Malayan Banking Bhd v Marilyn Ho Siok Lin

HIGH COURT (KUCHING) — ORIGINATING SUMMONS 24–60 OF 2005–III(II)
DAVID WONG J
8 JUNE 2006

Banking — Banks and banking business — Islamic banking — Islamic Banking Concept of Al Bai Bithaman Ajil — Whether amount owing should be the sale price — Whether court has discretion to rewrite the terms in the loan documents — Sarawak Land Code (Cap 81) s 148(2)

Land Law — Charge — Order for sale — Charge under Sarawak Land Code (Cap 81) — Loan facility an islamic banking facility — Whether court should make an order even it means ignoring the terms contained in the loan documents — Sarawak Land Code (Cap 81) s 148(2)

The defendant obtained an islamic banking facility, known as Al Bai Bithaman Ajil (BBA) from the plaintiff in 2002. The plaintiff (at the request of the defendant) became a party to the sale and purchase agreement in place of the defendant, for the purpose of payment to the vendor the facility amount or amount of advance in the sum of RM500,000 and thereafter immediately reselling the property to the defendant at the sale price of RM995,205.64. As security the defendant charged her property and promised under the charge to pay the plaintiff the sale price of RM995,205.64 by way of 240 monthly installments of RM4,107. On or about 2003, the defendant defaulted in paying five installments and as a result the plaintiff issued statutory notice under the s 148(1) of the Sarawak Land Code (Cap 81). The defendant contended that the amount owing should not be the sale price. For the plaintiff, it is a matter of reading the words in the annexure of the memorandum of charge and property sale agreement (collectively referred to as the BBA documents) which state plainly that on default, the defendant is required to pay balance of the sale price which is RM928,589.12 as at 21 February 2005.

Held

(1) Even though the court is faced with such plain language in the clauses in the memorandum of charge and property sale agreement, the power of this court under s 148(2) of the Sarawak Land Code (Cap 81) is a discretionary one as held in *Kuching Plaza Sdn Bhd v Bank Bumiputra (M) Bhd* [1991] 1 CLJ 223 (Rep). The words used in s 148(2)(c) Sarawak Land Code (Cap 81) and they are 'and the court after hearing the evidence may make such order as in the circumstances seems just'. These words empower the court with the flexibility (as opposed to the imperative power in s 256 of the National Land Code) to

make any order even it means ignoring the terms contained in the BBA documents provided it is just in the circumstance (see para 35).

(2) The court must have good reasons to ignore or put in another way rewrite the terms in the BBA documents. This involves the process of taking into consideration of 'all the circumstances of the case'. That would include the public interests, the peculiarities of the contract, and the compliances by the parties of the agreed terms contained therein. Of course at the end of the day, the primary aim must be to make an order as in the circumstance seems just (see para 35).

(3) Section 148(2) of the Sarawak Land Code (Cap 81) talks of what is just which revolves squarely on the question of whether or not equity in the circumstance should intervene. It would not be equitable to allow the bank to recover the sale price as defined when the tenure of the facility is terminated prematurely (see paras 37, 43); *Affin Bank Bhd v Zulkifli Abdullah* [2006] 3 MLJ 67 referred.

(4) Applying the formula used in *Affin*'s case, the amount owing as agreed by counsels is RM598,689.10 as at 31 May 2006. The court grants an order of sale of the defendant's charged property pursuant to the Sarawak Land Code (Cap 81) to recover the sum of RM598,689.10 as at 31 May 2006 and profit per day thereafter at RM106.16 until the date of satisfaction of the sum owing under the charge (see paras 46–47).

[Bahasa Malaysia summary

Defendan memperolehi satu kemudahan perbankan islam yang dikenali sebagai Al Bai Bithaman Ajil (BBA) daripada plaintif pada 2002. Plaintif (di atas permintaan defendan) menjadi parti kepada perjanjian jual beli menggantikan defendan untuk tujuan membayar penjual fasiliti amaun atau amaun pendahuluan sebanyak RM500,000 dan sejurus kemudian menjualkan hartanah tersebut kepada defendan dengan harga jualan RM995,205.64. Sebagai sekuriti, defendan mencagarkan hartanahnya dan berjanji di bawah cagaran tersebut untuk membayar plaintif harga jualan sebanyak RM995,205.64 melalui pembayaran 240 instalmen bulanan sebanyak RM4,107. Pada atau lebih kurang 2003, defendan ingkar membayar lima bulan instalmen dan hasil daripada itu, plaintif mengeluarkan notis statutori di bawah s 148(1) Kanun Tanah Sarawak (Cap 81). Defendan menyatakan bahawa jumlah yang terhutang tidak sepatutnya jumlah harga jualan. Bagi pihak plaintif, ia setakat membaca perkataan-perkataan di lampiran memorandum gadaian dan perjanjian jualan hartanah (yang kesemuanya dikenali sebagai dokumen BBA tersebut) yang menyatakan dengan jelas bahawa jika terdapat keingkaran, defendan dikehendaki membayar jumlah baki harga jualan iaitu RM928,589.12 setakat 21 Februari 2005.

Diputuskan:

(1) Walaupun mahkamah berhadapan dengan perkataan-perkataan yang jelas di klausa-klausa memorandum gadaian dan perjanjian jualan hartanah, kuasa

mahkamah ini di bawah s 148(2) Kanun Tanah Sarawak (Cap 81) adalah mengikut budi bicara seperti yang diputuskan di dalam kes *Kuching Plaza Sdn Bhd v Bank Bumiputra (M) Bhd* [1991] 1 CLJ 223 (Rep). Perkataan-perkataan yang digunakan di s 148(2)(c) Kanun Tanah Sarawak (Cap 81) adalah 'and the court after hearing the evidence may make such order as in the circumstances seems just'. Perkataan-perkataan ini memberikan mahkamah kelonggaran (tidak seperti kuasa imperatif di dalam s 256 Kanun Tanah Negara) untuk membuat sebarang perintah walaupun ini bermaksud mengendahkan terma-terma yang terkandung di dalam dokumen BBA tersebut hanya sekiranya ia adalah adil dalam keadaan tersebut (lihat perenggan 35).

