The Bai Bithaman Ajil Contract as a Mode of Islamic Financing Facility: Issues and Dilemma

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ABSTRACT

The Bai Bithaman Ajil contract which constitutes the most favourite form of transaction commonly practiced by the Islamic Banking in Malaysia has been criticized by many quarters in the last few years. The implementation of the Bai Bithaman Ajil contract as a form of financial instrument is apparently to be contrary to the Syariah principles, thus invalid and unenforceable. There have been various ruling of the court pertaining to the legal issues arise in the Bai-Bithaman Ajil contract but some of the issues still remain unresolved. This paper aims to discuss the legal issues of the Bai Bithaman Ajil contract which are deemed to be contrary to the Syariah. Furthermore, it also reviews the ruling of the court pertaining to the legal issues arising thereof.

Keywords: Bai Bithaman Ajil, Islamic Financing, Legal issues

Introduction

The *Bai Bithaman Ajil* Contract (hereinafter referred to as BBA) constitutes the most common form of financing facility being practiced by Islamic banking in Malaysia for the last two decades. Despite being a favorite instrument, the BBA contract has been widely criticized by public and judges in several court cases in respect of its validity. The BBA contract has also been doubted by many scholars in other jurisdictions especially those from the Middle-East where most of them reject it. This is because they are of the view that the BBA contract is an interest-based loan cloaked in Islamic dress.

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In 2008, the High Court Judge in *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (third party) & The Others* [2009] 1 CLJ 419; [2008] 5 MLJ 631 declared the BBA facility granted by the bank to the customer as not Syariah compliant, thus null and void. The ruling given by the court has created uneasiness amongst those who were involved in the Islamic Banking system. Finally, on 30 March 2009, the Appeal Court reversed the decision of the High Court and reaffirmed the bank's practices related to the BBA contracts were syariah compliant and therefore valid.

Due to the different ruling of the court pertaining to the BBA, this paper is written to discuss the legal issues arising thereof that are deemed to be contrary to the Syariah principles. In short, the analysis of the issues is based on the cases brought to the court.

Bai Bithaman Ajil Facility: Definition and Concept

The *'Bai Bithaman Ajil'* financing facility which is also known as *Bai Muajjal* is a term which means a sale (the *'Bai')* and the deferred payment of the price (the *'Bithaman AjiV).* This type of financing facility is a *Murabahah* contract based on the controversial *Bai al-Inah* concept.

Murabahah is a contract that refers to the sale and purchase transaction for the financing of an asset whereby the cost and profit margin (mark-up) are made known and agreed by all parties involved. The settlement for the purchase can be either on a deferred lump sum basis or on an installment basis and the terms are specified clearly in the agreement (Usmani, 2006).

The *Bai al-Inah* on the other hand, is a contract of sale and buyback based on the transactions of *Nasi 'ah* (delay). According to Imam Shafi'i, *Bai al-Inah* is a credit purchase of an asset which is later sold to the original owner or a third party, whether at a deferred or spot, higher or lower price than the first contract, or for an exchange of goods. Al Haskafi defines it as a deferred sale of an asset with a motive to generate profit. The debtor, then, resells the asset to the original seller at a lower price in order to settle his debt.

As far as the application of *Bai' al-Inah* as a financing facility is concerned, it is a sale and buyback transaction between the financier and the customer. The financier buys an asset from the customer on "spot" basis. The price paid by the financier constitutes the disbursement under the facility. Subsequently, the asset is sold to the customer on a

deferred-payment basis and the price is payable by installments. The second sale serves to create the obligation on the part of the customer under the facility. This buy-back agreement will ensure that the customer receives the money in cash while financier pays a prefixed or contracted amount in a future date. The difference between cash and mark-up price will represent the profit due to the financier (Rosly & Sanusi, 1999).

