Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–918 OF 2008, W-02–954 OF 2008, W-02–955 OF 2008, W-02–957 OF 2008, W-02–958 OF 2008, W-02–959 OF 2008, W-02–960 OF 2008, W-02–961 OF 2008 AND W-02–962 OF 2008

RAUS SHARIF, ABDULL HAMID EMBONG AND AHMAD MAAROP JJCA

26 AUGUST 2009

Banking — Banks and banking business — Islamic banking — Islamic banking concept of Bai Bithaman Ajil ('BBA') — Whether trial judge erred in finding that BBA contract more onerous than conventional loan agreement with riba — Whether BBA contract prohibited in Islam — Whether trial judge misinterpreted meaning of 'Islamic banking business' under s 2 of the Islamic Banking Act 1983 — Islamic Banking Act 1983 s 2

Constitutional Law — Courts — Jurisdiction — Doctrine of stare decisis — Whether validity and enforceability of BBA contract had been ruled upon by superior courts

This judgment concerned an appeal by the Bank Islam Malaysia Bhd ('BIMB'), the appellant, against a common judgment delivered by the High Court for 12 cases ('the common judgment'), which involved Islamic financing. The respondents in all the 12 cases were BIMB's customers who had entered into Bai Bithaman Ajil contracts ('BBA contracts') with BIMB. A BBA contract, the most common form of financial transaction used in Islamic banking, is a deferred payment sale contract that is used to finance bank's customers to purchase their own properties. In such a contract the customer first sold the property to the bank under the property purchase agreement ('the PPA'), which was a cash sale. With that purchase the property belonged to the bank and the customer had to buy it back from the bank at a sale price that included the bank's profit on the sale. In effect the bank would sell the same property it had purchased from the customer to that customer under a second document known as the property sale agreement ('PSA'). In the common judgment the High Court judge ('the trial judge') questioned the validity and enforceability of the BBA contracts on two main grounds, namely that he found the BBA contracts to be more onerous than the conventional loan with riba which was prohibited in Islam; and that he found that the BBA contract practised in this country was not acceptable by

all the four mazhabs in Islam. He thereby concluded that the BBA contracts were contrary to the basic principles of Islam. Based on such a conclusion the trial judge found that an Islamic bank could only recover the balance of the facility plus profit on the balance principal calculated at a daily rate until payment. The main issues for determination in this appeal were thus whether the BBA contract was more onerous than the conventional loan agreement with riba and also whether the BBA contract was prohibited in Islam.

Held, allowing the appeal with costs here and below:

(1) The trial judge's comparison between a BBA contract and a conventional loan agreement was not appropriate. A BBA contract was a sale agreement whereas a conventional loan agreement was a money lending transaction. As such, the profit in a BBA contract is different from the interest arising in a conventional loan transaction. Thus the trial judge was plainly wrong when he equated the profit earned by BIMB as being similar to riba or interest when the two types of transaction cannot be similar and when the BBA contract is in fact a trade transaction. Further, the comparison between a BBA contract and the conventional loan agreement is of no relevance and serves no purpose as the law applicable in a BBA contract is no different from the law that is applicable in a conventional loan agreement. The law is the law of contract and if the contract is not vitiated by any vitiating factor such as fraud, coercion, undue influence, etc the court had a duty to protect the sanctity of the contract entered into between the parties (see paras 24–27).

(2) By replacing the sale price under the PPA with an equitable interpretation of the same and by substituting the obligation of the customer to pay the sale price with a loan amount and profit computed on a daily basis the trial judge was in fact rewriting the contract for the parties. It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable (see para 28).

(3) The trial judge had misinterpreted the meaning of 'Islamic banking business' under s 2 of the Islamic Banking Act 1983 ('the Act'). 'Islamic banking business' as defined in s 2 of the Act does not mean banking business whose aims and operations are approved by all the four mazhabs. Further, the judges in civil courts should not take it upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise as it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. Moreover, as we had the legal infrastructure to ensure that Islamic banking business as undertaken by the banks in this country did not involve any element

not approved by Islam, the court had to assume that the Syariah Advisory Council under the aegis of Bank Negara Malaysia had discharged its statutory duty to ensure that the operation of the Islamic banks was within the ambit of Islam (see paras 29–32 & 35).