(2) Mahkamah mesti mempunyai alasan-alasan yang kukuh untuk mengendahkan ataupun dalam kata lain menulis semula terma-terma di dalam dokumen BBA. Ini membabitkan proses mempertimbangan 'kesemua keadaan kes tersebut'. Ini termasuk kepentingan masyarakat awam, keunikan kontrak tersebut dan sebarang pematuhan oleh pihak-pihak terhadap terma-terma yang dipersetujui di dalamnya. Tentu sekali pada akhirnya tujuan utama ialah untuk membuatkan satu perintah yang adil di dalam sesuatu keadaan (lihat perenggan 35).

(3) Seksyen 148(2) Kanun Tanah Sarawak (Cap 81) menjelaskan apa maksudnya adil, yang berkisar pada soalan sama ada ekuiti dalam keadaan ini patut campurtangan. Adalah tidak berekuiti untuk membenarkan bank mendapat kembali harga jualan seperti yang dinyatakan apabila tempoh fasiliti tersebut dibatalkan pra masa (lihat perenggan 37, 43); *Affin Bank Bhd v Zulkifli Abdullah* [2006] 3 MLJ 67 dirujuk.

(4) Dengan memakai formula yang digunakan di dalam kes *Affin*, amaun yang dihutang seperti yang dipersetujui oleh peguam-peguam ialah RM598,689.10 setakat 31 Mei 2006. Mahkamah membenarkan satu perintah jualan hartanah defendan yang digadaikan menurut Kanun Tanah Sarawak (Cap 81) untuk mendapat kembali jumlah RM598,689.10 setakat 31 Mei 2006 dan keuntungan harian selepas tarikh itu sebanyak RM106.16 sehingga tarikh penyelesaian jumlah yang dihutang di bawah gadaian tersebut (lihat perenggan 46–47).]

Notes

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

For cases on order of sale, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

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

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

Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd [2003] 2 MLJ 408 (refd)

Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd [2004] 4 CLJ 793 (refd)

Islam Malaysia Bhd v Adnan bin Omar [1994] 3 AMR 44 (refd)
K Umar Kanda Rajah v EL Magness [1985] 1 MLJ 116 (refd)
Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal [1991] 3 MLJ 163 (refd)
Malayan Banking Bhd v PK Ralamani [1994] 2 CLJ 25 (refd)
Stockloser v Johnson [1954] 1 QB 476; [1954] 1 All ER 630 (refd)

Legislation referred to
National Land Code 1965 ss 256, 257
Rules of the High Court 1980 O 1A, O 2 r 3, O 83 r 3(3)(c), (7), 1A
Sarawak Land Code (Cap 81) s 148(1), (2)(c)

Gabriel Wong (Detta Samen & Court) for the plaintiff.
Ernest Chua (Ernest Chua & Court) for the defendant.

David Wong J:

APPLICATION

[1] By an originating summons (encl 3), the plaintiff seeks the following orders:

(1) that the defendant's land described as all that parcel of land together with the building thereon and appurtenances thereof situate at Jalan Tun Jugah, Kuching containing an area of 863.9 square metres, more or less, and described as Lot 8620, Block 16, Kuching Central Land District which is charged by the defendant to the plaintiff under Memorandum of Charge Instrument No L 11261/2002 registered at the Kuching Land Registry office on the 31 May 2002 (hereinafter referred to as 'the said charge') be sold by public auction under the directions of this court and subject to s 151 of the Land Code (Cap 81) to satisfy the sum of RM928,583. The costs of and incidental to this application and costs of this action to be on a solicitor and client's basis and to be paid by the defendant to the plaintiff as at 21 February, 2005 being the balance of the sale price due and owing by the defendant under the property sale Agreement dated 14 May 2002 and pursuant to the provisions of the said charge;

(2) that the proceeds of such sale be paid into court and be applied in accordance with s 151 of the Land Code (Cap 81) but pending payment out at the written request of the plaintiffs' advocates the Registrar shall be authorized to deposit the proceeds of sale in an interest bearing account in the name of the Registrar with any reputable bank or financial institution as the plaintiff's advocates shall direct;

(3) the costs of and incidental to this application and costs of this action to be on a solicitor and client's basis and to be paid by the defendant to the plaintiff.;

(4) such further and other relief as the court thinks fits.

NATURE OF THE LOAN

[2] The defendant obtained a banking facility from the plaintiff in 2002 and the nature and terms of the aforesaid facility are contained in the plaintiff's letter of offer dated 17 April 2002 ('LOF').

[3] The defendant signed the LOF agreeing to abide by all the terms and conditions contained therein. Pursuant to the acceptance of the LOF, the plaintiff and the defendant signed three agreements, namely, novation agreement, property sale agreement and first party, fist legal charge over the property held under Lot 8620, Block 16, Kuching Central Land District. The name of this sort of banking facility is Al Bai Bithaman Ajil ('BBA'), the mechanics of which is neatly summed up in an article *Of Islamic Loan and Other Matters of Interest* in [2000] INSAF XXVIX No 3, 91 which states as follows:

> It is a buy-and-sell transaction under which the customer pays the selling price of the bank by installments over an agreed period of time. In this financing transaction the bank buys the property from the customer pursuant to the Property Purchase Agreement at the property purchase price, which is usually the amount of facility required by the customer, say, RM150,000.
>
> The bank then sells the property back to the customer immediately after the purchase pursuant to the property sale agreement at the property sale price, which is the sum of the property purchase price (RM150,000 in the example taken) and the bank's profit for the entire tenure of financing required (say RM150,000 (profit) for 15 years (tenure)). The sale price will therefore be RM300,000 which the customer will repay by monthly installments of an agreed figure over 15 years. By way of security for the repayment the customer will provide such securities as the bank may require. This is usually a land charge over the property, the subject matter of the transaction, and, perhaps, a guarantee

[4] As security for the banking facility, the defendant charged her property held under Lot 8620, Block 16, Kuching Central Land District (charged property) and promised under the charge to pay the plaintiff the sale price of RM995,205.64 by way of 240 monthly installments of RM4,107.

