

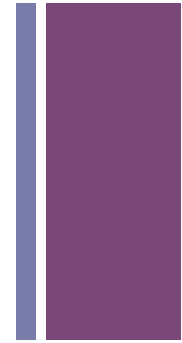
Islamic Finance Cases

LAB3073

ZULKIFLI HASAN

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- Islamic finance cases
- 1987-2002
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- 2012-2016



+ 1987-2002

- *Tinta Press Sdn Berhad v BIMB* (1987) 1 MLJ 474; 1 CLJ 474: Ijarah
- *Bank Islam Malaysia Berhad v Adnan Omar* [1994] 3 CLJ 735; [1994]3 AMR 44; [1994] 4 BLJ 372: BBA
- *Dato' Nik Mahmud Bin Daud v Bank Islam Malaysia Berhad* [1996]4 MLJ 295 (BBA) Malay Reserve
- *Bank Islam Malaysia Bhd v Shamsuddin Bin Haji Ahmad* [1999] 1 LNS 275; [1999] MLJ 450 (BBA)
- *Bank Kerjasama Rakyat Malaysia Bhd v Nesaretnam Samyveloo* [2002] 8 CLJ 95; [2002] 7 MLJ 103 (BBA)

+ Observation

- The judges are more concerned on the application of classic common law approach by emphasizing the civil technical aspects and did not tackle the actual *Shari'ah* issues.
- In the case of *Bank Islam Malaysia Berhad v Adnan Omar*, the High Court held that the defendant was bound to pay the whole amount of the selling price based on the grounds that he knew the terms of the contract and knowingly entered into the agreement. In this respect, the court applied the classic common law interpretational approach where the parties are bound with the terms and conditions of the contract. The court did not look into the issue further whether BBA facility involves an element not approved by the *Shari'ah* as stipulated under the IBA and the BAFIA.

+ 2003-2007

- *Bank Kerjasama Rakyat Malaysia Berhad v Emcee Corporation Sdn. Bhd.* [2003] 2 MLJ 408; 1 CLJ 625 (BBA)
- *Bank Islam Malaysia Berhad v Pasaraya Peladang Sdn Berhad* [2004] 7 MLJ 355 (BBA)
- *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Berhad* [2004] 6 CLJ 25; [2004] 6 MLJ 1 (istisna)
- *Arab Malaysian Merchant Bank Berhad v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 (BBA)
- *Malayan Banking Berhad v Marilyn Ho Siok Lin* [2006] 7 MLJ 249; 3 CLJ 796 (bba)
- *Affin Bank Berhad v Zulkifli Abdullah* [2006] 3 MLJ 67 (bba)
- *Malayan Banking Berhad v Yakup bin Oje & Anor* [2007] 6 MLJ 398 (bba)

+ Observation

- In the second phase, the court indicates its interest to examine critically the underlying principles and financing facility offered by the IFIs. Unlike the earlier cases in the first phase, several judges initiated a different approach in resolving issues involving Islamic finance particularly in the case of *Affin Bank Berhad v Zulkifli Abdullah* and *Malayan Banking Berhad v Marilyn Ho Siok Lin*.
- This position indicates the improvement of judges' level of awareness and understanding of Islamic finance.

+ *Affin Bank v Zulkifli Abdullah*

- BBA 25 years PP: rm394k paid rm33k claimed by the B: rm958k
- Held: profit up to the date of judgment plus penalty.
- The learned judge indirectly criticized the attitude of early court by using narrow interpretation and heavily applying classic common law approach.
- The proper approach is that for the court to examine further as to the implementation of Islamic banking whether it is contrary to the religion of Islam. The courts held that Islamic contract of BBA is similar with conventional loan and hence the Islamic banks could not claim the unearned profit because it is equal with interest calculation

+ 2008-2011

- *Bank Kerjasama Rakyat Malaysia Bhd v PSC Naval Dockyard Sdn Bhd* [2008] 1 CLJ 784; [2007] MLJ 722 (Bai INah)
- *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631; [2009] 1 CLJ 419 (BBA)
- *Light Style Sdn Bhd v KFH Ijarah House (Malaysia) Sdn Bhd* [2009] CLJ 370; [2009] 1 LNS 193 (Murabahah)
- *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839 (BBA)
- *Tan Sri Khalid Ibrahim v Bank Islam Malaysia Berhad* [2009] 6 MLJ 416 (bba)
- *Bank Islam Malaysia Bhd v Azhar Osman & Other Cases* [2010] 5 CLJ 54 [2010] 1 LNS 251 (bba)

+ Observation

- In the case of *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors* that the application of the BBA is contrary to the IBA and the BAFIA.
- Clearly indicates the new constructive approach of the court towards Islamic banking cases particularly in resolving issues pertaining to BBA facility. This judgment may affect the Islamic financial sector in Malaysia as the expert estimates that 70 per cent of Islamic financing facility was granted under BBA facility.

