Bank Islam Malaysia Bhd v Azhar bin Osman and other cases

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS D4–22A-395 OF 2005 AND D4–22A-399 OF 2005; SUIT NOS D4–22A-195 OF 2006 AND D4–22A-263 OF 2006
ROHANA YUSUF J
28 JANUARY 2010

Banking — Banks and banking business — Islamic banking — Loan facility — Bai Bithaman Ajil — Premature termination — Determination of quantum of plaintiff's claim — Whether bank had legal right to claim full sale price

Civil Procedure — Judicial precedent — Stare decisis — Bai Bithaman Ajil — Property sale agreement — Right to enforce payment of full sale price — Whether court should apply similar approach in cases decided earlier

The proceedings before this court involved two writs of summons and two originating summonses, respectively. All the four cases were based on Bai Bithaman Ajil ('BBA') contracts. Pursuant to the Court of Appeal's decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 MLJ 22 which held, inter alia, that a BBA contract was valid and enforceable, the parties were required to appear before this court for the determination of the quantum of the plaintiff's claim. It was contended on behalf of the plaintiff that in a BBA contract, the bank had a legal right to claim for the full sale price as stipulated in the property sale agreement ('PSA'). Accordingly, in an application pursuant to an originating summons, the court ought to grant an order for sale based on the full sale price, irrespective of a premature termination. The reasons for the above are as follows; firstly, the defendant had agreed to the amount of sale price and was under a legal obligation to pay the full sale price, and secondly, this court was bound by the decision of the Court of Appeal in *Lim Kok Hoe* which upheld and acknowledged the obligation to pay the full sale price under the PSA.

Held, allowing the plaintiff's claim with costs:

(1) In all cases of BBA contracts despite stipulating the full sale price as being payable, the bank grants *ibrar* or rebate on a termination due to breach or for prepayment. The granting of *ibrar* by Bank Islam Malaysia Bhd ('BIMB') is in line with the practice of other Islamic banks. That being the case in an order for sale the sum stipulated under s 257(1)(c) of the National Land Code ('NLC') shall be the amount payable in the event that a customer intends to tender payment under s 266(1) of the

NLC. Under this section, if a chargor tenders payment to court of the amount due and payable before the conclusion of the auction, the order for sale ceases to have effect. The approach of the Islamic banks that deduct unearned profit as *ibrar* is consistent with the requirement of s 266(1) of the NLC while at the same time facilitates cases of prepayment (see paras 9–10).

(2) Thus, in all applications for order for sale, the courts have allowed the sum specified under s 257(1)(c) of the NLC to be the sum due and payable at the date on which the order is made; based on the total sale price less the amounts paid under the instalments and further deducting the unearned profit of the bank computed at the day on which the order for sale was made (see para 10).

(3) Similar approach is also taken by this court in proceedings under a writ of summons. Judgment is entered on the quantum of the plaintiff's claim based on full sale price under the PSA less the amounts paid under instalments at the time the writ was filed or thereabout. This sum will further be deducted by the amount of unearned profit (if any) on the date of realisation as *ibrar*. This is because, unlike the application for an order for sale, there is no requirement for the plaintiff to state the amount due and payable on the date of judgment (see para 11).

(4) Whilst it is true that the Court of Appeal in *Lim Kok Hoe* held that a BBA contract in a way differs from conventional banking because it is a sale transaction, it cannot however be regarded as a sale transaction simpliciter. The BBA contract is secured by a charge and concession as *ibrar* is given as a matter of practice to all premature termination. Despite the written term of the agreement, the bank in reality does not enforce payment of the full sale price upon a premature termination. It always grants rebate or *ibrar* based on 'unearned profit' (see paras 13–14).

(5) The court does not enforce payment of the full sale price but intervenes on equitable grounds, albeit based on different approaches. Therefore, when an Islamic bank practices granting of rebate on a premature termination, it creates an implied term and legitimate expectation on the part of the customer. Accordingly it is only proper that such expectation and practice be read into the contract. Hence, where the BBA contract is silent on issue of rebate or the quantum of rebate, the bank must, by implied term, grant a rebate and such rebate shall be the amount of unearned profit as practiced by Islamic banks (see paras 18, 20 & 22).

Observation:

The legal documentations used by Islamic banks should have addressed the peculiarity of Islamic banking transaction, instead of adopting a cut and paste approach of the conventional banking documents. If the documents of the

banks had in fact specified a formula of rebate or *ibrar*, it will demystify the intricacies of a BBA transaction. It will be easily understood by the customer who would then not be put in the dark as to what is *ibrar* and what would be the amount of *ibrar* he should be receiving. In that way, the court need not have to interfere with the terms of the agreement or to add implied terms as I am now doing (see para 23).