RECALL OF THE BBA FACILITY

[5] On or about 2003, the defendant defaulted in paying five installments and as a result the plaintiff issued statutory notice under the s 148(1) of the Sarawak Land Code (Cap 81) which states as follows:

(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court.

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land and the court after hearing the evidence may make such order as in the circumstances seems just (Emphasis added.)

PLAINTIFF'S GROUNDS FOR THE APPLICATION

[6] As per the plaintiff's counsel submission they are:

(a) the defendant had defaulted in payment of the sum of RM928,476.62 as at 22 October 2004 demanded by the plaintiff (hereinafter referred to as 'the default') by way of the plaintiff's advocate's letter dated 5 November 2004 (exh NA 6A) and the certificate of posting (exh NA 6B); and

(b) in spite of the plaintiff's statutory notice to the defendant dated 25 November 2004 (exhs NA 7A and NA 7B) pursuant to s 148 (1) of the Land Code (Cap 81), the defendant up to today failed or refused to remedy the default.

DEFENDANT'S CONTENTIONS

[7] They are as follows:

(1) That the amount owing should not be the sale price. This can be discerned from encl 16 which is her affidavit in opposition where she contends, among other things that she does not owe the defendant the sale price of RM995,205.64. In her words she says:

> I contend that although the defendant is in default the plaintiff is not entitled in law and in equity to claim the said interests of RM495,205.64 after only a period of 14 months since the date of execution of the charge on 31 May 2002 as that interest of RM495,205.64 is for a period of 20 years or 240 months
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> In encl 21 which is her second affidavit in opposition she says:
>
> I have no knowledge of the plaintiff's financing procedure and the Syariah principles of Al-Bai Bithaman Ajil because they were never disclosed or explained to me at all material times and even up to now, I maintain that the difference between the purported sale price of RM995,205.64 and the purported advance of RM500,000 (ie 495,205.64) is in fact 240 months interest and not profit as alleged (para 3)

(2) Non compliance of O 83 r 3 of the Rules of The High Court by the plaintiff.

(3) There is duplicity of proceedings as the plaintiff in Originating Summons No 24–449–2004-II had also applied for the same property, namely, Lot 8620 Block 16 Kuching Central Land District to be auctioned off under another charge for an overdraft facility granted to the efendant.

FINDINGS OF THE COURT

Non Compliance of O 83 r 3(3) and (7)

[8] Order 83 r 3(3) and (7) read as follows:

Action for possession or payment

3. Where the plaintiff claims delivery of possession the affidavit must show circumstances under which the right to possession arises and except where the court

in any case or class otherwise directs, the state of account between the charger and chargee with particulars of

(a) the amount of the advance

(b) the amount of repayments;

(c) the amount of interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit;

(d) the amount remaining due under the charge...

7. Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

[9] Learned counsel for the defendant submits that in view of the fact that the plaintiff failed to state the amount advanced and the interests as required by the aforesaid rules, encl 3 ought to be struck out.

[10] This argument was canvassed in the case of *Islam Malaysia Bhd v Adnan Bin Omar* [1994] 3 AMR 44. In that case, the facts are similar to the present case in that it also concerned an Islamic Financing facility under BBA. The learned judicial commissioner dismissed the argument and in doing so she said:

> Order 83 rule 3(3)(c)
>
> A reading of O 83 r 3 (3)(c) in the context of the purpose of the whole order can lead to only one reasonable interpretation; And that is that there must be an amount of interest or an amount of instalment in arrears at the given date, but not necessarily both. The crucial precondition is the fact of default of payment of whatever amount. The intention is to show a calculation of such amount whether it be one of interest, of instalment or both. In the present case there is no question of there being any interest because of the Islamic nature of the loan. The defendant's default is in respect of the instalment payments and this has been duly particularized by the plaintiff. I am, as such, satisfied that there has been compliance of the said provision.
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> Order 83 rule 3(7)
>
> The defendant's argument that the plaintiff has no recourse to O 83 as he has omitted to 'state the amount of a day's interest in accordance with r 3 (7), defies logic. The premise for invoking r 3 (7) is that there exists 'a claim for interest to judgment'. In this case there is no claim for interest and therefore, there is no need whatsoever to state the amount of a day's interest.

[11] I fully agree with the learned judicial commissioner and in any event since the aforesaid decision, we have O 1A and O 2 r 3 where they provide that the court shall have regard to the justice of the case rather than non compliance of the rules. Here, it cannot be argued that the defendant was prejudiced by the non compliance (which I say there is not) as if one looks at encl 3 objectively one would know what the application is all about.

DUPLICITY OF PROCEEDINGS:

[12] With respect this contention is a non starter. Originating Summons 24–449–2004-II is in respect of another charge for another banking facility.

How there is duplicity with respect is incomprehensible. That is why her counsel did not even refer to this point in his submission.