Inasmuch as the BBA is a combination of *Murabahah* and *Bai al-Inah* concept, there have been several definitions given to it. According to Bank Negara Malaysia (2007), the BBA is a deferred payment sale whereby the property requested by the client is bought by the financier, who subsequently sells the goods to the client at an agreed price, including a mark-up (profit) for the bank. The selling price is fixed and agreed by both parties and will remain unchanged until the end of the payment period. Periodic installments are determined by the selling price and the payment period. The ownership of the property purchased will be under the claim of the financier and will be handed over to the customer upon full payment.

Rosly (1999) defines the BBA as a contract for financing sales by deferred installments. It is basically a trade-deal in which the seller allows the buyer to pay the price of a commodity at a future date in a lump sum or by installments (Ahmad, 1989). This means that BBA is a deferred payment sale contract which involves the selling of goods on a deferred payment basis at a price that includes a profit margin agreed by both parties (Muhammady, 2001). M. Illiayas (1995) on the other hand, defines the BBA as an agreement whereby the bank sells a property to the customer and permits the customer to pay the sale price on deferred payment by way of periodical installments.

According to Meera and Razak (2005), the BBA is an extension of the *murabahah* (cost plus) contract, whereby the commodity exchanged is delivered immediately but the sale price (with profit) is paid in installments over a long period. This facility provides the buyer the benefit of a deferred payment and the price of the sale object carries an additional profit.

The bank is allowed to mark-up the price in the BBA since it is fully responsible for the assets and any liability arising there from. Being a sale contract, the bank stands in the position as the owner and also as a vendor when it purchases the property from the customer. The transaction of sale and buyback of the property between the customer and the bank represents the application of the *Bai-al-Inah* concept in the BBA. The

property bought by the bank from the customer will be immediately sold back to the very same party. The sale price under the second sale is higher than the first one as the former includes the profit margin.

In *Bank Islam Malaysia Bhd* v *Pasaraya Peladang Sdn Bhd* [2004] 7 MLJ 355 the court explained that the BBA contract practiced in Malaysia consists of three separate agreements. The agreements are:

i. The Property Purchased Agreement (PPA)
This agreement provides that the bank would purchase the property concerned from the customer instead of from the vendor/developer/ proprietor at a price (which is actually the amount of financing).

ii. The Property Sale Agreement (PSA)
The Bank later would sell the very same property it has purchased back to the customer at a higher price which includes the profit margin pursuant to this second agreement. The customer will then repay the amount of the agreed purchased price by instalments according to financial tenure and nature of repayment as agreed by the parties at the time the contract is made

iii. The Charge Agreement
The customer will charge the purchased property to the Bank as a security to enable the bank to sell the property in the event of default of repayment by the customer.

BBA Contract: The Legal Issues

In Malaysia, the most popular facility granted under the *Bai Bithaman Ajil* is either to purchase a new house, to purchase an existing completed house or to build a house on customer's land. Being one of the popular modes of Islamic financing facility practiced by banking company in Malaysia, a close scrutiny by many quarters on the BBA contract in relation to its implementation certainly could not be avoided. As a result, many legal issues have been raised in the BBA contract unfortunately some of them are yet to be resolved until today. The legal issues of BBA contract are as follows:

i. *The* Bai al-Inah *concept in the BBA contract*

The application of the concept of *Bai al-Inah* in the BBA is found in two inseparable contracts of sales. The first sale contract is between the bank and the customer under which the latter receives the amount in

cash. Thereafter, the bank spontaneously and immediately sells back the same property to the customer under the second sale contract at a price higher than the previous sale. The payment is made by instalments over specific period agreed by both parties. The two contracts of sales are interrelated to each other in the sense that both are the sales of the same object between the same counterparties.

The *Bai al-Inah* concept is not an agreed matter amongst the jurists of Islam in terms of legality and validity. Many Muslim Scholars are in doubt as regards the concept *of Bai al-Inah.* According to Imam Malik, Hanbali and Hanafi jurists, the sale under the *Bai al-Inah* is invalid or void. They viewed such transaction as a fictitious sale to legalize that which is illegal or usurious under the Syariah principles (Rosly & Sanusi, 1999). This is because, in reality, the parties have no commitment to the sale contract be it either under the first or second transaction. They are having neither intention nor interest to own the property through the sale but rather interested to lend and borrow the money. The sale is deemed to be an illusionary since the real purpose of the parties is to exchange an amount of money with a higher amount. As a result, the *Bai al-Inah* is viewed as a forbidden sale since the motive behind such sale is to get a loan (financing amount) with interest (profit).