[Bahasa Malaysia summary

Prosiding di hadapan mahkamah ini melibatkan dua writ saman dan dua saman pemula, masing-masingnya. Kesemua empat kes tersebut adalah berdasarkan kontrak-kontrak Bai Bithaman Ajil ('BBA'). Menurut keputusan Mahkamah Rayuan dalam kes *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22 yang telah memutuskan, antara lain, bahawa kontrak BBA adalah sah dan berkuat kuasa, pihak-pihak dikehendaki hadir di hadapan mahkamah untuk penentuan kuantum tuntutan plaintif. Adalah dihujahkan bagi pihak plaintif bahawa dalam kontrak BBA, bank mempunyai hak sah untuk menuntut harga jualan penuh seperti yang ditetapkan dalam perjanjian jualan hartanah ('PJH'). Sewajarnya, dalam satu permohonan menurut saman pemula, mahkamah patut membenarkan perintah jualan berdasarkan harga jualan penuh, tidak kira penamatan pramatang. Alasan-alasan untuk perkara di atas adalah seperti berikut; pertama, defendan telah bersetuju dengan jumlah harga jualan dan mempunyai tanggungjawab sah untuk membayar harga jualan penuh, dan kedua, mahkamah ini terikat dengan keputusan Mahkamah Rayuan dalam kes *Lim Kok Hoe* yang mengekalkan dan mengakui tanggungjawab membayar harga jualan penuh di bawah PJH.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Dalam semua kontrak BBA meskipun menetapkan harga jualan penuh sebagai yang perlu dibayar, bank-bank memberikan *ibrar* atau rebet atas penamatan akibat pelanggaran atau untuk bayaran terdahulu. Pemberian *ibrar* oleh Bank Islam Malaysia Bhd ('BIMB') adalah sejajar dengan amalan bank-bank Islam lain. Dalam keadaan sedemikian bagi tujuan jualan jumlah yang ditetapkan di bawah s 257(1)(c) Kanun Tanah Negara ('KTN') hendaklah merupakan jumlah yang perlu dibayar sekiranya pelanggan berniat untuk membuat bayaran di bawah s 266(1) KTN. Di bawah seksyen ini, jika penggadai membuat bayaran ke mahkamah untuk jumlah yang terhutang dan perlu dibayar sebelum jualan lelong berakhir, perintah jualan tidak lagi berkuat kuasa. Pendekatan bank-bank Islam yang memotong keuntungan yang tidak diperoleh seperti *ibrar* adalah konsisten dengan keperluan s 266(1) KTN manakala pada masa sama memudahkan kes-kes bayaran terdahulu (lihat perenggan 9–10).

(2) Oleh itu, dalam semua permohonan untuk perintah jualan, mahkamah membenarkan jumlah yang ditetapkan di bawah s 257(1)(c) KTN sebagai jumlah yang terhutang dan perlu dibayar pada tarikh perintah tersebut dibuat; berdasarkan seluruh harga jualan kurang daripada jumlah yang telah dibayar dengan bayaran ansuran dan selanjutnya memotong keuntungan yang tidak diperoleh bank yang dikira pada hari perintah jualan dibuat (lihat perenggan 10).

(3) Pendekatan sama juga diambil oleh mahkamah ini dalam prosiding di bawah writ saman. Penghakiman dimasuki tentang kuantum tuntutan plaintif berdasarkan harga jualan penuh di bawah PJH kurang daripada jumlah yang telah dibayar dengan bayaran ansuran pada masa writ difailkan atau lebih kurang masa itu. Jumlah ini selanjutnya akan dipotong oleh jumlah keuntungan yang tidak diperoleh (jika ada) pada tarikh realisasi sebagai *ibrar*. Ini adalah kerana, tidak seperti permohonan untuk perintah jualan, tiada keperluan untuk plaintif menyatakan jumlah terhutang dan perlu dibayar pada tarikh penghakiman (lihat perenggan 11).

(4) Meskipun adalah benar bahawa Mahkamah Rayuan dalam kes *Lim Kok Hoe* telah memutuskan yang kontrak BBA adalah berbeza daripada perbankan konvensional kerana ianya adalah transaksi jualan, namun begitu ia tidak boleh dianggap sebagai transaksi jualan semata-mata. Kontrak BBA dijamin oleh gadaian dan konsesi sebagai *ibrar* diberikan sebagai amalan untuk semua penamatan pramatang. Meskipun terdapat terma perjanjian bertulis, pada hakikatnya bank tidak menguatkuasakan bayaran harga jualan penuh ke atas penamatan pramatang. Ia selalunya memberikan rebet atau *ibrar* berdasarkan 'profit unearned' (lihat perenggan 13–14).

(5) Mahkamah tidak menguatkuasakan bayaran harga jualan penuh tetapi campur tangan atas alasan-alasan ekuiti, walaupun berdasarkan pendekatan berbeza. Oleh itu, apabila bank Islam mengamalkan pemberian rebet ke atas penamatan pramatang, ia membentuk terma tersirat dan jangkaan munasabah di pihak pelanggan. Maka ianya hanya wajar jika jangkaan dan amalan sebegini dibaca menurut kontrak. Justeru itu, di mana kontrak BBA tidak menyebutkan tentang isu rebet atau kuantum rebet, bank itu hendaklah, melalui terma tersirat, memberikan rebet dan rebet tersebut hendaklah merupakan jumlah keuntungan yang tidak diperoleh seperti yang diamalkan oleh bank-bank Islam (lihat perenggan 18, 20 & 22).

Pemerhatian

Pendokumenan sah yang digunakan oleh bank-bank Islam patut mengemukakan keunikan transaksi perbankan Islam, dan bukan menggunakan pendekatan potong dan tampal daripada dokumen-dokumen perbankan konvensional. Jika dokumen-dokumen bank pada hakikatnya

telah menetapkan kaedah tentang rebet atau *ibrar*, akan memperjelas kerumitan transaksi BBA. Ia akan mudah difahami oleh pelanggan dan mereka tidak dibiarkan dalam kegelapan tentang apa itu *ibrar* dan berapa jumlah *ibrar* yang patut diterima olehnya. Dengan cara ini mahkamah tidak perlu campur tangan dengan terma-terma perjanjian atau untuk menambah terma-terma tersirat sepertimana yang dilakukan oleh hakim (lihat perenggan 23).]