STATUS OF THE BBA BANKING FACILITY

[13] Firstly the defendant alleges that she has no knowledge of the nature of a BBA banking facility as nobody explained to her. This allegation is infact a plea of non est factum. The legal principle of this plea is aptly summarized by Dato' Seri Visu Sinnadurai in his book *Law of Contract* (3rd Ed) at p 319 as follows:

6.34 *Principles of law governing the plea of non est factum.*

The law on non est factum was reviewed and restated by the House of Lords in *Sounders v Anglia Building Society (Gallie v Lee).*The House of Lords spelt out the following principles of law governing the plea of non est factum:

(a) The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate, any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.

(b) The burden of establishing a plea of non est factum falls on that party seeking to disown the document and that party must show that in signing the document he acted with reasonable care. Carelessness (or negligence devoid of any special, technical meaning) on the part of the person signing the document would preclude him from later pleading non est factum on the principle that no man may take advantage of his own wrong; It is not, however, an instance of negligence by way of estoppel.

(c) In relation to the extent and nature of the difference between the document as it is and the document as it was believed to be, the distinction formerly drawn between the character and the contents of the document is unsatisfactory and it is essential, if the plea is to be successful, to show that there is a radical or fundamental distinction.

[14] The defendant had not shown to this court that she had satisfied the preconditions for the plea of non est factum to apply. As such, I dismiss the defendant's allegation.

[15] I come now to the first contention of the defendant which I consider is the crux of this suit and that is:

> Whether or not the plaintiff is entitled to claim for the full sale price less what has been paid, that is RM928,589.12 as at 21 February 2005.

[16] The method in which the plaintiff arrived to the figure of RM928,589.12 is set out at para 4 of the encl 18, which I now set out:

Paragraph 4

(a) I deny the contentions made in para 3 of the defendant's affidavit.

(b) In accordance with the plaintiff's financing procedure and the syariah principles of Al-Bai Bithaman Ajil, the plaintiff (at the request of the defendant) became a party to the sale and purchase agreement in place of the defendant for the purpose of payment to the vendor the facility amount or amount of advance in the sum of RM500,000, and thereafter immediately reselling the property to the defendant at the sale price of RM995,205.64 (recitals I, II, III and IV, sections 1.01 and 2.01 of exh NA4)

(c) The purchase price of RM500,000 stated in para 12 of my earlier affidavit is the amount of advance which is also known as the facility amount (recitals I, II, III IV and sections 1.01 of NA3).

(d) Given the special features of syariah principles of financing under the Al-Bai Bithaman Ajil and/or the facility, the particulars contained in para 12 of my earlier affidavit needs to be read together with para 3 of my earlier affidavit.

(e) For the purpose of clarification, I supply herewith again the statutory particulars as follows:

(i) Selling Price (Amount secured by the RM995,205.64 charge)

(ii) Purchase Price (Amount of Advance/Facility Amount) RM500,000

(a) Amount of the repayment as at 21st RM57,925.64 February 2005

(b) Amount of monthly Installment in RM73,498.36 arrears as at 21 February, 2005

(c) Amount remaining due under the said RM928,589.12 charge/the property sale agreement as at 21st February 2005

(f) Since the profit margin had already been added to the purchase price to make up the sale price, the plaintiff had no further claim for interest and as such, it is not possible to state the amount of the daily interest claimable.

THE LAW ON THIS ISSUE

[17] The first case on this issue dates back to 1994 in the case of *Islam Malaysia Bhd v Adnan Bin Omar*. Much has been written on this area of law and the aforesaid case. Some of these articles are *Islamic Banking: Case Commentaries involving Al-Bai Bithaman Ajil* [1997] 3 MLJ cxcii by Dr Norhashimah Mohd Yasin, *Islamic/Interest-Free Banking in Malaysia: Some Legal Considerations* [1995] 3 MLJ cxlix by Mohd Illiayas, and *Legal Aspects of Interest-Free Banking in Malaysia by Dr Samar Kamar bin Hj Ab Latif* [1997] 2 MLJ xc. Of late this issue was revisited in two recent cases, namely *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 and *Affin Bank Bhd v Zulkifli Abdullah* [2006] 3 MLJ 67 from which I shall seek guidance.

ARAB-MALAYSIAN MERCHANT BANK BHD V SILVER CONCEPT SDN BHD [2005] 5 MLJ 210 (AMMB)

[18] The facts as stated in the headnotes of AMR reports are these. To finance the acquisition of a piece of land, the defendant requested a consortium of financial

institutions (the vendors) with the plaintiff as arranger and agent to provide certain Islamic banking facilities, to wit, an Al-Bai Bitaman Ajil facility (Al-Bai facility) and an Al-Wujuh facility with revolving drawing rights on an account maintained by the plaintiff as part agent of the vendors as marginal deposit account with a maximum of RM60,000,000. Pursuant to the Al-Wujuh facility, the vendors granted the defendant the Al-Bai facility involving the vendors' purchase of the land from the defendant. After the transfer of the title to the vendors was effected, the vendors resold the land to the defendant with the sale price to be paid in agreed installments. According to the provisions of the installment sale agreement, the defendant became liable to pay to the plaintiff, for the account of the vendors, the sale price of RM216,687,000, comprising the purchase price of RM125,000,000 and a further profit element. Pursuant to those agreements, the defendant effected two charges on the land, one for the AL-Bai facility and the other for the Al-Wujuh facility, with the consequence that in the event of the defendant's default, the facilities would be withdrawn and the entire sums would become due and payable immediately. The defendant subsequently defaulted and the plaintiff made demands in relation to both facilities which were not satisfied by the defendant. Hence, the plaintiff's application for the sale of the land by public auction pursuant to s 256 and s 257 of the National Land Code 1965 (NLC).