(4) In any event it was clear that the validity and enforceability of the BBA contract had been ruled upon by the superior courts. It is trite law that based on the doctrine of stare decisis a decision of the superior court is binding on all courts below it. In the light of this, the trial judge ought to have held himself bound by those decisions instead of ignoring or disregarding the decisions of the Supreme Court or the Court of Appeal as that would create misapprehensions in the judicial system (see paras 36–39).

[Bahasa Malaysia summary

Penghakiman ini mengenai satu rayuan oleh Bank Islam Malaysia Bhd ('BIMB'), perayu, terhadap penghakiman bersama yang disampaikan oleh Mahkamah Tinggi untuk 12 kes ('penghakiman bersama'), yang melibatkan kewangan Islam. Responden-responden dalam kesemua 12 kes merupakan pelanggan-pelanggan BIMB's yang menandatangani kontrak-kontrak Bai Bithaman Ajil ('kontrak-kontrak BBA') dengan BIMB. Kontrak BBA, transaksi kewangan yang paling biasa digunakan dalam perbankan Islam, merupakan penangguhan bayaran kontrak jualan yang digunakan untuk membiayai pelanggan-pelanggan bank untuk membeli harta mereka. Dalam kontrak tersebut pertamanya pelanggan akan menjual harta kepada bank di bawah perjanjian belian harta ('PBH'), yang merupakan jualan tunai. Dengan belian tersebut harta menjadi kepunyaan bank dan pelanggan perlu membeli balik harta tersebut daripada bank pada harga jualan termasuk keuntungan bank di atas jualan tersebut. Berikutan itu bank boleh menjual harta yang sama yang dibeli daripada pelanggan kepada pelanggan di bawah dokumen kedua dikenali sebagai perjanjian jualan harta ('PJH'). Dalam penghakiman yang sama hakim Mahkamah Tinggi ('hakim perbicaraan') mempersoalkan kesahan dan penguatkuasaan kontrak-kontrak BBA di atas dua alasan utama, bahawa dia mendapati kontrak-kontrak BBA lebih membebankan daripada pinjaman konvensional dengan riba yang dilarang dalam Islam; dan bahawa dia mendapati bahawa kontrak-kontrak BBA yang dipraktikkan di negara ini tidak diterima oleh keempat-empat mazhab dalam Islam. Oleh itu dia menyimpulkan bahawa kontrak-kontrak BBA berlawanan dengan prinsip-prinsip asas Islam. Berdasarkan kesimpulan tersebut hakim perbicaraan mendapati bahawa bank Islam boleh mendapatkan baki kemudahan ditambah dengan keuntungan di atas baki pokok dikira pada kadar harian sehingga bayaran. Isu utama untuk ditentukan dalam rayuan ialah sama ada kontrak BBA lebih membebankan daripada perjanjian

pinjaman konvensional dengan riba dan juga sama ada kontrak BBA dilarang dalam Islam. A

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi: B

(1) Perbandingan oleh hakim perbicaraan di antara kontrak BBA dan perjanjian pinjaman konvensional adalah tidak wajar. Kontrak BBA merupakan kontrak jualan manakala perjanjian pinjaman konvensional merupakan transaksi pinjaman wang. Oleh itu, keuntungan dalam C kontrak BBA berbeza dengan faedah yang timbul dalam transaksi pinjaman konvensional. Oleh itu hakim perbicaraan khilaf apabila dia menyamakan keuntungan oleh BIMB sebagai riba atau faedah apabila kedua-dua transaksi tersebut berbeza sama sekali dan apabila kontrak BBA sebenarnya merupakan transaksi dagangan. Selanjutnya, D perbandingan di antara kontrak BBA dan perjanjian pinjaman konvensional adalah tidak relevan dan tidak berfaedah memandangkan undang-undang yang digunapakai dalam kontrak BBA bersamaan dengan undang-undang yang digunapakai dalam perjanjian pinjaman konvensional. Undang-undang tersebut merupakan undang-undang E kontrak dan sekiranya kontrak tersebut tidak dicacatkan dengan mana-mana faktor yang mencacatkan seperti fraud, paksaan, pengaruh tak wajar dan sebagainya mahkamah mempunyai kewajipan untuk melindungi kesucian kontrak yang dimeterai di antara pihak-pihak (lihat perenggan 24–27). F

(2) Dengan menggantikan harga jualan di bawah PBH dengan tafsiran ekuiti dan menggantikan kewajipan pelanggan untuk membayar harga jualan dengan jumlah pinjaman dan keuntungan dikira pada kadar harian, hakim perbicaraan tersebut sebenarnya menulis semula kontrak G untuk pihak-pihak. Adalah undang-undang nyata bahawa mahkamah tidak boleh menulis semula kontrak di antara pihak-pihak yang dianggap adil dan saksama (lihat perenggan 28).