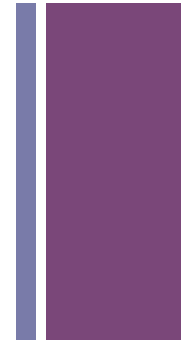
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*BANK ISLAM MALAYSIA BHD V
LIM KOK HOE & ANOR AND OTHER APPEALS
[2009] 6 CLJ 22*

“Similarly, the law applicable to BBA contracts is no different from the law applicable to loan given under the conventional banking. The law is the law of contract and the same principle should be applied in deciding these cases. Thus, if the contract is not vitiated by any vitiating factor recognised in law such as fraud, coercion, undue influence, etc. the court has a duty to defend, protect and uphold the sanctity of the contract entered into between the parties.”

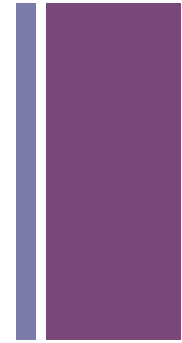
+ *Tan Sri Khalid Ibrahim v Bank Islam Malaysia Berhad* [2009] 6 MLJ 416

- For the first time in the history of the Malaysian court that the High Court judge made reference to the SAC for confirmation of the *Shari'ah* status of the agreement.
- BBA is recognized form of transaction.





Azhar bin Osman & 3 Other Cases ***(2010) 9 MLJ***



- Counsel for the bank contended that in a BBA contract the Bank has a legal right to claim for the full sale price as stipulated in the Property Sale Agreement, as.
- The HC observed that in specifying the amount due, the issue which confronts a BBA contract is the agreement is silent on:
- Since the tenure of the contract has not completed, normally the bank will further deduct as ibrar (a term used in Islamic banking for rebate) what it refers to as ‘unearned profit“, i.e. the amount which has yet to be earned by the bank, based on an Amortization table.
- When a BBA contract is prematurely terminated upon default by the borrower, the court cannot allow the bank to enforce the payment of the full sale price in a premature termination:

+ *Arab Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors*) [2008] 5 MLJ 631

- The beginning of pro-active attitude of the court in examining the validity and determining issues involved in Islamic banking cases.
- The Federal Constitution, the IBA and the BAFIA do not provide the interpretation of which *madhhab* is to prevail. BBA facility must not contain any element which is not approved by the religion of Islam under the interpretation of any of the recognized *maddhab*.

- The court accepts that BBA facility is a bona fide sale transaction and the interpretation of selling price in the case of *Affin Bank Berhad v Zulkifli Abdullah* was referred to where the court rejects the plaintiffs' interpretation and applies the equitable interpretation.
- Where the bank recalls BBA facility at a higher price in total, the sale is not a bona fide sale but a financing transaction and rendered the facility contrary to the IBA and the BAFIA.
- The court holds that the plaintiffs are entitled under section 66 of the Contracts Act 1950 to return the original facility amount they had extended. It is equitable that the plaintiffs must seek to obtain price as close to the market price as possible and account for the proceeds to the respective defendants.

+ Case analysis

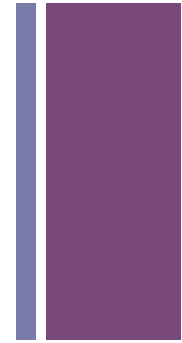
- In BBA facility, the court uses an equitable interpretation as to the definition of selling price whether the defendant was bound to pay the whole amount of the selling price even in the event of early termination of the contract.
- The classic common law approach will require the defendants to pay the whole amount of the selling price as they are bound by the terms of the contract but the court in this case chooses to apply an equitable principle.
- An equitable interpretation of the selling price removes the excessive amount of profit derived from BBA transaction and therefore the defendants will only have to pay the principal sum of the facility.