[19] One of grounds in which the defendant objected to the sale is the allegation that the facilities provided were in fact loans with interests charged thereon, hence the charges created are unenforceable. Suriyadi J at pp 394–395 of the judgment rejected the contention in the following manner:

> As mentioned above, the transaction before me had Islam as its foundation. That being so certain formalities must be adhered to of which have to be complied with by the plaintiff. Under the Islamic Law of Contract, the Arabic word for contract is al-aqd, which literally means an obligation or tie. It is an act of sealing a bargain (*Shariah: The Islamic Law* by Abdur Rahman I. Doi p 354[rcub]. After the offer and acceptance has been concluded, the obligation that arises out of that conclusive contract is called 'Uqud', thereafter to be fulfilled or complied with (Quran Ch 5:1)...
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> ... Having appreciated the available facts, I am satisfied that the papers of the plaintiff were in order in relation to the prerequisites of the contract, and hence the regularity of the Al-Bai Bithaman Ajil facility. All the participating parties had agreed to the type of contract, ie Islamic based, the type and number of facilities, the amount, the mode of payment, period of payment, the profit margin of the plaintiff, the format of the securities, and all the other necessary details.
>
> In support of its assertion of the existence of usury, the defendant had ingeniously deducted the cost price of the impugned land from the aggregate sum, and thereafter divided the profit by the number of months needed to complete the agreement. The sum derived, which could be converted and reflected into a certain percentage, in one year was thereafter alleged to be interest.
>
> Notwithstanding the above, I reject any argument that injects the argument that it is not permissible to buy on credit, especially when there is mutual consent. Even Prophet Muhammad had occasion to buy some grain from a Jew to be paid at a specific time, with his coat of mail as security. I am unable to acquiesce to any argument too that, just because a larger sum is agreed to be paid back founded on a buy back concept, with the defendant openly having requested for deferred payment, and with the differential sum resembling interest, the agreement must be void. I am unable to acquiesce to such a suggestion as there

is no clear text that prohibits such a transaction entrenched with all those ingredients. Even the followers of the Shafii and Hanafi schools and the majority of Muslim scholars consider it lawful, calling it 'Shifa al ilal fi hokum ziyadat al-thamam li mujarrad al-ajal (translated: The reason for increasing the price due to lapse of time)' (*The Lawful and Prohibited in Islam* by Yusuf al-Qaradawi). I therefore reject the argument of the defendant that, just because the defendant pays more than what was needed to buy the impugned property, such sum (here called profit) must be interest per se...

AFFIN BANK BHD v ZULKIFLI ABDULLAH [2006] 3 MLJ 67 (AFFIN)

[20] This case also concerns the Islamic Financing Scheme of Al-Bai Bithaman Ajil, where the plaintiff in 1999 granted a revised facility of RM394,172.06 to the defendant. Pursuant to that, the parties executed several agreements, one of which is the Property Sale agreement which provides a sale of the property from the plaintiff to the defendant for the sum of RM992,363.40. The defendant's teRMof repayment of RM394,172.06 and the profit margin totalling RM992,363.40 was 25 years. The defendant was required to make 60 monthly installments of RM2,500 and thereafter 240 monthly installments of RM3,509.84.There is also a provision that in the event of default in payment of the installments, the defendant covenants to repay the sale price less any paid installments. The plaintiffs claim is RM958,909.21 which is the sale price of RM992,363.40 less RM33,454.19 being the amount paid.

[21] The issue there was:

what is the amount that a customer has to pay to the provider of an Al-Bai Bithaman Ajil facility in the event of default.

[22] Abdul Wahab Patail J relying on the rationale in the Supreme Court case of *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 looked at the substance of the agreements signed by the plaintiff and the defendant and came to the following conclusion:

Meaning Of 'Sale Price' Or 'Bank Selling Price'

Although the term 'sale price' appear to be set out clearly enough in the property sale agreement, thai is only the appearance of the term at face value...

The substance of the sale price in the property sale agreement in an AI-Bai Bithaman Ajil facility is that it is not a sale price paid by a single payment but it is a series of equal monthly installments. It is also a substance of the transaction that profit margin is not a profit arising from a sale price arrived at in a bargain, but is based upon the agreed amount and tenure of the facility and the profit rate of the provider. The sale price is then the sum of the provider's purchase price and the profit margin.

The essence of the profit rate is that it is based on an agreed real or actual profit of the provider expressed as a percentage and not an interest rate that is being charged regardless. The profit margin is a function of the bank purchase price, the agreed profit rate on a constant rate of return and monthly rests, and the agreed tenure of the facility. It must be borne in mind that profit margin is calculated with the profit rate applied to the full tenure of the facility during which the installments are to be made. The sale price is then paid by monthly installments according to the number of months in the tenure of the facility.

That being the case, it follows that 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. Furthermore, the sum that is recovered from the facility in the event of default before the end of tenure is applied to other facilities and the bank continues to earn its profit rate on the same sum. To allow the bank to also recover a profit margin 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. That profit margin that continues to be charged on the unexpired part of the tenure cannot be actual profit. It is clearly unearned profit. It contradicts the principle of 'Al-Bai Bithaman Ajil as to the profit margin that the provider is entitled to. Obviously, if the profit has not been earned it is not profit, and cannot be claimed under the AI-Bai Bithaman Ajil facility. (pp 449–450 of the judgment)

The learned judge then proceeded to determine the actual amount due to the plaintiff and he at p 452 of the judgment did it in the following manner:

(i) *Balance Due 29 December 2005*

According to the calculations placed before the court for the bank, the bank profit at the agreed profit rale of 9% pa on RM394,172.06 is RM35.475.49 pa or RM35.475.49/I2 = RM2,956.29 per month or on a 360 day 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 two days. The profit, by simple arithmetic since the payments meantime is not very significant, for 74 months less two 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 RM394,172.06 the total due on the date of judgment is RM616,080.99. After crediting the defendant with all the payments he had made of RM33,454.19 the balance due on the date of judgment is RM582.626.80. The bank is also entitled to profit per day hereafter until full payment at (RM2,956/30) = RM98.54