(3) Hakim perbicaraan telah tersilap mentafsir maksud 'Islamic banking business' di bawah s 2 Akta Perbankan Islam 1983 ('Akta'). 'Islamic H banking business' seperti yang didefinisikan dalam s 2 Akta tidak bermaksud perniagaan perbankan yang tujuan dan operasinya diakui oleh keempat-empat mazhab. Selanjutnya, hakim-hakim dalam mahkamah sivil tidak perlu membuat keputusan untuk membuat deklarasi sama ada perkara tersebut menurut agama Islam atau I sebaliknya memandangkan ia memerlukan pertimbangan oleh alim ulama yang berkelayakan dalam bidang jurisprudens Islam. Tambahan pula, memandangkan kita mempunyai infrastruktur undang-undang untuk memastikan bahawa perniagaan perbankan Islam yang

dijalankan di negara ini tidak melibatkan apa-apa elemen yang tak diakui oleh Islam, mahkamah perlu membuat anggapan bahawa Majlis Penasihat Syariah di bawah naungan Bank Negara Malaysia telah menjalankan kewajipan statutorinya untuk memastikan operasi bank Islam di dalam lingkungan Islam (lihat perenggan 29–32; 35).

(4) Dalam apa-apa keadaan adalah jelas bahawa kesahan dan penguatkuasaan kontrak BBA telah diputuskan oleh mahkamah atasan. Adalah undang-undang nyata bahawa berdasarkan doktrin stare decisis, keputusan mahkamah atasan mengikat semua mahkamah di bawahnya. Oleh itu, hakim perbicaraan perlu memutuskan bahawa beliau terikat dengan keputusan tersebut daripada tidak mengendahkan atau mempedulikan keputusan-keputusan Mahkamah Agung atau Mahkamah Rayuan memandangkan itu akan menimbulkan salah faham dalam sistem kehakiman (lihat perenggan 26–39).]

Notes

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

For cases on jurisdiction, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1927–1944.

Cases referred to

Affin Bank Bhd v Zulkifli Abdullah [2006] 3 MLJ 67; [2006] 1 CLJ 438, HC (refd)

Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 210, HC (refd)

Bank Islam Malaysia Berhad v Adnan Omar [1994] MLJU 221; [1994] 3 CLJ 735, HC (folld)

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

Charter Reinsurance Co Ltd v Fagai [1996] 3 All ER 46, HL (refd)

Datuk Hj Nik Mahmud Bin Daud v Bank Islam Malaysia Berhad [1998] 3 MLJ 393; [1998] 3 CLJ 605, CA (folld)

M Paikan v YP Devathanjam [1952] MLJ 58, CA (refd)

Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors [1982] 2 MLJ 181, PC (refd)

Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, CA (refd)

Wong Pa Hock v American International Assurance [2001] MLJU 688; [2002] 2 CLJ 267, HC (refd)

Legislation referred to

Central Bank of Malaysia Act 1958 (repealed by the Central Bank of Malaysia Act 2009) s 16B, 16B(2)

Contracts Act 1950 s 66

Islamic Banking Act 1983 ss 2, 3(5)

Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–918 of 2008.
Richard Bong (Aida Rahayu with him) (Bong & Co) for the respondents in Civil Appeal No W-02–918 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–954 of 2008.
The first respondent in person in Civil Appeal No W-02–954 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–955 of 2008.
The first and second respondents in person in Civil Appeal No W-02–955 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–957 of 2008.
Adnan bin Seman @ Abdullah (Adnan Seman & Associates) for the respondents in Civil Appeal No W-02–957 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–958 of 2008.
Syed Shafiq Alhabshi (Stanislaus with him) (MS Vethanayagam & Associates) for the respondents in Civil Appeal No W-02–958 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–959 of 2008.
Harpal Singh Grewal (Harwinder Kaur with him) (AJ Ariffin Yeo & Harpal) for the respondents in Civil Appeal No W-02–959 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–960 of 2008.
The first and second respondents in person in Civil Appeal No W-02–960 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–961 of 2008.
The respondent in person in Civil Appeal No W-02–961 of 2008.
Mohamed Ismail Shariff (Oommen Koshy and Mohd Arief Emran with him) (Skrine) for the appellant in Civil Appeal No W-02–962 of 2008.
The respondent in person in Civil Appeal No W-02–962 of 2008.

