A

ARAB-MALAYSIAN FINANCE BHD

v.

TAMAN IHSAN JAYA SDN BHD & ORS; KOPERASI SERI KOTA BUKIT CHERAKA BHD (THIRD PARTY) AND OTHER CASES

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NOS: D4-22A-067-2003,
C
D4-22A-215-2004, D4-22A-1-2004,
D4-22A-185-2005, D4-22A-399-2005,
OS NO: D4-22A-395-2005,
WRIT NOS: D4-22A-166-2006,
D4-22A-167-2006, D4-22A-178-2006,
D
SUIT NO: D4-22A-192-2006,
WRIT NOS: D4-22A-203-2006 &
D4-22A-204-2006]
18 JULY 2008

E ***ISLAMIC LAW:*** *Islamic Finance - Riba - Qur'anic prohibition and condemnation of riba - Profit upon sale is allowed - Interest upon loan is prohibited - Importance of maintaining distinction between sale and loan - Islamic financing transactional schemes to be viewed as a whole and not as separate components - Whether existence of "aqad" and before that*
F *"ijab" and "qabul" prevent courts from examining terms of transaction - Court to look beyond labels used and look at substance*

BANKING: *Securities for advances - Islamic Financing - Al-Bai' Bithaman Ajil transaction - Whether contrary to Islamic principles - Correct interpretation of agreed purchase price under Al-Bai' Bithaman*
G *Ajil contract - Where bank becomes owner under novation agreement, sale to customer a bona fide sale - Where bank purchases directly from customer and sells back to customer at higher price, sale is not bona fide sale but a financing transaction - Profit portion of such Al-Bai' Bithaman*
H *Ajil facility renders it contrary to Islamic Banking Act 1983 or Banking and Financial Institutions Act 1989 - Bank entitled under s. 66 of Contracts Act 1950 to return of original facility amount only*

CONTRACT: *Illegality - Restitution - Islamic financing - Profit portion of Al-Bai' Bithaman Ajil facility renders it contrary to Islamic Banking*
I *Act 1983 or Banking and Financial Institutions Act 1989 - Bank entitled under s. 66 of Contracts Act 1950 to return of original facility amount only*

In the Al Bai' Bithaman Ajil cases herein, the respective defendants had already purchased the property from a third party and had paid for part of the price. Approaching the plaintiff banks for facilities to complete the purchase, the defendants were required to sell the property they had bought to the respective banks for that balance sum stipulated in the banks' property purchase agreement ('PPA'). The banks then sold the property to the defendants via the banks' property sale agreement ('PSA'). It was not in dispute that under the PSA, the defendants would pay an agreed number of instalments of specific sums to the banks, the total of which made up the banks' "selling price". The facts further showed that as security for this Al Bai' Bithaman Ajil facility, the respective defendants were required to and had executed a charge cum assignment of the property to the respective banks. The defendants defaulted in the payment of the banks' selling price, and the banks in consequence applied for an order for sale of the charged property. The defendants argued that the transaction herein, comprising as it were of the letter of offer, the PPA, the PSA and the charge or assignment in question, became transparently financing in nature and smacked of transactions for profits, and in the circumstances, beseeched the court to examine the same and determine whether it involved elements not approved by the religion of Islam – or had otherwise contravened the provisions of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989.

Held (granting order for sale; ordering return of original facility amount to plaintiff banks):

(1) The primary element governing Islamic financing facilities is the Qur'anic prohibition and condemnation of riba. On this, there is no dispute among the different mazhabs. A profit upon a sale is allowed, but interest upon a loan is prohibited in the Religion of Islam. But since both profit and interest are increases, maintenance of the distinction between a sale and a loan is therefore essential. (paras 15 & 24)

(2) Transactional schemes that purport to be Islamic must be viewed as a whole rather than as separate components, so that the transactions are seen for what they are, before forming an opinion on permissibility. (para 27)

(3) The plaintiffs' submission in reliance upon *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735, [1994] 4 BLJ 372 that since the parties have agreed upon a selling price, there is "aqad" and the court must look no further does not appear to be right. The fact there is an "aqad", and before that an "ijab" and "qabul" does not prevent an examination of the terms as to the transaction in fact is. It is necessary to look beyond the labels used and look at the substance. (paras 60 & 62)

(4) Where the bank becomes the owner under a novation agreement, the sale to the customer is a *bona fide* sale, and the selling price is as interpreted in *Affin Bank v. Zulkifli Abdullah* [2006] 1 CLJ 438. Thus, where the bank is the owner of the property, by a direct purchase from the vendor or by a novation from its customer, and then sells the property to the customer, the plaintiffs' interpretation of the bank's selling price is rejected and the court will apply the equitable interpretation. (para 68)

(5) Where the bank purchases directly from its customer and sells back to the customer with deferred payment at a higher price in total, the sale is not a *bona fide* sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility renders the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989. (para 69)

(6) Since the bank's action resulted more likely from a misapprehension rather that of intent aforethought, the plaintiffs were entitled under s. 66 of the Contracts Act 1950 to return of the original facility amount they had extended. (para 70)

Case(s) referred to:

Affin Bank Bhd v. Zulkifli Abdullah [2006] 1 CLJ 438 HC ***(refd)***

Arab-Malaysian Merchant Bank Berhad v. Silver Concept Sdn Bhd [2006] 8 CLJ 9 HC ***(refd)***

Bank Islam Malaysia Berhad v. Adnan Omar [1994] 3 CLJ 735; [1994] 4 BLJ 372 HC ***(refd)***

Bank Islam Malaysia Berhad v. Pasaraya Peladang Sdn Bhd [2004] 1 LNS 280 ***(refd)***

Bank Kerjasama Rakyat Malaysia v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

BI Credit & Leasing Berhad v. Loo Wah Hee & Anor [2002] 1 LNS 114 ***(refd)***
Che Omar Che Soh v. PP [1988] 2 MLJ 55 ***(refd)***
Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA ***(refd)***
Malayan Banking Bhd v. Marilyn Ho Siok Lin [2006] 3 CLJ 796 HC ***(refd)***
Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 SC ***(refd)***
Malayan Banking Bhd v. Ya'kup Oje & Anor [2007] 5 CLJ 311 HC ***(refd)***
Woo Yew Chee v. Yong Yong Hoo [1978] 1 LNS 240 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Federal Constitution, art. 74
National Land Code, ss. 256, 257(1)
Rules of the High Court 1980, O. 83 r. 3(3), (7)

(Suit No: D4-22A-067-2003)
For the plaintiff - Yau Her Lerk; M/s Sharizat Rashid & Lee
For the defendant - S Selvarajah; M/s Fernandez & Selvarajah
Third party - Not informed
Koperasi Seri Kota Bukit Cheraka Bhd - not present

(Suit No: D4-22A-215-2004)
For the plaintiff - Justhinder Kaur; M/s Mohamed Ismail & Co
For the defendant - Adnan Seman; M/s Adnan Seman & Assoc