[23] The learned judge's views are contrary to the views expressed by Dr Norhashimah Mohd Yasin in his article *Islamic Banking: Case Commentaries involving Al-Bay Bithaman Ajil* [1997] 3 MLJ cxcii and by Mohd Illiayas in his article *Islamic/Interest-Free Banking in Malaysia: Some Legal Considerations* [1995] 3 MLJ cxlix. In his article at p cxcvi Dr Norhashimah Mohd Yasin at p cxcvi posed the question:

(ii) *Whether the bank can claim the full selling price upon default*

This issue was raised by the defendant in his appeal (in April 1996) to the Supreme Court against the decision of the High Court in favor of BIMB. This appeal is yet to be reported. In his affidavit, the appellant (Adnan) criticized BIMB for insisting on the full amount of the selling price, ie RM583,000 on default of monthly installments by him. He submitted that for the bank to demand the full selling price on default of payments in the foRMof installments is manifestly unjust, and as such un-Islamic.

As a matter of fact, the settlement of full selling price is categorically laid down in the charge (annexure) document as follows:

In the event that the charger shall

(a) fail to pay or default in payment of any one of the monthly instalment under the properly sale agreement or other monies due and payable to the bank thereunder and under the properly sale agreement (for this purpose, failure to pay without demand on the due dates as stipulated in the property sale agreement shall be deemed to be a default);

(b) ...;

(c) ...;

(d) ...;

(e) ...;

Then, and in any of such cases, all monies and liabilities and other dues covenanted to be paid by the charger under this charge shall be immediately payable by the charger to the bank and the bank shall forthwith become entitled to recover the same and to exercise the rights and powers upon default under this charge and as provided by the law without any previous notice to or concurrence on the part of the charger.

The incorporation of such a provision is inconsistent with the very nature of a BBA transaction. Its opponents argue that the bank should be estopped from recovering the full balance of the sale price before the expiry of the stipulated period (say 20 years) and should be permitted to make a claim only for unpaid installments (arrears of installments due). This argument is rejected by Mohd Illiayas in the following words.

It is submitted that the aforesaid argument is, with respect, flawed. Whilst it may be true that the facility is granted for a specific period, the time to pay the sale price, however, is not deferred to the end of that period. The deferment is only up to the agreed period for payment of the next installment due. Further, the Quran requires all persons to honour their contractual obligations and it is implied that one who is delinquent in that regard may be penalized. On a practical note, however, the issue is only of academic interest as few financiers will grant facilities if they are required to postpone their right to foreclose on properties charged to them until expiry of the whole tenure of the facilities.

As such, the grounds of justification made by the learned writer are logically acceptable thus legalizing such an act by the bank which concludes discussion on the issue. In sum, the bank is entitled to claim the full selling price upon default and the appellant has no right to question its validity as far as syariah is concerned. Further, he should ad idem in treating the amount of RM583,000 as the amount given to him by the bank. Finally, Adnan should know about the existence of such a condition as a party to the contract, as a copy of charge documents and other related documents were given to him.

[24] Learned counsel for the plaintiff naturally relied on the case of AMMB to further the plaintiff's cause and attempts to distinguish *Affin's case* on the ground that there were two distinct actions in that case, namely, an application for an order of sale and the determination of the sum to be recovered while in the present case, there is one application and that is for an order of sale. With respect, the learned counsel is being technical in his contention and in fact ignoring prayer 1 of encl 3 which states the sum outstanding to be RM928,589.12 which is the sale price less the installments paid by the defendant.

APPROACH OF THIS COURT

[25] Abdul Hamid Mohamad JCA (as he then was) in the case of *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408 at p 411 said:

The Law

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 conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by 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.

[26] Not only do I agree with the sentiments stated in the above case, I am bound by them under the principle of stare decisis.

[27] In Sarawak, the relevant law is s 148(3)of the Sarawak Land Code (Cap 81) which was the subject of deliberations in *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, where his Lordship, Gopal Sri Ram JCA at pp 800–801 stated as follows:

Now, although s 148(3) of the Sarawak Land Code is similar in effect to s 254(1) of the National Land Code (see *Citibank v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96), ss 148(1) and (2) of the former are differently constructed from s 256 of the latter. Under s 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders: *the only consideration being that of justice in the circumstances of the case*. Thus, if a chargee applies for an order for sale, the court, by virtue of s 148(2), may if it does not in the circumstances seem just, refuse that order and in its stead make, for example, an order directing that the chargee receive the rents and profits from the charged land. Such an order may well be made in cases where the value of the charged property far exceeds the sum owing and the charged property is producing sufficient income to repay the loan within a reasonable time.

Contrast this with s 256 of the National Land Code the terms of which are imperative. In essence it says that the court 'shall' make an order for sale unless there is shown 'cause to the contrary'. So, the court is under a duty to make an order for sale when no cause to the contrary is shown.

[28] The power of this court under s 148(2) of the Sarawak Land Code (Cap 81) is a discretionary one as held in *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163, where the Supreme Court in dealing with the aforesaid section said (at p 166):

It is common ground that the power to grant the order for sale under the section is discretionary.

The phrase 'circumstances seem just' would seem to raise the question what are the circumstances existing that would make the order for sale not seem just.

