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TITLE: Article: AFFIN BANK BHD v ZULKIFLI ABDULLAH -- SHARIAH PERSPECTIVE

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TEXT:

Introduction

The growth in the Islamic banking industries has naturally brought an increase in the volume of cases in Malaysian courts.

However, the courts in almost all the cases adjudicated the issues entirely through the application of civil laws and one such case is *Affin Bank Bhd v Zulkifli Abdullah* [2006] 3 MLJ 67 -- a Shariah perspective which is worth consideration in view of the impact it created on the Islamic banking industries in Malaysia.

This commentary seeks to view the issues involved in that case from an Islamic perspective.

Facts

The defendant in this case was a former employee of the plaintiff ('the bank'). In 1987 he bought a double storey corner unit house ('the property') from a vendor for the sum of RM385,000. He paid a deposit of RM39,000.

He requested the bank for an Islamic finance facility under the concept of *A'Bai Bithaman Ajil* (BBA). In line with the BBA concept, the bank purchased the property from the defendant for the sum of RM346,000 and almost simultaneously the bank sold the property to the defendant wherein the defendant agreed to purchase the property from the Bank and agreed for the sale price to be paid over 18 year tenure by 216 monthly instalments of RM3,582.80 subject to an Ibra' of RM1,421.47 as long as the defendant remained the bank's employee.

The total payment of 216 instalments of the amount after monthly *Ibra's* would come up to RM466,847.28 and the amount of RM466,847.28 was described in the letter of offer and other documents as the bank's selling price. However it is to be noted that the total sum payable by the defendant would be RM773,884.80 if the '*Ibra*' is not given to the defendant.

The facts showed that the defendant left the employment of the bank at the end of December 1997. He paid RM7,500 before defaulting. He requested for restructuring of the facility with the bank which was agreed by the bank in 1999, however no new documentations were signed.

Under the 'restructured facility' the defendant was to pay the sum of RM2,500 over 60 monthly instalments and then continue with 240 monthly instalments of RM3,509.84. The total payment over a 25 years term would come up to RM992,361.60.

It appeared that the defendant once again defaulted monthly payment under the 'restructured facility' and the bank filed proceedings in court seeking the balance of the restructured sale price of RM958,909.21.

Validity of 1999 revision

The facts disclosed there were two facilities granted under the BBA facility in 1997 and subsequently it was revised in 1999. The question is whether the revision is valid?

In this case it is apparent that there was no fresh sale and purchase agreement executed by the bank and the defendant stipulating the new sale price (revised sale price). The only document which existed between the defendant and the bank is a letter dated 1 November 1999 which in itself requires a fresh set of documents to be signed but no such documents were executed.

It is to be noted that in Islamic banking the issuance of a fresh letter of offer by the bank does not by itself constitute an underlying transaction between the bank and the defendant. BBA is a sale and purchase transactions and never intended to become a strict financing instruments.

As such BBA must be treated as sale contracts and cannot be equated with financial instruments.

Sale is a contract of exchange which implies an exchange of goods and its counter value, the price. In the absence of any contract of exchange or in this particular case a new sale and purchase agreement signed between the bank and the defendant it can be concluded that there is no valid sale concluded between the bank and the defendant in 1999.

When the defendant requested for the 1997 facility to be restructured, the bank and the defendant should have mutually terminated the 1997 facility which would require the defendant to pay the sale price immediately. The bank and the defendant will then enter into a fresh BBA transaction at the new revised sale price wherein part of the new revised sale price will be utilised to pay off the 1997 facility.

In Islam, money is not treated as commodity; its use is restricted to act as a medium of exchange and as a measure of value only. Money by itself cannot be the subject matter of trade. In the revision of the facility in the case, it can be construed that the bank was revising the 1997 sale price without any underlying transaction which would tantamount to deal with money as the subject matter.

As such, the excess money which the bank accepted over and above the original sale price without a valid underlying transaction is *riba* which disentitled the bank from receiving it. It is to be stressed that the essential feature of Islamic banking is that it must be interest free, as riba is forbidden in Islam as revealed in Surah Al-Baqarah (2:275) -- '*but Allah has permitted trading and forbidden riba (interest)*'.

1997 Facility

In this facility the bank purchased the property at RM346,000 and simultaneously sold to the defendant the property for a sale price on deferred payment payable by 216 monthly instalments of RM3,582.80 subject to an *Ibra*' of RM1,421.47 as long as the defendant remained as the bank's employee.

The total amount payable by the defendant throughout 216 months at RM3,582.80 would be RM773,884.80. However the documents signed between the bank and the defendant stipulated the bank's selling price at RM466,847.28.

Once a selling price is concluded it became a binding agreement between the bank and the defendant, the price of the house cannot be altered.

Amount claimable

What then is the amount claimable by the bank, is it RM773,884.80 or RM466,847.28?

