Malayan Banking Bhd v Ya'kup bin Oje & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–173 OF 2006–II
HAMID SULTAN JC
30 AUGUST 2007

Banking — Banks and banking business — Islamic banking — Whether bank was entitled as of right to full profits in event Islamic facility was terminated prematurely — Sarawak Land Code (Cap 81) s 148(2)(c)

At the request of the defendants, the plaintiff had granted the defendants a financing facility amounting to RM80,094 under the Syariah principle of Al-Bai Bithaman Ajil ('BBA') to finance the purchase of a property ('the property'). The facility was entered on 15 July 2003 and the defendants defaulted after paying the sum of RM16,947.62. The plaintiff sought for an order for sale under s 148(2)(c) of Sarawak Land Code ('the SLC') in consequence of the defendants' breach by non-payment of the sum of RM167,797.10 due and owing to the plaintiff as at 26 June 2006. The sum actually received by the defendants was only RM80,065, but the amount they had to repay was RM167,797.10 as at 26 June 2006, which sum on the face of it for the purpose of repayment only, would be seen to be excessive, abhorrent to the notion of justice and fair play when compared and contrasted with the secular banking facilities. In consequence of this glaring injustice, there were at least two High Court decisions (in *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67 and *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249) which had restricted the plaintiffs suing under BBA facility from recovering the full profits that they were entitled to under the agreement. The issue was whether the court should allow the order for sale for the repayment of the sum in the original form or restrict the order for sale as set out in the two High Court cases or make suitable orders or directions as the justice of the case requires and demands. The question to be decided was whether the plaintiff was entitled as of right to the full profits in the event the BBA was terminated very much earlier as in this instance, taking into consideration s 148(2)(c) of SLC or for that matter 256 of NLC.

Held, order accordingly:

(1) Islamic contract relating to commercial transaction is not only subject to the terms of the contract but must be decided subject to the Quranic injunctions and/or Islamic worldview as the case may be. For this very purpose, the court can on their own motion decide the issue or alternatively call experts to give their views, pursuant to s 45 of the Evidence Act 1950 or pose the necessary questions to the Syariah Advisory Council for their views (see para 39(a)).

(2) Section 148(2)(c) of the SLC makes it mandatory to exercise equity and the court may not grant the order if it is going to be perverse to the defendants. When it comes to justice and equity, similar powers is also preserved under s 256 of the National Land Code 1965 (see para 39(b)).

(3) As matter of practice, most of the Islamic banks do exercise their discretion and give a rebate, thereby keeping with the true spirit and intent of justice and equity under the Syariah law. Further, Islamic law of commercial transaction will not permit the bank to state the rebate for default under the BBA as Islamic law of contract, though it may appear to be similar to the secular law, is not the same. The Syariah law does not generally permit conditional contract, contract upon a contract, etc. However, this does not mean that Islamic bank cannot openly state their policy and rates of rebate without encapsulating in BBA agreements. This will promote transparency and equity. The fact that '*ibrar*' is unilateral does not stop Islamic banks from voluntarily relinquishing part of their claim or the court upon default by the customer to demand that proper concessions be granted to the customer on equitable grounds when exercising its jurisdiction and powers for order for sale under s 148(2)(c) of SLC or that of s 256 of NLC (see para 39(c)).

(4) Equity in this case applied both to the plaintiff as well as to the defendants. To obtain a just result and without dismissing this originating summons, the court would give an opportunity to the plaintiff to demonstrate equitable conduct by filing an affidavit stating: (i) that upon recovery of the proceeds of sale they will give a rebate; and (ii) specify the rebate. The amount specified must not be a nominal rebate but a substantial one taking into account the prevailing market force by banks generally, and the meaningful decision in the cases of *Affin Bank Bhd* and *Malayan Banking Bhd*. If the court is satisfied that the proposed rebate is just and equitable, it shall make an order in terms of the plaintiff's application, subject to the terms set out in the proposed affidavit. Otherwise, the court may not make the order as prayed or may make some other order as the justice of the case requires (see para 39(d) & (e)).

[Bahasa Malaysia summary

Atas permintaan defendan-defendan, plaintif telah memberikan defendan-defendan satu kemudahan kewangan berjumlah sehingga RM80,094 di bawah prinsip Syariah Al Bai Bithaman Ajil ('BBA') untuk membiayai pembelian harta tanah ('harta tanah'). Kemudahan tersebut telah dimasuki pada 15 Julai 2003 dan defendan-defendan telah mungkir selepas membayar sejumlah RM16,947.62. Plaintif memohon untuk satu perintah jualan di bawah s 148(2)(c) Kanun Tanah Sarawak ('KTS') berlanjutan daripada kemungkiran defendan-defendan secara tanpa bayaran untuk sejumlah RM167,797.10 yang tertunggak dan terhutang kepada plaintif setakat 26 Jun 2006. Jumlah sebenar yang telah diterima oleh defendan-defendan adalah hanya RM80,065, tetapi jumlah yang mereka perlu membayar semula adalah RM167,797.10 setakat 26 Jun 2006, yang mana jumlah yang tertera untuk tujuan pembayaran semula sahaja yang kelihatan keterlaluan, berlebihan kepada konsep keadilan dan saksama apabila membezakan dan membandingkan dengan kemudahan perbankan sekular. Berlanjutan daripada

ketidakadilan yang menonjol ini, terdapatnya sekurang-kurangnya dua keputusan mahkamah tinggi (dalam *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67 dan *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249) yang telah menghalang plaintif mendakwa di bawah kemudahan BBA daripada mendapatkan semula keseluruhan keuntungan yang mereka berhak di bawah perjanjian. Isu adalah sama ada mahkamah perlu membenarkan perintah jualan untuk bayaran balik jumlah dalam bentuk asal atau mengehadkan perintah jualan seerti mana digariskan dalam dua kes Mahkamah Tinggi atau membuat perintah atau arahan yang sesuai sebagaimana keadilan kes diperlukan dan dituntut. Persoalan yang perlu ditentukan adalah sama ada plaintif berhak sebagaimana haknya kepada keuntungan penuh apabila BBA ditamatkan seawalnya sebagaimana dalam keadaan ini, mengambil kira s 148(2)(c) KTS atau berkenaan dengan perkara 256 KTN.

Diputuskan, memerintahkan yang sewajarnya:

(1) Kontrak Islam berkenaan dengan transaksi komersial tidak hanya tertakluk kepada terma-terma kontrak tetapi mestilah diputuskan tertakluk kepada perintah Al-Quran dan/atau pandangan hidup Islam dalam keadaan tertentu. Berkenaan dengan tujuan utama ini, mahkamah boleh dengan usulnya sendiri menentukan isu atau secara alternatif memanggil pakar-pakar untuk memberikan pandangan mereka, menurut s 45 Akta Keterangan 1950 atau mengemukakan persoalan-persoalan yang perlu kepada Majlis Penasihat Syariah untuk pandangan mereka (lihat perenggan 39(a)).

(2) Seksyen 148(2)(c) KTS membuatkannya mandatori bagi melaksanakan ekuiti dan mahkamah boleh tidak membenarkan perintah jika menjadikan dibantah keras oleh defendan-defendan. Apabila ianya hadir untuk keadilan dan ekuiti, kuasa yang sama juga diperuntukkan di bawah s 256 Kanun Tanah Negara 1965 (lihat perenggan 39(b)).

(3) Apa yang dipraktikkan, kebanyakan bank-bank Islam ada melakukan budi bicara mereka dan memberikan rebet, oleh itu memastikan maksud sebenar dan tujuan keadilan dan ekuiti di bawah perundangan Syariah. Selanjutnya, transaksi undang-undang komersial Islam tidak membenarkan bank untuk menyatakan rebet untuk kemungkiran di bawah BBA seperti mana undang-undang kontak Islam, walaupun ianya mungkin menunjukkan persamaan kepada undang-undang sekular, adalah tidak sama. Undang-undang Syariah tidak secara amnya membenarkan kontrak bersyarat, kontrak ke atas kontrak, dan lain-lain. Tetapi, ini tidak bermakna bahawa bank Islam tidak boleh menyatakan secara terbuka polisi mereka dan kadar rebet tanpa dirangkumkan di dalam perjanjian BBA. Ini akan mempromosikan keikhlasan dan kesaksamaan. Fakta bahawa '*ibrar*' adalah satu pihak tidak menghalang bank-bank Islam daripada secara suka rela melepaskan sebahagian tuntutan mereka atau mahkamah apabila kemungkiran oleh pelanggan untuk menuntut bahawa konsesi sebenar dibenarkan kepada pelanggan atas alasan ekuiti apabila melaksanakan bidang kuasanya untuk perintah jualan di bawah s 148(2)(c) KTS atau s 256 KTN (lihat perenggan 39(c)).

(4) Ekuiti dalam kes ini terpakai kepada kedua-dua plaintif dan juga defendan. Untuk mendapatkan keputusan yang adil dan tanpa menolak saman pemula

ini, mahkamah akan memberikan peluang kepada plaintif untuk menunjukkan tindakan yang saksama dengan memfailkan afidavit yang menyatakan; (i) bahawa apabila mendapatkan semuka hasil penjualan mereka akan memberikan rebet; dan (ii) menyatakan jumlah rebet. Jumlah yang dinyatakan mestilah bukannya rebate yang sedikit tetapi satu yang cukup banyak yang mengambil kira secara lazimnya pasaran paksaan oleh bank-bank secara amnya, dan keputusan yang bermakna dalam kes-kes *Affin Bank Bhd* dan *Malayan Banking Bhd*. Jika mahkamah berpuashati bahawa rebet yang dicadangkan adalah adil dan saksama, ianya akan membuat satu perintah seperti dipohon dalam permohonan plaintif, tertakluk kepada terma-terma yang digariskan di dalam afidavit yang dicadangkan. Jika tidak, mahkamah tidak akan membuat perintah tersebut seperti mana yang dipohon atau membuat perintah yang lain sebagaimana keadilan kes yang diperlukan (lihat perenggan 39(d) & (e)).]