Raus Sharif JCA (delivering judgment of the court):

INTRODUCTION

[1] On 18 July 2008, the Kuala Lumpur High Court delivered a common judgment for 12 cases concerning Islamic financing which sent shock waves to the Islamic banking industry. The learned judge declared that the Bai Bithaman Ajil ('BBA') contract, a financial instrument in Islamic financing, which had been in existence and practised in this country for the past 25 years was contrary to the religion of Islam.

[2] The plaintiff in the respective 12 cases was Bank Islam Malaysia Berhad ('BIMB'). BIMB is an Islamic bank licensed under the Islamic Banking Act 1983 and thus authorise to carry on Islamic banking business. The defendants were BIMB's customers.

[3] What had happened was this. Prior to the delivering of the common judgment, the learned judge had instructed counsel appearing in the 12 cases which were pending before him, to file their respective written submissions.

[4] The written submissions were duly filed but counsel were not called upon to appear before the learned judge to make oral submissions or provide clarification of their written submissions. From the written submissions the common judgment for the 12 cases was delivered by the learned judge.

[5] In the common judgment, the learned judge did not deal with the particular facts of the individual cases. What he had done was to discuss and make decisions regarding, in the learned judge's own words 'the basic principles concerning Islamic financing'. At the end of it, he concluded that the BBA contracts were contrary to basic principles of Islam.

[6] In his ruling, the learned judge had grouped the BBA contracts into two categories: those where there was a novation agreement and those where there was none. In those where there was a novation agreement he further subdivided it with two subcategories, those where the financing had expired and those where it is still ongoing. For those where the financing period had expired, the claim by BIMB was allowed in full. For those where the financing period is still ongoing and had not expired, he ruled that the amount claim was excessive and unfair. He applied the 'equitable' interpretation of the sale price as he had interpreted in his earlier judgment in the case of *Affin Bank Bhd v Zulkifli Abdullah* [2006] 3 MLJ 67; [2006] 1 CLJ 438.

[7] What had happened in *Affin Bank Bhd v Zulkifli Abdullah* was this. Zulkifli Abdullah obtained a secured housing loan of RM394,172.06 from the Affin Bank Bhd under the BBA in 1997. Zulkifli Abdullah defaulted the loan in 2002 after paying RM33,454.19 to the bank. Affin Bank Bhd then claimed from Zulkifli Abdullah the full sale price of RM958,909.21, inclusive of the plaintiff's profit margin for the full term of the loan. Affin Bank Bhd also applied for an order for sale of the changed property. Zulkifli however challenged the amount claimed. The learned judge held:

(a) If the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the

tenure and yet be required to pay the bank's profit margin for the full tenure. To allow the bank to also be able to earn for the unexpired tenure of the facility, means the bank is able to earn a profit twice upon the same sum at the same time.

(b) The profit margin that continued to be charged on the unexpired part of the tenure cannot be actual profit. It was clearly unearned profit. It contradicted the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider was entitled to. Obviously, if the profit had not been earned it was not profit, and should not be claimed under the Al-Bai Bithaman Ajil facility.

(c) The profit margin could be calculated and derived with certainty. Even if the tenure was shortened, the profit margin could be recalculated with equal certainty. The total due on the date of the judgment was RM616,080.99 and after crediting the defendant with all the payments he has made of RM33,454.19, the balance due on the date of judgment was RM582,626.80.

(d) Once it was established that there had been a default, then unless there was cause to the contrary, the order for sale must be given since a charge is an ad rem right to dispose of the security to recover a secured debt.

[8] The learned judge then proceeded to determine the actual amount due to the plaintiff in the following manner:

> Balance due 29 December 2005
>
> According to the calculation placed before the court for the bank, the bank profit at the agreed profit rate of 9%pa on RM394,172.06 is RM35,475.49pa or RM35,475.49/12 = RM2,956.29 per month or on a 360 day 20 year basis as agreed, RM98.54 per day. Between 1 November 1999 to the date of judgment on 29 December 2005 is a period of 74 months less 2 days. The profit, by simple arithmetic since the payments meantime is not very significant, for 74 months less 2 days is RM218,767.49. As agreed the bank is also entitled to penalty of RM3,141.44 as on today. Added to the bank purchase price of RM349,172.06 the total due on the date of judgment is RM616,080.99. After crediting the defendant with all the payments he had made RM33,454.19, the balance due on the date of judgment is RM582,626.80. The bank is also entitled to profit per day here after full payment at RM2,956/30 = RM98.54.