The bank is at liberty to grant *Ibra*' which can amount to a release of a debt. It connotes an action by the creditor releasing the debt payable by a debtor or buyer which would result in the freeing of the debtor's debt obligations. n1

Ibra' can be done unilaterally and its cooperation is not subject to acceptance by the debtor. However a debtor can choose to exercise not to accept the release of debt. Article 1568 of the Mejelle stipulates that '*A release is not dependent on acceptance, but by a refusal it is rejected*'.

As *Ibra*' is discretionary and given at the sole prerogative of the bank; it is normally given to a customer who is not delinquent. However in this case when the bank agreed RM466,847.28 as the sale price, it is to be presumed that the bank has released the defendant of any obligation in excess of RM466,847.28 especially in the absence of any evidence of non-acceptance of the*ibra'* by the defendant.

Two sale price?

Can the bank insist the selling price of the house at RM773,884.80 on the basis that this was the price payable by the defendant and the ibra' will only be applicable as long as the defendant was under the employment of the bank?

In Islam the price must be certain to avoid*Gharar* (uncertainty). When a bank fixed two prices for the house, firstly the lesser price as long as the buyer is under his employment and secondly, an increased price when he left the bank, the price of the house will be uncertain which is prohibited in Islam and could affect the validity of the sale.

The Prophet (*saw*) has expressly prohibited Gharar as reported by Muslim. n2

Once the defendant agreed to purchase the house at RM466,847.28, the sale price crystallised into a debt to be payable by the defendant to the bank. The Prophet (saw) was reported to have said that '*Muslims are bound by their stipulations unless it be a condition which turns a haram into halal or a halal into haram*'. n3

Even though the sale price is payable by instalments, it is considered only a privilege accorded to the defendant, as long as he did not default the instalment payment. Once the defendant defaulted the instalment payment, the bank has the right to insist the whole sum of sale price to be paid as a lump sum as it is the contractual sum which is agreed to be paid by the defendant to the bank.

As the RM466,847.28 is a sale price of a valid contract, the bank has absolute right to claim the contractual amount of RM466,847.28 and there arise no issue whether it is unearned profit or not.

Therefore with due respect, it is unjustifiable under *shariah* to separate the sale price of the house into unearned profit for the unexpired tenure in the event the bank decided to seek a lump sum payment upon default by a customer.

Need for reflection

The learned judge in the case commented that a borrower under a Riba ridden loan is better off than a purchaser under an Islamic facility. This warrants consideration. This is the first time a judge had focus on this aspect of Islamic banking facility and such an observation should not be swept under the carpet. A solution acceptable to Islam must be found.

If one analyse the attitude of Islam towards the economic system, its essential aim is to achieve humanity and justice. Islam recognises free enterprise, yet the freedom is not unlimited. There is no freedom to destroy or to weaken the society's value or to harm others. n4

The defendant obtained an Islamic facility for RM346,000 but the bank claimed a sale price at RM992,363.40, under the assumption that the revision in 1999 is valid, does the seller has an absolute right to fix any price on the subject matter even though it is excessive?

Excessive pricing of a subject matter is considered to have effect on the consent of the contracting party. However all *sunni* jurists seems to be unanimous that excessive pricing alone does not give a right to the buyer to rescind the contract unless substantiated by fraud or inducement. They however defer on exceptional cases. The *Hanafi* provided three exceptional cases wherein a victim of excessive pricing has the right to rescind the contract of sale without prove of fraud, namely in the case of disabilities of buyer due to age, prodigal and lunacy.

The *Hanbalis*allows the victim of excessive pricing to rescind in three situations, firstly where the seller was asked to sell his goods before he reaches his destination depriving him from knowing the actual price; secondly, where the prices of commodities were increased to deceive others; and thirdly where the buyer himself was not a good bargainer and did not know the normal price for such goods.

On the other hand the *Malikis* considers the three above sale to be valid eventhough prohibited. The buyer is allowed to rescind the contract in the second instances and not in the other instances, whereas the *Shafiis* are of the different opinion that excessive pricing has no bearing on the sale as the excessive pricing may not occur without the negligence of the buyer. n5

Bearing the above classical jurists' views, I am of the opinion that the issue of excessive pricing need to be revisited by our jurists as fixing of sale price with an increased of 300% over the purchase price is manifestly high and could lead to exploitation.

The banks must be allowed to make a reasonable profit from its transactions but it cannot be allowed to exploit a buyer as it would ultimately lead to hardship to the whole communities. A buyer who took up an Islamic facility from a bank may end up as a bankrupt when the circumstances force him to default as the subject matter may not sufficiently appreciate to cover his debt payable to the bank. It is not in public interest to force him to be declared a bankrupt.

Perhaps it is a high time for our jurists to consider fixing a fixed percentage of profit allowable over a purchase price or value of the subject matter which can be adopted by the banks in deciding the sale price of the subject matter.