(Suit No: D4-22A-1-2004)
For the plaintiff - Mohammad Said Daud (Yusfarizal Yussoff with him); M/s Zulpadli & Edham
For the defendant - Katherine R Durai; M/s AJ Ariffin Yeo & Harpal

(Suit No: D4-22A-185-2005)
For the plaintiff - Justhinder Kaur; M/s Mohamed Ismail & Co
For the defendant - M/s Vethanayagam & Assoc

(Suit No: D4-22A-399-2005)
Counsel for plaintiff - not present
Ramli Shuhaimi (D1 - present)
Nooriza Mohd Nor (D2 - present)

(Originating Summons No: D4-22A-395-2005)
Counsels for plaintiff & defendant - not present

(Writ No: D4-22A-166-2006)
For the plaintiff - Noraisyah Abu Bakar; M/s Noraisyah & Co
Mohd Razmi Abd Rahman (D1) - present

(Writ No: D4-22A-167-2006)
For the plaintiff - Noraisyah Abu Bakar; M/s Noraisyah & Co
Defendant - not represented

(Writ No: D4-22A-178-2006)
For the plaintiff - Noraisyah Abu Bakar; M/s Noraisyah & Co
Defendant - not represented

(Suit No: D4-22A-192-2006)
For the plaintiff - Syed Zakaria Syed Zainal Abidin; M/s Radzi & Abdullah
Defendant - not represented

(Writ No: D4-22A-203-2006)
For the plaintiff - Noraisyah Abu Bakar; M/s Noraisyah & Co
Defendant - not represented

(Writ No: D4-22A-204-2006)
For the plaintiff - Noraisyah Abu Bakar; M/s Noraisyah & Co
Defendant - not represented

Reported by Amutha Suppayah

JUDGMENT

Abdul Wahab Patail J:

[1] This court had directed counsels for plaintiff banks and other financiers, as well as counsels for defendant customers in these cases before the court to present their submissions together so that their collective efforts could be availed of for a more comprehensive consideration than would have been possible if each case had been argued and decided separately, and to obtain a more consistent result as to the basic principles concerning Islamic financing facilities. The resulting submissions read collectively did not disappoint in this regard. To do justice to the collective effort required considerable time, effort and organisation.

[2] A consideration of the basic principles concerning Islamic financing must include a consideration of the Religion of Islam under the Federal Constitution and the relevant laws as to banking and finance in addition to the relevant elements in the said religion.

Federal Constitution

[3] The introduction of Islamic financing in Malaysia is complicated by this country's constitutional arrangements. Article 74 of the Federal Constitution of Malaysia provides that finance, including banking, money-lending, pawn-brokers, control of credit, as well as trade, commerce and industry are subject matters within the Federal List, while matters relating to the Religion of Islam are within the States List. Cases involving the former are within the jurisdiction of the civil courts, while those involving the latter, but only so far as it concerns the matters in paragraph 1 of the States List in Schedule 9, are within the jurisdiction of the Syariah courts.

[4] This jurisdictional limitation in respect of the States and the Syariah courts means that cases involving Islamic financing in Malaysia remain within the Federal legislative jurisdiction, and cases relating thereto are brought in the Civil courts. No legislation in the form of Islamic laws has been made for trade and financing based upon Islamic principles. The only provision is that there be no element involved which is not approved by the Religion of Islam.

[5] Neither the Federal Constitution nor the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989 provide as to the interpretation of which mazhab in the Religion of Islam is to prevail and be applied. The terms Islam and Religion of Islam are therefore not confined to any mazhab of the religion. The Islamic financing facilities are presented as Islamic to Muslims of all mazhabs. The facilities do not say they are offered only to Muslims of a certain mazhab, for example Syafi'e. If a facility is to be offered as Islamic to Muslims generally, regardless of their mazhab, then the test to be applied by a civil court must logically be that there is no element not approved by the Religion of Islam under the interpretation of any of the recognised mazhabs. That it is acceptable to one mazhab is not sufficient to say it is acceptable in the Religion of Islam when it is not accepted by the other mazhabs.

Religion And Law

[6] Complications are perceived to arise from aspects neatly described by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Berhad v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9 as follows:

A [13] This case involves the marriage of two distinctly diverse worlds, namely the Islamic world and the common-law sourced civil law, both protected and enabled by the Federal Constitution. The agreements here have Islam as their foundation whilst the foreclosure proceedings come under the civil law jurisdiction, specifically the National Land Code 1965 and the Rules of the
B High Court 1980.

Civil Court And Islamic Financing Cases

[7] In a case involving a question as to the application of s. 256
C of the National Land Code in an Islamic financing facility, the Court of Appeal in a brief and to the point judgment in *Bank Kerjasama Rakyat Malaysia v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625 CA held:

D The Law

As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking.
E The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should
F be applied in deciding the application.

The main source of the applicable law is s. 256 of the National Land Code: ...

[8] In dealing with cases involving Islamic financing facilities, the
G civil court functions strictly as a civil court. It remains for all purposes a civil court. It does not become a Syariah court. Nor does it proceed to apply Islamic law according to the interpretations and beliefs of any particular mazhab as it might if it were a Syariah court. The civil court's function is to render a
H judicially considered decision on the particular facts of the specific case before it according to law.

I

Orders For Sale

[9] No civil court of competent jurisdiction is under any circumstances mere rubber stamp to grant any order, be it an order for sale. In applications pursuant to s. 256 of the National Land Code and made under O. 83 of the Rules of the High Court 1980, plaintiffs are required to set out under r. 3 thereof:

> Order 83 Rule 3. Actions for possession or payment. (O. 83 r. 3)
>
> 1. The affidavit supporting the originating summons must comply with the following.
>
> 2. The affidavit must exhibit a true copy of the charge and the original charge, and in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.
>
> 3. If plaintiff claims delivery of possession, the affidavit must show the circumstances under which the right to possession arises and show the amount of advance, amount of repayment, amount of instalments in arrears as at date of summons and date of affidavit, and amount remaining under the charge.
>
> 4. If delivery of possession is sought, the affidavit must give particular of every person who to the best of the plaintiff's knowledge is in possession of the charged property.
>
> 5. If the charge creates a tenancy other than a tenancy at will between the chargor and chargee, the affidavit must show how and when the tenancy was determined and if by service of notice when the notice was duly served.
>
> 6. Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in para (3).
>
> 7. Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

[10] The requirements under O. 83 r. 3(3) and r. 3(7) are not necessary if the court is to be a mere rubber stamp for orders for sale. The court must be satisfied when it issues an order there would be a finality to the matter between the plaintiff and the

defendant. Order 83 requires that where money or possession is claimed, the plaintiff must show by affidavit the circumstances under which the right arose and show the amount of advance, amount of repayment, amount of instalments in arrears as at date of summons and date of affidavit, and amount remaining. Thus, while applications for orders for sale are in respect of *ad rem* rights, O. 83 requires the *in personam* part of the actions to be dealt with also, for it would be clear injustice if the *ad rem* rights were allowed when there is such error on the *in personam* part of the action that there was no foundation for an order for sale. In recognising that an order for sale is in respect of an *ad rem* right while the debt is an *in personam* right, the common error has been in viewing the proceedings before the court as being exclusively under s. 256 of the National Land Code 1965 and overlooking the fact that the application, governed under O. 83, involves addressing the *in personam* claim also.