Rosly (2005) viewed the *Bai al-Inah* contract as a loan in the form of a sale. The sale is only an appearance to show the permissibility of the transaction for the debtor to get the money. To legalize the loan transaction under Islamic law point of view, the creditor use subterfuge technique by creating a fictitious object or asset and sells at higher price payable by installment in the future. The parties who are involved, however, do not have intention to use the object of sale for consumption purposes. As a result, the *Bai al-Inah* is viewed as simply a legal device *(hilah)* in order to overcome the prohibition of *riba* \

Many contemporary Muslim Scholars viewed such a transaction as not an act of sale since the intention of the parties clearly shows the purpose of the contract is to grant a loan with a profit. Under the Islamic principles, such act is forbidden as it leads to an unjustified enrichment or advantage in the form of monetary to one party to the contract without giving any counter value to the others. In *Majlis Amanah Rakyat* v *Bass bin Lai* [2009] 2 CLJ 433, the court was of the view that any contract related to commercial transaction which is executed in a manner of trickery or fictitious should not be allowed to be used and if so, it may then defeat justice, equity and/or *Qur'anic* commands.

The Shafi'i school of law however legalized and validated *Bai al-Inah* transactions, though some of them considered the practice as *makruh* (Engku Rabiah, 2008). The permissibility of the *Bai al-Inah* is on the grounds that the intention of the parties is immaterial so long as the transaction has been properly concluded by external evidence.

The Shari'ah Advisory Council (SAC) of the Malaysian Securities Commission (SC) and the National Shari'ah Advisory Council (NSAC) of the Central Bank of Malaysia (Bank Negara Malaysia - BNM) followed the Shafi'i School on this matter and had officially endorsed *Bai al-Inah* transactions in their legal rulings and resolutions. (Engku Rabiah, 2008). One of the arguments being raised to support the adoption of the Shafi'is view is the public interest consideration *(maslahah),* i.e. to overcome the problem of liquidity shortage in the country, without having to resort to conventional *riba* '-based borrowing (Engku Rabiah, 2008). The legalization *of Bai al-Inah* is also said to be in line with the Islamic legal maxim on the lesser of two evils or *Akhaf al dararain* (Engku Rabiah, 2008).

ii. *Transfer of Ownership*

Inasmuch as the BBA contract involves a sale transaction, the title is important to determine the ownership of the property. A seller who has no legal ownership of the property has no right to sell the property as well as to transfer the ownership to the buyer. Nevertheless, in the typical BBA contract, there is no evident to proof that the bank is holding the ownership of the property as there is no transfer of the name to the bank in the issue document of title of the property. In the first limb of the BBA contract i.e. the Property Purchase Agreement, the bank purchases the property from the customer and later sells the same property back to the same customer under the Property Sale Agreement which takes place on the same day. Since the bank is not directly purchasing the property from the vendor/developer/proprietor but is purchasing it from the customer, a question arises as to whether the customer has already held the ownership at that particular time.

Under the common practice, when a customer is interested to buy property, a down payment of 10% of the price must first be paid to the vendor/developer /proprietor and upon so, a signing of sale and purchase agreement between both parties will take place. The agreement between the customer and the vendor/developer /proprietor as to the purchasing of the property does not however confer the customer the title of the

property unless the full amount of the purchased price is paid. At this stage, the customer is certainly not in the position of having the ability to settle the full price and will apply to the bank for the financing facility. At this moment, the contract of BBA will step in and the customer immediately sells the property to the bank and in consideration to it, the bank will pay the price of the purchased property in so far as the amount of financing needed by the customer (the financing amount is normally 90% of the purchased price).