Ibn Qadi, a *Hanafi* jurist had proposed to fix an arithmetical proportion in determining an excessive pricing in accordance with different varieties of the subject matter.

Whereas *Malikis* and *Hanbali's* considers excessive pricing when the sale price is more than one third or more than the subject matter's real value.

On the other hand *al-Shaibani*held the view that a price of an approximate 50% over a subject matter as excessive pricing. n6

Fixing of a sale price based on an agreed profit rate to commensurate with the tenure and amount of the facility gives an impression that a similar mode of calculating interest (*riba*) adopted by conventional loan is being employed in determining the ultimate sale price. It seem to suggest that the only difference under Islamic facility is that the percentage of profit is fixed at a certain percentage whereas the conventional loan percentage is in line with base lending rate (BLR) which fluctuates. It also gave an impression that time of payment act as an exclusive basis in determining the price of a subject matter.

Therefore, the court cannot be blamed if it employed 'a civil law approach' in differentiating the sale price as earned and unearned profit for unexpired tenure of the Islamic facilities as it is induced by the banks themselves when they employed a calculation of sale price akin to conventional loan formula.

The current setting of sale price under an Islamic facility which is identical to a conventional loan cannot be just as it lead to exploitation and injustice which also gave an impression that it is a back door to *riba*'.

One of the reasons *Riba* is prohibited is due to the fact that it hinders real trade. Imam Al Ghazzali observed that *Riba* is prohibited because it prevents people from undertaking real economic activity. This is because when a person having money is allowed to earn more money on the basis of interest, either in spot or in deferred transactions, it becomes easy for him to earn without bothering himself to take pains in real economic activities. This leads to hampering the real interests of the humanity, because the interests of the humanity cannot be safe guarded without real trade skills, industry and construction.

In view of that, banks must be encouraged to calculate sale price based on real sale. Perhaps in fixing a sale price the banks could request for a property valuer's opinion in determining the future sale price of a subject matter in tandem with tenure of an Islamic facility provided to the customer.

In order to address the situation of a buyer taking advantage of the facilities granted by deliberately defaulting, provision can be provided whereby the buyer may be penalise with liquidated damages based on the actual damages suffered by the banks as assessed by the courts. With the exception of Qard' Hassan (interest free loan) Islamic Bankers must act like a trader and not a lender!

Even though the banks will argue that customer will be granted *lbra*' but it is only subject to Bank Negara's supervision, the customer has no legal right to enforce the Ibra' in the event the banks victimise the customer as *Ibra*' is under the prerogative and mercy of the banks. It cannot be denied whenever a bank comes to the aid of the court to claim a sale price, it will be benefited by the accelerated payment resulting from a court order.

The courts may want as assurance that Ibra' would be granted to a defendant for the accelerated payment through the court order. In order to show its bona fide intention to the court, the banks in its own accord may claim its sale price with a discount given for an accelerated payment. The sale price due to a bank is considered as a debt and in Islam a creditor is allowed to give a discount on the debt and demand an accelerated payment.

The same concept could be adopted whenever a bank institutes a claim for a debt of sale price in the court. This will avoid the interference of court in the sale price.

Judicial intervention

The Islamic banking industries must be given space to find its own solution in remedying the situation.

However if the current trend continues the court may intervene to remove the exploitation and injustice. The court as guardian of justice can interfere in the contract between the banks and its customers on the principle of '*Adl Wa Ehsan* (justice and equity). It is revealed in the Al Quran 16:90 '*God commands justice and fair dealing*'.

The court may readjust the contractual obligations judicially if the parties are unable to find an amicableasettlement. There are various legal maxims which are applicable in financial transactions such as:

No harm may either be inflicted or reciprocated

Necessities allow actions which would otherwise be prohibited

Harm must be removed

If a contract between the contracting parties becomes an instrument of injustice, a judge cannot ignore the unfairness and insist on strict adherence to the letter of contract. Hence, a judge is empowered to set aside a contract when the fact disclosed gross unfairness on one of the parties n7 as Islamic system is a just and equitable system that promotes close relationship between the banks and the customers based on cooperation and equitable sharing of risks and rewards.

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FOOTNOTES:

n1 *Wahbah Al Zuhaili -- Fiqh dan Perundangan Islam* Vol V1 p 332.

n2 *Sahih Muslim Vol 111 p 56.*

n3 Sunan Abu Dawud (Hassan's translation) III, 1020, Hadith 3587.

n4 Dr Razali Haji Nawawi -- Islamic Law on Commercial Transactions p 20.

n5 Dr Razali Haji Nawawi -- Islamic Law on Commercial Transactions p 36.

n6 Dr Razali Haji Nawawi -- Islamic Law on Commercial Transactions p 33.

n7 Prof Mohammad Hashim Kamali -- *Principles of Islamic Jurisprudence* p 406.