[11] Similarly in Islamic financing cases.

Islamic Banking And Financing

[12] Islamic financing in Malaysia is governed by the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989 for banks licensed under the respective legislation. The fundamental requirement under these Acts is contained in the provision that in respect of Islamic banking and financing, the aims and operations of the bank do not involve any element not approved by the Religion of Islam.

[13] It is clear that Parliament does not intend that any financing facilities and schemes be passed off upon the public as Islamic when such facilities and schemes involve any element not approved by the Religion of Islam. That provision requires the civil court, therefore, to examine and make a finding of fact in the case before it, what element if any, is involved which is not approved by the Religion of Islam. In this regard, the civil court is not so much concerned with Islamic law *per se*, as with findings as to the elements of the Religion of Islam where they arise. The civil court is concerned with the fact of those elements, and not the economic, social, religious and other justifications or rationale of the elements, for example, the prohibition and condemnation of riba in the Religion of Islam.

[14] It follows that if the civil court is not to be a rubber stamp to issue orders for sale, it must maintain curial supervision that the orders for sale are being sought upon balance sums that are not pursuant to any element not approved by the Religion of Islam.

Riba And Usury

[15] The primary element governing Islamic financing facilities is the Qur'anic prohibition and condemnation of riba. On this, there is no dispute among the different mazhabs.

[16] The "Tafsir Pimpinan ar-Rahman Kepada Pengertian Al-Qur'an", a translation of the Al-Qur'an by Sheikh Abdullah Basmeih, edited and certified by Sahibul Fadhilah Datuk Haji Muhammad Noor bin Haji Ibrahim, and published by Islamic Affairs Division, Prime Minister's Department, is the approved translation in Malaysia. It is therefore accepted as authoritative. It provides the following translation into Bahasa Malaysia of Verses 275-280 of Surah Al-Baqarah in respect of the prohibition of riba:

> 275. Orang-orang yang memakan (mengambil) riba itu tidak dapat berdiri betul melainkan seperti berdirinya orang yang dirasuk Syaitan dengan terhoyong-hayang kerana sentuhan (Syaitan) itu. Yang demikian ialah disebabkan mereka mengatakan: "Bahawa sesungguhnya berjual beli itu sama sahaja seperti riba". Padahal Allah telah menghalalkan berjual beli (berniaga) dan mengharamkan riba. Oleh itu sesiapa yang telah sampai kepadanya peringatan (larangan) dari Tuhannya lalu ia berhenti (dari mengambil riba), maka apa yang telah diambilnya dahulu (sebelum pengharaman itu) adalah menjadi haknya, dan perkaranya terserahlah kepada Allah. Dan sesiapa yang mengulangi lagi (perbuatan mengambil riba itu) maka mereka itulah ahli neraka, mereka kekal di dalamnya.
>
> 276. Allah susutkan (kebaikan harta yang dijalankan dengan mengambil) riba, dan ia pula mengembangkan (berkat harta yang dikeluarkan) sedekah-sedekah dan zakatnya. Dan Allah tidak suka kepada tiap-tiap orang yang kekal terus dalam kekufuran, dan selalu melakukan dosa.
>
> 277. Sesungguhnya orang-orang yang beriman dan beramal salih, dan mengerjakan sembahyang serta memberikan zakat, mereka beroleh pahala di sisi Tuhan mereka, dan tidak ada kebimbangan (dari berlakunya sesuatu yang tidak baik) terhadap mereka, dan mereka pula tidak akan berdukacita.

278. Wahai orang-orang yang beriman! Bertaqwalah kamu kepada Allah dan tinggalkanlah (jangan menuntut lagi) saki baki riba (yang masih ada pada orang yang berhutang) itu, jika benar kamu orang orang yang beriman.

279. Oleh itu, kalau kamu tidak juga melakukan (perintah mengenai larangan riba itu), maka ketahuilah kamu: akan adanya peperangan dari Allah dan RasulNya, (akibatnya kamu tidak menemui selamat). Dan jika kamu bertaubat, maka hak kamu (yang sebenarnya) ialah pokok asal harta kamu. (Dengan yang demikian) kamu tidak berlaku zalim kepada sesiapa, dan kamu juga tidak dizalimi oleh sesiapa.

280. Dan jika orang yang berhutang itu sedang mengalami kesempitan hidup maka berilah tempoh sehingga ia lapang. Dan (sebaliknya) bahawa kamu sedekahkan hutang itu (kepadanya) adalah lebih baik untuk kamu, kalau kamu mengetahui (pahalanya yang besar yang kamu akan dapati kelak).

[17] Translations of the same verses of the Qur'an into English from other recognised sources are as follows:

Verse 275

YUSUF ALI: Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (for ever).

PICKTHAL: Those who swallow usury cannot rise up save as he ariseth whom the devil hath prostrated by (his) touch. That is because they say: Trade is just like usury; whereas Allah permitteth trading and forbiddeth usury. He unto whom an admonition from his Lord cometh, and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. As for him who returneth (to usury) – Such are rightful owners of the Fire. They will abide therein.

SHAKIR: Those who swallow down usury cannot arise except as one whom Shaitan has prostrated by (his) touch does rise. That is because they say, trading is only like usury; and Allah has allowed trading and forbidden usury. To whomsoever then the admonition has come from his Lord, then he desists, he shall

have what has already passed, and his affair is in the hands of Allah; and whoever returns (to it) – these are the inmates of the fire; they shall abide in it.

Verse 276

YUSUF ALI: Allah will deprive usury of all blessing, but will give increase for deeds of charity: For He loveth not creatures ungrateful and wicked.

PICKTHAL: Allah hath blighted usury and made almsgiving fruitful. Allah loveth not the impious and guilty.

SHAKIR: Allah does not bless usury, and He causes charitable deeds to prosper, and Allah does not love any ungrateful sinner.

Verse 277

YUSUF ALI: Those who believe, and do deeds of righteousness, and establish regular prayers and regular charity, will have their reward with their Lord: on them shall be no fear, nor shall they grieve.

PICKTHAL: Lo! those who believe and do good works and establish worship and pay the poor-due, their reward is with their Lord and there shall no fear come upon them neither shall they grieve.

SHAKIR: Surely they who believe and do good deeds and keep up prayer and pay the poor-rate they shall have their reward from their Lord, and they shall have no fear, nor shall they grieve.

Verse 278

YUSUF ALI: O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers.