The sale which is deemed to have taken place between the bank and the customer under the abovementioned situation, as a matter of fact, creates a doubt since the customer at that material time has yet to have the ownership of the property. As such, how a sale could deem to have occurred? If so, what is the consequence if the customer fails to obtain any financing facility? Does the vendor/developer/proprietor of whom the customer purchased the property from entitle to forfeit the down payment of 10% paid by the customer in the event of inability to settle the purchased price? Does upon signing of the sale and purchase agreement between the customer and the vendor/developer/ proprietor confer any title of ownership of the property to the customer so as to entitle the sale to be concluded between the customer and the bank later on?

If one refers to the agreement of both parties, there is a clear term which empowers the vendor/developer/proprietor to forfeit the 10% down payment in the event of inability of the customer to settle the purchased price. This situation indicates that the customer does not hold any title of the property at that time and only holds it after the 90% of the financing facility is approved by the bank. Based on this situation, the sale between the bank and the customer could not take place in reality. Consequently, the transaction between the bank and customer which is deemed to be a sale is not really a sale but is done under fictitious, in order to justify the financing facility which in reality is a loan contract.

In *Dato' Nik Mahmud b Baud* v *Bank Islam Malaysia Berhad* [1998] 3 CLJ 605, the question as to the transfer of title of property which leads to a *bona fide* sale transaction was raised. In this case, the appellant/customer had entered into a BBA contract with the respondent/ Bank whereby the land under the Malay Reservations Enactment 1930 of Kelantan ('the Enactment') was sold and repurchased by him and later charged to the bank. The appellant claimed that the Enactment under section 7(i) prohibits any transfer or transmission or vesting any

right or interest of any Malay in reservation land to or in any person not being Malay and thus rendered the contract and charged created over the property null and void.

The Court of Appeal held that there was no evidence to show that the registered proprietorship of the land was being transferred at any time and that the appellant was the registered proprietor all along the execution of the BBA contract. This case clearly shows that the transfer of ownership is not an important element in the BBA sale contract whereas in law, for the sale to conclude between the parties, there must be evidence that the transfer of title being affected or otherwise no sale transaction is concluded. Thus the so-called sale transaction in the BBA facility is in fact simply a credit device instrument and not a *bona fide* sale transaction.

iii. *Prohibition* o/Riba' *in a Transaction*

The Syariah has propagated that all trading activities must involve risk for profits to be gained and the concept of 'no risk no gain' is already entrenched in Islamic commercial transactions. This means that under the Syariah principles, in order for the trade to be valid, there must be an equal counter value or known as *i 'wad* between the parties to the contract. Any unjust disparity between the parties in a transaction may lead to *riba* '(Tabari, 2010). The *'riba'* rule does not permit one to earn profit directly from cash transactions, unless it is a trade related transaction with the employment of capital, labour and risk. In a case where one party to the transaction obtained some profits without implicating any risk-taking or liability or value added services, such a transaction is lack of *i'wad.* As a result, the profits derived from such a transaction tantamount to *riba'* (Rosly et al. 2000). Thus, in order for the bank to be entitled to the profits, some risk of the transaction must be borne by it. If no risk is borne but the bank is getting some benefits out of it, such a transaction could not amount to a sale but in fact has implicated it with *riba'* which is strongly prohibited and condemned by Allah (Al-Baqarah: 275).

With reference to the structure of the BBA documentations, there is nowhere in the agreement especially the second agreement of the BBA contract i.e. the Property Sale Agreement (PSA) that provides the terms in relation to defective property. As far as the BBA contract is concerned, if defects are discovered, the customer must revert to the very manufacturer/vendor/proprietor/developer of whom the customer has purchased or obtained the said property from.