+ Profit portion of BBA facility is unlawful and contrary to the religion of Islam

- 1. The court considers deferred payment of the selling price is a credit or a loan and any profit claimed or charged by the bank as an additional to the facility amount is interest. The court signifies that the profit derived from BBA facility is lawful if the transaction is considered as a bona fide sale. Nevertheless, BBA facility in this case abandon the element of bona fide sale in which making the profit derived from it would be prohibited as *riba*



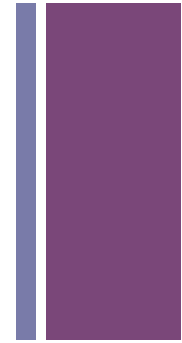
- 2. In addition, the court also mentions that excessive selling price under BBA facility imposed a heavier burden upon the defendants that would be contrary to the intent and purpose of verses 275-280 of *surah al-Baqarah*.
- Al-Ghazali insists the practice of *ihsan* or doing good deeds in business rather than merely advocating the maximization of profit. The element of tolerance and benevolence should be the basis upon which the Islamic banking business transactions are conducted.





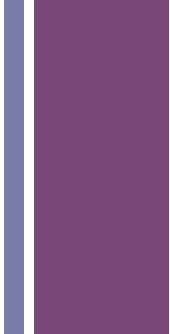
■ 3. The issue of *iwad* in BBA transaction.

Although the court in the current case does not mention anywhere this specific issue, it is observed that BBA facility has apparently neglected the requirement of *iwad* (equal counter value or compensation) where the obligation of warranty to the properties sold has been shifted to the vendor and not the plaintiffs as the sellers. Moreover, it is evident in most of BBA legal documentations that the bank holds no liability arising from all defective assets sold.



■ 4. The true nature of contracts and transactions is the substance and not the words and the structure. The distinction between a sale and a loan is not maintained in its form alone but it must also be maintained in substance.

■ The court opines that BBA facility may be classified as pretence of sale transaction unless there was a novation agreement to make the bank a genuine seller.

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- + ■ 5. In interpreting the requirement under the IBA and the BAFIA that the financing facilities offered do not involve any element not approved by the religion of Islam, the court declares that the facility must not contain any element not approved by any of the recognized *madhab* unless the financing agreement states the specific to a particular *madhhab*.
 - Since *Bay al-Inah* concept is only acceptable in *madhhab Shafi'i*, it fails to meet the IBA and the BAFIA's requirement and renders the transaction null and void.



Effect of the Void Instruments

Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad [2009] 6 MLJ 416 HC

• “... Learned counsel contends that the mode of execution of APA and ASA was **improper** because Tan Sri Khalid was made **to sign both agreements first before they were passed back to be completed by the bank.** There was therefore **no separation of the APA with the ASA and no distinction in term of time of execution as required under the said ruling of the SAC.** As such there was **no complete sale of shares to the bank under the APA before the bank can resell shares** to Tan Sri Khalid in the ASA. To my mind, **this issue is based on mere technicality and a trivial one.** The **consensus between parties has been arrived at the point the letter of offer was accepted** by Tan Sri Khalid. **The agreement to be bound is subject to the formalities of the execution of various documents.** Signing of the written agreements is **to formalise and to translate the consensus of parties in the terms clearly agreed upon.** Besides, it has always been a practice, for the borrower to affix signatures on all banking documents before the bank execute the same, and it is rather inconceivable to suggest that it can affect the validity of the contract. Furthermore, a written confirmation from the bank’s own Shariah Council in exh GN4 confirmed that the mode employed for the execution of the documents in the present case is in order and has no bearing from Shariah perspective. With seven sets of APA and ASA documents signed in the same manner, the parties would have condoned and accepted such practice. As such, I fail to see how these agreements will not be binding on parties merely because they are signed without following orders of precedent, when after entering into the seven sets of transaction the defendant never protests or raises any issue.”

+ Mohd Alias Ibrahim V Rhb Bank Bhd & Anor [2011] 4 Clj 654 [2011] 3 Mlj 26

- Plaintiff challenged the validity of s 56-57 of the CBA 2009. Ultra vires the Federal Constitution
- 1. Binds the court? Usurping article 121 (1) of the FC.
- 2. Whether the sections had in effect delegated the court power to the sac.
- 3. Making ruling binding, the parties had been deprived of their right to be heard:
 - i. breach of constitution
 - ii. Breach of natural justice
- 4. Retrospective effect.