[9] It can be seen from the case cited above that an Islamic bank could only recover the balance of the principal of the facility plus profit on the balance principal calculated at a daily rate until payment.

[10] The learned judge further ruled that for those contracts, where there was no novation agreement, the agreement was in fact a loan agreement. And,

since interest is prohibited in Islam, BIMB could only recover the principal sum advanced pursuant to s 66 of the Contracts Act 1950.

APPEALS

[11] BIMB, being adversely affected by the above rulings, filed 12 separate appeals to this court. On 31 March 2009, we heard nine out of the 12 appeals. The nine appeals were:

(a) Civil Appeal No W-02–918 of 2008

Bank Islam Malaysia Berhad … Appellant

And

(1) Lim Kok Hoe

(2) Koh Hsia Ping (F) … Respondents

(b) Civil Appeal No W-02–954 of 2008

Bank Islam Malaysia Berhad … Appellant

And

(1) Mohd Razmi bin A Rahman

(2) Wan Hazlina bt Wan Mohd Ali ... Respondents

(c) Civil Appeal No W-02–955 of 2008

Bank Islam Malaysia Berhad … Appellant

And

(1) Baharom bin Harun

(2) Rohynoon bt Mohd Yussof ... Respondents

(d) Civil Appeal No W-02–957 of 2008

Bank Islam Malaysia Berhad … Appellant

And

(1) Ghazali bin Shamsuddin

(2) Mokhtar bin Shamsudin

(3) Kamarudin bin Samsudin ... Respondents

(e) Civil Appeal No W-02–958 of 2008

Bank Islam Malaysia Berhad … Appellant

And

(1) Peringkat Raya (M) Sdn Bhd

(2) Mohamed Kamal bin Hussain ... Respondents

(f) Civil Appeal No W-02–959 of 2008

Bank Islam Malaysia Berhad … Appellant

And

Nordin bin Suboh … Respondent

(g) Civil Appeal No W-02–960 of 2008

Bank Islam Malaysia Berhad … Appellant

And

(1) Zawawi bin Osman

(2) Maznon bt Mohd Sidin ... Respondents

(h) Civil Appeal No W-02–961 of 2008

Bank Islam Malaysia Berhad … Appellant

And

Widyawati bt Mohd Nor … Respondent

(i) Civil Appeal No W-02–962 of 2008

Bank Islam Malaysia Berhad … Appellant

And

Noor Azlina bt Baharom … Respondent

ISSUES AND FINDINGS

[12] After hearing the parties, we unanimously allowed the BIMB's respective appeals. We now give our reasons.

[13] The nine appeals involved BBA contracts. Thus, in order to understand the decision and reasoning of the learned judge, it is necessary to set out briefly the nature and essential features of a BBA contract.

[14] A BBA contract is a financial instrument in Islamic banking. It is the most common form of transaction being used in Islamic banking in this country. Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a property purchase agreement and also a property sale agreement.

[15] In a typical BBA contract, the customer will first sell the property or asset to the bank under the property purchase agreement. The bank's purchase price would be the amount required by the customer. That sum is called the facility amount or the financing amount. It is also described as the bank's purchase price.

[16] The sale is a cash sale. The bank has to pay the purchase price to the customer immediately upon the completion of the documentation process. But in most cases, where a customer had entered into a sale and purchase agreement with a developer to purchase a house, and therefore needs financing, the bank and the customer would mutually agree that the bank shall release the amount (the bank's purchase price) to the developer in stages against progress payment certificates.

[17] With that purchase, the property belongs to the bank. But, the customer is to buy it back from the bank and he will only be able to pay the price over a period of years. The bank will sell but the sale price will not be the same amount as the bank's purchase price. The sale price will include the bank's profit on the sale, which will later be calculated and added to the purchase price. The total amount is now the sale price. In effect, the bank will sell the very same property it has purchased from the customer to him at a selling price under the property sale agreement. The customer then will pay the bank's selling price over a period of years by monthly installments. At that point the customer becomes the owner of the property again.