Notes

For cases on Islamic banking, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–1954.

For cases on judicial precedent in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4289–4323.

Cases referred to

Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67, HC (refd)

Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631, HC (refd)

Bank Islam Malaysia Bhd v Adnan Omar [1994] 3 CLJ 735, HC (refd)

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (folld)

Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd [2003] 2 MLJ 408; [2003]1 CLJ 625, CA (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, FC (refd)

Datuk Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd [1998] 3 MLJ 393; [1998] 3 CLJ 605, CA (refd)

Hairul Hisham bin Salim v Dato' Zainal Abidin bin Zin & Anor [2003] 5 MLJ 567, HC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249, HC (refd)

Malayan Banking Bhd v Ya'kup bin Oje & Anor [2007] 6 MLJ 389, HC (refd)

Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd [2006] 5 MLJ 21; [2005] 4 CLJ 345, FC (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)

Young v Bristol Aeroplane Co Ltd [1944] 1 KB 718, CA (refd)

Legislation referred to

Malayan Reservations Enactment 1930

National Land Code ss 256(2), 257(1)(c), 266, 266(1)

Rules of the High Court 1980 O 83, O 83 rr 3, 3(a), (c)

Oommen Koshy (Skrine) (Aedyla Bokari (Nassir Hafiz Nazri & Rahim) with him) for the plaintiff.

Defendant in person in Originating Summons No D4–22A-395 of 2005.

Defendants not present in Originating Summons No D4–22A-399, Suit Nos D4–22A-195 of 2006 and D4–22A-263 of 2006.

Rohana Yusuf J:

INTRODUCTION

[1] There are two sets of appeal that went before the Court of Appeal relating to Bai Bithaman Ajil ('BBA') contracts in Islamic banking. The first set of appeal involves 11 writs of summons and one originating summons. They were heard together and decided by the Court of Appeal on 26 August 2009 and reported in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22. The Court of Appeal held that a BBA contract is valid and enforceable and reversed an earlier decision of the High Court in *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631. Subsequent thereto all cases involving BBA contracts that were heard together thereat were sent to this court for determination of the quantum of plaintiff's claim. The quantum of the plaintiff's claim in these writs of summons and the amount due under the originating summonses had in fact been determined by me on 28 January 2010.

[2] Another set of appeal came before another panel of the Court of Appeal on 20 October 2009. That panel followed its earlier decision and again the cases were sent to this court for determination of the quantum of plaintiff's claim in the writs of summons, as well as the amount due under the originating summonses. The proceedings before me, which were actions in the second set of appeal, involve two writs of summons registered as D4–22A-263 of 2006 and D4–22A-195 of 2006, and two originating summonses registered as D4–22A-395 of 2005 and D4–22A-399 of 2005 respectively. Pursuant to the order of the Court of Appeal, parties were notified to appear before the learned deputy registrar for case management and all the cases were set to be heard together on a specified date. However, only the solicitors for the plaintiff were present on that date.

[3] The plaintiff in each of these four cases is Bank Islam Malaysia Bhd ('BIMB'). For the purpose of hearing before me on the issue of quantum, BIMB filed an affidavit for each of the cases stating the latest statement of account in support of its claim. On the day set for hearing, none of the defendants appeared, except Encik Azhar bin Osman, who is the defendant

in the originating summons D4–22A-395 of 2005. He appeared in person. All the four cases are based on BBA contracts.

[4] Learned counsel for BIMB, Encik Oommen Koshy (Encik Aedyla Bokari with him) 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 ('PSA'). Accordingly he argued that in an application pursuant to an originating summons, the court ought to grant an order for sale based likewise, on the full sale price, irrespective of a premature termination. The bases of Encik Oommen Koshy's arguments are two. First, he contended that this court should honour and enforce the clear written terms of the contract and should not interfere with the intention of parties by imputing any other term. Since parties had agreed as to the amount of sale price as stipulated in the PSA, the defendant is under a legal obligation to pay the full sale price, irrespective of when a breach occurs. Secondly, by virtue of the doctrine of stare decisis, this court is bound by the decision of the Court of Appeal in *Lim Kok Hoe* which, according to Encik Oommen Koshy, upheld and acknowledged the obligation to pay the full sale price under the PSA.

[5] Before I proceed to analyse the arguments of learned counsel, it would be appropriate for me to state here the practice of this court in determining the quantum of the plaintiff's claim under a terminated BBA contract generally, both in an application for order for sale as well as a claim for a judgment sum in a writ of summons. It is worth noting also that writing a decision on Islamic banking cases can be rather challenging because of the scarcity of precedent to refer to. Perhaps this is because Islamic banking in Malaysia is still in its stage of infancy, with just over 30 years in practice, as compared to over 250 years of conventional banking. It is made more difficult in these cases when there is no opposing counsel to argue the defendant's case and elucidate the issues that may cause injustice to the defendant. It is also my observation that typically the contract documents used in these transactions are, more often than not, a modified version of the standard banking document, which not surprisingly, made reading more arduous. Be that as it may, what I propose to do here is to set some of the practices and legal position, which to my mind is appropriate, given the existing set of laws, in determining the quantum of plaintiff's claim under BBA contracts.