There are many cases brought to the court challenging the validity and enforceability of the BBA contract on the grounds that the contract has been tainted with *riba"* thus had operated contrary to the Syariah principles. In *Adnan bin Omar* v. *Bank Islam Malaysia Berhad* (unreported), the Supreme Court however, dismissed the claim and upheld the validity and enforceability of the BBA contract. Subsequently, in *Dato' Hj. Nik Mahmud Nik Baud* v *Bank Islam Malaysia Bhd* [1998] 3 CLJ 605 and *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408, the issue was raised again and the Court of Appeal affirmed the validity and enforceability of the BBA contract. Ironically, there is nowhere in all these cases, the courts tried to discuss the substance of the BBA contract and its operational in detail but simply conclude the validity of the contract based on the terms used therein.

Later, in *Arab Malaysian Finance Bhd* v *Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd, (third party) and Other Cases* [2009] 1 CLJ 419; [2008] 5 MLJ 631, a different ruling was made by the High Court where it declared the BBA contract granted by the bank to the customer was not Syariah compliant thus null and void. This is because the court was of the view that the BBA contract has been tainted with the element of *riba'* which renders it to be no different from the conventional loan contract. Since the BBA contract is a transaction of sale, the element *of riba'* should not be embedded in it and if so it would be contrary to the Islamic principles of transaction. The court was also of the view that it is necessary to see the substance of the transaction between the parties rather than looking at the labels and words used in the agreement in order to determine whether or not the transaction is approved by the Islamic Religion.

In the case of *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ, the court was of the view that in determining the validity of the BBA contract, the experts should be called to give their views, pursuant to section 45 of the Evidence Act 1950. Furthermore, the court could also pose the necessary questions to the Syariah Advisory Council for their views.

The ruling of the court in *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd,* however has been reversed by the Court of Appeal in *Bank Islam Malaysia Berhad v Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22, where it affirmed the decision of the earlier cases as to the validity and enforceability of the BBA contract. The court also reiterated

that the BBA contract is a sale transaction and must not be compared to a loan transaction. The court ruled that BBA being a sale contract has fulfilled all the elements required under the Islamic principles and the profits earned by the bank should not be equated as being similar to *riba'* or interest in the conventional loan. The reason given by the court for such ruling is that the issue had already been settled by the Superior court in the case of *Adnan bin Omar v Bank Islam Malaysian Bhd* (unreported) and by virtue of trite law of the doctrine of *stare decisis,* the decision of a superior court is binding on all courts below it. Again, no discussion in detail is made by the court as to the substance of the contract but simply ruled out by relying on the decision made earlier by the Supreme Court.

iv. *The Element* 0/Gharar *in the Sale Transaction*

One of the Syariah principles in relation to commercial transaction is the avoidance of the element of *gharar.* It is a second major prohibition in Syariah after *riba* \ In Islamic legal terminology, *gharar* literally means uncertainty, ambiguity, risk, danger or peril (Saleem, 2000) and the existence *of gharar* in contract is synonymous with fraud (Kamali, 1999). *Gharar* exists in the sale of an article of goods which is not present at hand or sale of an article of goods but the consequence or outcome of which is not yet known; or a sale involving risk or hazard where one does know whether the commodity will later come out to be or otherwise (Razali, 2008). *Gharar* also exists when there is inadequate or inaccurate information in a contract or where there are multiple transactions in a contract leading to conditionality in it which finally renders it uncertain and ambiguous (Razali, 2008).

Based on the above explanations, *gharar* or uncertainty in contract implies hazard, risk, chance or stake which is characterized by an unspecified element of quality, quantity or price. *Gharar* may also happen in a contract where the subject matter is not yet known or in existence, which finally may lead to the unknown consequences or outcomes. The prohibition of such practice is found in the saying of The Prophet Muhammad (SAW) which was reported by Muslim r.a.: *"Allah's Messenger forbade a transaction determined by throwing stones and the type which involves uncertainty* and *"Do not sell a thing which is not with you".* Also another hadith reported by Al Bukhari : *"The Messenger of Allah forbade me to sell a thing which is not my property or selling something that is not apparent and seen clearly".*

Apart from the *Hadith* of the Prophet, the above prohibition is also found in the *Mejelle* (The Civil Code of the Ottoman Caliphate) which provides that *'things sold must be in existence'* [art 197] and *'the sale of a thing not in existence is void'* [art. 205].