PICKTHAL: O ye who believe! Observe your duty to Allah, and give up what remaineth (due to you) from usury, if ye are (in truth) believers.

SHAKIR: O you who believe! Be careful of (your duty to) Allah and relinquish what remains (due) from usury, if you are believers.

Verse 279

YUSUF ALI: If ye do it not, Take notice of war from Allah and His Messenger: But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly.

A PICKTHAL: And if ye do not, then be warned of war (against you) from Allah and His messenger. And if ye repent, then ye have your principal (without interest). Wrong not, and ye shall not be wronged.

B SHAKIR: But if you do (it) not, then be apprised of war from Allah and His Messenger; and if you repent, then you shall have your capital; neither shall you make (the debtor) suffer loss, nor shall you be made to suffer loss.

Verse 280

C YUSUF ALI: If the debtor is in a difficulty, grant him time Till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.

D PICKTHAL: And if the debtor is in straitened circumstances, then (let there be) postponement to (the time of) ease; and that ye remit the debt as almsgiving would be better for you if ye did but know.

E SHAKIR: And if (the debtor) is in straitness, then let there be postponement until (he is in) ease; and that you remit (it) as alms is better for you, if you knew.

[18] The court observes that there is nothing that prohibits giving of a loan. It is only the "riba" element in a loan that is prohibited and condemned. Even so, it is the lender who stands condemned as to the riba. Hence, borrowers who have to pay riba are victims. F Hence also, loans without riba, such as benevolent loans ("qard al-hasan") are allowed. The prohibition is therefore not as to the giving of loans, or for that matter, loans incorporating riba, but riba itself.

G **[19]** This "riba" as referred to in the Qur'an is the same "usury" in Judaism and Christianity because Verse 161 of Surah An-Nisaa explicitly mentions that riba was prohibited for the Jews also.

[20] The following excerpts may be read with advantage as to the H prohibition of usury in Judaism and Christianity:

Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury. (Deuteronomy 23:19)

I If you lend money to My people, to the poor among you, you are not to act as a creditor to him; you shall not charge him interest. (Exodus 22:25)

He who oppresses the poor taunts his Maker, But he who is gracious to the needy honors Him. (Proverbs 14:31) A

He that by usury and unjust gain increaseth his substance, he shall gather it for him that will pity the poor. (Proverbs 28:8)

Lord, who shall abide in thy tabernacle? Who shall dwell in thy holy hill? He that walketh uprightly, and worketh righteousness and speaketh the truth in his heart. He that putteth not out of his money to usury, nor taketh reward against the innocent. (Psalms 15:1, 2, 5) B

Then I consulted with myself, and I rebuked the nobles, and rulers and said unto them, Ye exact usury, every one of his brother. And I set a great assembly against them. (Nehemiah 5:7) C

He that hath not given forth upon usury, neither hath taken any increase, that hath withdrawn his hand from iniquity, hath executed true judgment between man and man, hath walked in my statues, and hath kept my judgments, to deal truly; he is just. He shall surely live, said the Lord God. (Ezekiel 18:8.9) D

In thee have they taken gifts to shed blood; thou hast taken usury and increase, and though hast greedily gained of thy neighbors by extortion, and hast forgotten me, said the Lord God. (Ezekiel 22:12) E

Usury: Common Law & Equity

[21] Usury is synonymous with lending that takes advantage of borrowers. Usury was condemned because the terms of the loans were, for lack of a better term, usurious in nature. Study of the history of common law and the development of the courts of equity show that it took the development of equitable principles in the Chancery Court, such as the equity of redemption and of equitable trust to remove the hardships and injustices resulting from the operation of common law that parties are bound by the terms of their agreement, when terms of agreement were usurious or oppressive. The equitable principles developed in the Chancery Court are amongst the foundation stones in the law and practice of modern conventional loans, whether with fixed or variable interest. F G H

[22] It must be observed that hardships from usury occur only when borrowers breached the terms of their loans, resulting in the loss of the property mortgaged as security as well as the payments they had made. In the event no breach occurred, both lender and I

borrower could have had no complaints. Thus the prohibition and condemnation of usury arose from the hardships, arising from usurious terms, suffered by those who were unable to meet their obligations under their loan agreements.

[23] No study appear to have been undertaken as to the terms of loans made in Islamic areas that are prohibited as riba, let alone a comparative study of terms of loans with riba amongst the Arabs with usurious loans amongst Jews and Europeans and with modern conventional terms have been undertaken although it would have assisted for a better understanding of what is riba. The court did not find any such specific study. The more effortless view was taken, it seems, that it is the interest upon the loan that is riba, and since riba is prohibited, therefore interest is prohibited.

[24] The application of the notion that it is the interest in a loan that is riba to the verses quoted above in the Surah al-Baqarah results in the interpretation that a profit upon a sale is allowed, but interest upon a loan is prohibited in the Religion of Islam. But since both profit and interest are increases, maintenance of the distinction between a sale and a loan is therefore essential. On a first glance it can be observed that the profit on a sale is upon the goods sold, while the profit upon a loan is for the time the borrower is allowed the use of the lender's money.

Other Elements

[25] In considering whether the distinction between a sale and a loan is maintained, it must also be borne in mind that there is another basic element in the Religion of Islam. It is that Allah is Omniscient. On that element of omniscience rests the belief of the faithful in the certainty and inevitability of Allah's justice. That belief is the persuasive force for the faithful to perform their obligatory duties, as well as their assurance of the certainty of their reward for compliance.

[26] This element arises for inclusion in the consideration because the prohibition and condemnation of riba in the Surah al-Baqarah is, according to the Religion of Islam, by Allah, Who will pass His judgment. Whether the court is a syariah court or not, that Allah is Omniscient must also be assumed where that court is required, in this case by law, to take cognisance of elements in the Religion of Islam.

Form And Substance

[27] Regardless whether a person is a follower of the Religion of Islam or not, the logic remains true that if a god is omniscient, that god knows the truth of what is done and intended, regardless of the terminology or language used. The effect of the assumption of omniscience is therefore that legal devices or trickery ("hila") would fail in the eyes of Allah. Transactional schemes that purport to be Islamic must be viewed as a whole rather than, by closing one eye in succession, to view the agreements in the transaction as separate components, so that the transactions are seen for what they are, before forming an opinion on permissibility. It has been said with obvious justification, that what matters in discerning the true nature of contracts and transactions is the substance and not the words and structure.

[28] It is helpful to recall the words of Salleh Abbas LP, writing the judgment of the Supreme Court comprising Wan Suleiman, George Seah, Hashim Yeop A. Sani & Syed Agil Barakbah SCJJ, and quoting from S. Abdul A'la Maududi, *The Islamic Law and Constitution*, 7th edn., March 1980 in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55:

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through his prophets and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered.