PRESENT PRACTICE

[6] The nature of a BBA contract is well explained in the Court of Appeal's decision in *Lim Kok Hoe*, and I can do no better. In a typical BBA contract, the first transaction begins with a property purchase agreement ('PPA'). As in the present case D4–22A-263 of 2006, vide the PPA the defendant sells his

property to the BIMB for a sum of RM177,960 and almost simultaneously BIMB sells it back to him at a price of RM451,895.04 under the PSA. There are, depending on the circumstances, variations as to the manner in which a bank pays the purchase price under the PPA to the customer. In a case where the construction of the property is completed, the bank will pay by lump sum payment of the full purchase price. In other instances, payment may be made progressively, which usually depends on the stage of completion. Ordinarily the repayment by the customer under the PSA is on deferred payment basis by way of periodical instalments for an agreed tenure which may run to 20 years or more. Again depending on the terms agreed, payment of the instalments may commence immediately upon the initial payment or after payment by the bank of the full purchase price under the PPA. As security for the payment of the instalments by the customer under the PSA, a charge over the property is created in favour of the bank.

[7] Upon default by the customer, the bank may enforce the charge by applying for an order for sale and simultaneously file a writ of summons for judgment sum. An application for an order for sale is made by way of an originating summons. Section 256(2) of the National Land Code ('NLC') states that, an application for an order for sale, must be made in accordance with the law relating to civil procedure, namely, the procedures as laid down under the Rules of the High Court 1980 ('RHC'). Order 83 of the RHC provides for, inter alia, the procedure for a sale of a charged property. Section 257(1)(c) of the NLC, requires an order for sale made by the court 'shall specify the total amount due to the chargee at the date on which the order is made ...' whilst under O 83 r 3 of the RHC, requires that there must be particularisation of the account between the chargor and chargee which includes 'the amount remaining under the charge' (see O 83 r 3(a)). Thus, an additional or supplementary affidavit would be required in an application for an order for sale for the purpose of specifying the amount due to the chargee at the date on which the order is made.

[8] In specifying the amount due, the issue which confronts a BBA contract is this. The PSA stipulates the sale price, the payment of which is by way of instalments for a specified tenure of the contract. The agreement is however silent on the amount due to the bank when the tenure of the BBA contract has not completed. The non-completion may be due to prepayment or termination due to breach. Also, it is silent on the amount payable when the bank has not paid the purchase price in full under the PPA. What I have gathered thus far from cases involving Islamic banks that have come before me, which includes Hong Leong Islamic Bank Bhd, RHB Islamic Bank Bhd, Bank Kerjasama Rakyat Malaysia Bhd and Affin Islamic Bank Bhd, is this. When a customer wants to prepay under a BBA contract, the bank will issue a redemption statement. Usually the redemption statement will stipulate the

amounts payable for prepayment at each monthly interval for a period of three months thereafter. The redemption statement usually states that, if prepayment is made at the end of January for instance, the redemption sum would be less than if a prepayment is made at the end of February and so forth. The redemption sum is computed based on when payment is due. The computation, as I understand it, is based on the full sale price under the PSA less the paid instalments. Since the tenure of the contract has not completed, the bank will further deduct as *ibrar* (a term used in Islamic banking for rebate) what it refers to as 'unearned profit'. Unearned profit, as the name suggests, is the amount which has yet to be earned by the bank. I have been made to understand, from a testimony given by a representative of RHB Bank in another case, 'unearned profit' is based on an amortisation table used by these Islamic banks. According to his testimony, the amortisation table is essentially an internal document in the form of a table that is used in the banking industry throughout the globe. It enumerates or tabulates the banking transaction and the particulars of which are as shown herein below. Adjustments are made to the amount in the table in the course of transaction, depending on whether the instalments are paid early or otherwise. What I would like to illustrate here is the method of computation used by the bank based on this table in determining the balance sale price and the rebate granted to customers. A word of caution is necessary in referring to this table. This table represents an ideal BBA transaction. In reality of a banking transaction, there may be late payment of instalment by a customer. Then the bank will have to readjust the respective figures in the table accordingly.

Eg for illustration purposes only

Payment No	Installment	Financing Amount	Unearned Profit/Ibrar	Balance Selling Price
0		100,000.00	48,912.97	148,912.97
1	1,128.13	99,517.70	48,267.14	147,784.85
111	1,128.13	22,087.88	1,602.82	*23,690.70*
112	1,128.13	21,102.40	*1,406.17*	22,562.57
113	1,128.13	20,110.56	1,323.88	21,434.44
114	1,128.13	19,112.31	1,194.00	20,306.31
115	1,128.13	18,107.62	1,070.57	19,178.19
116	1,128.13	17,096.43	953.62	18,050.06
117	1,128.13	16,078.72	843.21	16,921.93
118	1,128.13	15,054.43	739.37	15,793.80
119	1,128.13	14,023.53	642.14	14,665.67
120	1,128.13	12,985.97	551.57	13,537.54
121	1,128.13	11,941.71	467.71	12,409.41
122	1,128.13	10,890.70	390.58	11,281.29