[18] To illustrate the BBA contract, we will refer to the facts in Civil Appeal No W-02–918 of 2008. In that case the customer applied to BIMB for a financing facility to purchase a property known as Unit B10-3 Jenis Excelsa, Taman Universiti Indah, Fasa 111C ('the property'). BIMB purchased the property from the customer pursuant to a property purchase agreement dated 16 October 1996 for a purchase price of RM145,800. On the same date BIMB sold the property to the customer pursuant to a property sale agreement for a sale price of RM450,954. Again on the same date, the customer executed a deed of assignment in favour of the BIMB to secure the payment of the sale price. The sale price was to be paid by the customer by 360 monthly instalments of RM1,252.65 per month. The customer had paid the sum of RM105,556.13 before he defaulted in the payment of the sale price. The balance sale price due was the sum of RM370,425.05. That was the sum claimed by BIMB from the customer.

[19] The above illustration clearly demonstrates that in a BBA contract the sales took place immediately both pursuant to the property purchase agreement and the property sale agreement, so that when the property sale

agreement was entered into, the customer becomes the owner of the property immediately. What was deferred was the payment of the BIMB's selling price by the customer to the BIMB.

[20] The above illustration also demonstrates that in BBA contract, the property purchase agreement and the property sale agreement completed the BBA transaction. But, invariably the bank will require security from the customer for the payment of the bank's selling price. If a separate title to the property has been issued, the customer will create a charge in favour of the bank. If a separate title has not been issued, the customer will execute a deed of assignment by way of security. However, it should be noted that the charge or assignment is not part of the BBA transaction. It is a security arrangement. Even without the charge or assignment the BBA contract will be completed.

[21] The learned judge in his common judgment questioned the validity and enforceability of the BBA contracts on two main grounds. First, he found the BBA contract was 'far more onerous than the conventional loan with riba' which is prohibited and unequivocally condemned in Islam. Second, he found that the BBA contract practised in this country is not acceptable by all the four mazhabs in Islam. He ruled that BBA contract is only acceptable to one mazhab, and this is not sufficient to say that it is approved by the religion of Islam which is a requirement under s 2 of the Islamic Banking Act 1983.

BBA CONTRACT 'FAR MORE ONEROUS THAN THE CONVENTIONAL LOAN WITH RIBA'

[22] The learned judge in advancing his view that the BBA contract is 'far more onerous than the conventional loan with riba', used the facts in *Bank Islam Malaysia Berhad v Adnan Omar* [1994] MLJU 221; [1994] 3 CLJ 735 (*Adnan Omar*), as the starting point. In that case, the bank was also BIMB, had granted the customer a facility amounted to RM583,000. It involved three simultaneous transactions, namely:

(a) on 2 March 1984, the customer sold to BIMB a price of land for RM265,000 which sum was duly paid to him;

(b) on the same date, BIMB resold the same piece of land to the customer for RM583,000 which amount was to be paid by the customer in 180 monthly installments;

(c) also on the same date, the said land was charged to BIMB by the customer as security for the debt of RM583,000.

A **[23]** Using the facts in *Adnan Omar*, the learned judge concluded by stating that the customer 'who had sought and obtained an Islamic financing facility of RM265,000 ended up, when he defaulted not long after, with liability of RM583,000'. This, according to the learned judge had resulted in the customer being liable to an amount far higher than he would have been B liable to in a conventional loan with interest. He then pointed out that if a conventional loan must be avoided because of the prohibition of 'riba' or interest, surely the alternative must result in a consequence that is less burdensome than a default in the conventional loan with prohibited interest. He continued in the following words:

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> But it is equally evident in this case that the result of what is presented as the application of the al-Quran principle is that the defendant became liable, upon default at any time, to an amount that is 2.2 times the facility he obtained. It could hardly have been intended by these words in the *surah al-Baqarah* that an Islamic D financing facility should result in consequences for more onerous than the conventional loan with 'riba' that is prohibited and unequivocally condemned. One might pause and observe that the harshness of usury is hardest upon those who default, and much less so, if at all, upon those fortunate enough to be able to service the loan successfully. The al-Quran could hardly have intended that its E followers, faithfully and trustingly seeking an Islamic compliant facility, should be delivered to those who offer what appear to be perfectly Islamic compliant facilities, but upon a default, had an interpretation applied that imposes a far more onerous liability than the conventional loan with interest. It is difficult to conceive that the religion of Islam intended to discourage its followers from the conventional loan with interest, condemn lenders for such loans, and deliver its F followers into the bands of banks and financiers who under sale agreements with deferred payments, exact upon default, payments far exceeding the liability upon default of a conventional loan with interest. One cannot say that the religion of Islam is so much more concerned with form than substance as would sustain the bank's interpretation of 'selling price'.