As far as the BBA facility is concerned, the element of *gharar* as discussed above will not be an issue whenever the property to be purchased is already in existence. Nonetheless, if the property to which the facility is covering is to be constructed or yet to exist, the validity of the BBA facility is questionable as such transaction involves the principle of *gharar*. For instance a customer is already bound by the contract of a sale of a house which is still under construction or yet to exist at the time the contract is made regardless of the consequences arise therein. If the house is abandoned or could not be completed, the customer is still liable to repay to the bank the amount that he or she had agreed in the contract. As a result, the uncertainty as to the consequences in the contract has led to the entry of the element of *gharar* in the BBA which could render such contract invalid.

Apart from the above, the element of *gharar* was also discovered in the BBA documentation. Yusuf (2009) found there was an element of multiple pricing within a single contract in the agreement. The stipulation of grace period (GPP) pricing apart from the sale pricing quoted in sale and purchase contract of the BBA may lead it to be in violation to the Syariah principles due to the existence *of gharar* (ambiguity) in the price.

v. *The Selling Price: Modes of Calculation*

As regards the value of the property, the amount of selling price to be paid by the customer under the second agreement i.e. Property Sale Agreement (PSA) is far higher than the amount that the bank is paying to the customer under the first agreement i.e. Property Purchase Agreement (PPA). The different value of the property under these two contracts leads to a question of how such 'selling price' is determined by the bank.

In *Affin bank* v *Zulkifli b Abdullah* [2006] 1 CLJ 438, the 'bank's selling price' was arrived at by taking from the original facility extended and, applying and adding thereon the bank's profit margin rate and the length of time sought for the payment. The selling price will remain throughout the entire period of financing and would not change. If one refers to the methods used in calculating the selling price under the BBA contract, one may find that such a calculation has no different with that of the conventional loan with interest.

According to a study conducted by Dr. Sazali, Prof Anuar and Puteri Farah, the financier under the BBA contract will charge a proportion of profit margin (Annual Percentage Rate) from the total amount of finance cost for the asset for the specified period that has been agreed by the parties involved in the transaction. As a result, the entirety of financing cost carried out from the sum of installments within the principal cost of the asset could be identified.

Despite the fixed amount of installments throughout the period of financing, in comparison to the conventional loan, the selling price in BBA contract does not reflect the prevailing market value since the profit margin for the deferred payment is quite substantial. The sum to be paid under the BBA is in fact more than 100% of the amount of the facility the customer obtained. In the event of default, the bank normally applies two actions against the defaulter i.e. i)order for sale and ii) an order to recover such sums in the event of a deficiency in the proceeds of sale. The first order is to sell the secured property and the second order is to get the full amount of the selling price. As the selling price of the property under the BBA contract is being determined very much higher than the market value, even if the property is sold, the proceeds of the sale are sometimes still insufficient to meet the amount of the selling price. Consequently, the customer is still liable to the repayment of the remainder amount of the selling price.

In *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67, the defendant bought a double storey link house and was given a financing facility under the Syariah principle of *Al-Bai Bithaman Ajil* from the plaintiff, who was his employer at that time, for a sum of RM346,000.00. The loan was to be repaid over 18 years tenure by 216 monthly installments and a charge was registered against the title. However the defendant resigned from the plaintiff bank and at his request, the loan facility was restructured whereby under the revised facility, the plaintiff bank selling price of the house was RM 992,363.40, payable over a period of 25 years. The defendant later defaulted in payment and the plaintiff filed two actions, namely an order for sale and an order to recover such sums in the event of a deficiency in the proceeds of sale. The plaintiff bank claimed all sums agreed in the contract i.e. RM992,363.40 even though the defendant has already paid 19 installments totaling RM33,454.00.

The court however had rejected the interpretation of the selling price by the bank and applied the equitable interpretation of the sale price. The court ruled that the bank should not be allowed to charge the

profit margin on the unexpired part of the tenure as it was clearly unearned profit. If so that would contradict the principle of *Al-Bai Bithaman Ajil* as the profit which had not been earned is not in reality profit. The learned judge allowed the balance due on the date of judgment by computing the profit on a per day basis that is due to the bank until full settlement. The court took an approach of determining the bank's profit per day and allowing the same up till date of realization.

