for a benefit, he may obtain the same benefit, and what is less than it in harm, and he may not obtain more than that such benefit, because it is not permissible for him to obtain more than his right, or other than what he deserves. If he rents cattle he should ride it.

It is not permissible for him to load it because the passenger is lighter than the load. If he rents out a car to certain distance, he is not allowed to ride it for longer distance than that he specified for its rental. If he rents out a property to live in, he is not allowed to make it a storage for wood or iron or the like. Which is more harmful to the home than being a residence. To sum up, if the contract is on the property for compensation, it is a sale, and if the contract is for the benefit from the property with a compensation, it is a lease. Based on this, the contract may be for the object alone, such as the sale of a tree that has fruits that appeared to be good without selling its fruit, and it may be for the object with its benefit as the sale of a house, or it may be for the fruit alone, as the sale of the fruit that appeared to be good, and it may be on to the benefit of a non-embodied object such as the residents of the house. If it is on a benefit that is not considered an object, then it is a lease and not a sale, and just as the purchaser of the asset owns the asset, and has right of disposing of it (in every way), the lessee also owns the benefit that he owned by renting.

And he may dispose of it in every way. Just as the one who buys the fruit of the tree, if it appears to be of good, he can sell it while it is on the trees. The tenant may rent the leased property if he possesses it. because possessing the property when renting it takes the place of possessing the benefit, the evidence is that it is permissible to dispose of it, so its contract is permissible, as is the sale of the fruit on a tree. And when the property is rented and its benefit is received, the lessee can dispose of it according to all the Shariah permits, to get the benefit of the property that he rented because it is his property, so he may rent it at the rent he sees fit, no matter how much it is. Based on this, what is called vacancy for stores, houses and others - which is the payment of a certain amount of money in excess of the estimated rent for the house or warehouse to the first tenant by the one who rents from him - is permissible and there is nothing in it, because the tenant rents the house or store that he rents to others with the estimated rent, and an additional amount is to be paid to him, and this is a rental of the property that he rented with an increase over the original rent, which is permissible, because it is permissible for him to rent what he rented for more or less than what he rented; because it is a contract that is permissible with the capital. Therefore, it is permissible to increase it like selling the thing after receiving it with an increase of the price of what he bought.] [Cited from *The Islamic Personality Vol.2*].

2- Likewise, if the lessor wants to recover the leased property before the expiry of the contract, the lessee may request a compensation for the benefit that he cannot obtain for the remainder of the lease term. If the lessor does not accept payment of compensation for the benefit remaining from the time of the contract, the lessee may seize the property and collect its benefit until the expiry of the contract, and he may lease it to another person than the lessor, that is, to another lessee.

3- If the lease contract (for the commercial store according to the question) ends with the expiry of its time and the lessor wants to recover the leased property (the commercial store), then the tenant is legally obligated to return the leased property to its leased owner because it is his property, and he may not refuse to return it or require payment of compensation (an amount of money) in order to return the property to its original owner, as shown in the quote above from the book, *The Islamic Personality* Vol. 2.

Third: We have previously issued an answer to a question about parts of this issue on 20/1/2014, and it stated:

[1- The lessee leases the property to another lessee...

It is permissible for the tenant of the house to rent the house to someone else during the period of the lease mentioned in the contract, for a rent that is more or less than the rent that he rented the shop from its owner, **because the lease is a contract on the benefit with compensation, that is, the tenant has the right to dispose of the benefit of the leased property, but for what he leased it for during the tenure period mentioned in the contract, if he rents it to housing, it is permissible for him to live in it, and it is permissible to enable others to live in it in any legitimate way as a gift, or as a lease ... and at the rent price that is agreed upon with the other tenant, but it is not permissible for him to rent it for another benefit, so it is not permissible to rent it as a commercial office, for example, if he had rented it for housing. It must also be during the lease term, so he should not rent it for a period longer than the original lease term.**

This ruling is adopted by the majority of jurists (Hanafi, Maliki, Shafi'i, and more correct according to the Hanbalis), as long as the object is not affected by the difference in the user, and many of the jurists of the predecessors permitted it, whether it was with same rental price or more.

But they differed if the lease was to the landlord, i.e., the landlord rented his house to a tenant for a year, then after three months, for example, the landlord needed the house and wanted to rent it from the tenant for the remaining nine months, and kicks out [evicts] the tenant... They differed in this issue, and they had different opinions on it...] **End.**

Fourth: The question of what is called (the commercial asset) and how to deal with it remains:

1- The commercial asset was defined by some of those who adopt it as: (an intangible movable funds that includes all the movable funds designated for the practice of a commercial activity or several commercial activities), and they said: (The commercial asset includes, as obligatory, customers and a commercial reputation, and also includes all other funds necessary for the exploitation of the asset such as the trade name, the logo, the right to rent, commercial furniture, goods, equipment, tools, patents, licenses, trademarks, trade and service marks, industrial designs and models, and in general all industrial, literary or artistic property rights attached to the original). According to this statement, the reality of the commercial asset shows that it includes two types of funds:

A- Material items such as furniture, equipment, tools...etc. which are money of real value.