[29] For the defendant, she in her words contends that though she 'is in default the plaintiff is not entitled in law and in equity to claim the said interests of RM495,205.64 after only a period of 14 months since the date of execution of the charge on 31 May 2002 as that interest of RM495,205.64 is for a period of 20 years or 240 months.(para 5 of encl 16)

[30] For the plaintiff, it is a matter of reading the words in the annexure of the memorandum of charge and property sale agreement (collectively referred to as the

BBA documents) which state plainly that on default, the defendant is required to pay balance of the sale price which is RM928,589.12 as at 21 February 2005.

[31] Section 6.02 of the annexure of the memorandum of charge states as follows:

> If the Chargor shall commit a default pursuant to s 6.01 hereof or if any of the events stipulated in s 6.01 hereof shall happen and which if capable of remedy is not remedied within a period of 7 days from the date of notice by the chargee requesting remedy of same or is not remedied within the time specially stipulated therefore (if any) in respect of the event in question the sale price and all other sums payable under this Charge and the Property Sale Agreement shall become and deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the Chargee shall be entitled forthwith to take such action as may be appropriate against the Chargor.
>
> The period of seven days shall be the period for the purpose of the Charge (in substitution for the period of thirty (30) days referred to in subsection 145(3) of the Sarawak Land Code

[32] Section 7.02 of the property sale agreement states as follows:

> If the Customer shall commit a default pursuant to s 7.01 or if any of the events stipulated in s 7.01 hereof shall happen and which if capable of remedy is not remedied within a period of seven days from the date of notice by the Bank requesting remedy of the same, or is not remedied within the time specially stipulated thereof (if any) in respect of the event in question, the sale price and all other sums payable under this agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the Bank shall be entitled without further notice to the Customer to enforce the Charge and or the Letter of Set-Off and all of the remedies available under the law.

[33] Sale price is defined in both documents to be the sum of RM995,205.64.

[34] Faced with such plain language in the aforesaid clauses, does this court have the option to ignore it?

[35] In my view, the answer is in the affirmative and my ground for saying so lies in the words used in s 148(2)(c) Sarawak Land Code (Cap 81) and they are '... and the court after hearing the evidence may make such order as in the circumstances seems just'. These words empower the court with the flexibility (as opposed to the imperative power in s 256 of the National Land Code 1965) to make any order even if it means ignoring the terms contained in the BBA documents provided it is just in the circumstance. Needless to say, the court must have good reasons to ignore or put in another way rewrite the terms therein. This involves the process of taking into consideration of 'all the circumstances of the case'. That would include the public interests, the peculiarities of the contract, and the compliances by the parties of the agreed terms contained therein. Of course at the end of the day, the primary aim must be to make an order as in the circumstance seems just.

[36] I will now embark on that process. Firstly to recap, the facts are these. The defendant in May 2002 took out a BBA banking facility and the same was for a period of 20 years with a monthly payment of RM4,107 for 240 months which was

the profit for the plaintiff. Unfortunately after 14 months, the defendant defaulted in her payment of the installment payments, resulting in the plaintiff taking out this action to recover the sale price less the installments paid by the defendant which she contends is inequitable and through her counsel urges this court to construe the terms in the BBA documents in the context of s 148(2) of the Sarawak Land Code (Cap 81).

[37] As mentioned above, s 148(2) of the Sarawak Land Code (Cap 81) talks of what is just, which in my mind, revolves squarely on the question of whether or not equity in the circumstance should intervene. What then is the circumstance in the present case? In my view, the circumstance in which the defendant finds herself in is similar to the circumstance where a vendor seeks to forfeit a large amount of money paid under an agreement for the sale and purchase of a parcel of land where it is normal for the sale price to be paid by way of installments with a provision for forfeiture of all payments made in the event of default of any installment payment. In such circumstance, equity had intervened. A case on point can be found in the case of *Stockloser v Johnson* [1954] 1 QB 476; [1954] 1 All ER 630. Denning LJ at pp 637–638 of his judgment sets out the principle as follows:

> It seems to me that the cases show the law to be this: (1) When there is no forfeiture clause. If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see *Palmer v Temple*; *Mayson v Clouet*; *Dies v British and International Co*; *Williamson Vendor and Purchaser* (4th Ed), p 1006. (2) But when there is forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v Drinkle*, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner
>
> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell LJ has said about it, differing herein from the view of Romer LJ. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money...
>
> In the course of the argument before us Somervell LJ put an illustration which shows the necessity for this equity even though the buyer is not ready and willing to perform the contract. Suppose a buyer has agreed to buy a necklace by instalments, and the contract provides that, on default in payment of any one instalment, the seller is entitled to rescind the contract and forfeit the instalments already paid. The buyer pays 90 per cent of the price but fails to pay the last instalment. He is not able to perform the contract because he simply cannot find the money. The seller thereupon rescinds the contract and retakes the necklace and resells it at a higher price. Surely equity will relieve the buyer against forfeiture of the money on such terms as may be just.
>
> Again, suppose that a vendor of property, in lieu of the usual 10 per cent deposit, stipulates for an initial payment of 50 per cent of the price as a deposit and a part payment; and later, when the purchaser fails to complete, the vendor resells the property at a profit and in

addition claims to forfeit the 50 per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages.

These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates, not because of the plaintiffs default, but because it is in the particular case unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense. This equity of restitution is to be tested, I think, not at the time of the contract, but by the conditions existing when it is invoked. Suppose, for instance, that in the instance of the necklace, the first instalment was only 5 per cent of the price; and the buyer made default on the second instalment. There would be no equity by which he could ask for the first instalment to be repaid to him any more than he could claim repayment of a deposit. But it is very different after 90 per cent has been paid. Again, delay may be very material. Thus in *Mussen*'s case the court was much influenced by the fact that the purchaser had allowed nearly six years to elapse before claiming restitution. He had already had a good deal of land conveyed to him and, during his six years delay, values had so greatly changed that it may be that he had had his money's worth. At any rate, it was not unconscionable for the defendant to retain the money.