The interpretation of the selling price expounded in the above case was followed in the case of *Malayan Banking Bhd* v *Marilyn Ho Siok Lin* [2006] 3 CLJ 796 whereby the judge ruled that it would not be equitable to allow the bank to recover the sale price as defined when the tenure of the facility was terminated prematurely.

In *Bank Islam Malaysia Bhd* v *Azhar Othman & Other Cases* [2010] 5 CLJ 54, the High Court agreed with the selling price approach laid down in *Affin Bank s case* which did not allow the bank to claim the full sale price of the property when the BBA contract is prematurely terminated upon default by the customer. The court viewed that bank should not be allowed to enrich itself with an amount which was not due while at the same time taking cognizance of the customer's right to redeem his property.

vi. *The Selling Price: Concept of Justice*

Under the Syariah law, the concept of justice is the primary aim as far as Islamic commercial transaction is concerned. Any act that is burdensome or oppressive to one side of the parties to the contract is absolutely prohibited. As far as BBA contract is concerned, the court in *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd* [2009] 1 CLJ 419; [2008] 5 MLJ 631, found that, the facility given is far more burdensome in terms of the price of the property sold to the customer. This is because the purchase price ascertained by the bank does not reflect the prevalent market value. It is in fact doubled or may be tripled than the amount that the customer received out of selling the property (the amount of facility given) or even more than the amount that a customer of conventional loan has to pay.

Certain quarters opined that the high profit margin imposed by the bank towards the selling price does not violate the Syariah. However, it should be noted that an excessive amount of profit derived from a transaction is, in fact, contrary to the spirit of Syariah to ensure justice to all. Furthermore, it has also been argued that the selling price fixed by the bank should not be an issue since the amount has already been agreed

between the parties at the time the contract is made. However, one has to remember that the customer is in fact has no right to interfere with the calculation of the selling price but has to simply accept what has been fixed or calculated by the bank.

In *Bank Islam Malaysia Berhad* v. *Adnan Omar* [1994] 3 CLJ 735 for instance, the defendant was granted a facility under the mode of BBA. The facility was executed in a manner where the defendant sold to the plaintiff a piece of land for RM265,000 which sum was duly paid to him and 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 189 monthly installments. A security by a charge of the said land was given on the same day also. When the defendant defaulted not long after, the bank claimed the amount that the parties have agreed i.e. RM583,000 upon which it is 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. The High Court held that the defendant was bound by the contract thus liable to pay the sums as stated in the agreement.

With reference to the above case, it clearly shows that the element of justice and equity which constitutes the paramount concern of Syariah in a matter relating to commercial transaction has not been taken into consideration by the court. When the bank is allowed to recover the sums that have been agreed in the BBA contract, it indicates that the bank is entitled to the profit which is yet to be earned. The profit charged on the unexpired part of the tenure should not amount to be an actual profit for the bank. To claim so, would certainly amount to injustice as well as contradictory to the principles of BBA contract. Moreover, the ruling of the court founded on the principle that a person is bound by what he or she has agreed upon, formed an indication that Syariah compliant is not a matter that should be concerned about by the court in making judgment on cases related to Islamic financing contract.

vii. *The Application* o/Ibra' *(Rebate) in the Contract of Sale*

Under the conventional loan, the customer is required to pay the outstanding principal amount and the earned interest whenever an early settlement is made. In comparison, under the Islamic financial system, the customer is still liable to settle the total outstanding selling price (which includes the profits) even in the case of early settlement. This is because the selling price has already been determined upfront and been agreed upon by the parties at the time the contract is made.

However, by convention, the bank may at its discretion grant a rebate or known as *ibra'* to the customer who made early settlement. The rebate is usually given in the form of a reduction in the balance outstanding. Nevertheless if no agreement is fixed upfront as to the exercise of *ibra* \ such situation may create confusion due to uncertainty *(gharar)* in the price.