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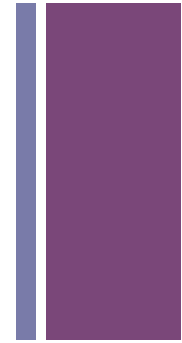
2012-2015

- *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 7 MLJ
- *Low Chin Meng v CIMB Islamic Bank* [2015] 5 CLJ 324
- *MK Associates Sdn Bhd v. Bank Islam Malaysia Bhd* [2015] 6 CLJ
- *Maybank Islamic BHD v M-10 Builders Sdn Bhd & Anor* (2015) 1 SHR



Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2012] 7 MLJ

- (Mohd Zawawi J):
- It is settled law that ss 56 and 57 of the Act are valid federal laws enacted by Parliament and as such were not in contravention of the FC.
- Difference of opinion on Shariah issues relating to Islamic banking should be resolved within the SAC. It is advisable and practical that a special body like the SAC should ascertain the Islamic law most applicable to the Islamic banking industry in Malaysia



+ *Low Chin Meng v CIMB Islamic Bank*
[2015] 5 CLJ 324

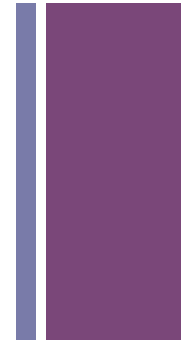
- Highlighted the same issue i.e. its validity and legality of *al-Bay Bithaman Ajil*.

+ *MK Associates Sdn Bhd v. Bank Islam Malaysia Bhd* [2015] 6 CLJ

- In this case the plaintiff, MK Associates Sdn Bhd defaulted in the installments of *al-Bay Bithaman Ajil*. The defendant, Bank Islam Malaysia Bhd claimed the outstanding balance of the facility together with *ta'widh* or compensation for late payment in the amount of RM10, 384, 262.88 for the period of 30 months i.e. from January 2000- June 2012. The plaintiff contended that the defendant was not entitled to charge *ta'widh* since it was not part of the terms agreed upon at the time of the agreements were signed. The defendant on the other hand claimed that it has rights to do so pursuant to the BNM's letter dated 10 December 1998 and the *Shari'ah* Advisory Council Resolution in 1998.
- There are there main issues involved in this case namely: (i) whether the defendant was entitled to charge the plaintiff, *ta'widh* pursuant to the Agreements; (ii) whether the defendant was entitled in law to charge the plaintiff *ta'widh*; and (iii) whether the defendant was entitled to charge *ta'widh* in the sum of RM10, 384, 262.88. After giving due consideration of all factors and arguments, the learned judge made decision in favour of the plaintiff and *ta'widh* was not relevant in this case.

+ Cont...

- The court held that the plaintiff must know of the imposition of *ta'widh* so that consent would be valid. The plaintiff in this case did not know the term *ta'widh* as at the time the agreements were entered into in 1998, it was not practised by IFIs. The learned judge opined that *ta'widh* was only introduced after the SAC's Resolution in 1998 and the said resolution was only effective on 1 January 1999. It is unfair for the imposition of *ta'widh* where the agreements are silent on it and therefore it shall be applicable only on or after 1 January 1999.



+ **Maybank Islamic BHD v M-10 Builders Sdn Bhd & Anor (2015) 1 SHR**

- By their conduct, both parties were privy to the illegality and had camouflaged the MOD facility as murabahah and both had benefited from this illegality.
- This transaction had clearly violated the basic tenets of the financing premised on the Islamic concept.
- Further, the contract involving the MOD facility which the parties termed as murabahah was contrary to the basic tenets of financing based on murabahah as there were no fresh ASA and APA having been executed.

+ ■ Held:

- 1. The practice of the civil court referring question on Islamic law to Islamic authorities is not new.
- 2. The jurisdiction falls under the Civil Court jurisdiction. Law relating to finance.
- 3. The SAC is merely required to make an ascertainment and not determination. The court still has to decide the ultimate issues and the final decision remains with the court.
- 4. No retrospective effect.
- **Effect of the Void Instruments:** It was held that, if the murabahah contract contradicts the Shariah principles and the basis tenets of the financing based murabahah, the murabahah Facility was declared null, void and unenforceable