[38] Lord Denning's statement of the law was adopted by the Federal Court in the case of *K Umar Kanda Rajah v EL Magness* [1985] 1 MLJ 116.

[39] I am aware that unlike the illustration above (which concerns a sale and purchase of land) there has not been a similar kind of payments by the defendant here. However the charging of her property to the plaintiff as security amounts to payments by the defendant for the simple reason that during the tenure of the charge the charged property for all intents and purposes belong to the plaintiff and further the value of the charged property is more than the amount of profit required to be paid by the defendant. Accordingly relying on the principles expounded by Lord Denning, I find that the circumstance here dictates that equity should intervene.

[40] I am fully aware that the BBA documents are drawn up based on Islamic principles and I am applying the common law principle of equity in construing the same. This approach is available to me as everyone knows the principle of equity is consistent with Islamic teachings.

[41] Further as the learned judge in the AMMB case at p 394 of his judgment said and I quote:

Stripped of all the heavy Arabic sounding words, any law student will feel less intimidated by any Islamic contractual transactions, as the fundamentals are not too dissimilar with most common-law contract. The latter and the Islamic contractual transactions in fact are not too dissimilar in their treatment too to all contracts, even those that are a bit dodgy eg those tainted by fraud, misrepresentation, inducement etc.

[42] Further interaction between Islamic laws and the common law in Malaysia is not something foreign and in fact had been in existence since way back in 965 (see address at Kolej Universiti Islam Malaysia by the present Chief Jstice of Malaysia,

YAA Tun Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, on *The Relationship Between Syariah And Civil Law In The Malaysia Legal System: Developments And Future Possibilities* — (http://www.kehakiman.gov.my/). A

[43] My approach is fortified by the conclusion reached in the *Affin* case which, with utmost respect to the learned judge in the AMMB case, I agree with. the learned judge may have approached the issue purely on construction of the contract basis and came to the conclusion that the real intention of the parties was that the sale price could be recovered only if the purchaser had the full use of the tenure of the facility. The path which the learned judge took to come to his conclusion is creative in view of the clear definition of the sale price in the property sale agreement. However in substance the learned judge had applied the principle of equity in his deliberations in redefining the meaning of 'sale price' contained in the property sale agreement. This can be discerned from the words used by his lordship, words like 'unearned profits', 'inconsistent with the borrower's right to the full tenure if he is required to pay the full bank's profit and denied the joyment of the full tenure' and '... the bank being able to earn a profit upon the same sum at the same time'. The aforesaid words are words by the courts when they are referring to the doctrine of unjust nrichment. Hence, I have no hesitation in regarding *Affin*'s case as an authority for the proposition that it would not be equitable to allow the bank to recover the sale pice as defined when the tenure of the facility is terminated prematurely. B C D

[44] Further it is in the public interests that the Islamic Banking industry continues to flourish in this country and abroad. Adopting the interpretation given by the learned judge in the *Affin* case would enhance that process. It is common knowledge that people have a preference to a BBA facility for the simple reason that they are better off than that of a conventional bank loan in terms of ringgits and cents as the amount of repayments in the nature of profits are slightly lower to the normal interests charged in conventional loans and fixed. In conventional loans, the interests for the loans move up and down according to market forces. That is how it is being marketed by the banking industry and the reason for its popularity. As such, people who take up a BBA loan should not be put in a worse position than had they taken a conventional bank loan. If the plaintiff in this case succeeds, there is no doubt that the defendant would be put in a worse position than had she taken a conventional one. In a conventional bank loan, the borrower will only be required to pay an amount outstanding as at the date of the recovery of the loan, which is the date of the sale of the charged roperty. This is of course one of the grounds which the learned judge in *Affin*'s case relied on in coming to his conclusion. E F G H

[45] It is also noteworthy to observe that the plaintiff has given credit to those installments paid by the defendant where in fact the BBA documents permit it to claim for the full sale price which is RM995,205.64. Nowhere in the aforesaid documents does it talk about giving credit to installments paid. By this waiver, the plaintiff itself is saying that to demand for the sale price may not be equitable or for that matter the intention of the parties. I

[46] I shall now deal with the amount which should be paid by the defendant. Applying the formula used in *Affin*'s case, the amount owing as agreed by counsels in encl 43A are as follows:

(1) Application profit rate
: 7.75% per annum

(2) Date if release of advance
: 14th May 2002

(3) Purchase price/advance
:RM500,000

(4) Period from the date of release of advance to 31 May 2006
:48.5 months

(5) Plaintiff's profit per annum
: RM500,000 x 7.75% per annum
= RM38,750.00 per annum

(6) Plaintiff's profit per month
: RM38,750/ 12 months
= RM3,229.17 per month

(7) Plaintiff's profit per day
:RM38,750/ 365 days
= RM106.16 per day

(8) Profit for expired tenure of advance (from 14 May 2002 to 31 May 2006)
:RM3,229.17 X 48.5 month
= RM156,614.74

(9) Total of advance and earned profit
RM500,000 (Purchase Price) +
RM156,614.74 (Profit for Expired Tenure)
=RM656,614.74 as at 31 May 2006

(10) Total Due and Owing after deduction for payments made by defendant
RM598,689.10 as at 31 May 2006

[47] For reasons stated above, in respect of prayer 1 of encl 3, I grant an order of sale of the defendant's charged property pursuant to the Sarawak Land Code (Cap 81) to recover the sum of RM598,689.10 as at 31 May 2006 and profit per day thereafter at RM106.16 until the date of satisfaction of the sum owing under the charge. As for prayers 2 and 3 of encl 3, I grant order in terms therein.

Application allowed.

Reported by Sally Kee