B- Non-material elements such as reputation, patents, industrial property rights...etc. which are elements of intangible value.

2- By examining the reality of the so-called commercial asset, it turns out that it is something different from the benefit of the leased property, which is the benefit of the property used as a commercial store... The benefit of the property is the use of the property for commercial activity... and what they call commercial asset is not included in that. The commercial asset in its two branches, the material elements and the intangible elements, is something in excess of the benefit of the leased object, i.e., the property in this case... This commercial asset is later acquired by the tenant's action when he furnishes the commercial store in a manner appropriate for the related trade and places the necessary equipment and tools in it and the store has a good reputation, customers and commercial activity...etc.

3- In the commercial origin, there are material elements that are permissible by Sharia, such as furniture, tools, devices, and the like, if they are in accordance with the provisions of Shariah... and there may be prohibited materials such as statues... as well as there are non-material elements that are permissible such as reputation, commercial logo, trademark, and the like... and there are elements in it. Moral rights that are not permissible in Islam, such as some moral rights related to intellectual property such as copyrights, patents and the like....

4- If the commercial asset to be sold, transferred or leased includes prohibited material or moral elements, it is not permissible to dispose of it by taking compensation for it. Rather, the prohibited elements should be disposed of first. But if it does not include prohibited material or intangible elements, i.e., it is permissible, then it is valid to exchange it with compensation for it according to what is explained later.

5- If the lease contract is not expired, the lessee may lease the commercial premises and exchange the commercial asset for a consideration to another lessee. He does not need the permission of the original lessor, and that is the remaining period of the lease contract for the commercial premises... He may also return the property (the shop) to its lessor owner in return for a compensation for the benefit and the commercial asset. And all of this if the commercial asset falls under the permissible ... and during the lease term.

6- If the lease contract for the real estate (the commercial store) expires, the so-called commercial asset is considered. The opinion that I outweigh:

The lessee must return the commercial store to its original owner (the lessor), and as for the commercial asset, what was material, he may take it or sell it, it is his property, such as furniture and the like... As for the fame of the store and its commercial reputation, the tenant's benefit to it ends with the expiry of the lease contract, and after that the lessee does not own it until he sells it or takes compensation for it as his right... This intangible commercial asset is not a benefit owned by the lessee after the end of the lease contract so that he has the right to sell it. Rather, with the expiration of the lease contract, the lessee's ownership of this intangible benefit that he owned during the lease term ends.

7- As for some contemporary scholars who see this intangible benefit such as the right of pre-emption or the right to divide the nights between the wives, some jurists permit taking an allowance for this right, the comparison between these rights and the right of commercial reputation is completely different and incorrect for the following reasons:

A- It states in the Kuwaiti Fiqh Encyclopedia on the subject of benefits: (D - The absolute right...

As for substituting for rights, the rule according to some of the Hanafi jurists is that if the right is free of the ownership, then it is not permissible to substitute for it, like the right of pre-emption, if compensated by money, the right in pre-emption becomes invalid and not taken.

As for the non-Hanafis, they did not refer to a rule that can be relied upon in order to know this, but after following up on some issues, it can be said in the sentence: The Shafi'i and the Hanbalis consider that the right that is not substituted for with money, or that which

is neither in kind nor benefit, such as the right of pre-emption, and the right of the conditional option, and the wife's gift of her day for the second wife, this is not permissible to compensate for, as for what is substituted for with money such as the right of retribution and restitution by fault, then it is permissible to compensate for it.

This is in general, since Ibn Taymiyyah permitted the wife to take compensation for her gift of her day to the second wife, and for all her other rights that can be shared. In a narration on the authority of Imam Ahmad, it is permissible to seek compensation for the right of pre-emption from the buyer and not from anyone else, and it is taken from the issues that were received by the Malikis that they permit taking compensation for every right that has been established for a person, they permit taking compensation for preemption and for the wife's gifting her day to the second wife, and others.

B- So the jurists who say that compensation for the right of pre-emption or the right of the wife's day for the second wife is taken, this is as long as the right exists, and not after its disappearance... As for the right of pre-emption, it is when the holder of pre-emption is a neighbour, but if he moved from his neighborhood and moved away, he lost the right of pre-emption... Likewise with regard to the wife, she has this right while she is a wife, and not if she is divorced, for example... And so here, the right of the tenant to benefit from the reputation and fame is during his rental term. If the term is not extended, his right of the reputation ends, it is no longer his right to sell it and take compensation for it, but must leave the property after the term ends, unless it is agreed to extend it.

As for what is mentioned in the man-made laws about making this intangible commercial asset a right for the lessee during the lease term and after that he disposes of it by buying and selling, and the leased property is not vacated at the end of the lease term unless the price of the intangible commercial asset is paid to him, this has no weight in the Shariah rules.

This is the opinion that I outweigh in this matter, and Allah Knows Best and is Most Wise.

Your Brother,

Ata Bin Khalil Abu Al-Rashtah

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The link to the answer from the Ameer's Facebook page:

<https://www.facebook.com/HT.AtaabuAlrashtah/posts/511533693867338>