[29] In developing a Fiqh al-Muamalat, caution must therefore be exercised for it is all too easy, when creating and then relying on legal fiction, to fall into the pit of complacency and inadvertently developing a "fiqh al-hiyal". Bearing this in mind it is not sufficient that the distinction between a sale and a loan is maintained in form, but it must also be maintained in substance. It is the reality and not the form and labels that matter.

Concept And Implementation

[30] There is no dispute that the concepts of Al-Bai' Bithaman Ajil, Al-Istisna'a, Bai Al-Inah, Murabahah, Al-Ijarah and the like are, in principle, Islamic in nature since no interest is involved.

There are thus no issues involving elements not approved by the Religion of Islam inherent in these concepts. The starting point of consideration by the court is therefore that these purportedly Islamic financing schemes, approved by the Syariah Advisory Council under the Central Bank of Malaysia Act 1958 (Revised 1994) Act 519, in principle do not involve any element not approved by the Religion of Islam. There is neither necessity nor reason to refer these concepts to the Syariah Advisory Council for any ruling, which in any case, while they are to be taken into consideration, are not binding upon the court.

[31] The function of this court is to examine the application of these Islamic concepts, as to whether as implemented, and in the particular cases before it, the transactions do not involve any element not approved in the Religion of Islam. It is a question of looking at the particular facts. That remains the judicial function of the court which it cannot abdicate.

[32] The above form the foundation of this court's approach in respect of the actions involving Islamic financing facilities before it. Since the Islamic financing schemes now before the court revolve around a sale transaction it is appropriate to commence with the Al-Bai' Bithaman Ajil.

Earlier Decisions

[33] In the first reported decision, *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735; [1994] 4 BLJ 372, the High Court held that the defendant was bound on the grounds he knew the terms and had knowingly entered into the agreement.

[34] The above case is relied upon by the plaintiff banks for the proposition that the High Court does not look into the issue whether the Al-Bai' Bithaman Ajil transaction involves an element not approved by the Religion of Islam or not.

[35] In *Bank Islam Malaysia Berhad v. Adnan Omar*, a facility amount of RM583,000 had been granted to the defendant by the plaintiff. This was secured by a charge of the land in question by the defendant to the plaintiff. The facility amount was granted under the Islamic concept of Bai-Bithaman Ajil which, as practised by the Islamic Bank, involved three simultaneous transactions, which in that case were:

(i) On 2 March 1984 the defendant sold to the plaintiff a piece of land for RM265,000 which sum was duly paid to him;

(ii) On the same date, the plaintiff resold the same piece of land to the defendant for RM583,000 which amount was to be paid by the defendant in 180 monthly instalments;

(iii) Also on the same date, the said land was charged to the plaintiff by the defendant as security for the debt of RM583,000. The High Court held that the defendant was bound to his agreement to pay RM583,000.

[36] The consequence was that the defendant who sought and obtained an Islamic financing facility of RM265,000 ended up, when he defaulted not long after, with liability of RM583,000. The claim for the total of all installment payments not yet due to be brought forward as due and payable upon termination and declaration by the bank of a default, involved an interpretation of "selling price" that resulted in the defendant being liable to an amount far higher than he would have been liable to in a conventional loan with interest.

[37] If repetition of this may be forgiven, it is self evident that if a conventional loan must be avoided because of the prohibition of "riba" or interest, surely the alternative must result in a consequence that is less burdensome than a default in the conventional loan with prohibited interest. But it is equally evident in this case that the result of what is presented as the application of the Qur'anic principle is that the defendant became liable, upon default at any time, to an amount that is 2.2 times the facility he obtained. It could hardly have been intended by the terse words in the Surah al-Baqarah that an Islamic financing facility should result in consequences far more onerous than the conventional loan with "riba" that is prohibited and unequivocally condemned.

[38] One might pause and observe that the harshness of usury is hardest upon those who default, and much less so, if at all, upon those fortunate enough to be able to service the loan successfully. The Qur'an could hardly have intended that its followers, faithfully and trustingly seeking an Islamic compliant facility, should be delivered to those who offer what appear to be perfectly Islamic compliant facilities, but upon a default, had an interpretation applied that imposes a far more onerous liability than the

A conventional loan with interest. It is difficult to conceive that the Religion of Islam intended to discourage its followers from the conventional loan with interest, condemn lenders for such loans, and deliver its followers into the hands of banks and financiers who under sale agreements with deferred payments, exact upon
B default, payments far exceeding the liability upon default of a conventional loan with interest. One cannot say that the Religion of Islam is so much more concerned with form than substance as would sustain the bank's interpretation of "selling price".

C **[39]** In *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 the plaintiff bank relied upon the approach in *Bank Islam Malaysia Berhad v. Adnan Omar.*

[40] No doubt if the defendant in *Affin Bank Bhd v. Zulkifli*
D *Abdullah* had been able to perform upon his obligations under the terms of the facility, there was no question of any element not approved by the Religion of Islam. But in seeking an amount far higher than the liability in a conventional loan, it raised the question whether the bank's interpretation of "selling price"
E involved any element not approved by the Religion of Islam.

Equitable Interpretation

[41] Startled that an original facility of RM346,000, became after a revision and after a default, in liability sought by the bank in the
F sum of RM992.363.40, the court in *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 ordered the matter to a trial where testimony was heard to enable the court to understand how such sum came about. It transpired that the facility originally RM346,000 was revised after the defendant left the employ of the
G plaintiff to the new amount of RM992,363.40. Termed as the "bank's selling price", it was arrived at by taking the facility extended and, applying and adding thereon the bank's profit margin rate and the length of time sought for the payment of the bank's selling price.

H **[42]** The plaintiff bank relied upon the approach in *Bank Islam Malaysia Berhad v. Adnan Omar.* It was the classic common law approach that since the defendant agreed and signed, the defendant was bound. There was no question that the defendant
I was bound to his contract but the true question was what was he bound to as the "selling price".

[43] It was evident the selling price under the bank's interpretation was the original facility amount extended, to which the bank's profit margin rate and the length of time payment of installments was applied. Although the selling price calculation appeared similar to loan with interest calculation, that fact of similarity alone of course does not make the transaction into a loan. The fact the calculation looked like an interest based loan calculation was not taken against the bank. No finding of loan was made. Accepting that the Al-Bai' Bithaman Ajil transaction, after a novation, in that case was a sale by the plaintiff to the defendant, it was obvious it was only the bank's interpretation of the "selling price" that resulted in the startling liability upon the defendant.

[44] An equitable interpretation of the bank's selling price term is that, from the evidence, it was in fact a formula that determined the bank's selling price from the original facility amount to which was applied the bank's profit margin rate as derived from the terms of the agreement between the parties, but applied as at the time the facility is paid off, meaning that the parties had agreed to a selling price upon a formula which produced the sum to be paid at the time the facility is paid off and the total sum in the agreement only represented the selling price if the full term is utilised. The equitable interpretation took away the harsh result inherent under the plaintiff's interpretation and reduced the facility to being no worse but even so, still no better, than the liability under a conventional loan.