G

[24] We have no hesitation in accepting that 'riba' or interest is prohibited in Islam. But the issue at hand is whether such comparison between a BBA contract and conventional loan agreement was appropriate. With respect, we H do not think so. This is because the two instruments of financing are not alike and have different characteristics. BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction. The two transactions are diversely different and indeed I diametrically opposed.

[25] Thus, the learned judge was plainly wrong when he equated the profit earned by BIMB as being similar to 'riba' or interest. The two cannot be similar as BBA contract is in fact a trade transaction. It is a transaction

between the customer and the bank. In such transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank.

[26] Further, the comparison between BBA contract and conventional loan agreement is of no relevance. It serves no purpose as the law applicable in BBA contract is no different from the law that is applicable in a conventional loan agreement. Abdul Hamid JCA (as he then was) in the case of *Bank Kerjasama Rakyat Malaysia v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625, dealing with Islamic banking facility said:

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

[27] Similarly, the law applicable to BBA contracts is no different from the law applicable to a 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 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.

[28] Thus, the learned judge in coming to the conclusion that BBA contract is in fact a loan agreement and consequently by:

(a) replacing the sale price under the property purchase agreement with an 'equitable interpretation' of the same; and

(b) substituting the obligation of customer to pay the sale price with a 'loan amount' and 'profit' computed on a daily basis.

as he expounded in *Affin Bank Bhd v Zulkifli Abdullah*, was in fact rewriting the contract for the parties. It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable. This principles has been clearly expressed in numerous cases (see *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181; *Wong Pa Hock v American International Assurance* [2001] MLJU 688; [2002] 2 CLJ 267; *M Paikan v YP Devathanjam* [1952] MLJ 58 and *Charter Reinsurance Co Ltd v Fagai* [1996] 3 All ER 46).

A BBA CONTRACT NOT ACCEPTABLE BY ALL THE FOUR MAZHABS AND THUS NOT ACCEPTABLE IN THE RELIGION OF ISLAM

B **[29]** The learned judge acknowledged the fact that cases involving Islamic financing in this country remain within the Federal Legislative jurisdiction, and such cases are brought in the civil courts and not the Syariah courts. He also acknowledged that no legislation in the form of Islamic laws has been legislated for trade and financing based upon Islamic principles. But the C learned judge took issue on the definition of 'Islamic banking business' in s 2 of the Islamic Banking Act 1983 which reads:

> 'Islamic banking business' means banking business whose aims and operations do not involve any element which is not approved by the religion of Islam.

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[30] The learned judge in interpreting the above definition stated as follows:

> If a facility is to be offered as Islamic to Muslims generally, regardless of their E mazhab, then the test to be applied by a civil court must logically be that there is no element not approved by the religion of Islam under the interpretation of any of the recognised mazhabs. That it is acceptable to one mazhab is not sufficient to say it is acceptable in the religion of Islam when it is not accepted by the other mazhabs.

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[31] With utmost respect, the learned judge had misinterpreted the meaning of 'do not involve any element which is not approved by the religion of Islam'. First, under s 2 of the Islamic Banking Act 1983, 'Islamic banking business' does not mean banking business whose aims and operations are G approved by all the four mazhabs. Secondly, we do not think the religion of Islam is confined to the four mazhabs alone as the sources of Islamic law are not limited to the opinions of the four imams and the schools of jurisprudence named after them. As we all know, Islamic law is derived from the primary sources ie the Holy Quran and the Hadith and secondary H sources. There are other secondary sources of Islamic law in addition to the jurisprudence of the four mazhabs.

[32] In this respect, it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the religion I of Islam or otherwise. As rightly pointed out by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which *ulama*' take years to comprehend'. Thus, whether the bank business is in

accordance with the religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.

[33] This issue is in fact addressed in the Islamic Banking Act 1983. To ensure that the operation of the banking business of an Islamic bank is in accordance to the religion of Islam, s 3(5) provides that the Central Bank ie the Bank Negara Malaysia shall not recommend the grant of an Islamic banking licence, and the Minister shall not grant a licence, unless he is satisfied:

> (b) that there is, in the articles of association of the bank concerned, provision for the establishment of a Syariah advisory body, as may be approved by the Central Bank, to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the Religion of Islam.