123	1,128.13	9,832.91	320.25	10,153.16
124	1,128.13	8,768.29	256.74	9,025.03
125	1,128.13	7,696.79	200.11	7,896.90
126	1,128.13	6,618.37	150.41	6,768.77
127	1,128.13	5,532.98	107.66	5,640.64
128	1,128.13	4,440.59	71.93	4,512.51
129	1,128.13	3,341.14	43.25	3,384.39
130	1,128.13	2,234.59	21.67	2,256.26
131	1,128.13	1,120.89	7.24	1,128.13
132	1,128.13	0.00	0.00	0.00

This table illustrates a BBA transaction where the customer sells to the bank vide a PPA an assets of the customer for a sum of RM100,000. The bank sells back to the customer under the PSA for RM148,912.97, payable in 132 instalments of each RM1,128.13. The first column denotes the instalment numbers which is on monthly basis. As an example, if a customer defaulted on payment of instalment No 112 in the first column, the balance selling price due to the bank will be RM23,690.70. This figure appears in the last column. If the sum is paid immediately, the bank will grant an *ibrar* by deducting the unearned profit of RM1,406.17 as shown in the 'unearned profit' column. However, if the amount is not paid immediately, for example, it is only paid on the date when instalment No 124 is due; the unearned profit that the bank will deduct as *ibrar* will be recomputed taking into account the non-payment of the outstanding instalment from date of default to the payment date. It must be born in mind that the figure in the 'unearned profit' column in the instalment No 124 does not automatically apply but need adjustment based on punctuality of instalment payment. In the event that no payment is made till the end of the tenure that is, when instalment No 132 becomes due or thereafter, the bank would be entitled to receive the sum of RM23,690.70 with no rebate, as there would be no further unearned profit left to be deducted as *ibrar*. The balance sale price of RM23,690.70 would be the maximum amount that the bank could claim as there is no interest chargeable thereon after judgment is obtained. If I am permitted to state here, compared to conventional banks, Islamic banks' claim will be capped to the sale price and no more. Needless to say, depending on the terms of the contract the bank may also be entitled to other ancillary charges due, including late payment charges.

[9] In an ongoing trial before me based on BBA contract, a witness from the BIMB testified that in all cases of BBA contracts despite stipulating the full sale price as being payable, the bank grants *ibrar* or rebate on a termination due to breach or for prepayment. The granting of *ibrar* by BIMB is in line with the practice of other Islamic banks. That being the case in an order for sale application too the sum stipulated under s 257(1)(c) of the

NLC shall be the amount payable in the event that a customer intends to tender payment under s 266(1) of the NLC. Under this section if a chargor tenders payment to court of the amount due and payable before the conclusion of the auction (that is to say, before the hammer falls), the order for sale ceases to have effect.

[10] From the above it may be said that the approach of the Islamic banks that deduct unearned profit as *ibrar* is consistent with the requirement of s 266(1) of the NLC while at the same time facilitate cases of prepayment. Thus, in all application for order for sale before me, I have allowed the sum specified under s 257(1)(c) of the NLC, to be the sum due and payable at the date on which the order is made; based on the total sale price less the amounts paid under the instalments and further deducting the unearned profit of the bank computed at the day on which the order for sale is made, as illustrated in the amortisation table above. In taking this approach, I am mindful that the law strictly requires the bank when applying for an order for sale to state the amount due on the date on which the order for sale is made. In a case where the tenure of the contract has completed there would be no further unearned profit to be deducted and the full sale price would be the amount due and payable. Even if it is long overdue, the amount due and payable remains the same because the sale price under the PSA does not attract any interest.

[11] Similar approach is taken by this court in proceedings under a writ of summons. Judgment is entered on the quantum of the plaintiff's claim based on full sale price under the PSA less the amounts paid under instalments at the time the writ was filed or thereabout. This sum will further be deducted by the amount of unearned profit (if any) on the date of realisation as *ibrar*. This is because, unlike the application for an order for sale, there is no requirement for the plaintiff to state the amount due and payable on the date of judgment.

ARGUMENT BY THE BANK

[12] For the banks, often it is argued that the court must enforce the full sale price, irrespective of the time, breach occurs. In other words, it is not the business of the court to interfere with written terms of the contract since the customer has agreed to pay the full sale price upon default. This argument is premised on the underlying presumption that a BBA contract is a sale transaction and not a loan transaction. Hence, a sale price must be met at all cost. It is also the belief of the proponent of this argument that, by inserting a rebate clause in the agreement it will create uncertainty on the sale price and the *gharar* operates. Besides, since it is a sale agreement, the sale price does not

change, lest it will not reflect the transaction as a true sale. As a matter of practice however, the bank in all instances will grant a rebate at its discretion.

[13] With due respect, I find this argument untenable. Whilst it is true that the Court of Appeal in *Lim Kok Hoe* held that a BBA contract in a way differs from conventional banking because it is a sale transaction, it cannot however be regarded as a sale transaction simpliciter. The BBA contract is secured by a charge and concession as *ibrar* is given as a matter of practice to all premature termination. Further, it is not a simple sale because even if the bank does not make payment of the full purchase price under PPA the bank would still be entitled to claim the amount already paid. Whereas in a simple sale if the first leg of the transaction fails, the bank's right to the amount paid will not ipso facto accrue since the sale was never completed.