[45] Much reliance have been placed upon *Bank Islam Malaysia Berhad v. Adnan Omar* by the plaintiffs for their interpretation of sale. Such reliance overlook what finding by the court in *Bank Islam Malaysia Berhad v. Adnan Omar* itself that what was granted was a loan, excepting one reference to there being no question of interest because of the Islamic nature of the loan:

> It was a term of the charge document that in the event of any default in the payment of the loan installments by the defendant, the plaintiff would be entitled to sell the charged land. The defendant had defaulted in his installment payments since April 1985.
>
> ... i) the amount of RM583,000 which was stated as a loan in the charge document was never received by him as a loan; it was just a facility amount and he only received RM265,000. ...

A ... It is relevant to note that all the aforementioned transactions between the parties were above board and made with the full knowledge of the defendant. He knew that the entire exercise was to implement the grant of a loan to him by the bank, the repayment of that loan inclusive of a profit margin by him, and the charge of his land as security for the loan. This was done by way of a couple of land transactions in order to bring the loan transaction within the limits of Islamic Law. His knowledge of this is evidenced by his acceptance of the letter of offer containing all the above terms ...

C In view of the circumstances of the loan I am persuaded to accept the plaintiff's statement of the amount of advance under O. 83 r. 3(3)(a) as being RM583,000. In my view this is in accord with the intention of the parties and the defendant cannot now dispute the amount.

D A reading of O. 83 r. 3(3)(c) in the context of the purpose of the whole order can lead to only one reasonable interpretation; And that is that there must be an amount of interest or an amount of installment in arrears at the given date, but not necessarily both. The crucial precondition is the fact of default of payment of whatever amount. The intention is to show a calculation of such amount whether it be one of interest, of installment or both. In the present case there is no question of there being any interest because of the Islamic nature of the loan. The defendant's default is in respect of the installment payments and this has been duly particularised by the plaintiff. I am, as such, satisfied that there has been compliance of the said provision ...

The defendant averred that the statement of balance due was not the correct amount because the maturity date for the loan is 2 March 1999 and any payment which he makes now would entitle him to rebate in the total sum owed on account of early recovery, as stated in the plaintiff's affidavit of 9 March 1991. However, as explained by the plaintiff, the relevant agreements give the defendant no right to rebate. This rebate or 'muqassah' is practised by the plaintiff on a discretionary basis. In any event, there was no question of early repayment as the loan was not a term loan and the defendant's failure to pay the installments was a breach of the agreement which has invoked the plaintiff's right to terminate the facility and demand for immediate full repayment of the loan.

[46] Plainly if it was a loan, there is no question of earning a profit upon a loan without involving an element not approved by the Religion of Islam. An appeal by the defendant was dismissed by the Federal Court, but there is no published judgment. In the circumstances, *Bank Islam Malaysia Berhad v. Adnan Omar* must be seen as a decision on the basis of its own facts and the submissions raised thereat.

[47] In *Affin Bank Bhd v. Zulkifli Abdullah* the court rejected the bank's interpretation of what was the "selling price", and applied the equitable interpretation of the term.

Selling Price Calculation

[48] Although the equitable interpretation applied in *Affin Bank Bhd v. Zulkifli Abdullah* meant that the sum as the calculated selling price is calculated for the date when the facility was to be paid off, the issue of "gharar" does not arise since to derive the bank's profit margin rate from the agreement between the parties required little arithmetic, and the selling price as on the date the loan is paid off can be calculated with certainty. The Bank Negara Malaysia website offers the following in respect of Al-Bai' Bithaman Ajil house financing:

> **1. What is Al-Bai' Bithaman Ajil (BBA) House Financing?**
>
> BBA House Financing is an Islamic house financing facility, which is based on the Syari'ah concept of Al-Bai' Bithaman Ajil (BBA). BBA is a contract of deferred payment sale ie, the sale of goods on deferred payment basis at an agreed selling price, which includes a profit margin agreed by both parties. Profits in this context is justified since it is derived from the buying and selling transaction as opposed to interests accruing from the principal lent out.
>
> **2. What are the main characteristics of a BBA House Financing?**
>
> All the components to determine the selling price has to be fixed because the selling price has to be fixed at the time the contract is made. Hence, the profit rate for BBA financing is fixed throughout the period of financing

3. What are the mechanics of the BBA House Financing?

a) Customer identifies the asset to be purchased.

b) Bank determines the requirements of the customer, in relation to the financing period and nature of repayment.

c) Bank purchases the assets concerned.

d) Bank subsequently sells the relevant asset/property to the customer at an agreed price, which consists of:

- Actual cost of the asset to the bank ie, financing amount.
- Bank's profit margin

e) Customer is to settle the payment by instalment payment through out the financing period/period.

4. What are the difference between BBA house financing and an ordinary conventional housing loan?

An ordinary conventional housing loan is given on the basis of debtor/creditor relationship. Whereby, the amount of loan is being charged interest, normally quoted at a certain percentage above Base Lending Rate over loan period, repayable in periodic instalment. The Base Lending Rate will fluctuate up or down and it will affect the total loan cost. Simultaneously, arrears in conventional loans are normally capitalised.

However, under the Islamic Banking Scheme, since BBA concept is being applied, a seller buyer relationship will be established and the selling price is fixed upfront. The sales price is then repaid in periodic instalment and the agreed instalment will remain fixed throughout the financing period. As such, customer's interest rate risk is eliminated. Furthermore, arrears will not be capitalised.

5. Will my monthly instalments change according to the Base Lending Rate?

The BBA Financing scheme is not tagged to the Base Lending Rate. Thus, the instalments will be fixed according to the rates declared upon agreement.

6. Is it possible to compute the Selling Price?

Yes, the selling price is computed as per the formula;

Selling Price = (Monthly Instalment x Number of Financing Months) + Grace Period Profit (if any)

Notes:

- Monthly instalment is computed using the agreed profit rate on a Constant Rate of Return and monthly rest.

- Grace Period Profit is charged when Bank is financing property under construction. As such, during the construction period, customer will pay the grace period profit only.

Example:

Financing Amount: RM100,000.00

Profit rate: 8%

Financing Period: 20 Years

Instalment per month: RM837.00

Selling Price = (RM837 x (20 x 12)) + 0 = RM200,880

7. Is early settlement allowed under the BBA financing facility?

Yes. In addition, customer is not required to give advance notice to the Bank for the early settlement i.e. financing is settled before the completion of the financing tenor. As such, there is no early settlement penalty fees/charges imposed on customer.

8. Does the customer entitled for rebate (Ibra') in case of early settlement?

Yes, customer will be entitled for a rebate on the concept of Ibra' for the unearned profit at the Bank's discretion.

The rebate is in the form of a reduction in the balance outstanding. The early settlement amount is the net figure after deducting the rebate.

9. What is the period of financing for BBA House Financing?

Normally for house or residential property financing, the maximum repayment period is 30 years or at the age of 65 whichever is earlier. It might differ from one Bank to another.