[34] Thus, it is a requirement for any Islamic bank to establish a Syariah advisory body to advise the bank and to ensure the operations of its banking business do not involve any element which is not approved by the religion of Islam. In fact, in 2003, a single Syariah Advisory Council was established through an amendment of the Central Bank of Malaysia Act 1958. Section 16B of the Central Bank of Malaysia Act 1958 established the central Syariah Advisory Council under the aegis of Bank Negara Malaysia. With the amendment, the single Syariah advisory council became 'the authority for the ascertainment of Islamic law for the purpose of Islamic banking business, *takaful* business, Islamic financing business, Islamic development financial business or any other business which is based on Syariah principles'. Section 16B(2) of the Act provides for the membership of the Syariah Advisory Council. With the establishment of the single Syariah Advisory Council, the Islamic Banking Act 1983 had been amended accordingly. It provides as follows:

> 13A Advice of Syariah Advisory Council
>
> (1) An Islamic bank may seek the advice of the Syariah Advisory Council on Syariah matters relating to its banking business and the Islamic bank shall comply with the advice of the Syariah Advisory Council.
>
> (2) In this section, 'Syariah Advisory Council' means the Syariah Advisory Council established under subsection 16B(1) of the Central Bank of Malaysia Act 1958.

[35] Thus, we already have the legal infrastructure to ensure that the Islamic banking undertaken by the banks in this country does not involve any

element which is not approved by the religion of Islam. The court, will have to assume that the Syariah advisory body of the individual bank and now the Syariah Advisory Council under the aegis of Bank Negara Malaysia, would have discharged their statutory duty to ensure that the operation of the Islamic banks are within the ambit of the religion of Islam. This is more so, when the customers in these appeals have not made any allegations that the Syariah advisory body of BIMB or the Syariah Advisory Council established by the Bank Negara had failed to exercise their statutory duties. Thus, the learned judge, with respect, should not have taken upon himself to rule that the BBA contracts were contrary to the religion of Islam without having any regard to the resolutions of the Syariah Advisory Council of the Central Bank Malaysia and the Syariah Advisory body of BIMB on the validity of BBA contracts.

[36] In any event, the questions raised by the learned judge on the validity and enforceability of the BBA contracts, is not novel. It had been raised in previous cases and had been ruled upon. In *Adnan Omar*, the High Court upheld the validity and enforceability of the BBA contract. In that case, the High Court accepted as correct and affirmed the judgment of Ranita Hussein JC. Subsequently, the validity and the enforceability of BBA contracts was again decided by this court in *Datuk Hj Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* [1998] 3 MLJ 393; [1998] 3 CLJ 605, and *Bank Kerjasama Rakyat Malaysia Berhad v Emcee Corporation Sdn Bhd*.

[37] In *Dato' Hj Nik Mahmud bin Daud*, the customer argued that the property purchase agreement and the property sale agreement and the land charges based on them were null and void. Both the High Court and the Court of Appeal disagreed with the contention and granted the order of sale for the full outstanding balance of the bank's selling price. In *Emcee Corporation Sdn Bhd*, the validity and enforceability of the BBA contract was again challenged. The High Court at Seremban refused to grant the order for sale on the construction of a term in the agreement. On appeal, the Court of Appeal reversed the judgment of the High Court and granted the order. An application for leave to appeal to the Federal Court by the customer was refused by the Federal Court.

[38] From the above cases, it is clear that the validity and enforceability of the BBA contract had been ruled upon by the superior courts. It is trite law that based on the doctrine of stare decisis, a decision of a superior court is binding on all courts below it. The importance of this principle must not be taken lightly. In this regard, we can do no better than be guided by the wise words of Steve Shim CJ (Sabah and Sarawak) in *Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293:

> It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained to status of immutability.

His Lordship further stated that:

> Judicial hierarchy must be observed in the interest of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.

[39] In light of the above the learned judge ought to have held himself bound by those decisions. He cannot simply ignore or disregard the decisions of the Supreme Court or the Court of Appeal. To do so, as pointed by Steve Shim CJ (Sabah and Sarawak) would create chaos and misapprehensions in the judicial system.

[40] In conclusion, it is our view that the High Court judgment was manifestly wrong and must be set aside. Accordingly, we allowed the nine appeals with costs here and the court below. The orders of the learned judge are therefore set aside. We ordered the respective cases to be sent back to the High Court to be heard on its merit. We also order that the deposits of these appeals are to be refunded to BIMB.

Appeal allowed with costs here and below.

Reported by Kohila Nesan