[14] If we were to take Encik Oommen Koshy's argument to the extreme, is this court expected to order that a full sale price be paid by a customer even if the bank had not made payment of the full purchase price under the PPA? That is quite difficult to reconcile and surely cannot be so. In fairness the bank cannot be allowed to argue that a sale transaction must be adhered strictly to the letter only on the part of the customer. Why a bank should insists on payment of the full sale price and thereafter as a matter of practice grant a rebate to the customer simply to show that it is a sale transaction may have its purpose but to place the customer in such a precarious position is quite something else, particularly when such grant is at the bank's absolute discretion. From the practice of the bank it is clear that the insistence on enforcing payment of the full sale price appears to be merely an attempt to adhere to written text but I doubt if such appearance achieve its purpose. This is because, despite the written term of the agreement, the bank in reality does not enforce payment of the full sale price upon a premature termination. It always grants rebate or *ibrar* based on 'unearned profit'.

[15] According to Encik Oommen Koshy's argument also, the notion of enforcing payment of the full sale price followed by the grant of rebate or *ibrar* at the absolute discretion of the bank is in line with the spirit of a sale transaction. When questioned as to how a customer would then know what the amount of rebate would be, he suggested that, if there is surplus in the amount received from an auction, the bank would be obliged to refund to the customer the surplus from the proceeds. It is unclear what is meant by surplus. If surplus means an amount over and above the sale price, there is no reason for the bank to withhold the same. The bank must refund such surplus as retaining it amounts to unjustified enrichment on the part of the bank. Surplus must therefore mean the amount over and above the sum due to the bank and this amount may be refunded at the discretion of the bank. In other words, he suggested that, though rebate is always granted, it is not a matter

of right that the customer is entitled to it. Any aggrieved customer, according to Encik Oommen Koshy also, can always bring an action to the court for determination, as to whether he is entitled to a rebate or the amount of rebate is correct.

[16] Ingenious as this argument may be, regrettably I differ in my view. I dread to imagine that such a day would come because if a customer were to seek for a determination as suggested, then what would be the contractual terms upon which the court is to determine. This is particularly so, since it is also Encik Oommen Koshy's argument that the court ought not to interfere. Even if as a last resort, justice demands equitable interference, the court would have little choice but to fall back on generally accepted practice of Islamic banks. That being so, I simply cannot appreciate, let alone understand, why a customer must go through such an excruciating process when at the end of the day he comes to the same position namely, that in determining the correct amount of rebate, the court would apply what would be the generally accepted practice of Islamic banks. In other words the approach to be taken then would be the same approach taken by this court here and now. Further, it must be said that Encik Oommen Koshy's suggestion would simply add to the burden already suffered by the aggrieved customer in terms of time and expenses, which this court should not condone, particularly since the issue could be resolved at this proceeding.

[17] Thus far, there are a few decisions of the High Court that relate to the quantum of the plaintiff's claim in BBA contract. The first of such cases is *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67. In that case it was held that the bank cannot claim the full sale price of the property in the event of default by the customer. The learned judge in that case 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 realisation. This case was later followed by *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249. The High Court in *Malayan Banking Bhd* did not allow the full sale price to be the amount stipulated for an order for sale but instead follow *Affin Bank*'s approach. Further to that, the court ruled that it would not be equitable to allow the bank to recover the full sale price as defined in the instrument when the tenure of the facility was determined prematurely. In *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389, the High Court also did not allow the plaintiff to enforce payment of the full sale price stipulated in the application for order for sale but instead ordered the bank to put up an affidavit to indicate the amount of rebate to be granted before allowing an order for sale. This is because, His Lordship Hamid Sultan Abu Backer JC (as he then was) was of the view that Shariah banks is not a charitable institution and are entitled to earn profits out of

their investment and when there is default it should adjust its profits according to the facts and justice of the case as required under the Shariah principles and practice.

[18] In all the above decisions, when a BBA contract is prematurely terminated upon default by the borrower, the court did not allow the bank to enforce the payment of the full sale price in a premature termination. The underlying principles which come to fore, derived from these decisions is clear. The court does not enforce payment of the full sale price but intervene on equitable grounds, albeit based on different approaches. I am doing the same for the following reasons.

[19] In my view, if I were to grant an order for the full sale price in an order for sale application, it will defeat the requirement of s 266(1) of the NLC. I am guided by the decision of the Federal Court in *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21; [2005] 4 CLJ 345. Section 266 of the NLC is designed out of concern to protect the chargor. As held by the Federal Court in that case it has the objective of protecting the chargor who is on the brink of having his property sold at an auction to know exactly where he stands in terms of the amount of repayment in order to give him the opportunity to redeem his position under s 266 of the NLC. If I were to follow Encik Oommen Koshy's argument, it would mean that when a customer wants to tender payment under s 266(1) of the NLC he will have to fork and pay the bank the full sale price and then wait at the mercy of the bank for a rebate. Even in a situation when the bank did not pay the full purchase price under the PPA, the burden lies on him to tender the full sale price under the PSA. Thereafter, he will be kept wondering if he is entitled to any rebate and how much (if any). If the customer eventually receives a rebate but feels that it is insufficient, he will have to come to the court for determination. Surely, that cannot be the intention of s 266. Regretfully, I must say that in such a scenario, the protection intended by s 266 will be rendered meaningless.

[20] The practice of the banks in deducting the unearned profit as *ibrar* is not ignoble. In the same breath, it is inconceivable how stipulating the terms of the rebate will be repugnant to Shariah. The latter however creates unnecessary anxiety in customers. For that and other reason stated herein, I have, for the purpose of determining the quantum of claim, taken an approach to enforce an implied term of Islamic banking practice in the case before me. In this respect, I am guided by the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151. In *Sababumi* Zakaria Yatim FCJ (as he then was) stated in that case that the court may infer an implied term from evidence that the parties to a contract must have intended to include it in the contract, though it has not been expressly set out

in the contract. Therefore when an Islamic bank practices granting of rebate on a premature termination, it creates an implied term and legitimate expectation on the part of the customer. Accordingly it is only proper that such expectation and practice be read into the contract.