10. What is the margin of financing for BBA House Financing?

The margin of financing differs from one bank to another. Generally, the margin ranges from 70% to 100% against the Sales & Purchase Agreement value or the current market value. Again, customer's repayment capacity will also affect the margin of financing that Bank can offer.

11. Is there security/collateral requirement under BBA House Financing?

Yes, the property financed by the bank will be used security/ collateral for the financing facility under the BBA House Financing. The property is usually secured by way of first party charge.

12. What are the legal documents for the BBA House Financing?

a) Letter of Offer

b) Property Sale Agreement

c) Property Purchase Agreement

d) Legal Charge or,

e) Assignment and Power of Attorney

f) Or any other Islamic financing documents that is required for the house financing.

[49] The above shows how the selling price can be calculated. That someone does not have the skill to do so but needs another to help him implies no uncertainty. That the date the selling price is paid off was not pre-determined is no more uncertain than the uncertainty as to when a default might occur and if the bank would terminate and demand immediate payment of the balance of the selling price. The objection therefore carries no logical merit whatsoever.

[50] No disrespect is intended if I do not discuss other decisions including *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605, *Bank Islam Malaysia Berhad v. Pasaraya Peladang Sdn Bhd* [2004] 1 LNS 280; *Malayan Banking Bhd v. Marilyn Ho Siok Lin* [2006] 3 CLJ 796; *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] 5 CLJ 311.

Ibra Or Muqassah

[51] Another suggestion is that ibra (or muqassah) can be given in the event of early repayment. However, the essence of ibra is that it is a rebate at the discretion of the plaintiff. It does not answer the issue before this court which concern only the correct interpretation of the agreed purchase price under an Al-Bai' Bithaman Ajil contract.

Al-Bai' Bithaman Ajil

[52] The term "Al-Bai' Bithaman Ajil" is no more than a sale (the "bai") and deferred payment of the price (the "bithaman ajil") as agreed to between the parties. In the light of the prohibition and condemnation of riba, and approval of increase or profit upon a sale, it is necessary to examine more closely the concept of increase, profit and interest.

[53] If interest is no more than an increase, expressed as a sum or rate, for the facility of a loan, profit upon a sale is the increase upon the sale. The sum of the seller's cost and his profit is the selling price. The selling price is ordinarily paid upon delivery. If the payment is to be made later, the seller in effect is extending a credit, in other words, a loan, of that selling price. If there is no increase of the selling price as a consequence of granting time to make payment, it is a benevolent loan (qard al-hasan).

[54] If the payment is to be made later, it may be argued that the carrying cost the seller incurs can be a legitimate cost if identified and agreed as such. This was assumed in *Affin Bank Bhd v. Zulkifli Abdullah* and other Al-Bai' Bithaman Ajil cases. This is so even if that carrying cost includes interest that the seller has to pay a third party. This is because the prohibition and condemnation of riba is only against the lender and not the borrower, even if the borrower in respect of interest in the carrying cost is the bank itself.

[55] In the contracts there is the provision of ta'wid, being compensation for delayed payment of the amount due. In the light of the approval by the Central Bank of Malaysia and absence of specific submissions that it carries an element contrary to the Religion of Islam, the Court will allow the order.

[56] But it must be said that, bearing in mind that deferred payment of the selling price is a credit or a loan, permissible only because no riba is charged, any profit claimed or charged by the seller from deferred payment by adding to the cost above a profit for himself for the time given to make full payment, that profit arising from the giving of time to make payment is interest, is riba and the very element prohibited in the Religion of Islam.

A

Bona Fide

[57] In employing the "Al-Bai' Bithaman Ajil" concept in a bank's Al-Bai' Bithaman Ajil scheme, care must be taken to keep the transaction as a *bona fide* sale. It is too easy to structure a loan as a joint venture or a sale, and it is always only too human to be tempted and to succumb to such structuring in order to make profit. Hence in the past, as in *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438, there was a conscious effort to make the transaction into a formal sale by the bank. See also *BI Credit & Leasing Berhad v. Loo Wah Hee & Anor* [2002] 1 LNS 114. A novation agreement was required for the client to relinquish his contract with the vendor. The bank took over all obligations of the purchase from the vendor. Then the bank as the owner proceeded to sell to its customer. Even so such arrangements came under criticism as mere sleight of hand in the face of the Omniscient and the initial steps to distortion and doom in the quest for profit.

[58] Furthermore, the key to the argument that the Al-Bai' Bithaman Ajil scheme does not involve any element not approved by the Religion of Islam is to read the property sale agreement ("PSA") independently. This is accepted in mazhab Syafi'e, but not by the other recognised mazhabs. It is not the function of the civil court to decide or rule whether mazhab Syafi'e or the other mazhabs are right. The learned Dato' Sheikh Ghazali Haji Abdul Rahman (the then Syariah Chief Justice of Malaysia) wrote in his foreword in the publication "Resolutions of the Securities Commission Syariah Advisory Council":

> It cannot be denied that there may be a few SAC resolutions that differ from the opinion of Syariah experts in other countries. These differences exist due to the difference in time and place, and also differences in needs and background of a country. If we should go back to the ancient times of Islamic communities, such varied opinions with regard to certain principles are not uncommon. Even Imam Syafi'e, founder of the Syafi'e school of thought (mazhab), occasionally had two differing opinion on the same issue due to differences in context, background, time and place of occurrence.

B C D E F G H I

> Indeed, these differences in opinions should be seen as a beauty and a blessing for Muslims because, whether consciously or not, they provide a way out for every problem and satisfy the needs of Muslim communities of different geographical and cultural backgrounds. What is needed is that we respect any opinion offered so long as it is based on Syariah arguments.

[59] There is much in the religious approach that is to be respected, particularly in seeking common ground between the mazhabs. But while it is true to say that there are these differences in the Religion of Islam, the requirement under the Islamic Banking Act 1983 and Banking and Financial Institutions Act 1989 that the financing facilities offered do "not involve any element not approved by the Religion of Islam" means that unless the financing facility is plainly stated to be offered as specific to a particular mazhab, then the fact it is offered generally to all Muslims means that it must not contain any element not approved by any of the recognised mazhabs.

Transaction Versus Agreement

[60] The submissions advanced for the plaintiffs and reliance upon *Bank Islam Malaysia Berhad v. Adnan Omar (supra)* suggest also that since the parties have agreed upon a selling price, there is "aqad" and the court must look no further. This view does not appear to be right. The fact there is an "aqad", and before that an "ijab" and "qabul" does not prevent an examination of the terms as to the transaction in fact is. In *Malayan Banking Bhd v. P K Rajamani* [1994] 2 CLJ 25 SC the appellant admitted it had granted the borrower a new facility under which the new interest rate was no longer 9% as in the previous facilities but 10%. The question before the Supreme Court on appeal was whether it was indeed a new facility as stated. The Supreme Court held:

> It may also be true that the appellant had admitted that it had granted to the borrower a new facility of RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10% pa, and therefore different from the first and second facilities of 9% pa. However it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (see *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240; *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513).

[61] This *"Woo Yew Chee v. Yona Yong Hoo"* is the case of *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240 FC where Raja Azlan Shah Ag. CJ (Malaya), as His Majesty then was, had held:

> I now turn to the crux of the matter: was the transaction a licence or a tenancy? What is the test to be applied? It is now well known that the law will always look beyond the terminology of the agreement to the actual facts of the situation see *Addiscombe Garden Estates Ltd, v. Crabbe* [1958] 1 QB 513. The reason is because of the number of sham agreements purporting to create no more than mere licences which are designed to circumvent the protective provisions of the Control of Rent Act. ...

[62] The court has authority therefore, where warranted, as in a consideration of whether there are any elements that are not approved by the religion of Islam, to look beyond the words of agreement to the actual facts of the case in order to determine the substance of the transaction between the plaintiffs and the defendants before it draws any conclusions on the nature of the Al-Bai' Bithaman Ajil transactions. It is necessary to look beyond the labels used and look at the substance particularly in light of the fact that the interpretation advanced by the plaintiffs result in the defendants being burdened with a debt far in excess of that if they had taken an interest based conventional loan, a result which on the face of it contradicts the intent and purpose of the Qur'an to banish the burden of riba in riba-burdened loans. To refuse to do so and to look exclusively to the PSA would only be a refusal to acknowledge reality or facts before the court.

[63] The device of a set of contracts is reminiscent of the practice of bankers and merchants in the Middle Ages across territories of Judaism and Christendom who circumvented laws against usury by entering into a set of contracts *(contraction trinius)*. Their scheme was even more obtuse than in the Al-Bai' Bithaman Ajil cases before this court. They entered into a set of contracts comprising an investment by the banker in the merchant's business scheme, a sale of the banker's rights to profit in the merchant's business scheme in return for specific payments, and a contract of guarantee which provided the security. In sum it had the effect of reproducing the effect of an interest bearing loan with security, but each contract read independently were not illegal as usury. It would be appalling to make it that the Religion of Islam gives recognition to such practice to circumvent the Surah al-Baqarah.

[64] In the Al-Bai' Bithaman Ajil cases now before the court, the defendants had already purchased the property from a third party, and had paid for part of the price. Approaching the respective plaintiff for a facility to complete their purchase, the respective defendant was required to sell the property he had bought to the respective plaintiff for that balance sum under a bank's property purchase agreement (PPA). The respective plaintiff then sold the property to the respective defendant under a bank's property sale agreement (PSA), wherein the respective defendant agreed to pay an agreed number of monthly instalments of specific sums. As security he was required to execute a charge or an assignment of the property to the plaintiff. The total of the agreed instalments add up to the bank's "selling price". No more is the vendor of the property involved, except to receive the balance of his selling price to the respective defendants. The effort to purchase directly from the original vendor and then to sell to the bank's customer has been abandoned. More so than ever before the transaction between the plaintiff bank and its defendant customer became transparently financing in nature and for profit when the Al-Bai' Bithaman transaction comprising letter of offer, PPA, PSA and the charge or assignment are read together.

[65] If the Al-Bai' Bithaman Ajil transactions of the past were said to maintain only a pretence of a sale transaction between the bank and the customer, the Al-Bai' Bithaman Ajil in the current cases abandoned all pretence. It usually happens when pretence is resorted to, that in time, when the reason for the pretence is lost in the interstices of time, the pretence is abandoned. That, however, neither justifies nor corrects the problem that it must not be a pretence in the first place, but that the novation was what it was intended to be, to make the bank a genuine seller.

[66] To summarise, it is essential to maintain a *bona fide* sale in order that the profit should not be an element not approved by the Religion of Islam. Even so, an interpretation of the selling price must not be such as to impose a heavier burden than on a loan with interest for that would obviously be contrary to the intent and purpose of Surah al-Baqarah. The correct interpretation would be that which is not worse if not better than in conventional loan with riba. If effort to maintain a *bona fide* sale is abandoned, deferred payment of sale price is effectively a credit or loan extended and any profit would be prohibited as riba.

A

Summary, Conclusion And Orders

[67] To summarise, this Court holds that neither the Federal Constitution nor the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989, in using the terms "Islam" and "Religion of Islam", provide as to the interpretation of which mazhab of Islam is to prevail. The Al-Bai' Bithaman Ajil facilities are offered as Islamic to all Muslims, and not exclusively to followers of any particular mazhab. It follows, therefore, that the test is that there must be no element involved that is not approved by the Religion of Islam under the interpretation of any of the recognised mazhabs. Thus, the fact that the reading of the PPA and the PSA independently is not accepted under other mazhabs even though it accepted under mazhab Syafi'e means that the PPA and PSA cannot be read independently for the purposes of the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1989. This is consistent with the foundation element in the Religion of Islam of the omniscience of Allah.

[68] This court accepts that where the bank is the owner or had become the owner under a novation agreement, the sale to the customer is a *bona fide* sale, and the selling price is as interpreted in *Affin Bank Bhd v. Zulkifli Abdullah.* Thus, where the bank was the owner of the property, by a direct purchase from the vendor or by a novation from its customer, and then sold the property to the customer, the plaintiffs' interpretation of the bank's selling price is rejected and the court applies the equitable interpretation.

[69] This court holds that where the bank purchased directly from its customer and sold back to the customer with deferred payment at a higher price in total, the sale is not a *bona fide* sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility rendered the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989 as the case may be.

[70] Acting upon the basis that the bank's action resulted more likely from a misapprehension rather that of intent aforethought, the court holds the plaintiffs are entitled under s. 66 of the Contracts Act 1950 to return of the original facility amount they had extended.

[71] Notwithstanding that the properties may, where no title had been issued, have been assigned absolutely to the plaintiffs, by virtue of the fact the assignment was as security, it is equitable that the plaintiffs must seek to obtain a price as close to, if not more than, the market price as possible, and account for the proceeds to the respective defendants.

[72] Where the above ruling disposes of the matter, the court orders that counsels for the plaintiffs and defendants do draft their orders for approval accordingly as appropriate:

a) That order for sale by public auction is granted in respect of the charged properties for the recovery of the balance of purchase price upon the sum due as purchase price on the date of settlement, including ta'wid if any;

b) That auction date shall be held on a date four months from the date of this judgment;

c) That the reserved price, being a price equivalent to the market price, shall be fixed by the deputy registrar;

d) Other orders in respect of auction as provided by s. 257(1) of the National Land Code;

e) Costs to be taxed and paid by the defendants; and

f) Liberty to apply.

[73] Where the ruling above does not dispose of the matter but that there are other issues, parties are to proceed with the usual directions for case management and appear for case management on 29 October 2008.