Notes

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

Cases referred to

Affin Bank Bhd v Zulkifli bin Abdullah [2006] 3 MLJ 67 (refd)
Bank Islam Malaysia Bhd v Adnan bin Omar [1994] 3 AMR 44 (folld)
Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd [2004] 4 CLJ 793 (refd)
Co-Operative Central Bank Ltd v Y & W Development Sdn Bhd [1997] 3 MLJ 373 (refd)
K Umar Kandha 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)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] 7 MLJ 249 (refd)
Public Bank Bhd v Teck Huat Bricks and Tiles Factory Sdn Bhd [2004] 3 MLJ 88 (refd)
RHB Bank Berhad v Alom Industries Sdn Bhd [2007] 3 AMR 670 (refd)

Legislation referred to

Evidence Act 1950 s 45
National Land Code 1965 ss 148(2), 256(3), 340
Rules of the High Court 1980 O 83
Sarawak Land Code (Cap 81) s 148(2)(c)

Cecil Ha Chung Yen (Kadir, Wong, Lin & Co) for the plaintiff.
Defendants not represented.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's originating summons seeking an order for sale under s 148(2)(c) of Sarawak Land Code (Cap 81) ('SLC') in

consequence of the defendants' breach of a facility agreement under the Syariah principle of *Al-Bai Bithaman Ajil* '(BBA') by non-payment of the sum of RM167,797.10 due and owing to the plaintiff as at 26 June 2006. The defendants are not present and represented.

BRIEF FACTS

[2] The defendants requested a sum of RM80,094 to facilitate the purchase of the property which is the subject matter of the sale. (a) At the request of the defendants, the plaintiff had granted the defendants a financing facility amounting to RM80,094 under the Syariah principle of BBA to finance the purchase of the said property. In accordance with the plaintiff's financing procedure and the Syariah principles, under the property purchase agreement and property sale agreement both dated the 15 July 2003, the defendants have agreed to sell and the plaintiff has agreed, at the request of the defendants, to purchase the said property subject to the terms and conditions therein contained for the purpose of immediately reselling the said property to the defendants at the agreed sale price of RM184,094 by deferred payment of RM409 for the first 12 months and thereafter the next instalment amount will be calculated based on the subsequent profit rate, remaining financing tenor and current financing amount outstanding ('the said sale price'). AND the payment to be made within 26 years. (b) That by the said charge, the defendants charged the said property to the plaintiff as security in consideration of the plaintiff advancing the said facility. (c) In breach of the covenants under the said charge, the defendants had defaulted in the monthly instalment payments as covenanted and failed to effect payment despite repeated demand.

[3] In this case, BBA was entered in 15 July 2003 and the defendants defaulted after paying the sum of RM16,947.62. From the facts it is clear that the sum actually received by the defendants is only RM80,065, but the amount they have to repay is RM167,797.10 as at 26 June 2006, which sum on the face of it for the purpose of repayment only, will be seen to be excessive, abhorrent to the notion of justice and fair play when compared and contrasted with the secular banking facilities. In consequence of this glaring injustice, there are at least now two High Court decisions which have restricted the plaintiffs suing under BBA facility from recovering the full profits that they are entitled to under the agreement (see *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67; *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249). The issue now for me to decide is whether I should allow the order for sale for the repayment of the sum in the original form or restrict the order for sale as set out in the above two cases or make suitable orders or directions as the justice of the case requires and demands. I would have take into consideration the commercial impact of the said decision at a time Malaysia is seen and promoted to become one of the world leaders in Islamic Banking and balance it with need for the courts to protect the consumers within the parameters of justice and equity, as entrusted to the courts under the Federal Constitution.

PLAINTIFF'S ARGUMENT

[4] The plaintiff in support for the order for sale says that I should not follow the two decisions above and grant the prayers, and to justify the same inter alia submits as follows:

(a) First the plaintiff says that the sale of land under SLC must be given the same narrow and restricted interpretation as the expression 'cause to the contrary' under s 256(3) of the National Land Code 1965 ('NLC') and relies on the case of *Public Bank Bhd v Teck Huat Bricks and Tiles Factory Sdn Bhd* [2004] 3 MLJ 88. In the said case, Datuk Clement Skinner J had analysed the said provision and had opined that in an application for sale of land under the provisions of SLC, the judge should direct himself in the way stated by the Federal Court in the case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 in relation to NLC. In *Low Lee Lian*, the Federal Court also observed that 'cause to the contrary' may be established only in three categories of cases namely: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC. (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale. (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to *some rule of law or equity* (emphasis is mine). As a rider, I will say in my view the phrase *some rule of law or equity* cannot be encapsulated in a narrow and restricted manner. Equity is always a practical and vibrant concept based on which the court must decide on the facts of each case to administer substantive justice. Further, in *Public Bank Bhd*, it was also asserted that the Federal Court had said that an application for an order for sale of charged land is a speedy and summary procedure where the judge is concerned with three things, namely: (i) whether the chargee has given the appropriate statutory notice as stipulated in the NLC; (ii) that the procedural requirements prescribed by O 83 of the RHC have been complied with; (iii) the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary. As a rider, I will say that the object of O 83 of the Rules of the High Court 1980 (RHC 1980) is to identify clearly the facts relating to liability and quantum under the charge. As Syariah instrument, such as BBA, is not interest based, O 83 may appear not to be relevant. However, if the rules of procedure do not cater to such Syariah instrument, there is no legal prohibition under our procedural law for the judge to direct compliance of the rules as near as possible with necessary variation as the justice of the case may require. Some writers on Islamic Banking tend to over react to O 83 in their writings which emotion only shows the writer's lack of knowledge of procedural law, its intent and spirit.

(b) On the issue of discretion of court, in *Low Lee Lian*, the Federal Court made the following observation:

> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations

A raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.

It must be said here that the Court of Appeal recently had an opportunity to consider the scope of s 148 of the SLC in the case of *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793. Gopal Sri Ram JCA made the distinction between the said provision and s 256 of the NLC, particularly the fact that under the SLC, the court has the option to make one of three orders; either an order entitling the chargee to enter into possession and be registered as proprietor (s 148(2)(a)), to receive the rents and profits of the charged land (s 148(2)(b)) or an order for the sale of the charged land (s 148(2)(c)).

(c) Secondly, the plaintiff says that until and unless it is judicially pronounced otherwise, cases such as *Public Bank Bhd* still provides invaluable guidance as to the practice in respect of an order for sale under s 148 of the SLC. On this issue, I will cite the observations of the Court of Appeal in the case of *Century Land Resources Sdn Bhd* which reads as follows:

> The only reason we make these points is to draw attention to the danger of courts in Sarawak applying decisions under s 256 of the National Land Code, such as *Low Lee Lian* without addressing the differences between the two provisions. They must keep in the forefront of their minds that the section they are dealing with is very different from that applied by the courts in the States of Malaya.

(d) The plaintiff also admits that the power to grant an order for sale under the SLC is a discretionary one and relies on the case of *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd And Another Appeal* [1991] 3 MLJ 163. In my recent decision in *RHB Bank Berhad v Alom Industries Sdn Bhd* [2007] 3 AMR 670 in dealing with s 148(2)(c) of SLC, I made the following observations:

(8) To determine whether the order for sale ought to be allowed, I need to be satisfied that it is just on the facts of the case as it stands to allow the application. In doing so I must take into consideration the following:

(i) in a statutory sale on a charge action, the chargee is not attempting to sue for the debt the borrower owes but he is only exercising his statutory remedy against the chargor. In consequence, the defence of the chargor that the claim is excessive or in breach of the terms of the charge must be mounted by a separate action against the chargee and cannot generally be raised to defeat the chargee's application for sale. This is so because the charge action is an action in rem i.e. against the property per se and not an action in personam to settle issues relating to the debt.

(ii) the chargee must comply with all statutory as well as procedural requirements before the order for sale is granted. Any breach of the chargee in almost all cases will be strictly construed in favour of the chargor.

(9) The defendant says that there is a fundamental breach. In my view, I will not treat it as a fundamental breach as there is no provision under the charge whatsoever to say so. If there is a breach it may only amount to a

breach entitling the defendant to claim damages and is not sufficient to defeat the statutory order for sale. However, for the purpose of a sale under s 148, the court can consider whether the conduct of the plaintiff was just, otherwise an order for sale can be refused. In that sense, an order for sale of property under SLC is not a statutory right to the chargee but is a discretionary relief vested on the court to exercise in the event it is just. In my view, the test will be that once the defendant places prima facie facts to satisfy the court, the conduct of the plaintiff is unjust and is not within the letter, interest and spirit of the charge document, it is necessary for the chargee to satisfy the court that the decision to recall for the facility and proceed with the sale was necessary and expedient to protect the chargee's interest on the circumstance of the case.

(10) On the facts of this case, whatever breach the defendant complains of can be adequately dealt with in a personam action and it is frivolous, vexatious and abuse of process of court to raise it in a charge action when the defendant has defaulted in payment and is continuously in default. Also there is no evidence before the court to remedy the breach by payment of the sum due notwithstanding the time period for the breach has lapsed. In such circumstance, it will not be just not to allow an order for sale.

(11) The powers vested in the courts to refuse an order for sale under SLC is much wider than that given under the National Land Code 1965 (Code). For, under the Code, an order for sale is almost always granted if all statutory and procedural requirements are duly complied with, unless the chargor can satisfy the court of the existence of cause to the contrary. However, under the SLC, to some extent the law enables the court to subject the exercise of the legal rights of the chargee to equitable considerations; considerations that is of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way as was advocated by Lord Wilberforce, in the decision of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 in a winding up petition on just and equitable grounds, and that phrase in my view will be equally applicable to make such order as in the circumstance seems just as set out in s 148(3) of SLC.

(e) Finally, the plaintiff asserts that enforcement of the said charge by the plaintiff is an assertion of a statutory right and not an action upon a covenant and relies on the case of *Co-Operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373.

PLAINTIFF'S SUBMISSION ON BBA

[5] The plaintiff says the BBA banking facility is a form of financing facility premised on Syariah principles, whereby the banking institution will finance borrowers who wish to acquire an asset but to defer the payment for the asset for a specific period or to pay by installment (deferred payment sale). In essence, the plaintiff says the bank will purchase the property and thereafter sell the property to the borrower and the difference between the purchase price paid by the bank and the

A sale price is considered to be the profit earned by the bank for the tenure of the facility. The plaintiff relies on the case of *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249 where David Wong Dak Wah J had dealt with BBA and similar issues as in the facts of this case in an articulate manner. In this context, the plaintiff says and I quote:

B (a) the question that continues to plague members of the legal fraternity as well as the banking industry in relation to BBA facility is this: 'Whether a financier is entitled to claim the full profit from the borrower in the event the agreement is determined upon the default of the borrower.' It comes as no surprise then that this confusion and uncertainty, has been compounded by conflicting judicial pronouncements on this point. On the one hand, the case of *Affin* C *Bank Bhd v Zulkifli Bin Abdullah* [2006] 3 MLJ 67 suggests that banks cannot claim the full sale price of the property in the event of default by the borrower. On the other hand, the case of *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 permits banks to claim the profit of the full tenure from the borrowers.

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[6] On the present issue addressed by the plaintiff, I find it encouraging and courageous for the writer Habib Rahman bin Seni Mohideen to demonstrate his legal scholarship in Syariah Banking in a manner never attempted by our local writers in his article captioned *Affin Bank Bhd v Zulkifli Abdullah — Shariah Perspective* [2006] E 3 MLJ i to say:

> The Islamic banking industries must be given space to find its own solution in remedying the situation.
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> However if the current trend continues the court may intervene to remove the exploitation and injustice. The court as guardian of justice can interfere in the contract between the F banks and its customers on the principle of *Adl Wa Ehsan* (justice and equity). It is revealed in the Al Quran 16:90 'God commands justice and fair dealing'.
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> The court may readjust the contractual obligations judicially if the parties are unable to find an amicable settlement. There are various legal maxims which are applicable in financial transactions such as:
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> G
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> No harm may either be inflicted or reciprocated
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> Necessities allow actions which would otherwise be prohibited
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> Harm must be removed
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> H If a contract between the contracting parties becomes an instrument of injustice, a judge cannot ignore the unfairness and insist on strict adherence to the letter of contract. Hence, a judge is empowered to set aside a contract when the fact discloses gross unfairness on one of the parties as Islamic system is a just and equitable system that promotes close relationship between the banks and the customers based on cooperation and equitable sharing of risks and rewards.

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[7] The article of the learned writer which I have read in full, shows maturity, addresses the current issues which tarnishes the image of Islamic Banking System and proposes ways and means to achieve growth and success in Islamic Banking within the spirit and intent of Syariah law as opposed to some articles written by writers who

asserts in a mischievous manner that under the Syariah if '*you agree you must pay*', without balancing the argument in favour of the debtor. In respect of the above article, I wish to say that Islamic Banks are only traders or venture capitalists. As any traders or venture capitalists, they are subject to the laws of the country and obliged to trade within the norms of their trading license. There is nothing sacrosanct about the service they provide. Courts have to ensure that nobody exploits the public by dubious methods and propagate justification through formulas and concepts with which the public is not well acquainted currently. It is the constitutional obligation of the courts to ensure that at all material times, justice prevails in the right perspective, both for Islamic Banks as well as consumers. In this respect, the courts must not reduce the status of Syariah banks to charitable institutions but ensure and respect that they are trading institutions entitled to earn profits out of their investment and only in exceptional circumstance such as where there is default to adjust their profits according to the facts and justice of the case as required under the Syariah principles and practice.

[8] Further, the plaintiff submits in *Affin Bank Bhd*, the defendant obtained a secured housing loan of RM394,172.06 from the plaintiff under the BBA in 1997. The defendant defaulted in 2002 after paying the plaintiff RM33,454.19 and the plaintiff claimed the full sale price of RM958,909.21, inclusive of the plaintiff's profit margin for the full term of the loan. The plaintiff applied for an order for sale of the charged property and the defendant challenged the amount claimed. In granting an order for sale and reducing the amount of repayment, Abdul Wahab Patail J held:

(1) 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 (see para 29).

(2) 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 (see para 29).

(3) 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 (see para 34). The total due on the date of the judgment was RM616,080.99 and after crediting the defendant with all the payments he had made of RM33,454.19, the balance due on the date of judgment was RM582,626.80 (see para 37).

(4) 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 (see para 45).

[9] The plaintiff asserts the said property is charged to the plaintiff in this case to secure the payment of the sale price only and says the plaintiff is hereby exercising its

statutory right to sell the said property to recover the sum owing under the property sale agreement and relies on *Arab-Malaysian Merchant Bank Bhd*, where Suriyadi J (as he then was) opined:

> As it is now, despite being hampered by the paucity of adequate precedents and authority, it is my considered opinion that any transacted Islamic banking business must be presumed to be in order at the outset unless rebutted later (see s 114(e) of the Evidence Act 1950). At its inception, so long as the bank genuinely adheres to the very fundamentals of the al-Quran and authentic ahadith, ie, the exact demands of the religion of Islam, and the papers on the face of it are in order, that bank may proceed with the relevant banking transaction. Any slip-shod preparatory work by the bank merely makes the rebuttal easier.
>
> In the event any litigation is commenced, it must be appreciated that not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulamaks take years to comprehend. Grounded on those reasons, and by the manner of the provisions so enacted any court must accept the matter as being in order at first instance, until challenged. By analogy, in any foreclosure case, if the cause papers are in order, unless there is cause to the contrary as contended by the charger, the order must be given.
>
> Further, in that case the court suggested that any question that arises concerning a Syariah matter, the court may refer such question to the Syariah Advisory Council, pursuant to Central Bank of Malaysia (Amendment) Act 2003 (Act A1213) new provision of 16B(8).

[10] In crux, the plaintiff submits that the decision of *Arab-Malaysian Merchant Bank Bhd* must be preferred and the Supreme Court decision in *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 AMR 44 should be followed.

[11] The plaintiff relies on a number of articles written by various writers to support the plaintiff's application and also attempts to refresh my memory by referring to an article written by me under the caption *Is There A Need For Legislative Intervention To Strengthen Syariah Banking And Financial Instruments?* [2002] 3 MLJ clxx and says as follows:

> Your Lordship had taken the view that arguments, that one is bound by contractual obligation, such as that in the Adnan case, is a fallacy in Syariah law when it has to be tempered with justice and equity. In the same article, Your Lordship had also acknowledged that as a matter of practice, banks exercise their discretion and give a rebate thereby keeping within the true spirit and intent of justice and equity under Syariah law. Your Lordship had suggested that legislative intervention is required to ensure that Syariah banking activities are not hampered in the event the court rules that a document infringes the Syariah law and/or civil law.

[12] At the outset, I wish to assert that articles written by purported scholars who in the affirmative sense stress that the Quranic injunctions requires parties to be bound by the agreement and in consequence the BBA must be honoured ie, 'you agreed to pay you must pay' such syllogism, is hogwash within the framework of Islamic Jurisprudence. When parties enter into Islamic commercial transaction, it is always subject to Quranic injunction to act with justice and equity and there is a need for the parties entering into such commercial dealing to respect Islamic worldview on such transaction; more so in the fairness to ensure that the deal is

completed as per the terms and the need to mitigate the breach, taking into consideration various principles, inclusive of the concept that says that excess profit is not permissible. In crude terms, one cannot borrow the Islamic label for obtaining benefits only but must balance it with justifiable burden, for the Syariah in the strictest term has propagated in all trading activities that there must be risk involved. 'No risk no gain' is an entrenched concept in Islamic commercial transactions. If there is no risk, such transaction may infringe on the riba rule. Islamic Administration of justice will never permit trader or venture capitalists to strip the loin cloth of the borrowers. This is one of the major distinctions from the secular system. Under the secular system, contracts can be framed reducing all risks and earn a profit by way of interest. Under the Syariah administration of justice, such legal trick and scholarly arguments to perpetuate injustice will not be entertained. It is most unfortunate event for Islamic banks to insist on the legal rights under the facility agreement and finally proceed to make a person a bankrupt under the secular law and not Islamic law for Islamic law as I said earlier will not allow indignation to a person. My reasons are as follows:

(a) Islamic law of commercial transaction fundamentally is rooted on the premise of total eradication of *riba* and *gharar* (uncertainty). It is seen as a coherent system designed to cater for human welfare to achieve maximum benefit. The law of commercial transaction balances the moral and material needs of society to achieve socio-economic justice. The very objective of the Syariah is to promote the welfare of the people, which lies in safeguarding their faith, life, intellect, posterity and property.

(b) The Quran emphatically instructs Muslims not to acquire each other's property *bi-al-batil* or wrongfully (2:188 and 4:29).

(c) To understand Islamic principles of commercial transaction, it is essential to understand Islam, its worldview and Islamic economics, in relation to commercial transaction.

    (i) Islam essentially requires a total and unqualified submission to Allah, the Almighty. The Quran has specifically stated the obligation of man to Allah, his family, his society and to the nature. Fulfilling this obligation is truly part of acts of worship or ibadah. All obligations are interlinked and are placed to ensure the continuous success of the State, subject and economy. An ideal and successful society in Islamic perspective is seen to be one where all the obligations are practiced in full. The practice in its full form is truly the '*din*' or religion of Islam. Worshipping Allah alone does not complete the '*din*'. Looking after the needs of the family, society and the nature are all essential for human survival and it becomes part of ibadah and '*din*'. Without economic activities, society cannot exist. The true ibadah for a Muslim in all transaction is to subscribe to economic activities in line with the Quran, Sunnah and other sources of Islamic law.

    (ii) The word Islam can be said to be abstract but its meaning is understood by the whole world as denoting a religion. The word *din* literally means religion. The similarity is that both refer to the submission to the will of Allah. In that respect, man is seen to be the servant (*abd*) and vicegerent (*khalifah*) of Allah. He has specific duties to perform. Syariah law states that

A the absolute owner of the property is Allah. Man is his *abd* and *khalifah*. Though a person may possess property at his disposal, he is subject to Islamic norms in dealing with his property. To some extent, the Syariah law of commercial transaction regulates the disposal of properties.

(iii) The secular economic principles address the problem of consumption, B production and distribution. In contrast, Islamic economic principles forecast on the manner to eradicate poverty. Equitable distribution is one of its goals. Islam views that inequity is created by mass exploitation of resources to obtain maximum profit. Principles of Islamic commercial transaction are nurtured to check exploitation, inequities and the creation of economic imbalances in society. All Islamic transaction is subject to C Islamic worldview and has to be developed according to a methodology that is founded upon this worldview. Islamic law has developed various principles applicable to commercial transaction to eliminate exploitation in business transaction and to eradicate unjust enrichment. The most striking principles are seen in respect of riba and gharar. It will appear that these D principles have never been advocated by Islamic Banks operating its business here or there are no fatwas directing Islamic Banks to comply with the related Quranic injunctions or Islamic worldview. A borrower under Islamic commercial transaction cannot in the true sense be a subject of insolvency proceedings under the Syariah law or practice.

E (d) Support for what I have said above is found in the writing of many scholars. Some of these have been cataloged in the article title *Islam, The Islamic Worldview, And Islamic Economics* [see IIUM Journal of Economics & Management 5, no 1 (1997): 39–65]. The relevant part reads as follows:

F This understanding of religion is not necessarily accepted nor applicable to all societies and civilizations. It is a description of the experience and history of western Christianity. Eliade (*Encyclopedia of Religious* 12, 1987) states that:

> … this dichotomy between the religious and the remainder of human life is a western product and concern … This distinction between the sacred and the profane, between religion and other aspects of human endeavour is a result of the G process of secularization that has been the experience of Christian/Western civilization especially since the 17th century.

In Islam, it is this dichotomy and separation of 'religion' from other aspects of life that is contradictory, incoherent, and meaningless. For 'religion' in Islam, as H understood by Islamic scholars and based on its own sources of knowledge, cannot be equated with the concept of religion as understood in the west today. The significance, relevance and centrality of Islam to Muslims is not bound by a time period in 'human evolution' but has values, standards and criteria which are absolute. Religion is not a 'human creation' of, and for, 'infantile man,' but is a representation of a 'way of life' for all times. The term used to denote 'religion' in the Holy Qur'an I is din and does not limit itself to the personal rituals and faith/dogma as usually understood by the term religion. As mentioned by Watt (1979: 3 4), the term din refers more to a:

> …Whole way of life …covers both the private and public/societal lives of man, it permeates the whole fabric of society, and includes theological dogma, forms of

worship, political theory and a detailed code of conduct, including even matters which the European would classify as hygiene, or etiquette …

As far as Islam is concerned, we will argue that the concept of din is one of the central elements in the Islamic worldview and provides an all encompassing ethos for man. More specifically, the economic vision of Islam cannot be envisaged without accepting the all pervasive concept of din. In Islamic scholarship, besides referring to the Qur'an and the Traditions of the Prophet Muhammad (pbuh), semantic analysis is another tool used in trying to grasp the importance of this term and its relationship with other key terms and cultural concepts which provide a 'conceptual grasp of the Islamic worldview' (Izutsu, 1964).

Al Attas (1978) talks of the relationship between din, the Islamic worldview, and its implications on ethics and morality. He stresses the importance of language in elaborating the meaning of fundamental terms and concepts which represent the worldview of a people. These key terms and concepts, referred to as the basic vocabulary of Islam, must be preserved in meaning in order to provide a meaningful and consistent Islamic worldview. This can only be done if the verses in the Qur'an, the Traditions of the Prophet, their commentaries, and the linguistic works of past scholars are referred to and understood correctly. However, this does not imply that Muslims should be bound by rigid details of the worldview of past scholars in all matters. While the fundamentals of the Islamic worldview are not subject to change, its manifestation in 'secondary areas' like economics would require flexibility and development according to the times and situations. The ability to derive solutions for contemporary problems based on the unchanging Islamic worldview is the biggest challenge facing contemporary Islamic economists. While the explicit laws and norms laid down in the Qur'an and Sunnah are fixed, the majority of economics today would not be covered explicitly. Interpretations of the texts become a central methodological issue. The derived implicit values in turn must proceed from the Islamic worldview which centres, among others, on the concept of din or religion.

The term din appears in the Holy Qur'an 92 times and is used in different contexts to give the following meanings: debt, obedience, judgment and way/custom/religion. It is natural for man to obey and submit to God's will in all aspects of his worldly life (Qur'an 51:56). While obedience forms the central purpose of life, what this means in economic matters depends on how one interprets 'God's will' with respect to economic pursuits.

The implication of man's acceptance of the covenant with God (Qur'an 7:172) is that man has to judge himself and others, based on God's criteria as represented by the various revelations sent to man at different times through all the Prophets and messengers, and by using his intellect to interpret and understand the criteria (Qur'an 4: 150 152, 163 165; 10:47; 2:121; 39:42; 47:24;). But man, if his lower self is not controlled by his higher self, has a tendency to forget this covenant and his natural inclination to submit to God, hence the need for 'religion,' revelation and prophets. Also, man is the only creation that was given 'free will' or the ability to make conscious choices (Qur'an 18:29). In Islam, all the previous prophets from Adam till Isa (Jesus) are recognized and are part of the beliefs of Muslims (Qur'an 4:150 152). The Holy Qur'an is considered to be the final and complete revelation for man and the Prophet Muhammad is the seal of prophets (Qur'an 33:40). Based on this permanent revealed knowledge, man then uses his 'aql to organize his life on earth. The interpretation and understanding of this revealed knowledge become central in all human endeavour, and a proper understanding of the Islamic worldview is a necessary pre condition in all efforts to build Islamic 'systems of thought,' and hence policies, in the various disciplines.

A CONCEPT OF JUSTICE AND SYARIAH

[13] Central to the concept of Islam is Justice. All transactions whether it is judicial, political, commercial or private etc. are subject to this concept. In the Qur'an, (*al-Hijr*: 85) states that:

B

> We created not the heavens, The earth, and all between them, But for just ends. And the hour is surely coming (when this will be manifest). So overlook (any human faults) With gracious forgiveness.

This concept has been emphasised in various places in the Holy Qur'an (see the Qur'an (*al-Maidah*: 8); Qur'an (*an-Nisaa*: 135); Qur'an (*ad-Dukhan*: 38–39); Qur'an (*an-Nisaa*: 58) and Qur'an (*an-Nisaa*: 105); Qur'an (*al-Baqarah*: 213); Qur'an (*ash-Shura*: 15); Qur'an (*an-Nisaa*: 107); Qur'an (*Sad*: 26); Qur'an (*al-Hadid*:25)). In Islam, man is seen to be the servant (abd) and vicegerent of Almighty. He has specific duties and obligations to perform in relation to Allah, to himself, to nature, to the religion, to his relatives and to the community. Islamic ethos demands that a Muslim abides by the messages of the Holy Qur'an, follow the Sunnah of the Prophet (pbuh) and accept the rulings of recognised religious scholars of the past. A Muslim is imposed with a greater duty and responsibility and must abide by this ethos to achieve fallah (success). Justice in Islam is part of Allah's attribute and to stand firm for it is to be a witness to Allah [see the Qur'an (*an-Nisaa*: 135)]. In the Qur'an, (*al-Maidah*: 8) it is asserted that:

C D E

> O ye who believe! Stand out firmly, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear God. For God is well-acquainted with all that ye do.

In addition, the Qur'an, (*an-Nisaa*: 135) says:

F

> O ye who believe! Stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it be (against) rich and poor: For God can best protect both, follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily God is well-acquainted with all that ye do.

G Furthermore, in the Qur'an (*ad-Dukhan*: 38-39) it is asserted that:

> We created not the heavens, the earth, and all between them, merely in (idle) sport. We created them not except just ends: but most of them do not understand.

Further, the Qur'an (*an-Nisaa*: 58) says:

H

> God doth command you to render your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: verily how excellent is the teaching which he giveth you! For God is He who heareth and seeth all things.

In addition, in the Qur'an (*al-Baqarah*: 213) it is asserted that:

I

> Mankind was one single nation, and God sent Messengers with glad tidings and warnings; and with them He sent the Book in truth, to judge between people in matters wherein they differed; but the People of the Book, after the clear Signs came to them, did not differ among themselves through selfish contumacy. God by His Grace guided the Believers to the Truth, concerning that wherein they differed. For God guides whom He will to a path that is straight.

The Qur'an (*ash-Shura*: 15), over and above says: A

> Now then, for that (reason), call (them to the Faith), and stand steadfast as thou art commanded, nor follow thou their vain desires; but say:' I believe in the Book which God has sent down; and I am commanded to judge justly between you. God is our Lord and your Lord: For us (is the responsibility for) our deeds, and for you for your deeds. There is no contention between us and you. God will bring us together, and to Him is (our) final goal. B

Further, in the Qur'an (*an-Nisaa*: 107) it is asserted that:

> Contend not on behalf of such as betray their own souls; for God loveth not one given to perfidy and crime. C

The Qur'an (*Sad*: 26) furthermore says:

> O David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (and justice): nor follow thou the lusts (of thy heart) for they will mislead thee from the Path of God; for those who wander stray from the Path of God, is a Penalty Grievous, for that they forget the Day of Account. D

Moreover, in the Qur'an (*al-Hadid*: 25) it is asserted that:

> We sent aforetime our apostles with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice; and We sent down Iron, in which is (material for) mighty war, as well as many benefits for mankind, that God may test who it is that will help unseen, Him and His apostles: for God is Full of Strength, exalted in Might (and able to enforce His will). E

[14] Learned author, Ahmad Qadri (1982) aptly summarises the concept of justice by stating that justice in Islam is much higher than the so called distributive and remedial justice of Aristotle, the natural justice of the Anglo-American Common Law, the formal justice of the Roman Law, or any other man-made law. Moreover, he says that it searches out the innermost motives of man, because he has to act as in the presence of God, to Whom all things, acts, and motives are known. It is trite that Islam is against all kinds of injustices and warns the wrongdoers. Support for this proposition can be found in many of the verses in the Holy Qur'an [see The Qur'an (*al-Imran*: 57); Qur'an (*al-Imran*: 86); Qur'an (*al-Maidah*: 29); Qur'an (*Yunus*: 13) and Qur'an (*Hud*: 113); Qur'an (*al-Imran*: 18); Qur'an (*Ghafir*: 20); Qur'an (*al-Anbiyaa*: 47); Qur'an (*at-Tin*: 8); Qur'an (*al-An'am*: 115); Qur'an (*al-Jathiya*: 18); Qur'an (*al-Hadid*: 25); Qur'an (*al-Nahl*: 90); Qur'an (*an-Nisaa*: 58); Qur'an (*al-Maidah*: 45); Qur'an (*ar-Rahman*: 7 to 9)]. In the Qur'an (*an-Nisaa*: 58), it is asserted that: F G H

> God doth command you to render your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: verily how excellent is the teaching which he giveth you!. For God is He who heareth and seeth all things. I

Further, the Qur'an (*an-Nisaa*: 105) says:

> We have sent down to thee the Book in truth, that thou mightiest judge between men, as guided by God: so be not (used) as an advocate by those who betray their trust.

[15] From the above verses it can be argued that substantive justice is of paramount importance and must be delivered by the judge to the litigant. In the eye of Allah, a person who judges and fails to deliver substantive justice will be in breach of the Islamic Injunctions as promulgated in the Holy Qur'an. There are a number of Hadiths which supports this proposition. For example, *Sunan Abu Dawud* [see Abu Dawud, (Hasan, Ahmad, Trans 1990), vol 3], where it is narrated that:

> Judges are three types, one of whom will go to paradise and two to hell. The one who will go to paradise is a man who knows what is right and give judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to hell; and a man who gives judgment for people when he is ignorant will go to hell.

It is also narrated by Abu Dawud that:

> When a ruler gives a decision having tried his best to decide correctly and is right, he will have double reward; and when he gives decision having tried his best to decide correctly and is wrong, he will have a single reward.

In this commentary to the hadiths, the translation writes:

> This shows that a competent mujtahid is not a sinner if he commits an error in his decision, rather he will get a single reward. In case he is right, he will get double reward: one for his effort and the other for right decision. But it is remarkable that a competent man should exercise ijtihad. Every layman is not allowed to derive the rules of law from Qur'an and Sunnah. A mujtahid must have perfect knowledge of the Qur'an, traditions (*sunnah*) of the Prophet (may be peace upon him), consensus (*ijma*'), of the Muslims, opinions of the Companions and method of employing analogy (*Qiyas*).

[16] Thus a Muslim adjudicator is bound by Islamic Injunctions and is duty bound to deliver substantive justice. A judge within a context of the Qur'an and Hadith can said to be in dereliction of judicial duty if he fails to hear a case on its merits and/or dismisses a case for non-compliance of rules, without condoning the non-compliance or fails to order the litigant to comply with the rules before hearing the matter on merits. Support for this proposition can be indirectly garnered from a number of Hadiths. For example, in Sunan Abu Dawud it is reported that:

> If a Muslim decides unjustly or does not give his judgment according to the Quranic injunctions, he does not become an unbeliever. He is a sinner and evil-doer. Ibn 'Abbas says that these verses were revealed about the Jews who violated the covenant with the Prophet (may peace be upon him). These verses refer to Jews and not to Muslims. An unjust and tyrannical judgment is a grave sin but not unbelief.

[17] Islam not only represents a religion but also a complete way of life. The golden thread of Islam is justice. Justice is Supreme. It is not an understatement to say that the primary object for the creation of the universe is to uphold justice and truth. In the Qur'an (*al-Hijir*: 85) states:

> We created not the heavens, The earth, and all between them, But for just ends.

[18] It is undoubtedly clear that the Holy Qur'an condemns all forms of injustice and those who are associated with the perpetrators of injustice. In the Qur'an

(*al-Imran*: 57) it is stated that: 'But Allah loveth not, Those who do wrong.' Further, in the Qur'an (*al-Imran*: 86) it is stated that: 'But Allah guides not, A people unjust.' Furthermore, it must be emphasized that all wrongdoers cannot escape the eye of Allah. In the Qur'an (*al-An'am*: 58) it is stated that: 'But Allah knoweth best, Those who do wrong.

[19] The punishment for those who do wrong are spelled out in the Qur'an (*al-Maidah*: 29) where it is mentioned that:

> For thou wilt be among, The companions of the fire, And that is the reward, Of those who do wrong.

[20] In the Qur'an (*Yunus*: 13) is a clear message that Allah has destroyed wrong doers in the past. It says that:

> Generations before you, We destroyed when they, Did wrong: their Apostles, Came to them with Clear Signs, But they would not believe! Thus do we requite, Those who sin!

[21] The Holy Qur'an not only condemns those who are unjust but also those who are associated with or lend support expressly or impliedly to the unjust acts. In the Qur'an (*Hud*: 113) it is stated that:

> And incline not to those, Who do wrong, or the Fire Will seize you; and ye have, No protectors other than Allah, Nor shall you be helped.

[22] One is even prohibited from sitting in the company of unjust persons. In the Qur'an (*al- An'am*: 68) it is stated that:

> After recollection, sit not, Thou in the company, Of those who do wrong.

[23] Thus, the concept of justice in Islam is seen to be Supreme. Without justice, Islamic virtues cannot be successfully applied and practiced. Whatever transaction, whether it is commercial or private or whatever decision, whether political or private, there is a duty imposed on all Muslims to come to a just conclusion, within the tenets of Quranic injunctions and Islamic world view. This makes it more important for a Muslim adjudicator not only to comply with the positive laws but the judicial ethos necessarily needed to comply with the Islamic injunctions.

RIBA TRANSACTION PROHIBITED

[24] The Almighty has placed an injunction on all Muslims (or mankind) not to deal in any transactions that have an element of interest ('*riba*' or usury). The Holy Quran *al-Baqarah* asserts 2:275:

> Those who devour usury (a) Will not stand except as stands one whom the satan by his touch hath driven to madness. (b) That is because they say: 'Trade is like usury,' (c) But Allah hath permitted trade and forbidden usury.

[25] Similar injunctions are also seen in other religions. For example, in the Old Testament of the Bible, it is stated:

> Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury.

[26] The learned authors of the English commentary to the 'The Holy Quran', published by the custodians of the two Holy Mosques in the commentary to (a), (b) and (c) above say as follows:

(a) Usury is condemned and prohibited in the strongest possible terms. There can be no question about the prohibition. When we come to the definition of usury, there is room for difference of opinion. Hadhrat 'Umar, according to Ibn Kathir, felt some difficulty in the matter, as the Prophet left this world before the details of the question were settled. This was one of the three questions on which he wished he has had more light from the Prophet. Our 'Ulma, ancient and modem, have worked out a great body of literature on usury, based mainly on economic conditions, as they existed at the rise of Islam.

(b) An apt simile: whereas legitimate trade or industry increases the prosperity and stability of men and nations, a dependence on Usury would merely encourage a race of idlers, cruel blood suckers, and worthless fellows who do not know their own good and therefore are akin to madmen.

(c) Owing to the fact that interest occupies a central position in modern economic life, and specially since interest is the very lifeblood of the existing financial institutions, a number of Muslims have been inclined to interpret it in a manner which is radically different from the understanding of Muslim scholars throughout the last 14 centuries and is also sharply in conflict with the categorical statements of the Prophet (peace be upon him). According to Islamic teachings, any excess on the capital is 'riba' (interest). Islam accepts no distinction, in so far as prohibition is concerned, between reasonable and exorbitant rates of interest, and thus what came to be regarded as the difference between usury and interest; nor between returns on bonus for consumption and those for production purposes and so on.

[27] This Quranic injunction and the prohibition of financial activities that has an element of interest and/or has no genuine nexus to trading activities constitute the foundation of all lawful trading activities under Syariah law. Pursuant to this Quranic injunction, to say 'Syariah bank' or 'Islamic bank' or 'Islamic financial instrument' in my view is, technically incorrect and it will be appropriate if they are renamed 'Syariah trading house' or 'Islamic trading house' or 'Islamic trading instruments' or worded to bear similar effect respectively. This is so because the Quran only permits trading activities and not financial activities as understood in the conventional sense. However, it is now generally accepted by those who are familiar with Islamic commercial transaction that 'Syariah bank' or 'Islamic bank' or 'Islamic financial instrument' or like expressions connotes institutions and instruments which deal (or purportedly deal) with trading activities within the spirit and confinement of Quranic verse 2:275.

[28] All trade related documents under the Syariah must have the element of employment of capital, labour and risk, failing which it may be tainted as a riba transaction and treated as forbidden (haram). The fixing of profit or definite returns

in terms of percentage as opposed to sharing of profits in Syariah banking activities are more akin to 'riba' than trade. It must be emphasized that the basic and most important characteristic of Islamic financing is that it does not deal with fixed interest rate or pre determined profits. It is based on a profit and loss sharing contract. In crux, it is equity based financing. In a word, Syariah banking principles invites banks to be venture capitalists rather than lender. However, it is not uncommon to find literature by Islamic jurists who have approved or authored Islamic trading instruments in form and not in substance to adulterate the meaningful injunction of verse 2:275 for commercial gains. This activity has been perpetuated for centuries under the concept of *helah* (legal fiction or legal trick). This doctrine was developed by jurists to achieve a purpose, which in form is seen to be within the spirit of Syariah law, but the end result was not seen to be important by the jurists. In principle, these jurists take the view that intention is not an essential element in the Islamic banking system, as long as the form subscribes to the compliance of Islamic norms on riba. If not for the acceptance of *helah* in modern Islamic literature, the operation of many products or instruments offered by the Syariah banks will appear to be an infringement of the Quranic injunctions. Criticism of modern Syariah banking is based on this. Notwithstanding objections and controversies by jurists in respect of the doctrine of *helah*, the doctrine has contributed to the modern literature on Syariah banking. The objections are not without reasons. The extensive number of legal stratagems used by jurists to avoid or limit the strict prohibition of Quranic injunctions is seen to adulterate the pure and divinely ordained system. For example, despite the prohibition of riba, a loan with interest in modern times is neatly camouflaged and justified by circuitous logic by the method of a double sale. This is simply done by A, a lender who would purchase an object from B, for an agreed price X payable immediately in cash. B would then contract to re purchase the same subject matter from A for a price X + I (I representing the agreed interest though defined as profit) payable by future specified date. The authors of those instruments will often argue jurisprudential justification for its creation as they are often financially rewarded for their efforts. Such arguments will appear to be in breach of Syariah principles. As a result, presently we see many innovative Islamic financial instruments parallel to conventional banking instruments, which may not be within the spirit and intent of the Quranic injunctions. Such arguments have failed in Pakistan. Under the constitutional framework of the Islamic Republic of Pakistan, any citizen of Pakistan has a constitutional right to challenge any law that is repugnant to the injunctions of Islam. The Supreme Court of Pakistan, pursuant to an appeal by the Government and different banks and financial institutions of the country related to interest, delivered a judgment, which is hailed as 'Historic Judgment on Interest'. The Supreme Court in its judgment had declared that interest as unlawful according to the Quranic injunctions. The bench in that case had invited more than 20 scholars consisting of bankers, lawyers, economists, businessman, and chartered accountants etc., to address the critical issues involved in respect of interest in Syariah Banking (see Justice MMT USMANI, 2000, *The Historic Judgment on Interest* (1st Ed) Karachi: Idaratul Ma'arif Karachi).

[29] The issues in *The Historic Judgment* was aptly set out by Justice Maulana Muhammad Taqi Usmani as follows:

3. Most of the appellants as well as some juris-consults argued before us that interest-based commercial transactions are invented by the modern business, and their history does not refer back to more than 400 years, therefore they are not covered by the term 'Riba' used by the Holy Qur' an, and the prohibition of Riba does not include the prohibition of interest as in vogue in modern transactions.

4. This view is sought to be supported by five different lines of argument adopted before us against the prohibition of interest.

5. The first approach to interpret the term riba, as adopted by some of the appellants, was that the verses of the Holy Qur'an which prohibit Riba were revealed in the last days of the life of the Holy Prophet and he could not have an opportunity to interpret them properly and therefore no hard and fast definition of the term Riba can be found in the Holy Qur'an or in the Sunnah of the Holy Prophet. Since the term remained ambiguous in nature, it falls within the area of mutashabihaat and its correct meaning is unknown. According to this approach the prohibition of Riba should be restricted to the limited transactions expressly mentioned in the Hadith literature and the principle cannot be extended to the modern banking system which was not even imaginable at the time of revelation of the verses.

6. The second line of argument runs on the basis that the word riba refers only to the usurious loans on which an excessive rate of interest used to be charged by the creditors which would entail exploitation. As for the modem banking interest, it cannot be termed as riba if the rate of interest is not excessive or exploitative.

7. The third argument differentiates between consumption loans and commercial loans. According to this approach the word Al-riba used in the Holy Qur'an is restricted to the increased amount charged on the consumption loans used to be taken by the poor people for their day to day needs. These poor people deserved sympathetic attitude on humanitarian grounds, but the rich people exploited their miserable condition to charge heavy amounts from them in the form of usury. The Holy Qur'an has taken this practice as a severe offence against humanity and declared war against those involved in such abominated transactions. So far as the modern commercial loans are concerned, they were neither in vogue in the days of the Holy Prophet nor has the Holy Qur'an addressed them while prohibiting riba. Even the philosophy underlying the prohibition of riba be applied to these commercial and productive the debtors are not poor people. In most cases they are wealthy or at least economically well-off and the money taken by them are generally used for generating profits. Therefore, any increase charged from them by the creditors cannot be termed as zulm (Injustice) which was the basic cause of the prohibition of riba.

8. The fourth theory advanced during the arguments was that the Holy Qur'an has prohibited riba-al-jahiliyya only which, according to a number of traditions, was a particular transaction of loan where no additional amount over and above the principal was stipulated in the agreement of loan. However, if the debtor could not pay off the loan at its due date, the creditor would give him more time against charging an additional amount. According to this theory, if an increased amount is stipulated in the initial agreement of loan, it does not constitute riba al-Qur'an. However, it does fall in the definition of riba-al-fadl, prohibited by the Sunnah. Its prohibition is of a lesser degree which can be termed as makrooh and not haram. Therefore, this prohibition may be relaxed in cases of genuine need and it does not apply to the non-Muslims. Being a special law applicable to the Muslims only, it falls within the category of 'Muslim Personal Law' which falls outside the jurisdiction of the Federal Shariat Court, as contemplated in art 203(B) of the Constitution of Pakistan.

9. The fifth way of argument was that although the modern interest-based transactions are covered by the of prohibition of riba, yet the commercial interest being the back-bone

of the modern economic activities throughout the world, no country can live without being involved in interest-based transactions and it will be a suicidal act to abolish interest from domestic and foreign transactions. Islam, being a practical religion, recognizes the principle of necessity and it has allowed even to eat pork in extreme situation where one cannot live without eating it. The same principle of necessity should be applied to the interest-based transactions also, and on the basis of this necessity the laws permitting the charge of interest should not be declared repugnant to the injunctions of Islam.

10. All these different sets of arguments led us to resolve the main issue i.e. whether or not commercial interest of modern financial system falls within the definition of riba prohibited by the Holy Qur'an, and if it does, whether they can be allowed on the basis of necessity. This also led us to examine whether the modern financial transactions can be designed without interest and whether or not the proposed alternatives are feasible keeping in view the modern structure of commerce and finance. In order to resolve these issues we invited a number of experts as juris-consults consisting of Syariah scholars, economists, bankers, accountants and representatives of modern business and trade who have provided assistance to the Court in their respective areas of specialization.

[30] In this Historic Judgment, various arguments to support riba transaction and some Islamic Financial Instruments in Syariah Banking in vogue were denounced by the Supreme Court of Pakistan. His Lordship Justice Maulana Muhammad Taqi Usmani observed:

Murabahah Transaction

218. Moreover, Islamic Banking is not restricted to Profit and loss sharing. Though Musharakah is the ideal mode of financing that fully conforms, not only to the principles of Islamic jurisprudence, but also to the basic philosophy of an Islamic economy, yet there is a variety of instruments that may be used on the assets side of the bank, like Murabahah, leasing, salam, istisna, etc. Some of these models are less risky and may be adopted where Musharakah has abnormal risks or is not applicable to a particular transaction. Some of the appellants have complained that the Federal Shariat Court, in its impugned judgment, has declared the mark-up system, too, as against the injunctions of Islam. It means that *murabahah* cannot be used by an Islamic bank as a permissible mode of financing.

219 This complaint is misconceived. The Federal Shariat Court has not held the murabahah transaction as invalid in principle. It has rather suggested murabahah for financing exports in para 367 of its judgment. However, the Court has held the 'mark-up system as in vogue' to be against the Islamic injunctions and has expressed its apprehension that this mode will be subject to misuse and, that if applied without fulfilling the necessary conditions on a large scale basis, it will bring little difference to the present system. We have already observed that the 'mark-up system as in vogue in Pakistan' is not a *murabahah* transaction in the least. It is merely a change of name. The purported sale of goods never takes place in real terms. If murabahah is effected with all its necessary conditions, it is not impermissible in Syariah, nor has the Federal Court declared it as an absolutely impermissible transaction per se. We have already mentioned above while describing the background of the objection of the infidels against the prohibition of riba that 'sale is similar to riba' (in paras 50 and 51 of this judgment) that they used to sell a commodity on deferred payment for a higher price. Their objection was that when they increase the price at the initial stage sale, it has not been held as prohibited but when the purchaser fails to pay on the due date, and they claim an additional amount for giving him more time, it is termed as 'riba' and haram. The Holy Qur'an answered

this objection by saying 'Allah has allowed sale and forbidden riba'. As explained earlier (in para 190 of this judgment) murabahah is a sale and not a financing in its origin. It must, therefore, conform to all the basic standards of a sale. It may be used only where the client of the bank really wants to purchase a commodity. The bank must purchase it from the original supplier and after taking into its ownership and (physical or constructive) possession sells it to the client. All these elements must be visibly present in a valid murabahahwith all their legal and logical consequences, including in particular, that the bank must assume the risk of the commodity so long as it remains in its ownership and possession. This is the basic feature of the murabahahwhich makes it distinct from an interest-based financing and once it is ignored, though for the purpose of simplicity, the whole transaction steps into the prohibited field of interest-based financing.

220. An objection frequently raised against murabahah transaction is that when used as a mode of financing it contemplates an increased price based on the deferred payment. It means that the price of commodity in a murabahah transaction is more than the price of the same commodity in spot market. Since the price is increased against the time given to the purchaser, it resembles the interest-based loan transaction.

221. We have already explained in paras 136 to 140 of this judgment that Islam has treated money commodity differently. Having different characteristics both are subject to different rules and principles. Since money has no intrinsic utility, but is only a medium of exchange which has no different qualities, the exchange of a unit of money for another unit of the same denomination cannot be effected except at par value. If a currency note of Rs 1000/= is exchanged for another note of Pakistani rupees, it must be of the value of R 1000/= The price of the former note can neither be increased nor decreased from Rs1000/= even in a spot transaction, because the currency note has no intrinsic utility nor a different quality (recognized legally), therefore, any excess on either side is without consideration, hence, not allowed in Syariah. As this is true in a spot exchange transaction, it is also true in a credit transaction where there is money on both sides, because if some excess is claimed in a credit transaction (where money is exchanged for money) it will be against nothing but time.

222. The case of normal commodities is different. Since they have intrinsic utility and have different qualities, the owner is at liberty to sell them at whatever price he wants, subject to the forces of supply and demand. If the seller does not commit a fraud or misrepresentation, he can sell a commodity at a price higher than the market rate with the consent of the purchaser. If the purchaser accepts to buy it at that increased price, the excess charged from him is quite permissible for the seller. When the seller can sell his commodity at a higher price in a cash transaction, he can also charge a higher price in a credit sale, subject only to the condition that he neither deceives the purchaser, nor compels him to purchase, and the buyer agrees to pay the price with his free will.

223. It is sometimes argued that the increase of price in a cash transaction is not based on the deferred payment, therefore, it is permissible while in a sale based on deferred payment, the increase is purely against time which makes it analogous to interest. This argument is again based on the misconception that whenever price is increased, taking the time of payment into consideration, the transaction comes within the definition of interest. This presumption is not correct. Any excess amount charged against late payment is riba only where the subject matter is money on both sides. But if a commodity is sold in exchange of money, the seller, when fixing the price, may take into consideration different factors, including the time of payment. A seller, being the owner of a commodity which has intrinsic utility may charge a higher price and the purchaser may agree to pay it due to various reasons for example:

(a) His shop is nearer to the buyer who does not want to go to the market which is not so near.

(b) The seller is more trust-worthy for the purchaser than others, and the purchaser has more confidence in him that he will give him the required thing without any defect.

(c) The seller gives him priority in selling commodities having more demand.

(d) The atmosphere of the shop of the seller is cleaner and more comfortable than other shops.

(e) The seller is more courteous in his dealings than others.

224. These and similar other consideration play their role in charging a higher price from the customer. In the same way, if a seller increases the price because he allows credit to his client, it is not prohibited by Syariah if there is no cheating and the purchaser accepts it with open eyes, because whatever the reason of increase, the whole price is against a commodity and not against money. It is true that while increasing the price of the commodity, the seller has kept in view the time of its payment but once the price is fixed, it relates to the commodity, and not to the time, the price will remain the same and can never be increased by the seller. Had it been against time, it might have been increased, if the seller allows him more time after the maturity.

225. To put it another way, since money can only be traded in at par value, as explained earlier, any excess claimed in a credit transaction (of money in exchange of money) is against nothing but time. That is why if the debtor is allowed more time at maturity, some more money is claimed from him. Conversely, in a credit sale of a commodity, time is not the exclusive consideration while fixing the price. The price is fixed for commodity, not for time. However, time may act as an ancillary factor to determine the price of the commodity, like any other factor from those mentioned above, but once this factor has played its role, every part of the price is attributed to the commodity.

226. The upshot of this discussion is that when money is exchanged for money, no excess is allowed, neither in cash transaction, nor in credit, but where a commodity is sold for money, the price agreed upon by the parties may be higher than the market price, both in cash and credit transactions. Time of payment may act as an ancillary factor to determine the price of a commodity, but it cannot act as an exclusive basis for and the whole consideration of an excess claimed in exchange of money for money.

227. This position is accepted unanimously by all the four schools of Islamic law and the majority of the Muslim jurists. This is the correct legal position of Murabahah transaction according to Syariah. However, two points must be remembered:

(a) The *murabahah* when used as a mode of trade financing is borderline transaction with very fine lines of distinction as compared to an interest bearing loan. These fine lines of distinction can be observed only when all the basic requirements already explained are fully complied with. To ignore any one of them makes it an interest-bearing financing, therefore, it should always be effected with due care and precaution.

(b) Notwithstanding the permissibility of the *murabahah* transaction, it is susceptible to misuse and keeping in view the basic philosophy of an Islamic financial system it is not an ideal way of financing. Hence it should be used only where the *musharaka* and *murabahah* are not applicable.

228. Apart from *musharakah* and *murabahah* there are other modes of financing like ijara (leasing), salam and istisna that can be used in different types of financing. We need not go into the details of these because they are elaborated in different reports submitted to the government for the elimination of interest. The first comprehensive report in this respect was submitted by the Council of Islamic Ideology in 1980. The second report

was that of the Commission for Islamization of Economy, constituted under the Shariat Act. This Commission has submitted its comprehensive report to the government in 1991. Lastly, the same Commission was reconstituted under the Chairmanship of Raja Zafarul Haq which submitted its final report in August 1997. We have gone through all these reports and without commenting on each and every detail proposed in them we are satisfied that all these reports can at least be taken as the basic ground work for bringing about the change in our present financial system.

229. The upshot of this discussion is that the Doctrine of Necessity cannot be applied to protect the present interest based system for ever or for an indefinite period. However, this doctrine can be availed of for allowing a reasonable time to the government necessarily required for the switch-over to an interest-free Islamic financial system.

[31] It is elementary knowledge that the Holy Quran has stated that contracts must be honoured. However, this verse will not apply to a contract that is tainted with illegality. Further, one cannot enforce his full legal rights against equity and good conscience under the Syariah law. Argument such as that one is bound by contractual obligation is a fallacy in Syariah law when it has to be tampered with justice and equity. Quranic laws cannot be read out of context for material gains. The Holy Quran verse 2:41 states:

Do not sell my verses for a little price

[32] It is different in civil cases, where whenever there is a paying client there is no shortage of lawyers for the plaintiff or defendant. Both counsels are deemed to act in the best interest of justice, notwithstanding the arguments may be flawed. However, for the believers when dealing with Civitas Dei, the Quranic verses cannot be sold for a 'little price' as persons tampering with Quranic verses have been promised with an eternal place in purgatory. Verse 5: 10 states:

Those who reject faith and deny Our Signs will be Companions of Hell fire.

[33] It must be emphasized that justice and equity is the foundation of Civitas Dei. Understanding and appreciating the values of Civitas Dei was never a difficult task. However, matters falling in the hands of intellectually dishonest or morally corrupt or legally incompetent jurists, lawyers of the Syariah law or any law for that matter will only put good values to disrepute for material gains. Syariah law, being God's law, is easily comprehensible to any Muslims (or persons). For its proper application, what we need are people with a high sense of intellectual honesty and abiding faith in the principles of Islam. These are attributes, which must be present in those professing to be jurists and lawyers in Islamic commercial transaction or claiming to be pioneers in Syariah banking, for Islamic banking in its true form and spirit to be successful. Mischievous statement such as 'you agreed you pay' when it is a case of inability to pay are crude and very unrealistic proposition in Islamic Administration of justice.

VALIDITY OF BBA

[34] Whether BBA is valid or invalid depends on the nature of the instruments. However, the concept of BBA is now being widely accepted, provided it does not

infringe on the rule against riba. The Pakistan Supreme Court, in the historic judgment on interest stated above, has held that murabahah and/or BBA transactions (sale by deferred payment), when used as a mode of trade financing, is a borderline transaction with interest-bearing loan. The court stated that unless the basic requirements for its legal validity under the Syariah are strictly complied with, it might amount to interest-bearing loan. Further, the Supreme Court took the view that the murabahah and/or BBA concept is susceptible to misuse and is not an ideal financing system and should only be used where musharaka and murabahah, a concept of financing (partnership or equity financing), are not applicable. Our courts here have not ventured into the validity of such instruments in detail, as was done in Pakistan.

JUSTICE AND EQUITY

[35] On the facts of this case, the issue is not whether BBA is valid, the question here is whether the plaintiff is entitled as of right to the full profits in the event the BBA is terminated very much earlier as in this instance, taking into consideration s 148(2)(c) of SLC or for that matter s 256 of NLC. In *Affin Bank Bhd* the court in allowing the order for sale reduced the amount of profit. In Malayan Banking Bhd the court refused to grant the balance of the sale price amounting to RM928,589.12 for the facility sum of RM500,000. In allowing the order for sale, the court 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 Malaysia Bhd and another appeal* [1991] 3 MLJ 163. 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).

[36] Both of these judgments under the secular law has rightly attempted to act within the parameters of justice and equity to attain a just result and to ensure that excess profit is not made in name of Islamic principles. Even at common law, the doctrine of equity is often raised to mitigate the harshness of contractual obligation in limited circumstances.

[37] The proposition stated above was asserted by the Federal Court in *K Umar Kandha Rajah v EL Magness* [1985] 1 MLJ 116, where Syed Agil Barakbah on the facts of the case opined:

> As stated earlier the respondent had also committed a breach of the agreement by failing to hand over the title deed to the appellant. That would have entitled the appellant to damages had he taken prompt action and had not committed a breach by failing to settle the second installment. Since the respondent was not free from fault, a question arose whether having terminated the agreement he was entitled to forfeit the deposit of $5,000. The learned judge ordered that the said sum be forfeited and the balance be returned by the respondent to the appellant. At common law the respondent was entitled to do so, on the failure of the appellant to pay any of the installments on the dates specified in the agreement. As stated by Denning LJ, (as he then was) in *Stockloser v Johnson* [1954] 1 All ER 630, 637:
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> > In the present case however, the defendant is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him as part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause – a forfeiture clause if you please – permitting him to keep it.
>
> Equity however will only interfere and invoke the aid of its jurisdiction if the appellant shows that it will be unconscionable to allow the respondent to retain the money he has forfeited. Their Lordships of the Privy Council held in *Kilmer v British Columbia Orchard Lands Limited* [1913] AC 319 and in *Steedman v Drinkle* [1916] 1 AC 275 that the forfeiture clause in the sale agreement was in the nature of a penalty and relief was granted to the purchaser in spite of his failure to pay the installments according to the terms of the contract. Both cases relate to the sale of land similar to the present case. In the former the vendor sued to enforce the forfeiture after the purchaser had defaulted; the purchaser paid into court the installment due and counterclaimed for specific performance which was also decreed. In the latter specific performance was not decreed but the purchaser was granted relief from forfeiture. The ratio decidendi in both the cases was that the forfeiture clause being a penalty it was unconscionable to allow the vendor to forfeit the sum deposited as part payment of the purchase price. As Lord Moulton said in *Kilmer*'s case on p 325:
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> ...
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> > The circumstances of this case seem to bring it entire within the ruling of the *Dagenham Dock case* [1873] LR 8 Ch App 1022. It seems to be even a stronger case, for the penalty if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger.
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> In this regard, Romer LJ as quoted by Somervell LJ in *Stockloser v Johnson* on p 634, was of the view that there are sufficient authorities giving the court wider power to give such relief although there was no sharp practice by the vendor and although the purchaser was not able to find the balance. It would of course have to be shown that the retention of the installments was unconscionable in all circumstances.

Denning LJ on p 637 also expressed the view that where there is a forfeiture clause or the money is expressly paid as a deposit the buyer who is in default cannot recover the money at law at all. He may however have a remedy in equity but two things are necessary:

(1) the forfeiture clause must be a penalty ie the sum forfeited must be out of all proportion to the damage and

(2) it must be unconscionable for the seller to retain the money.

Turning to the present case the amount deposited is not disproportionate being only about 12% of the purchase price which is the usual amount of deposit in a contract for the sale of land. The appellant knew he would lose it if he did not complete the payments. Nevertheless the conduct of the respondent in failing to fulfill his obligation in handing over the title deed to the appellant after the latter had paid the first installment, in our considered judgment amounts to a sharp practice. Having had the said land discharged from the bank at the expense of the appellant, he committed a breach of the agreement by not handing the title deed to enable the appellant to apply for sub-division of the land and thereafter to commence development. According to the evidence of his own witness, the Collector of Land Revenue Klang (DW1), the respondent had already applied for sub-division of the said land on September 15, 1972 well before the agreement was executed. He was unsuccessful because he had not applied for conversion of the said land from 'agriculture' to 'housing.' He did so only on May 18, I974 about one year after the execution of the sale agreement and after the payment of the first installment and the discharge of the land from the bank. That clearly explains the reason for his failure and reluctance to hand over the title deed to the appellant who appeared to have been unaware of the true position. We are satisfied in the circumstances that it would be unconscionable to allow the deposit to be forfeited by the respondent and that it is just and equitable for the money to be returned to the appellant.

[38] In crux, one may under the English law say that 'when the law fails equity may save'. In my view this was the proposition Lord Denning in many of his judgments had boldly advocated. In contrast, Quranic verses will support the proposition that equity is the fulcrum of justice. Under the Syariah justice without equity, justice cannot be administered and, justice and equity must be read conjunctively and not disjunctively. Support for my proposition can be found in a number of Quranic verses. For example Surah al-Maidah: 42 stated below.

[39] For the reasons stated above, I take the view that it is so much easier and meaningful for judges, jurist and sages of law in construing any provisions of the constitution, law, contracts, concepts relating to Islamic principles and virtues to act within the spirit and intention of the various Quranic injunctions and in particular *al-Maidah*: 42, which says:

If though judge, judge in equity between them. For Allah loveth those who judge in equity.

This verse makes it mandatory to put equity first before any decision is arrived. Further, it is my judgment that:

(a) Islamic contract relating to commercial transaction is not only subject to the terms of the contract but must be decided subject to the Quranic injunctions and/or Islamic worldview as the case may be. For this very purpose, the court can on their own motion decide the issue or alternatively call experts to give

A their views, pursuant to s 45 of the Evidence Act 1950 or pose the necessary questions to the Syariah Advisory Council for their views.

(b) Section 148(2)(c) of the SLC makes it mandatory to exercise equity and the court may not grant the order if it is going to be perverse to the defendants. When it comes to justice and equity, similar powers is also preserved under
B s 256 of the NLC.

(c) I accept the fact that as matter of practice, most of the Islamic Banks do exercise their discretion and give a rebate, thereby keeping with the true spirit and intent of justice and equity under the Syariah law. Further, Islamic law of commercial transaction will not permit the bank to state the rebate for default
C under the BBA as Islamic law of contract, though it may appear to be similar to the secular law, is not the same. The Syariah law does not generally permit conditional contract, contract upon a contract etc., the principles and practice of which I will elaborate at an opportune moment. However, this does not mean that Islamic Bank cannot openly state their policy and rates of rebate
D without encapsulating in BBA agreements. This will promote transparency and equity. The fact that '*ibrar*' is unilateral does not stop Islamic Banks from voluntarily relinquishing part of their claim or the court upon default by the customer to demand that proper concessions be granted to the customer on equitable grounds when exercising its jurisdiction and powers for order for sale under s 148(2)(c) of SLC or that of s 256 of NLC.

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(d) Equity in this case applies both to the plaintiff as well as to the defendants. To obtain a just result and without dismissing this Originating Summons, I will give an opportunity to the plaintiff to demonstrate equitable conduct by filing an affidavit stating:

F (i) that upon recovery of the proceeds of sale they will give a rebate.

(ii) and specify the rebate. The amount specified must not be a nominal rebate but a substantial one taking into account the prevailing market force by banks generally, and the meaningful decision in the cases of *Affin Bank Bhd* and *Malayan Banking Bhd*.

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(e) If I am satisfied that the proposed rebate is just and equitable, I shall make an order in terms of the plaintiff's application, subject to the terms set out in the proposed affidavit.

(f) If I am not satisfied, I may not make the order as prayed or make some other
H order as the justice of the case requires, taking into consideration the thoughtful proposition in the case of *Century Land Resources Sdn Bhd.*

[40] This part of the judgment is delivered on 30 August 2007, that is on the eve of 50th year of our independence. In my view, courts must welcome and support
I Islamic banking as the principles involved will ultimately motivate a major attempt within the norms of Quranic injunction to eradicate total poverty and bring great success to the nation. In the same note, court must be vigilant to arrest traders or venture capitalists from exploiting Islamic principles at the expense of the consumers. This is a constitutional duty and is not alien to Islamic concept. I shall reserve the fate of this originating summons to another date and will give the plaintiff the liberty

to file an affidavit in the proposed manner as they think just and equitable within one month from the said order. I hereby order so.

Order accordingly.

Reported by Loo Lai Mee