[21] Learned counsel for the plaintiff also contended that the term 'unearned profit' is rather alien to Islamic banking contract as it is not in tandem with Shariah practice. I am not so clear what is meant by that because from the practices of Islamic banks that I have come across, the banks confirm that deduction of the unearned profit is a common practice and 'unearned profit' is an accepted term. Terminology per se cannot be made a reason not to follow an approach that has well been received by the banking industry. To my mind using the terminology *ibrar* with no interpretation or explanation is indeed more alien to the bank's customers. *Ibrar* is merely an Arabic term which means a rebate. The rebate to be granted is in fact based on the unearned profit of the bank. It is for that reason that I am more comfortable using the term 'unearned profit' as it is capable of being commonly understood in the banking circle, as it is based on the amortisation table. It would also be easily explained and capable of being understood by the customers as well. Besides, in my view using Arabic terminology per se does not make any transaction a Shariah transaction.

[22] I must vehemently stress that the purpose of this proceeding is to deal with what would be considered fair and equitable in the circumstances and to lay emphasis on what would be the better and appropriate approach in dealing with the plaintiff's quantum with particular reference to the manner of its determination while being mindful of the parties' position. In doing so, the bank should not be allowed to enrich itself with an amount which is not due while at the same time taking cognisance of the customer's right to redeem his property. Therefore where the BBA contract is silent on issue of rebate or the quantum of rebate, by implied term I hold that the bank must grant a rebate and such rebate shall be the amount of unearned profit as practiced by Islamic banks.

[23] That said, this issue in fact could have been easily resolved. The legal documentations used by Islamic banks should have addressed the peculiarity of Islamic banking transaction, instead of adopting a cut and paste approach of the conventional banking documents. If the documents of the banks had in fact specified a formula of rebate or *ibrar*, it will demystify the intricacies of a BBA transaction. It will be easily understood by the customer who would then not be put in the dark as to what is *ibrar* and what would be the amount of *ibrar* he should be receiving. In that way, the court need not have to interfere with the terms of the agreement or to add implied terms as I am now

A doing.

STARE DECISIS

B **[24]** Encik Oommen Koshy also contended that this court should enforce the full sale price instead of adhering to the present practice for another reason. He argued that, following the doctrine of stare decisis, this court is bound by the decision of the Court of Appeal in *Lim Kok Hoe* which had given full acknowledgement of the right of the bank to enforce payment of the full sale price under the PSA. The basis of his contention is as follows. The C Court of Appeal in *Lim Kok Hoe* referred to the cases of *Bank Islam Malaysia Bhd v Adnan Omar* [1994] 3 CLJ 735; *Datuk Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3 CLJ 605; and *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625. All these cases are based on BBA contracts which D according to learned counsel were upheld by the superior court. In all of them the full sale price has been allowed.

E **[25]** Before I deliberate on the issue of stare decisis, it would be useful to appraise ourselves on the application of this doctrine. Stare decisis, according to *Oxford Dictionary of Law* (5th Ed) literally means 'to stand by things decided'. This is the maxim which underlay the basis of the doctrine of binding precedent. It is necessary to abide by former precedent when the same points arise again in litigation. In other words, it is to stick with what F has been decided. It is axiomatic that the principle of stare decisis operates on the basis that 'like cases should be decided alike'. The application of this doctrine in England is found in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718. In that case the Court of Appeal held that the House of Lords decision binds the Court of Appeal and that the court is bound by its own earlier G decisions except for three situations namely:

(a) the court is entitled to decide which of the two conflicting decisions of its own to follow;

H (b) the court can refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; and

(c) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam. I

Per incuriam refers to a judgment of a court which has been decided without reference to a statutory provision or earlier relevant judgment. A judgment per incuriam need not be followed as precedent. A lower court therefore, is free to depart from an earlier judgment of a superior court where that earlier

judgment was decided per incuriam. However, ordinarily in the common law jurisdiction, the ratio decidendi of a judgment must be followed and is said to be binding on the court below.

[26] The same principle was also adopted by the courts in Malaysia. In *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, the Federal Court referred to *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 and held that the doctrine of stare decisis dictates that a court, other than the highest court, is obliged generally to follow the decisions of the courts at a higher level or at the same level. In *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577 the Federal Court finds that this doctrine has attained to status of immutability and judicial hierarchy, and must be observed to avoid uncertainty in the law. In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 the Federal Court states that it is necessary for each lower tier in the court structure to accept loyally the decision of the higher tiers and chaotic consequences would follow should the lower tier fail in this duty. In *Hairul Hisham bin Salim v Dato' Zainal Abidin bin Zin & Anor* [2003] 5 MLJ 567, the court observes that, 'the principle of stare decisis encapsulate the doctrine that a ratio decidendi of a superior court must be followed and is binding on the court below'. The ratio decidendi of a case can be defined as the principle of law on which the court reaches its decision. It has to be deduced from the facts and the reasons that the court gives for reaching its decision as well as the decision itself.