In 2002, on the basis of public interest *(maslahah),* the Bank Negara Malaysia via its Shariah Advisory Council (SAC) had made a resolution that Islamic banking institution may incorporate the clause to provide *ibra'* to customers who make early settlement in the Islamic financing agreement. The incorporation of the *ibra*' clause in the financing agreement is pertinent since it could erase the entry of the uncertainty *(gharar)* in the price. Notwithstanding of the resolution, the inclusion of the *ibra'* clause in the agreement could not provide any improvement to the existing situation since the granting of *ibra'* is a matter of discretion and not mandatory to the bank. As such, the burden suffers by the customer still exist as the bank is not obliged to grant *ibra'* in the case of early settlement.

In order to resolve the matter, another resolution pertaining to *ibra* * was made on May 2010. Under the new resolution, the Islamic banking institutions are obliged to grant *ibra'* to the customers for early settlement of financing based on buy and sell contract. The SAC also ruled that in order to eliminate uncertainties to customer's right in receiving *ibra* \ the granting of the *ibra'* must be included as a clause in the legal documentation of the financing. Hence, the granting of *ibra'* is now become a must and no longer on the discretion of the bank. The resolution also provides that the formula for the rebate will be standardized by The Bank Negara Malaysia.

The right of the customer to *ibra'* was discussed in *Bank Islam Malaysia Bhd* v *Azhar Othman & Other Cases* [2010] 5 CLJ 54 where the court disallowed the bank to claim the full sum of the selling price in the case of default by the customer. The court ruled that although the BBA was silent on the issue *of ibra'* or its quantum, by implied term, the bank is obliged to grant *ibra'* to the customer for the early settlement of the sale price. The court viewed that the quantum of the *ibra'* shall be the amount of unearned profit as practiced by Islamic banks. The decision of the High Court however was overturned by The Appeal Court (decision was made 13 October 2010) which disallowed the bank to grant *ibra'* in default cases. The Appeal court ruled that *ibra'* could only be given to an

early settlement cases and not for default cases. The court viewed that the *ibra'* should not be regarded as unearned profit and as such the bank is entitled to claim the balance sale price. Furthermore, the court reiterated that the duty of the court was to uphold the sanctity of the contract and should not to interfere by rewriting the terms of the contract for the parties.

The unwillingness of the Appeal Court to concur with the judgment of the High Court in the above case has led the issue of *ibra'* to remain unsettled. The granting of *ibra'* should not be segregated between a default and non default case. It should be allowed in whatever circumstances so long as the selling price is paid earlier than the tenure period. On the part of the bank, the losses suffered due to the default could still be recoverable due to the existence of the penalty clause in the agreement.

Conclusion

To sum up, there are many legal issues arise in the *Bai Bithaman Ajil* contract and some of the them still remain unresolved although there have been a lot of legal scrutiny on it. With reference to the cases brought to the court, the legal issues arise in the BBA contract are generally about the same i.e. the issue of validity of the contract and the element of injustice in its implementation. With regard to the issue of the validity of the contract, the matter is said to have settled whenever the Superior Court made an affirmative decision on it in earlier case. Thus, by virtue of the doctrine of *stare decisis,* all courts below it are bound by such decision. Whilst the judgment of superior court is binding on all courts below, the issue of whether such contract is really in line with Islamic principles however has never been discussed. The genuine of the sale transaction in the BBA contract is still open for criticism since there is no discussion as to the operational and the substance of the BBA contract. A reliance by the court on the terminologies used in the agreement in drawing a conclusion is in fact provides no better answer to the issues arising thereof. Furthermore, the issue of injustice especially pertaining to the quantum that has to be enforced in the BBA contract due early settlement in default case has no affirmative and final answer. Hence, to put all the questions on the BBA to an end, it is a must for the court especially the Superior Court to scrutinize closely and thoroughly the

operational and the substance of it, so as to provide cogent answers to all the issues arising there from.

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