[27] Coming back to the present case, the pertinent question to be asked is what then of the Court of Appeal decision in *Lim Kok Hoe* that binds this court, bearing in mind that under the doctrine of stare decisis that binding precedent is the ratio decidendi. It must be noted at the outset that the decision of the Court of Appeal in *Lim Kok Hoe* revolves around the issue of validity and enforceability of BBA contracts. Having deliberated on the arguments of counsel, the Court of Appeal upheld the validity of BBA agreement as enforceable contract. The reasons are stated in the judgment of His Lordship Md Raus JCA (now FCJ) at p 840 (MLJ); p 23 (CLJ). Applying the doctrine of stare decisis to *Lim Kok Hoe*, this court is bound to hold that a BBA contract is valid and enforceable agreement. In fact, the Court of Appeal did not make any finding on the issue of quantum of claim. The way I see it, it was not raised at the Court of Appeal and it is for that reason that the cases are sent down for the quantum of claim to be determined.

[28] Encik Oommen Koshy in his submission contended that in *Lim Kok Hoe* the Court of Appeal referred with approval, the earlier decisions in *Bank Islam Malaysia Bhd v Adnan Omar* [1994] 3 CLJ 735; *Datuk Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3

CLJ 605; and *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625. According to him all these decisions involve the decisions of the High Courts which were upheld by the superior court. The decisions ultimately, according to him, tantamount to the superior court acknowledging the right to enforce payment of full sale price in a BBA contracts.

[29] I cannot agree with that argument. This is because, if I were to apply the doctrine of stare decisis, only a ratio decidendi of a superior court decision will bind the lower tier. By merely citing all these decisions with approval it cannot be said that the Court of Appeal adopts the decision of these cases in toto. It would be indeed necessary to analyse what, the reference to all these cases entail.

[30] After a careful scrutiny of the cases I find that none of the decisions has established the ratio decidendi suggested. In *Bank Islam Malaysia Bhd v Adnan Omar* the bank sought for an order for sale based on BBA contract for the full sale price of RM583,000. The case particularly revolves on the issue of non-compliance of O 83 of the RHC. It was argued that, O 83 r 3(3)(c) requires a claim of interest which the bank failed to specify and comply. The court held that there is no question of interest because of Islamic nature of transaction and thus the failure to comply with O 83 is not fatal. The finding of the High Court was accordingly upheld in an unreported decision of the Supreme Court as mentioned in *Lim Kok Hoe* at p 856 (MLJ); p 39 (CLJ). Since there is no report on the Supreme Court decision of this case, I do not have the benefit of reading the ground of decision of the Supreme Court nor the grounds of appeal in the case. Thus, though the effect of the decision of the Supreme Court decision in *Adnan Omar*, results in the sale price being granted in full by the court, nevertheless it is not the ratio decidendi of that decision. In *Datuk Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* the Court of Appeal enforces a BBA contract and held that the BBA contracts do not transgress the Malay Reservations Enactment 1930 of Kelantan.

[31] In *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625, the Court of Appeal enforces a BBA contract. Abdul Hamid Mohammad JCA (as he then was) in that case states that 'though the facility given by the appellant to the respondent was an Islamic banking facility. But that did not mean that the law applicable in this application was different from the law applicable if the facility was given under conventional banking'. This remark cannot be taken literally. It cannot be taken to mean that the law of contract which recognises the sanctity of a contract and the right to enforce the contract to its letter, as a ratio decidendi that the sale price is enforceable. Reading it contextually, the observation is made by His Lordship in that case to show that the Islamic banking contract

is subject to the same law and legal system as any banking contract. It is true that the Court of Appeal in *Lim Kok Hoe* acknowledges these cases which ultimately resulted in granting and enforcing payment of the full sale price under the PSA, however none of the cases had in the judgment treated it to be the ratio decidendi of the decision.

[32] In fact to my mind, it is apparent from *Lim Kok Hoe*'s decision that the reference made by the Court of Appeal to all these cases is to reinforce its decision in upholding the validity and enforceability of BBA contracts. This is clear at p 39 of the judgment when the Court of Appeal states that 'it is clear that the validity and enforceability of BBA contract had been ruled by the superior courts'. Hence applying the doctrine of stare decisis it is binding on Court of Appeal in *Lim Kok Hoe* to follow the superior court. I am not able to find any affirmation on the quantum to be enforced in a BBA contract by the superior court. Thus, I am clear that there is no binding precedent by the superior court for me to follow to enforce the sale price under the PSA at all costs. There is not a slightest suggestion in *Lim Kok Hoe* that the issue of quantum has been canvassed before the court by counsel. Furthermore, by the very fact that the Court of Appeal sent the cases back to this court for determination of quantum, says it all.

[33] In conclusion, for the reasons adumbrated above, I hereby allow the plaintiff's claim with costs, in the writ of summons Suit No 22A-263 of 2006 for the outstanding sum of RM391,634.66 and in Suit No 22A-193 of 2006 for the sum of RM190,476.54. These judgment sums are subjected to deduction of the unearned profit by the plaintiff (if any) upon full realisation.

[34] As for the originating summons, a new hearing date of 22 February 2010 is fixed for the plaintiff in the Originating Summons No D4–22A-395 of 2005 in order for BIMB to file supplemental affidavit to state the outstanding sum, after deducting the unearned profit due to be deducted, on the date the order for sale is to be obtained. At the request of BIMB, Originating Summons No D4–22A-399 of 2005 is hereby struck out.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed