

SHARIAH AND LEGAL ISSUES IN THE BAY' BITHAMAN-AL-AJIL (BBA): A VIEWPOINT

by

NUARRUAL HILAL MD DAHLAN

*College of Law, Government and International Studies
Universiti Utara Malaysia*

and

SHARIFAH ZUBAIDAH SYED ABDUL KADER ALJUNID

*Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia*

Abstract

The primary duty of Islamic banks and financial institutions in Malaysia is to carry out Islamic banking and financial activities and to offer products that are in accordance with Islamic teachings. These products are subject to the scrutiny and approval of the Bank Negara's Shariah Advisory Council ('SAC') and the internal Shariah Advisory Bodies ('SAB') or the Shariah Committees of the respective financial institutions. Despite having been in existence for more than 25 years, it remains unclear on whether Islamic banks and financial institutions in Malaysia have been satisfactorily carrying out this duty. One area worth examining is the transaction involving house buying, particularly, falling under the purview of the Housing Development (Control and Licensing) Act 1966 (Act 118) and transactions involving houses pending completion. This paper examines this area of transaction and loan agreement, effected via the Bay' Bithaman al-Ajil ('BBA'), that Islamic banking and financial institutions in Malaysia provide. The purpose of this paper is to examine the extent of which the sale and purchase agreement and the loan agreement have complied with the requirements of Islamic law in protecting stakeholders and to provide practical suggestions to improve the existing practice. The functions, roles, establishment and problems plaguing the SAC and the SAB are also examined, particularly in respect of their role in advising the institutions on transactions involving house buying in Malaysia, bearing on provisions of the recent statute — the Central Bank of Malaysia Act 2009 (Act 701), enforced on 19 August 2009. The paper concludes that the current practice of the BBA is contrary to the teachings of Islam and should be modified and revamped until it is fully able to protect the interests of the purchaser/borrower.

INTRODUCTION

Islamic banking aroused quite an interest in the 1960s and 1970s following the resurgence of Islam in the early 20th century with the momentum being spearheaded particularly by Egyptian Muslim scholars¹ and thinkers such as Muhammad Abduh, Rashid Rida, Hassan al-Banna and Jamaluddin al-Afghani. Islamic banking eventually gained a foothold in Malaysia with the establishment of Bank Islam Malaysia Bhd in 1983.² Islamic banking facilities have since expanded to meet and serve the customers' demand for user-friendly banking facilities and products. These Islamic banking products include *mudarabah* — a general and special investment deposit in the nature of profit sharing between the depositors/customers and the bank, acting as the entrepreneur; *wadi'ah* — where the bank simply acts as the safekeeper of the deposits of the depositors/customers but it may provide returns to the depositors as a gift (*al-hibah*); *murabahah* (partnership and equity financing); *ijarah* (leasing); *musharakah* (partnership) and the BBA (ie sale by deferred payment). Due to the increasing demand for these Islamic banking products, Islamic windows (Islamic banking products) are likewise introduced by the conventional banks.³

OBJECTIVES OF THE PAPER

This paper examines the provisions of the standard BBA agreement as practiced by Islamic banks and Islamic Window Banks ('IWB') in Malaysia, as to whether the BBA⁴ is compatible with the requirements

- 1 Pioneered by Mir Ghamir Local Savings Bank, which was established in 1964 in a provincial rural centre in the Nile Delta of Egypt. See also Sudin Haron and Bala Shanmugam, 1997, *Islamic Banking System, Concept & Application*, Pelanduk Publications, Selangor at p 1.
- 2 See generally in Sudin Haron and Bala Shanmugam, 1997, Chapter 1.
- 3 Nor Mohamed Yakcop, 1996, *Teori, Amalan dan Prospek Sistem Kewangan Islam di Malaysia*, Utusan Publications & Distribution Sdn Bhd, Kuala Lumpur, Chapter 5.
- 4 BBA is implemented by way of two transactions. Firstly, through the property purchase agreement ('PPA') effected between the purchaser of a house and the bank. Secondly, after the bank purchases the property from the purchaser through the PPA, the bank will sell that property back to the purchaser at an increased price through an agreement known as the property sale agreement ('PSA'). The bank will obtain a profit being the difference between the price named in the PPA and the PSA. The price in the PSA is called 'the bank selling price' or the 'sale price'.

of the Shariah (Islamic law), specifically insofar as it relates to the purchase of houses-still-pending-completion and abandoned housing projects.

The determination is paramount because of the requirement for Islamic banks and IWB to uphold the principles of Islamic law in its operation. Several questions can be posed as follows:

- (1) Whether the said BBA complies with the requirements set out by Islamic law?
- (2) If the said BBA does not comply with Islamic law, whether the public or the stakeholders can apply for a court declaration that the BBA, as practised by Islamic banks and IWB, endorsed by the SAC and the SAB, is null and void and is ultra vires to the provisions of the Islamic Banking Act 1983 and the Banking and Financial Institutions Act 1984, in that the operation of Islamic banks and IWB shall be in accordance with the teachings of Islam?
- (3) Whether the decisions and the advice of the SAC and SAB can be challenged in a court of law if the BBA or other types of products are considered null and void under Islamic law, in light of the latest development of the position of the SAC and SAB in the recent decided case law and the new statute — Central Bank of Malaysia Act 2009 (Act 701) enforced since 19 August 2009?
- (4) Whether the SAC and the SAB are duty bound to act reasonably and in accordance with the principles of natural justice and observe the duty of care as propounded under the law?

The writers will answer the above questions in the subsequent headings of this paper.

THE STATUTORY STANDARD SALE AND PURCHASE AGREEMENT AS PRESCRIBED BY SCHEDULES G, H, I AND J OF THE HOUSING DEVELOPMENT (CONTROL AND LICENSING) ACT 1966

The application of the statutory standard formatted sale and purchase agreement (Schedules G, H, I and J) in Peninsular Malaysia (West Malaysia),⁵ as provided in the Housing Development (Control and Licensing) Regulations 1989, is mandatory for all house purchases in Peninsular Malaysia pursuant to reg 11(1) and (1A) of the Housing Development (Control and Licensing) Regulations 1989 and the

5 The East Malaysia (Sabah and Sarawak) has a different housing legislation.

principles laid down in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd*,⁶ *SEA Housing Corporation Sdn Bhd v Lee Poh Choo*⁷ and *Kimlin Housing Development Sdn Bhd (appointed Receiver and Manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors*⁸ and *MK Retnam Holdings Sdn Bhd v Bhagat Singh*.⁹

THE BBA — THE PROPERTY PURCHASE AGREEMENT ('PPA') AND THE PROPERTY SALE AGREEMENT ('PSA')

It is trite practice in Malaysia that for some who wish to purchase a house, especially a transaction falling under the Housing Development (Control and Licensing) Act 1966 (Act 118), they would seek to obtain a loan from an Islamic bank or the IWB. Before the purchasers apply for a housing loan from an Islamic Bank or IWB, they should have entered into agreements of sale and purchase (Schedules G, H, I or J) ('the said agreement') with the developers. Once the said agreements are executed and enforceable, the purchasers may apply for loans from an Islamic Bank or IWB to finance the balance purchase price of the property. The purchasers are required to execute two agreements to facilitate this, firstly, the PPA and secondly, the PSA. The first agreement (the PPA) provides that the purchasers agree to sell the property, which they purchased from the developer, at the price similar to the price they agreed with the developer, to that particular Islamic bank or IWB and on the undertaking that they (the purchasers) are to re-purchase the property from the bank. The second agreement is the PSA. Under this agreement (the PSA), the property (which has been vested in the bank) is sold by the bank back to the purchasers, at an increased price. The purchasers are required to repay the bank this price, by way of instalments for a specified duration until the sale price is fully settled. The bank will get a profit, being the difference between the price stipulated in the PPA/the said agreement and the price stated in the PSA (the sale price).

The type of transaction between the purchasers and the bank described above is called *bay al-inah*.¹⁰ It should be noted that the

6 [1985] 2 MLJ 291.

7 [1982] 2 MLJ 31 (FC).

8 [1997] 2 MLJ 805 (FC).

9 [1985] 2 MLJ 212.

10 See Resolutions of Shariah Advisory Council of Bank Negara Malaysia, BNM/RH/GL/012-2, 14 at <http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/07_shariah_resolution.pdf>. It may also be called *bay al-muajjal* or *murabahah*.

theory and application of *bay al-inah* are still subject to debate by the schools of Islamic law as the sale involves *riba'* (difference of prices) or a trick (*belah*), in sale and purchase activities, by applying *riba'* method of borrowing transaction.¹¹ The majority of Muslim jurists reject *bay al-inah*.¹² However, the minority (such as the Shafie and Zahari schools) permit it, but the application of *bay al-inah* must be used with circumspection and if only warranted by circumstances. Otherwise, its application should be limited.¹³

11 Wahbah al-Zuhayli, 1998 *al-Fiqh al-Islami Wa Adillatuhu*, Vol 4, Dar al-Fikri, Dimasq Syria, at pp 186 & 468.

12 Abu Hanifah opines that this type of sale is *fasid* (defective) if there is no person acting as an intermediary between the owner who lends and the purchaser who borrows. See Wahbah al-Zuhayli at pp 186 & 468. According to *al-Sahibayn* (the two friends — Muhammad al-Shaybani and Abu Yusuf), Maliki and Hanbali, *bay' al-Inah* involves a sinful intention and thus rendered the contract void. Maliki and Hanbali applied *sadd al-zarai'* in deducing the decision. See Wahbah al-Zuhayli, 1988, *ibid* at pp 196, 469 & 508. They base this on a story involving Zayd bin Arqam and a hadith of the Prophet (SAW). The majority of the jurists except the Shafie school opine that this type of sale is void as it may cause *riba'*. However it is permissible but is detestable (*karahah*) according to the Shafie school and the Zahari school. See Wahbah al-Zuhayli, 1988 at pp 469 & 508. See also *Arab-Malaysian Finance Berhad v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631.

13 Resolutions of Shariah Advisory Council of Bank Negara Malaysia, BNM/RH/GL/012-2, 14 at <http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/07_shariah_resolution.pdf>. See also Mohd Daud Bakar, 2009, *Pembiayaan peribadi mengikut perspektif Islam*, Prosiding Muzakarah Penasihat Shari'ah Kewangan Islam, CERT Publications Sdn Bhd at p 9. See also the judgment of Justice Maulana Muhammad Taqi Usmani in the Supreme Court of Pakistan, quoted by Hamid Sultan JC (as he then was) in *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389 (High Court at Kuching) at p 412 of the report. *Murabahah* or *bay al-inah* is not a favourable mode of trade financing in Islamic banks as it is considered a 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 are fully complied with. To ignore any one of them makes the *murabahah/bay al-inah* an interest-bearing financing, thus it should always be effected with due care and precaution. Notwithstanding the permissibility of the *murabahah/bay al-inah* 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 *musharakah* and *mudarabah* are not applicable.

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THE ESTABLISHMENT OF ISLAMIC BANKS AND ISLAMIC WINDOW BANKS

The conventional banking system has been in existence in Malaysia even before *Merdeka* day (Malaysia's independence day in 1957), introduced by the British. The Islamic financial system, however, was first introduced in Malaysia through the establishment of the Lembaga Urusan dan Tabung Haji (now known as Lembaga Tabung Haji) in 1963, followed by the incorporation of Bank Islam Malaysia Bhd in 1983. At present, even conventional banks are offering Islamic banking products. A further milestone in the development of Islamic financial products in Malaysia is the operation of the insurance system and products based on Islamic law principles. This development shows that the Islamic financial system is gaining ground at a fast pace and is now, arguably, able to run parallel with the conventional system.

Nevertheless, financial institutions offering Islamic financial products need to conform to the laws imposed by the monetary authorities in the protection of public interest and the stakeholders. On this matter, the relevant statutes are:

- (1) the Central Bank of Malaysia Act 2009 (Act 701) ('CBM');
- (2) the Banking and Financial Institutions Act 1989 (Act 372) ('BAFIA');
- (3) the Islamic Banking Act 1983 (Act 276) ('IBA'); and
- (4) the Takaful Act 1984 (Act 312).

The Central Bank of Malaysia Act 2009 is an Act to provide for the continued existence of the Central Bank of Malaysia and for the administration, objects, functions and powers of the bank ('the Central Bank') and for consequential or incidental matters. The BAFIA is an Act that provides new laws for the licensing and regulation of institutions carrying out banking, finance company, merchant banking, discount house and money-broking businesses, for the regulation of institutions carrying out certain other financial businesses, and for matters incidental thereto or connected therewith. On the other hand, the IBA is an Act that provides for the licensing and regulation of the Islamic banking business. The Takaful Act 1984 aims to provide for the regulation of the *takaful* business in Malaysia and for other purposes relating to, or connected with *takaful* (Islamic insurance).

Any financial institution intending to carry out a business is required to obtain the necessary licence for doing so. In respect of licensing, conventional financial institutions are subject to the

requirement to possess the necessary licence. This requirement is spelt out in s 4 of the BAFIA.

An interesting fact is that the conventional financial and banking institutions have also opened up their Islamic banking counters offering Islamic banking and financial products to the public. These IWB are still subject to the provisions in the BAFIA 1989 and s 124 of the BAFIA as well as the CBM.

Meanwhile, Islamic financial institutions, not being an IWB as explained above, which carry out Islamic banking transactions, are subject to the IBA. Section 3(1) of the IBA provides that an Islamic banking business shall not be transacted in Malaysia except by a company which is in the possession of a licence in writing from the Minister authorising it to do so. The meaning of 'company' refers to a company incorporated under the Companies Act 1965 (Act 125).

According to s 3(2) of the IBA, a company which desires authority to carry out an Islamic banking business in Malaysia shall have to apply in writing through the Central Bank (Bank Negara) to the Minister of Finance for a licence under this section.

The Minister of Finance of Malaysia then issues the Islamic banking and financial institution licence, upon the recommendation made by the Central Bank (Bank Negara), being the regulatory body of the Islamic banking and financial sector in Malaysia. The Central Bank also has a right not to support any application for licence until they are fully satisfied that the business activities purported to be carried out by the applicant, will comply with the religion of Islam. This requirement is provided in s 3(5)(a) of the IBA.

Foreign Islamic banks wishing to carry out an Islamic banking business must also obtain a similar licence. The application is subject to Part VA (ss 30A-30E) of the IBA. A company or a foreign institution other than a licensed Islamic bank which desires to carry out an international Islamic banking business in Malaysia shall also apply in writing through the Central Bank to the Minister of Finance for a licence. They are also required to comply with the related procedures and rules imposed.

In September 2006, the Central Bank Malaysia announced the issuance of new licences under the IBA to certain qualified foreign and Malaysian financial institutions to conduct Islamic banking businesses in international currencies other than in the Malaysia ringgit. Financial institutions that carry out such businesses are referred to as the 'International Islamic Bank' ('IIB'). The purported licences will allow the applicant institutions to carry out a wide array of international Islamic banking businesses with non-residents and residents. An application to

become an International Islamic Bank shall also be subject to the Central Bank's 'Guidelines on International Islamic Bank'.¹⁴

The BAFIA sets out the duties of licensed financial institutions including licensed financial institutions carrying out Islamic banking businesses or Islamic financial businesses, pursuant to s 124 of the BAFIA ('the Islamic window banks').

Apart from the important obligation of the licenced financial institutions carrying out Islamic banking businesses or Islamic financial businesses and of Islamic banks to observe the requirements of Islamic law, pursuant to s 124 of the BAFIA and s 2 of the IBA¹⁵ as well as under the provisions of the CBM, there are other duties of these institutions as further prescribed in the CBM.

Similarly, Islamic banks as defined under the IBA shall also be subject to certain duties as prescribed by the IBA. The relevant provisions are Parts 2 (Licensing of Islamic Banks), 3 (Financial Requirements and Duties of Islamic Banks), 4 (Ownership, Control and Management of Islamic Banks), 5 (Restrictions on Business) and 5A (International Islamic Banking Business).

THE CENTRAL BANK SHARIAH ADVISORY COMMITTEE

To facilitate the function of the Central Bank of Malaysia in regulating the practice of Islamic banking businesses, pursuant to s 51(1) of the CBM, the Central Bank may establish a SAC on Islamic finance which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business. The word 'Islamic financial business' according to s 3 of the CBM, means financial business in ringgit or in another currency which is subject to the laws enforced by the Central Bank and consistent with the Shariah.

The function of the SAC is, inter alia, to advise the Central Bank and the Islamic financial institution or any other person on matters pertaining to Islamic law on any financial matters and financial businesses (ss 52(1)(1) and 55(1) of the CBM). There is no definition of the word 'any other person' but, it is opined, that this word may include the court of law. This can be supported by s 56(1) of the CBM which requires that, if there is any question relating to an Islamic

14 See the Central Bank 'Guideline on International Islamic Bank', BNM/RH/GL/002-9 at <http://www.bnm.gov.my/guidelines/01_banking/04_prudential_std/25_int_islamic_bank.pdf>.

15 Section 2 of the IBA defines 'Islamic Banking Business' to mean 'banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam'.

financial business in any proceedings, the court of law or arbitrator shall refer such question to the SAC for advice and ruling. The ruling made by the SAC on matters pertaining to Islamic financial business, is binding on these persons (the bank, Islamic financial institution, the court of law, the arbitrator or any other person) (s 57 of the CBM). If there is a conflict between the ruling and advice of the SAC and the Shariah body or committee of any Islamic financial institution, the ruling and advice of the SAC shall prevail (s 58 of the CBM).

Thus, it appears that the SAC's advice and rulings shall prevail over all other bodies, including, the Islamic Banks' Shariah Committees (SAB), the National Fatwa Council (Jawatankuasa Fatwa Kebangsaan), States' Fatwa Councils (Jawatankuasa Fatwa Negeri-negeri), foreign fatwas (religious decrees) such as fatwas from the Islamic Fiqh Academy under the OIC (Organization of Islamic Conference) and local and foreign Muslim scholars from the Middle East such as Dr Yusof al-Qaradawi, Dr Said Ramadan al-Buti and Dr Wahbah al-Zuhayli.

The word 'Islamic financial institutions' means a financial institution carrying on Islamic financial business (s 3 of the CBM). While the word 'Islamic financial business' means any financial business in Malaysian ringgit or in another currency which is subject to the laws enforced by the Central Bank and is consistent with the Shariah (s 3 of the CBM).

The appointment of the members of the SAC is made by the Yang di-Pertuan Agong ('YDPA') on the advice of the Minister of Finance after consultation with the Central Bank (s 53(1) of the CBM). They have to be persons who are qualified in the Shariah or who have knowledge or experience in the Shariah and in banking, finance, law or such other related disciplines (s 53(1) of the CBM). Judges of the civil courts and of the Shariah Court of Appeal of the States or Federal Territory may also be appointed subject to certain conditions (s 53(2) of the CBM).

All persons, including the Islamic financial institutions, are duty bound to comply with the directions (written circulars, guidelines and notices) of the Central Bank on any Shariah matter relating to the Islamic financial business. These directions are made in accordance with the advice of the SAC. Any person who fails to comply with any of these directions, commits an offence and shall, upon conviction, be liable to a fine not exceeding three million ringgit (s 59(1), (2), (3) of the CBM).

ISLAMIC BANKS

In 1983, Parliament passed the IBA which aimed to regulate Islamic banking. This Act has been enforced since 7 April 1983. The IBA was originally based on the Banking Act 1973 (now known as BAFIA) with certain amendments to make it in compliance with the principles of

the Islamic law. The IBA is an Act that provides for the licensing and regulation of Islamic banking businesses.

Section 2 of the IBA provides certain important definitions involving the words 'Islamic bank' and 'Islamic banking business'. Accordingly, 'Islamic bank' means any company which carries on an Islamic banking business and holds a valid licence; and all the offices and branches in Malaysia of such a bank shall be deemed to be one bank. Meanwhile, 'Islamic banking business' means a banking business whose aims and operations do not involve any element which is not approved by the religion of Islam (see also s 3(5)(a) of the IBA).

To strengthen the IBA, an amendment was made in 2003¹⁶ with the insertion of a new provision imposing an obligation on each and every Islamic banking and financial institution to comply with the advice provided by the SAC concerning the operations, creations and innovations of their banking and financial products. This obligation currently is enshrined in s 13A of the IBA. This is for the purpose of ensuring that their Islamic banking and financial business and system are duly complied with the requirements of Islamic law.

Apart from the SAC, Islamic banks must also establish their own SAB to similarly check and advice their business and financial businesses and operations so as to not go against any of the provisions of Islamic law. This is required under s 3(5)(b) of the IBA.¹⁷

16 See s 4 of the Islamic Banking (Amendment) Act 2003 (Act A1214) enforced on 22 December 2003.

17 See also the definition of 'Islamic banking business' as defined under s 2 of the IBA to mean: 'Islamic banking business' means banking business whose aims and operations *do not involve any element which is not approved by the Religion of Islam*. (Emphasis added.)

Section 3(5)(a) provides: 'The Central Bank shall not recommend the grant of a licence, and the Minister shall not grant a licence, unless the Central Bank or the Minister, as the case may be, is satisfied — (a) that the aims and operations of the banking business which it is desired to carry on *will not involve any element which is not approved by the Religion of Islam*'. (Emphasis added.) Section 3(5)(b) on the other hand provides: 'The Central Bank shall not recommend the grant of a licence, and the Minister shall not grant a licence, unless the Central Bank or the Minister, as the case may be, is satisfied ... (b) that there is, in the articles of association of the bank concerned, provision for the establishment of a *Syariah advisory body*, as may be approved by the Central Bank, to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the Religion of Islam.' (Emphasis added.)

ISLAMIC WINDOW BANKS

Even though originally, there was no provision in the BAFIA which specifically provided for the control and governance of Islamic banking and financial business by conventional banking and financial institutions,¹⁸ after the positive development of the Islamic banking and financial business carried out by Islamic banks, there was a need to allow conventional banking and financial institutions to similarly implement the same. Thus, after ten years of Bank Islam Malaysia Bhd ('BIMB') becoming the pioneer in the Islamic banking business in Malaysia, the Government of Malaysia began allowing conventional banks to likewise carry out the Islamic banking and financial businesses through the establishment of Islamic banking and financial counters known as the 'Interest Free Banking Scheme' (Skim Perbankan Tanpa Faedah (SPTF)) in 1993.

In order to improve and smoothen out the implementation of the Islamic banking and financial business counters, a statutory amendment was made to the BAFIA in 1996. The amendment was the insertion of a new s 124 to the effect of allowing conventional banks and financial institutions, other than the Islamic banks, in Malaysia, to carry out Islamic banking and financial businesses. The main objectives of this amendment are to:

- (1) officially grant the right to conventional banking and financial institutions to carry out Islamic banking business; and
- (2) ensure that the conventional banking and financial institutions also establish their own Shariah Advisory Committee to advice on the Islamic banking businesses which they carry out.

Section 2 of the BAFIA defines 'Islamic bank' to mean 'a bank licensed under the Islamic Banking Act 1983'. Thus, to understand the meaning of 'Islamic bank', a reference has to be made to the IBA. According to s 2 of the IBA, 'Islamic bank' means 'any company which carries on Islamic banking business and holds a valid licence; and all the offices and branches in Malaysia of such a bank shall be deemed to be one bank'.

Unfortunately, the meaning of 'Islamic banking business' is not defined under s 2 of the BAFIA. Nevertheless, s 124(7) of the BAFIA spells out that this phrase has similar meaning with 'Islamic banking business' as defined under s 2 of the IBA vis, 'Islamic banking business' means 'banking business whose aims and operations do not

18 Unlike the IBA which specifically governs Islamic banks carrying out Islamic banking business.

involve any element which is not approved by the Religion of Islam'. However, 'Islamic financial business' is defined by s 124(7)(c) of the BAFIA to mean 'any financial business, the aims and operations of which, do not involve any element which is not approved by the Religion of Islam'.

Furthermore, the BAFIA prescribes certain duties on part of the conventional banks which carry out Islamic banking businesses and Islamic financial businesses (the IWB). The duties are:

- (1) to consult the Central Bank before carrying out these businesses (s 124(1) of the BAFIA); and
- (2) the IWB must seek advice from the SAC on the operations of its banking and financial businesses in order to ensure that they do not involve any element which is not approved by the religion of Islam (s 124(3) of the BAFIA) and subject to further written directions from the Central Bank issued from time to time to regulate their operations of the businesses (s 124(3) of the BAFIA).

There is no statutory provision requiring the IWB to establish its own internal SAB, unlike the Islamic banks, which are specifically required to do so under s 3(5)(b) of the IBA. Nevertheless, as the IWB is subject to the control of the Central Bank, the latter requires the IWB to establish their own internal SAB to advise their respective Islamic and financial businesses. However, the establishment and operation of their SABs are subject to the directions and guidelines of the Central Bank.¹⁹

GHARAR

There are many verses from the Quran, calling for the doing of justice and abstaining from committing any cruelty, fraud and injustice, especially in business and transactions. The following are examples of the relevant verses:

Do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property.

Surah *al-Baqarah* (2):188

19 See the Central Bank Guidelines On The Governance Of Shariah Committee For The Islamic Financial Institutions, December 2004, BNM/GPS 1 at <http://iimm.bnm.gov.my/view.php?id=24&dbIndex=0&website_id=14&ex=1256017525&md=%D4%FA%0E0%7E%C5e%B2F%2C%A8j%C3%FDjr> and <http://www.bnm.gov.my/guidelines/03_dfi/03_prudential/03_gl_governance_of_shariah_committee.pdf>.

O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!

Surah *al-Nisa* (4):29

Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition'.

Surah *al-Nahl* (16):90

O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah 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 Allah is well-acquainted with all that ye do.

Surah *al-Nisa* (4):135

... To the Madyan people We sent Shu'aib, one of their own brethren: he said: 'O my people! Worship Allah; Ye have no other god but Him. Now hath come unto you a clear (Sign) from your Lord! Give just measure and weight, nor withhold from the people the things that are their due; and do no mischief on the earth after it has been set in order: that will be best for you, if ye have Faith.'

Surah *al-A'raf* (7):85

And withhold not things justly due to men, nor do evil in the land, working mischief.²⁰

Surah *al-Syu'araa'* (26):183

O ye who believe! Fulfill (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for Allah doth command according to His will and plan.

Surah *al-Maidah* (5):1

Examples of practices involving fraud and injustice are the practice of *riba'* (interest/usury) in lending transactions and the *gharar*²¹ sale

20 *Ibid* at p 374.

21 Means 'detrimental act', causing harm or damage. A *gharar* transaction means undertaking buying and selling activities based on unknown or unspecified terms, conditions and subject matters or the inability for the surrender of the subject matter of the contract. See Majma' al-Lughah al-Arabiah al-Idarah al-'Ammah Lil Mu'jamat Wa Ahya' al-Turath, 2005, *al-Mu'jam al-Wasit*, (4th Ed), Maktabah al-Shuruk al-Dauliah, Qahirah Egypt at p 648.

and purchase. The practice may be necessary and appropriate for investors and businessmen as being creative and devious capitalist business devices to maximise profits with no or less risk but they are unlawful and cause injustice according to Islamic law. Thus, Islam prohibits the practice of *riba'* (interest/usury) and *gharar* transactions. This is explained in the following Quranic verses:

Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: 'Trade is like usury,' but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (forever).

Surah *al-Baqarah* (2):275

This because they love the life of this world better than the Hereafter: and Allah will not guide those who reject Faith. Those are they whose hearts, ears, and eyes Allah has sealed up, and they take no heed. Without doubt, in the Hereafter they will perish.

Surah *al-Nabl* (16):107-109

If any do wish for the transitory things (of this life), We readily grant them — such things as We will, to such person as We will: in the end have We provided Hell for them: they will burn therein, disgraced and rejected.

Surah *al-Isra'* (17):18

Similarly, the hadith of the Prophet Muhammad (SAW) also calls for a similar practice in carrying out any transaction:

Muslims are brothers. It is not permissible for a Muslim to sell a thing which contains faulty elements/flaws/defects (aib) to his fellow brother (Muslim) except if he discloses it.²²

Those who cheats us, is not from us.²³

It was reported that the Prophet Muhammad PBUH while he was passing a vendor selling foods, and became attracted to the bunch of foods before him. He put his hand into the bunch and found the part below the foods

22 Reported by Ibnu Majah from Utbah bin A'mir, quoted from Wahbah al-Zuhaili, 1988, *al-Fiqh al-Islami Wa Adillatubu*, Vol 5, Dar al-Fikri, Dimasq Syria at p 220.

23 Reported by the majority (Jamaah), except Bukhari and al-Nasai' from Abu Hurairah. See Naylu al-Awtar, Vol 5 at p 212, quoted from Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatubu*, Vol 5, Dar al-Fikri, Dimasq Syria, 1988 at p 220.

were wet. He asked the seller: What is this? The seller replied: the foods were wet because they were poured with rain water and to prevent public from knowing this fact, he put the wet foods at the bottom part of the bunch. On hearing of this, the Prophet PBUH said: 'He who cheats us, is not from us.'²⁴

It is not permissible for someone to sell a thing except after he has explained about it, nor is it permissible for a person who knows such a state of condition of a thing, except he explains about it.²⁵

Yahya related to me from Malik from Abu'r-Rijal Muhammad ibn Abd ar-Rahman ibn Haritha from his mother, Amra bint Abd ar-Rahman that the Messenger of Allah, may Allah bless him and grant him peace, forbade selling fruit until it was clear of blight. Malik said: 'Selling fruit before it has begun to ripen is an uncertain transaction (gharar).' (Muwatta' Imam Malik).²⁶

CONTRACT OF SALE INVOLVING A NON-EXISTENT SUBJECT MATTER

The position of Islamic law is clear on contracts involving a non-existent subject-matter. Islamic law lays down a condition that the subject matter must actually exist at the conclusion of the contract. Hence, if the subject matter does not exist, generally, the contract is void even though it could probably exist thereafter, or even if it is established then that it would exist in the future but the existence is still to the detriment of any party to the contract. A contract which involves a non-existent subject matter is prohibited pursuant to a hadith, whereby the Prophet Muhammad (SAW) prohibited a person from selling an animal foetus yet to be born while it is still in the mother's womb, when the mother was not part of the sale.²⁷ Similarly

24 Reported by Muslim, quoted from Hj Mohd Saleh Haji Ahmad, 2005, *Risalah Abkam*, Hjh Salihah Hj Ab Halim (ed), Intel Multimedia and Publication at p 275.

25 Extracted from Ahmad, Ibnu Majah, al-Hakim in *al-Mustadrak*, in *Nayl al-Awtar*, Vol 5 at p 212, in the Musnad of Ahmad Abu Ja'far al-Razi and Abu Siba', quoted from Wahbah al-Zuhaili, 1988, *al-Fiqh al-Islami Wa Adillatuhu*, Vol 4, Dar al-Fikri, Dimasq Syria at p 556.

26 Translation of Malik's Muwatta', Book 31, Number 31.8.12 at <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muwatta/031.mmt.html>.

27 Jamaluddin Abi Muhammad Abdullah bin Yusuf, al-Zaila'i, *Nasb al-Rayah*, Dar al-Hadith, Qalith, India, Vol 4 at p 14. See also Razali Nawawi, *Islamic Law on Commercial Transactions*, CT Publication Malaysia, 1999 at p 73 and Wahbah al-Zuhaili, *al-Fiqh al-Islami Wa Adillatuhu*, Vol 4, Dimasq Syria, 1988 at pp 427-429.

is the selling of milk whilst it is still within the udder of the animal. This sale is void as there is a possibility of the udder being perhaps void of milk, and instead, only containing air.²⁸ In one hadith, the Prophet (SAW) prohibited the act of stopping the milk of udder of the female goat for a certain duration for the purpose of enticing the public to purchase the female goat on the pretext of it containing a lot of milk.²⁹ The Prophet (SAW) too prohibited the sale of things which one does not own.³⁰

However, Muslim jurists allow the contract of a non-existent subject matter, as one of the exceptions to the above, relating to the sale of agricultural products before they become ripe. However, this is subject to the knowledge that the products have already appeared even before the signs of ripeness are shown. Further, this type of contract is allowed if the purchaser immediately harvests them. The position is the same in respect of the sale of fruits and agricultural products, which yield successively one after another during one harvest as in the case of water melons and egg-plants. In this particular case, Muslim jurists in general have agreed to allow the sale of fruits which have already appeared but will disallow the sale of fruits which are yet to appear.³¹ This contract falls under the category —

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- 28 Ala'uddin Abu Bakr bin Mas'ud al-Kasani, *Badar al-Sana'i*, Vol 5, Matba'ah al-Jamaliyyah, Qahirah at p 137 and Wahbah al-Zuhaili, 1988, *ibid* at pp 427-429.
- 29 Muhammad Sharbini bin Ali al-Shawkani, *Nayl al-Awtar*, Vol 5, *Matba'at al-Misriyyah*, 1357H, Qahirah at p 21, cited in Wahbah al-Zuhaili, 1988, *ibid* at p 219. This hadith is a unanimous and authentic hadith reported from Abu Hurairah.
- 30 Abu Dawud, 1988 *Sunan*, Vol 3, Dar al-Hadith, Qahirah at p 281 and Wahbah al-Zuhaili, 1988, *ibid* at pp 427-429.
- 31 Ala'uddin Abi Bakr bin Mas'ud Al-Kasani, *Bada'i al-Sana'i*, Vol 5, Matba'at al-Jamaliyyah, Qahirah Misr, 1328H at p 137. Also a hadith of the Prophet (SAW), reported by Bukhari and Muslim from Anas said that the Prophet (SAW) prohibits the selling of fruits until the fruits have existed (the fruits have ripen and are ready for harvesting). See Naylu al-Awtar, Vol 5 at p 172, cited in Wahbah al-Zuhaili. 1988, *ibid* at p 175. School of Maliki, school of Shiah Imamiah, Ibnu Taimiyah and Ibnu Qayyim from Hanbali school, allow the selling of fruits which are seen physically ripen or otherwise as a facility for sale and to hinder hardship in business dealing. However, for the Hanafi, Hanbali, Zaidiah, Zahiri and Ibadhiyah schools, the sale of the mixture between ripen and not ripen fruits, is prohibited. See Wahbah al-Zuhaili, 1988, *ibid* at p 176.

'the subject matter exists in essence, then comes into existence thereafter'.³²

As regards to the subject-matter which did not exist at the time of contract and it is established that it also could not exist in the future, Muslim jurists do not accept this kind of contract as this contract contains the element of *gharar*.³³ A transaction containing the element of *gharar* is prohibited based on the verses of the Quran above and the hadith of the Prophet (SAW).³⁴ Majority of the jurists are also unanimously of the opinion that the contract which its subject matter generally could not be surrendered to the parties at the conclusion of the contract or at the promised date, is a *gharar* contract and thus it is void, not binding and having no legal effect.³⁵

Gharar is forbidden in Islam as its existence would harm the well being, rights and interests of contractual parties and cannot ensure satisfactory outcomes, justice and fairness in their contractual dealings.³⁶ It is also forbidden by the Shariah because this element typically causes enmity, dispute, hardship, injustice and losses to the parties.

ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

Abandoned housing projects in Peninsular Malaysia are one of the spill over problems of the housing industry. This problem is a nightmare for the affected purchasers and becomes a burdensome social obligation for the government to tackle. From 1990 until June 2005, a total of 141 projects have been considered abandoned. This figure does not include abandoned housing projects which have been categorised as abandoned *in toto* since the 1970s, ie abandoned housing projects which have no possibility for rehabilitation at all,

32 Razali Nawawi, 1999, *Islamic Law on Commercial Transactions*, CT Publications Malaysia at p 74. See also Al-Sarkhasi, *al-Mabsut*, Vol 12 at pp 194-197, *al-Zailar'iy al-Haqa'iq*, Vol 4 at p 12, *Fatawa al-Hindiyyah*, Vol 3 at p 106, Ibn Jayzi, *al-Qawanin* at p 162, Ibn Qudamah, *al-Mughni*, Vol 4 at pp 202-209, cited in Razali Nawawi 1999, *ibid* at p 74.

33 *Ibid*. See also Surah *al-Nisa* (4):29: 'O ye who believe! Eat not up your property among yourselves in vanities'

34 Ibn Umar said the Prophet (SAW) prohibits sales involving *gharar* elements. See Al-Baihaqi, *al-Sunan al-Kubra*, Vol 5, Dar al-Fikri, Bayrut Lubnan at p 338.

35 Wahbah al-Zuhaili. 1988, *ibid* at pp 429-432.

36 www.zaharuddin.net, *Gharar & Gambling in Daily Transactions*.

housing projects (which are abandoned) carried out by parties who are not within the purview of the Ministry of Housing and Local Government ('MHLG') and abandoned housing projects in Sabah and Sarawak (East Malaysia). This figure is a cause of concern to the general public of purchasers who may lose confidence in housing developers and the housing industry as a whole and especially the government (MHLG) being the regulatory body in the housing industry.³⁷ There is also the formidable problem of what to do with abandoned housing projects? Can these abandoned projects be expediently and expeditiously rehabilitated? If so, how much will they additionally cost?

CAUSES OF ABANDONMENT OF HOUSING DEVELOPMENT PROJECTS IN PENINSULAR MALAYSIA

Among the reasons leading to the abandonment of housing projects in Peninsular Malaysia, are as follows:³⁸

- (1) Financial problems faced by the developers. The cause of this problem is owing to the problems with the developers' financial and construction management (severe liquidity problems and high gearing) to meet the construction costs and to repay creditors.
- (2) Loss of approval of the applications for housing developer licences by the MHLG. The MHLG fails to obtain the requisite advice and opinions from economists, legal experts, property experts and other experts in approving the applications.
- (3) Challenges and problems of dealing with and clearing the project site of squatters.
- (4) Ongoing conflicts, feuds and squabbles ensuing between and among the developers, land proprietors, purchasers,

37 The statistics on abandoned housing projects can be found in Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Malaysia: A Legal Perspective* [2006] 6 MLJ i; Nuarrual Hilal Md Dahlan, *Rehabilitation of Abandoned Housing Project: Experience of An Abandoned Housing Developer Through the Help of A Government Agency* [2007] 1 MLJ lxxxiv; and Nuarrual Hilal Md Dahlan, *Rehabilitation of Abandoned Housing Project in Peninsular Malaysia By a Purchasers' Voluntary Scheme: A Case Study* [2007] 4 MLJ clvii. See also Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework (Part One and Part Two)*, (2009), unpublished PhD Thesis, International Islamic University Malaysia.

38 *Ibid.*

contractors, consultants and financiers causing further difficulty to coordinate and streamline the development and construction activities.

- (5) Insufficient coordination between the land administration authority, planning authority, building authority, housing authority and other technical agencies in respect of the approval for the alienation of land, land uses, subdivision of lands, planning permission, building/infrastructure plans approval, housing developers' licences and issuance of the Certificate of Fitness for Occupation ('CF') and Certificate of Completion and Compliance ('CCC'), as the case may be.
- (6) Fraudulent practices of the housing developers, for example by instructing the architects or engineers to issue false claims for the release of the purchasers' housing loan funds from the end-financiers dishonestly.
- (7) Lacking of, and insufficient experience and skills in handling housing development projects and showing irresponsibility on the part of the developers. Some have even absconded after realising that they could not complete the projects.
- (8) Blatant disregard for the laws by the developers, throughout the course of the development of the housing projects. These laws are the Housing Development (Control and Licensing) Act 1966 ('Act 118') and its regulations made thereunder, the Street, Drainage and Building Act 1974 ('SDBA 1974'), the Uniform Building By-Laws 1984 ('UBBL 1984') and the planning and building guidelines issued by the planning authority and the building authority.
- (9) Weaknesses in enforcement on the part of the land administration authority, planning authority, building authority and the housing authority over the development of the housing projects.
- (10) Absence of a better housing delivery system such as the full 'build then sell' system.
- (11) No legal requirement for obtaining housing development insurance imposed on applicant developers as a condition precedent for the approval of the application for a housing developer's licence.
- (12) Insufficient legal requirements and practices allowing purchasers, the MHLG and the local authority to supervise, inspect, check and monitor the due progress of the housing development works undertaken by the developers.

- (13) No legal requirement and practice to get the necessary endorsement and verification from purchasers, the MHLG and the local authority over each and every progress claim made by the developers for the release of the loan funds from the end-financiers.
- (14) No specific legal provisions governing rehabilitation schemes that has led to abuse and misuse of power and authority by the rehabilitating parties to the detriment of the purchasers.
- (15) Economic slowdown and recession faced by the nation resulting in strict banking control over loan approvals and the regularisation of the loan repayments; this has also affected the housing industry and the related sectors.
- (16) No legal provisions regulating the loans (bridging loan) and the repayment of loans on part of the banks and financial lenders leading to the possibility of abuse and misuse of power on part of the banks and financial lenders to the detriment of the borrower developers.
- (17) Excessive immunity enjoyed by the state authorities and the local authorities against any legal action from aggrieved parties, even though they are negligent and in breach of the duty of care in the implementation of the provisions contained in the SDBA 1974 and the UBBL 1984, pursuant to s 95(2) of the SDBA 1974.
- (18) Insufficient professional staff members, insufficient legal and technical training and knowledge, insufficient office facilities, inefficient administration and administrative logistics on part of the housing authority (MHLG), land administration authority, local authority, local planning authority, appropriate authority and technical agency in Peninsular Malaysia which have indirectly, by and large, contributed to the problems of abandoned housing projects.³⁹

39 See the news in *The New Strait Times* ('NST') dated 12 September 2007, about the Auditor-General's Report conducted by the Auditor General's Office in 2006, reporting that the inefficient and poor management of funds, lack of enforcement and man-power, lack of appropriate training, mal-administration and poor monitoring, unreasonable overspending, and corruption in the states and federal agencies (including the MHLG and local councils) has caused huge losses to the government. See <http://www.malaysianbar.org.my/content/view/11104/2/>. Also *The NST*, Wednesday, 12 September 2007 at pp 1, 4 and 12.

- (19) Insufficient terms in the statutory standard sale and purchase agreements (Schedules G, H, I and J) of the Housing Development (Control and Licensing) Regulations 1989 or the usual standard of sale and purchase of house in the protection of the purchasers' interests if the housing units that they purchase are inevitably abandoned.
- (20) Insufficient terms in the bridging loan agreement between the developer and the bridging financier to the effect of protecting the rights and interests of the affected stakeholders in the development of housing projects.
- (21) Insufficient provisions in Act 118 in the protection of the rights and interests of purchasers if the housing projects are abandoned.
- (22) Insufficient terms and conditions in the housing loan agreement (including the BBA) effected by the purchaser/borrower and the end-financiers to finance the purchase of the housing unit of the purchaser/borrower against any possible grievances consequent to the abandonment of the housing projects.

GRIEVANCES OF PURCHASERS IN ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA

The grievances and problems faced by the purchasers, if a housing development project is abandoned, are:⁴⁰

- (1) that they are unable to get a vacant possession of the units on time as promised by the vendor developers;
- (2) that the construction of the houses is terminated or partly completed resulting in the houses being unsuitable for occupation

40 See Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Malaysia: A Legal Perspective* [2006] 6 MLJ i; Nuarrual Hilal Md Dahlan, *Rehabilitation of Abandoned Housing Project: Experience of An Abandoned Housing Developer Through the Help of A Government Agency* [2007] 1 MLJ lxxxiv; and Nuarrual Hilal Md Dahlan, *Rehabilitation of Abandoned Housing Project in Peninsular Malaysia By A Purchasers' Voluntary Scheme: A Case Study* [2007] 4 MLJ clvii. See also Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework (Part One and Part Two)*, (2009), unpublished Phd Thesis, International Islamic University Malaysia.

for a long duration of time,⁴¹ unless the units can expeditiously be revived;

- (3) that in the course of the abandonment of the project, purchasers would still have to bear all and keep up with the monthly installments of the housing loans repayable to their respective end-financiers, failing which, the purchased lots being held as security for the housing loan would be sold off with the possibility of the purchasers being declared bankrupts by their lender bank;
- (4) as the purported purchased unit has been abandoned and cannot be occupied, the purchasers would have to rent other premises, thus adding up to their monthly expenses;
- (5) the inability of the purchasers to revoke the sale and purchase agreements and claim for the return of all the purchase moneys paid to the developers as the developer may have absconded or may have no monetary provisions at all to meet the claims;
- (6) that many problems and difficulties happen in attempts to rehabilitate abandoned housing units; these problems occur because the projects may have been overdue for too long without any prospect of revival and to rehabilitate them, additional costs and expenditure on the part of the purchasers would be incurred;
- (7) the possible difficulties in reaching a consensus towards getting cooperation from the purchasers, defaulting abandoned developers, end-financiers, bridging loan financiers, contractors, consultants, technical agencies, local authority, land administration authority, state authority and planning authority to rehabilitate the projects; this may be due to technical and legal problems faced in the attempt to rehabilitate the projects;
- (8) insufficient funds to generate the rehabilitation as the outstanding loan funds of the purchasers are not enough, the

41 See for example, the abandoned housing project at Taman Bistari Kamunting, Taiping, Perak developed by Sri Ringgit Properties Sdn Bhd, where the project was abandoned since the middle of the 1980s. There were several attempts made by certain interested parties to rehabilitate the project but the attempts were proven to be futile. However, fortunately, with the injection of welfare funds and rehabilitation carried out by Syarikat Perumahan Negara Bhd ('SPNB'), a government linked company ('GLC') funded by the Ministry of Finance, in early 2001, the project has now fully been rehabilitated and is ready for occupation, after it had been abandoned for almost 20 years. This is based on File No KPKT/08/824/3957/E.

- purchasers refuse to part with their own money, there are no financial assistance from any agency and the fact that the rehabilitating parties would incur losses if they were to proceed with the purported rehabilitation;
- (9) purchasers themselves would need to top-up using their own money, as the available funds are insufficient for meeting the rehabilitation costs and they themselves personally would have to rehabilitate the projects that were left abandoned; thus, they would have to face all kinds of music in consequence of the abandonment and in initiating efforts for rehabilitation;
 - (10) that purchasers would not get any compensation and damages from the defaulting abandoned developers as they (the defaulting abandoned developers) may have no monetary provisions to meet the claims;
 - (11) that there may be no party agreeable to rehabilitate the abandoned housing projects, causing the project to be stalled for an indefinite period of time or for a long period of time or at the worst, the abandoned project may not altogether be rehabilitated;
 - (12) other pecuniary and non-pecuniary losses subtle or otherwise, suffered by purchasers due to the abandonment and in the course of rehabilitation of the projects pending full completion, such as divorces, family breakdowns, dismissals from employment, nervous shocks, mental breakdowns and losses of future earnings; and
 - (13) due to the abandonment and the ensuing complications occurring thereafter, the ordinary machinery and enforcement of the housing, planning, building and development laws become dysfunctional at the expense of the purchasers. This also includes the inability of the purchasers to take legal actions against the defaulting developer because the actions might not be beneficial nor feasible.

THE SHARIAH AND LEGAL POSITION OF THE STATUTORY STANDARD SALE AND PURCHASE AGREEMENTS UNDER REGULATIONS 1989 OF THE HOUSING DEVELOPMENT (CONTROL AND LICENSING) ACT 1966 (SCHEDULES G, H, I AND J) ('THE SAID AGREEMENTS')

According to a research finding, the said agreements are null and void as the agreements do not provide sufficient preventive and curative measures, in the protection of the stakeholders in house buying in Peninsular Malaysia. One of the reasons is that the said agreements inherently and with the possibility of containing *gharar al-fabish* (exorbitant *gharar*) elements are detrimental to the rights and

interests of the purchasers.⁴² This is so, bearing on the grievances faced by purchasers as illustrated above. Further, there are no effective preventive and curative measures to solve the problems of abandoned housing projects and its consequences.

It follows that this would affect the legality of subsequent transactions such as the loan transactions obtained from Islamic banks or IWB (for instance, the BBA) on the reason that, these loan transactions may be void as the prior house purchase agreement (the said agreement (Schedules G, H, I and J)) entered into by the purchaser and the vendor developer, it is opined, contains *gharar al-fabish* (exorbitant *gharar*) elements. Thus, on this premise, the BBA is also void as far as it involves the purchase of houses effected through the said agreements (Schedules G, H, I and J) ie prospective houses pending completion.

As the application of the said agreements may be void according to Islamic law, pursuant to the above arguments, it follows that, Islamic banks and other IWBs in Malaysia, are practising a mode of transactions that are contrary to the elements approved by the religion of Islam, and thus has, subtly, ultra vires the very foundational element of its establishment, pursuant to s 2 of the IBA⁴³ and s 124(7) of the BAFIA.⁴⁴

THE LATEST LEGAL DEVELOPMENT OF THE 'BBA' IN HOUSE FINANCING

There are some decided case laws which have held that the concept and application of the BBA in house financing is void as the transaction

42 See Nuarrual Hilal Md Dahlan, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework (Part One and Part Two)*, (2009), unpublished Phd Thesis, International Islamic University Malaysia at pp 453-467.

43 According to s 2 of the Islamic Banking Act 1983 (Act 276), 'Islamic bank' means 'any company which carries on *Islamic banking business* and holds a valid licence ...'. While the definition for 'Islamic banking business' means 'banking business whose aims and operations *do not involve any element which is not approved by the Religion of Islam*'. (Emphasis added.)

44 According to s 124(7) of the BAFIA, the word 'Islamic banking business' has similar meaning with 'Islamic banking business' as defined under s 2 of the IBA, vis, 'Islamic banking business' means 'banking business whose aims and operations do not involve any element which *is not approved by the Religion of Islam*'. (Emphasis added.) The word 'Islamic financial business', is defined by s 127(7)(c) of the BAFIA to mean 'any financial business, the aims and operations of which, do not involve any element which *is not approved by the Religion of Islam*'. (Emphasis added.)

involves the *riba'* element,⁴⁵ an element which is prohibited under Islamic law. The first case is *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631 (HC).⁴⁶ The BBA in house financing, according to the court in this case, is regarded as a loan transaction and not a sale and purchase transaction. Further, the BBA prescribed that if the borrower defaulted on the loan, the defaulting borrower has to repay the bank the whole amount of the sale price which is usually double/higher than the purchase price of the property in the sale and purchase agreement entered into by the borrower (customer/purchaser) and the housing developer. The BBA was held not only to contain the *riba'* element, its nature and operation were also deemed inequitable and unjust to purchasers/borrowers.

In *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389 (High Court of Kuching),⁴⁷ Hamid Sultan JC (as he then was) held

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- 45 As there is a difference between the price named in the transaction of purchase between the bank and the purchaser/borrower (the purchase price) and the price which the purchaser has to repay to the bank in deferred payment (the sale price).
- 46 In this case, the plaintiff applied for an order for sale for the security to the housing loan granted to the defendant, pursuant to s 256 of the NLC. The housing loan was effected by way of an Islamic house financing called the *Bay' Bithaman al-Ajil* ('BBA'), which applied the principle of *bay al-inah* or *murabahah*. The defendant contended that the BBA was void according to Islamic law as this instrument contained a *riba'* transaction and that the outstanding amount which became payable to the plaintiff bank by the defendant borrower was more than the amount of loan granted via the BBA. The court (Abdul Wahab Patail J) agreed with the arguments of the defendant borrower. However, the court allowed the application of the plaintiff for the order for sale but the price which the plaintiff bank entitled to was the price equivalent to the market price for the charged property (security).
- 47 In this case, the borrower obtained a housing loan under the BBA, for an amount of RM80,094 from the plaintiff lender to purchase a house. Later, the borrower defaulted on the loan, after paying some monthly instalments, all amounting to RM16,947.62. The plaintiff, as the lender applied for an order for sale to sell the charged property (the house) and for the amount of RM167,797.10, being the loan of RM80,094 and the profit margin chargeable by the lender bank for the whole length of the repayment of the instalments period. 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 or make suitable orders or directions as the justice of the case requires. The question to be decided was whether the plaintiff lender was entitled as of right to the full profits if the BBA was terminated very much earlier, taking into consideration s 148(2)(c) of the Sarawak Land Code.

that in the order for a sale involving BBA documents, the defaulting borrower should be entitled to a rebate against the whole loan amount due together with the interests which becomes payable on his default to service the monthly instalment. Thus, the term in the PSA and the charge document as well as the annexure which prescribes that if the borrower defaults, he shall be required to pay the total amount of the loan together with the profit margin for the whole repayment of the instalment period, was inequitable and repugnant to Islamic law. The whole amount of debt together with the profit margin which was chargeable on the borrower should be equitably limited to the length of repayment period which he has occupied, enjoyed or used the charged property, not the blanket amount for the whole repayment of the instalment period as prescribed in the PSA, charge document and annexure. Hamid Sultan JC ordered that the plaintiff should amend its affidavit in support for the order for sale to the effect that the amount due by the defaulting borrower should be subject to a substantial rebate taking into consideration the length of period the defaulting borrower had enjoyed possession and occupation of the charged property and apply the instalment amounts which the borrower had paid to the lender bank against the total loan amount and the profit margin due.

Similar findings were made in *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67 (High Court in Kuala Lumpur)⁴⁸ and

48 In this case, the defendant purchased a double storey link house and secured the loan under the Shariah principle of the BBA from the plaintiff bank, who was his employer at that time, for a sum of RM346,000. The loan was to be repaid over an 18-year tenure by 216 monthly instalments and a charge was registered against the title. However, later the defendant borrower resigned from the plaintiff bank and at the defendant's request, the loan facility was restructured to the effect that the bank selling price of the house was RM999,363.40, payable over a period of 25 years. After making several instalment payments totalling RM33,454.19, the defendant borrower defaulted again. The plaintiff applied for an order for sale of the charged property as well as a writ of summons to recover such sums if there is any deficiency in the proceeds of the sale. The issue before the court was the order to recover the actual amount that a customer has to pay to the provider of a BBA in the event of default, in this case, after having paid RM33,454.19 in instalments.

Malayan Banking Bhd v Marilyn Ho Siok Lin [2006] MLJU 283 (High Court in Kuching).⁴⁹

However, the above findings of the court were contrary to the earlier decisions of the court involving the BBA in *Bank Islam Malaysia Bhd lwn Pasaraya Peladang Sdn Bhd* [2004] 7 MLJ 355 (High Court in Alor Setar), *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735, *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1996] 4 MLJ 295 (High Court in Kota Bharu), *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393 (CA) and *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corp Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625 (CA), where in these cases, the courts allowed the plaintiff banks' applications to recover the whole sale price for the whole tenure of the loan repayment as the outstanding debts together with the profit margin due by the defaulting defendant borrower, under the BBA, without taking in account of the length of the repayment period on part of the defendant borrower who has occupied or enjoyed the property in question.

Nevertheless, in a recent historic decision by the Court of Appeal on 26 August 2009, the Court of Appeal upheld the decisions of the courts in *Pasaraya Peladang, Dato' Haji Nik Mahmud* and *Emcee Corp*. There were nine cases⁵⁰ brought before the Court of Appeal involving BIMB as the appellant. The issue involved the BBA and in these nine cases, the judge in the High Court decided that the BBA was contrary to the religion of Islam as it involved the *riba'* transaction. However, the judge in the Court of Appeal (Raus Shariff JCA on behalf of the court and the other judges, Abdul Hamid Embong and

⁴⁹ This case also involved a BBA to finance a house. The defendant borrower defaulted on the loan after paying some instalments. The plaintiff bank applied for an order for sale against the charged property. The issue in the case was whether the plaintiff bank was entitled to recover the whole amount due (the whole sale price of RM995,205.64) as the defendant borrower only enjoyed some portion of the tenure period, not the whole repayment period. The court held that the defendant borrower was entitled to a substantial reduction of the debts due to the plaintiff bank to commensurate with the period of his enjoyment and occupation of the house on the ground of equity. Thus the judge held that the total due and owing after deduction for payments made by the defendant borrower should be RM598,689.10 and not RM995,205.64 (the sale price of the plaintiff bank).

⁵⁰ These cases were reported in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839 (CA). The cases also could be found at <<http://portal.kehakiman.gov.my/>>.

Ahmad Maarop JJCA concurring) held that the learned judge in the High Court erred in his decision by holding that the BBA was contrary to the religion of Islam as it involved the element of *riba*'. According to Raus Shariff JCA, the BBA is not a *riba*' transaction, instead it is a sale transaction under Islamic law. Further, according to Raus Shariff JCA, the High Court judge was not competent to decide the matter, ie whether the BBA is in compliance with Islamic law. The competent persons are those Islamic jurists conversant in Islamic law and in reference to Islamic banking and finance in Malaysia, the SAC and SAB of the Islamic banks. Further, the High Court judge in these nine cases had not observed the doctrine of stare decisis (judicial precedent), where before these nine cases were adjudicated, there were Supreme Court and Court of Appeal cases⁵¹ which held that the BBA was valid under Islamic law.

OUR OPINION ON THE BBA OF HOUSE FINANCING IN MALAYSIA

Although judicial decisions have held that the BBA does not involve elements of *riba*', in the writers' opinion, the BBA as practiced in Malaysia may not be valid on the ground of the elements of *gharar* contained in it. Hence, following the elaboration on *gharar al-fahish* (exorbitant *gharar*) and the judicial decisions that the BBA contains the *riba*' element,⁵² the following are the findings of the writers in respect of the BBA as practiced in Malaysia by the Islamic financial institutions.

- (1) The BBA is void for it inherently involves *gharar al-fahish* elements, particularly in the case of a transaction financing a house pending completion. The elements of *gharar al-fahish* are the grievances of the purchasers in abandoned housing projects which have been elaborated above.⁵³
- (2) In houses pending completion, where the transaction involves the application of Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989 or

51 *Adnan bin Omar v Bank Islam Malaysia Bhd* (unreported) (SC), *Datuk Haji Nik Mahmud* (CA) and *Emcee Corp* (CA).

52 In the previous case law which did not approve the practice of the BBA, the issue of *gharar* particularly involving abandoned housing projects, has not been addressed.

53 For further explanation, please refer to Nuarrual Hilal Md Dahlan, 2009, *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework (Part One and Part Two)*, unpublished PhD Thesis, International Islamic University Malaysia.

otherwise, normally the purchaser/borrower may pay some portion of the price as deposit. However, on payment of the deposit and on the execution of the sale and purchase agreement with the developer, the purchaser applies for a housing loan (BBA) from an Islamic bank to finance the balance purchase price. This is effected by the PPA and PSA as well as other documents such as the charge document or deed of assignment or power of attorney ('PA'), as the case may be. Normally, in the purchase of house, the purchaser pays a deposit representing 10% of the purchase price. The balance purchase price (90%) will be paid by the bank to the vendor/developer progressively. The bank granting the loan (90% of the purchase price) to the purchasers to complete the sale will charge the said house as collateral to the loan. The title to the housing unit will not be registered into the purchaser's name until and unless the purchaser has fully settled that loan (90% of the purchase price) together with the profit margin (the sale price) to the bank. Once the purchaser has fully settled the sale price (usually in installment), then will the bank discharge the collateral (the house as the security to the loan) and will allow the transfer of the house into the purchaser's name. However, the issue is, whether the purchaser/borrower had acquired full ownership (*milk al-tam*) warranting him to become the full and absolute legal owner (not just being an equitable and beneficial owner) to the purported house on the payment of the deposit and on the execution of the sale and purchase agreement when his name has yet to be registered as the registered proprietor of the property at the land office. It is still doubtful that he has obtained any legal ownership (*milk al-tam*) to the purported house to warrant him to 'sell' the purported house to the Islamic bank for the latter to re-sell the purported house to him (the purchaser/borrower) in accordance with *bay al-inah* or *murabahah* principles.⁵⁴ Thus, in transactions involving houses pending completion, the issue of ownership of the purported uncompleted house is still unresolved. In other words, the ownership is not a full (*milk ghair al-tam*) and unconditional ownership but an incomplete ownership (equitable/beneficial ownership). Incomplete ownership would not give any absolute power/

54 See Engku Rabbiah Adawiah Engku Ali, *Islamic House Financing: Issues & Solutions*, (2009), Prosiding Muzakarah Penasihat Syariah Kewangan Islam, CERT Publications Sdn Bhd at pp 21-27.

authority on part of the purchaser to sell the purported house to an Islamic bank. However, it may be argued that, the purchaser/borrower can sell the purported house to the Islamic bank, even though his ownership of the house is still incomplete, in order to get the housing loan from Islamic bank, on the condition that the actual owner (the developer or the like) has agreed to such an undertaking. Be that as it may, in the opinion of the writers, this is still not acceptable under Islamic law, as the ownership of the purchaser over the house is still incomplete (*milk ghair al-tam*) which can justify the selling of the house by the purchaser to the bank and for the bank to re-sell the house to purchaser, under *bay' al-Inah* and *murabahah* modes. This is to avoid the possibility of *gharar* in the transaction. It follows that the charge created over the house (which is still under *milk ghair al-tam*) as the security to the BBA may also not be valid under Islamic law, as the house is still not absolutely/fully owned (*milk ghair al-tam*) by the purchaser/borrower to warrant selling the said house to the bank for the bank to re-sell the house under the BBA transaction.

- (3) It is opined that, the current practice of the BBA seems absurd, in the sense that, the house which is subject to the charge being a security to the BBA, is also considered under the ownership of the bank. The bank's ownership over the house is explicitly stated in the PPA and PSA. How could the bank as the 'owner' of the house, 'charge' their own asset? Thus, the positions and status of the house, the charge, the ownership, the purchaser, the bank and the developer in the BBA transaction are ambiguous and not certain. This can lead to *gharar*. It should be noted, notwithstanding a charge has been created against the land and in an abandoned housing project, in the event of a default on the BBA repayment by the purchaser, the bank may also be not able to enforce the charge and foreclose the security⁵⁵ as the house is still not complete and it is doubtful that there is any interested buyer to bid for the purchase of the house/project.
- (4) The BBA is void, based on judicial decisions, on the ground that the practice is inequitable and unfair to the general public. The inequitable element is that the profit margin is higher than the debt owed. This would amount to a *riba'*, transaction. Secondly,

55 Pursuant to cl 2(2) of Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989.

if the borrower defaults, he has to pay the whole amount of the debt and the profit margin for the whole repayment of the installment period without being entitled to any equitable and appropriate rebate.

- (5) There will be no adversity (hardship) in rejecting the Malaysian style of the BBA. In other words, the degree of necessity (*darurah*) does not exist currently in Malaysia for allowing the practice of the BBA (hybrid of *bay' al-Inab* and *murabahab*), which are rejected by majority of jurists as it may involve *riba'* elements. Instead, other modes which are more equitable must be implemented such as *musharakah* (partnership) or *ijarah* (rental/lease). Some quarters may argue that the practice of the BBA is for the *maslahah/maslahah amah/maslahah al-mursalah* (public interest) of the *ummah* (Muslim society), in line with the *maqasid al-Shariah*.⁵⁶ However, to reply this, the *maslahah* must not be in derogation of the express provisions of the primary texts (the Quran and Sunnah) which clearly prohibit *gharar*, *riba'* and other inequitable/unjust practices. It (the BBA) may be applicable if there is a necessity (*darurah*) for it. However, it is opined that the degree of necessity (*darurah*) for the practice of the BBA in Malaysia warranting the application of the BBA has not yet actualised. We have the means to replace the BBA with better products, but we do not resort to

56 What is meant by *maslahah* is the preservation of the objectives of the five *maqasid al-shariah* (religion (*din*), self, mental strength (intellect), progeny (dignity) and property or wealth). Any policy and action resulting in the elimination of these objectives is considered harmful against the necessities of mankind. See Abd al-Wahab Khalaf, *Ilmu al-Usul al-Fiqh*, (al-Qahirah: Dar al-Ilmi, 1972) at pp 197-207 and Wael bin Hallaq, *The Origins and Evolution of Islamic Law*, (Cambridge: Cambridge University Press, 2005) at pp 145-146. The purpose of *maqasid al-shariah* is to achieve, justice (*'adl*), securing benefits to mankind in this terrestrial world and the Hereafter, protecting mankind against corruption, harmful elements, hardship and evil, providing human comfort and satisfying human emotional needs. See Shams al-Din Abi Abdullah Muhammad bin Abi Bakar (Ibnu Qayyim al-Jawziah), *Ilam al-Muwaqqi'in 'An Rab al-Alamin*, ed, Muhammad Muhy al-Din Abd al-Hamid, (Bayrut: Dar al-Fikri, 1977), 3: 14-15. See also Wan Azhar Wan Ahmad, 2003, *Public Interests (Al-Masalih al-Mursalah) in Islamic Jurisprudence, an Analysis of the Concept in the Shafi'i School*, (Kuala Lumpur: ISTAC IUM, 2003), at pp 1-16 (Introductory Chapter) and Dr Abd al-Aziz Berghout, *Islamic Law and Public Interests: Urgency of Creative Ijtihad* [2005] 1 ShLR 11 at pp 12 and 16.

them. This is sinful. This is akin to the requirement that to perform the obligatory prayer (*solah fardu*), one shall have to stand up (*qiyam*). If he has the ability to stand up (*qiyam*) without any difficulty or hardship, but instead he chooses to pray by sitting down, his prayer is rejected as the *rukun* (pillar) of the prayer (*solah*) has not been fulfilled.⁵⁷ Similarly in the BBA, we have the ability and means to use better Islamic products such as *musharakah* and *ijarah* in house financing, but we choose the BBA (the Malaysian BBA). The reason for this may be due to the economic and/or maximisation of profit factors. Thus on this footing, it is opined that the rationale and reason for adopting the Malaysian BBA is not satisfactorily sound.

- (6) If the housing project fails and is subsequently abandoned, the purchasers are still required to pay the monthly installments to the bank. There is no term in the BBA that protects the interest of the purchasers if in the course of construction, the houses are abandoned.
- (7) The banks absolve any liability for ensuring the completion of the houses. The banks do not consider the grievances faced by the purchasers of abandoned housing projects. What the bank wants is for the installment monies of the BBA to be fully settled by the aggrieved purchasers.
- (8) Purchasers are the aggrieved party when an abandonment occurs. They must pay their monthly installments yet they cannot occupy the purported houses. Consequently, they would have to rent other premises and have to face other grievances, pecuniary and non-pecuniary. There is no term in the BBA which can provide measures to face these problems.
- (9) In the BBA, through the PSA, the banks are owners of the property. Logically, the owner is obligated to ensure that the purported houses will be duly completed and duly handed over to purchasers and the titles can be registered in the purchasers' names. There is no guarantee that at the end of the day, if the project is abandoned or the property has not been duly constructed, the bank as owner must either do whatever is necessary to protect the interests of the purchasers or to compensate the purchasers or to return back all the monies paid to them (restitution and indemnity). There is no term prescribing this duty on the banks in the PPA and PSA.

57 See Dr Wahbah al-Zuhayli, 1988, *ibid* at pp 635-645.

- (10) There are no preventive and curative measures provided in the BBA, especially in the PSA, to avoid losses on part of the purchasers due to the abandonment of houses which they purchased.
- (11) There is no term in the BBA which provides the purchasers with the right to sue the bank for the calamities that have occurred or the right to claim compensation and damages. Provisions such as defect liability period, protection against sub-standard housing constructions, the guarantee that the titles to the property are to be registered into the purchasers' name on full settlement of the loan and compensation for late delivery of vacant possession and the obligation of the bank to obtain the CCC, must also be made clear and provided in the BBA.

SUGGESTIONS

In facing the above problems, the following are suggested:

- (1) The practice of BBA should be abolished. Instead, Islamic financial institutions should use other modes of transaction such as *musharakah* and *ijarah* in house financing. This would prevent the possibility of occurrences of *riba'* and *gharar* transactions and other problems associated with the BBA as illustrated above;
- (2) The new modes of in house financing, such as *musharakah* and *ijarah*, must also provide sufficient terms in the protection of the interests of purchasers if abandonment or otherwise inevitably occurs; or
- (3) If the practice of the BBA is to resume, it must substantially be revamped to the effect of protecting the rights of the stakeholders. The following are suggested in this respect:
 - (a) the profit margin should be reduced to a more acceptable and equitable amount so as to avoid *riba'* to commensurate with the period of occupation and enjoyment of the house by the purchaser/customer;
 - (b) the rebate should be substantial if the borrowers were to settle earlier or where the borrowers default during the repayment period as far as the rebate commensurates with the period of enjoyment of the house and the total instalments which have been paid to the bank and as far as this is equitable to the bank and the purchasers/borrowers;
 - (c) to avoid any possible occurrence of abandoned housing projects and the grievances and problems consequent to it altogether, the Islamic bank should only apply the BBA for

It can therefore be questioned on whether the immunity conferred on the SAC is compatible with Islamic law.

In the opinion of the writers, the immunity provisions in the CBM above are in conflict with Islamic law. The grounds are as follows.

In Islam, the person in authority including the SAC does not have immunity against any wrong advice/rulings.⁵⁹ This is based on the Quranic verses and the sunnah of the Prophet (SAW), vis:

Say: 'I am but a man like yourselves, (but) the inspiration has come to me, that your Allah is one Allah: whoever expects to meet his Lord, let him work righteousness, and, in the worship of his Lord, admit no one as partner.'

Surah *al-Kahfi* (18):110

Allah doth command you to render back 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 Allah is He Who heareth and seeth all things.

Surah *al-Nisa* (4):58

Ibnu Habban recorded that, on the day of Badr, the Prophet (SAW) was inspecting his army, drawn up in files, and dressing the formation to check if anyone of them was not in his proper place. He had a baton in his hand with which he struck a soldier on the belly that had pushed a bit forward. The soldier complained and demanded retaliation. The Prophet (SAW) raised his shirt and offered his belly for treatment in a like manner.⁶⁰

In the closing days of his life, the Prophet (SAW) addressed a public gathering and said:

... if I have whipped anybody's back, let him retaliate on my back. If I have condemned or censured anybody's honour, here is my honour to take revenge upon. If I have taken anybody's property, here is my property; let him take it, and let him not fear haggling on my part, as it is not my habit. In fact, dearest to me is the one who takes his claim from me if he has a right thereto, or forgives me. Thus I shall meet my God with clear conscience. A man rose and claimed that the Prophet (SAW) had borrowed some money from him. This was at once paid to him.⁶¹

59 See Liaquat Ali Khan Niazi, *Islamic Law of Tort*, (Lahore: Research Cell, Dyal Sing Trust Library, 1988 at p 278.

60 *Ibid* at pp 278 and 280.

61 Qazi Muhammad Sulaiman, *Rahmatul lil Alamin*, (4th Ed), Vol 1 at p 308, quoted from Niazi, 1988, *ibid* at p 280. See also hadith No 2229, Al-Imam Muslim, *Terjemahan Shabih Muslim*, 4:220.

Saad ibn Umar says:

One day I put on dress of a gaudy colour ... When I went in the presence of the Prophet PBUH, he exclaimed dislike and hit me on the belly with his stick. I said: 'O Messenger of God, I shall retaliate.' Hereupon he uncovered his belly ...⁶²

Similar policies were also adopted and applied during the time of the Caliphs Abu Bakr, Umar Al-Khattab, Uthman bin al-Affan, Ali bin Abu Talib, the Abbasiyah al-Mansur and the Spanish al-Hakim ibn Hisham ibn Abd al-Rahman al-Dakhil.⁶³

Thus, the provisions in the CBM, purporting to give immunity to the rulings and advice of the SAC against any contrary ruling by the other competent body including the court of law, may undermine the legitimate expectation of the public (customers/purchasers) to get the best possible Islamic financial products in the protection of their interests and rights. Thus, based on the above authorities, in the opinion of the writers, the provision providing special position and immunity to the SAC is not acceptable in Islamic law and is void.

In the writers' view, the supremacy of the SAC should be abolished. In place of this, the writers would like to add that specialised courts should be established to deal with cases involving Islamic banking and financial businesses. The court should consist of persons who are learned and competent, both in civil and in the Shariah laws to dispose of the cases.⁶⁴ Further, certain statutes should be introduced to support the practice of Islamic banking and financial businesses. The suggested statutes are — the Islamic Evidence Act, Islamic Civil Procedure Code, Islamic Law of Muamalat (Islamic Transaction), Islamic Specific Relief Act and

62 Dr Liaquat Ali Khan Niazi at p 308.

63 *Ibid* at pp 280-283.

64 Thus, to implement this, the government should conduct continuous and systematic trainings on Islamic banking and financial knowledge, Islamic law, Islamic jurisprudence, Arabic language and the like to the judicial, legal and administrative officers and introduced these courses as core courses in the program of Bachelor of Law degrees in the local higher institutions. Further, in order to be fully conversant in Islamic law, the government should consider sending these officers to undergo tailor-made trainings on Islamic studies specialising on Islamic banking, Islamic finance, Islamic law of muamalat and Islamic jurisprudence in the renowned Islamic learning of higher institutions such as al-Azhar al-Sharif in Egypt and universities in Saudi Arabia, Jordan and Syria.

Islamic Law of Contract.⁶⁵ Thus, by having these judicial, administrative, legal and statutory logistics, the development of Islamic banking and financial businesses can be enhanced and spur the overall development of Islamic banking and financial businesses in Malaysia as the world's Islamic banking and financial hub; this would also attract investments from the Middle East and other parts of the world to invest in the Malaysian Islamic banking and financial business industries.

CONCLUSION

As an answer to the questions posed in the earlier part of this paper, it is the opinion of the writers that the current practice of the BBA is contrary to the teachings of Islam and thus it should be modified and revamped until it is fully able to protect the interests of the purchaser/borrower or in the alternative, other modes of in house financing should be chosen,⁶⁶ in replacement of the current BBA. The alternative modes should also contain terms and conditions which can balance the interests of the bank and the purchaser/borrower, and provide measures so as to protect the interests of the latter, particularly when the housing units are abandoned.

65 For this matter, the Courts of Judicature Act 1964, the Federal Constitution, the Rules of the High Court 1980, the Subordinate Courts Act 1948 and the Rules 1980, the Court of Appeal Rules 1994 and the Federal Court Rules 1995, Limitation Act 1953 and other relevant statutes should also be amended if necessary, and as far as this is expedient, in support of the development of Islamic banking and financial business. See also Nuarrual Hilal bin Md Dahlan and Abdul Rani Kamaruddin, *Jurisdiction on 'Islamic Banking Business' in Malaysia: Qua Vadis Syariah Court?* Jurnal Undang-Undang IKIM (IKIM Law Journal), Vol 8, No 2, 2004 at pp 90-93.

66 For example the Islamic bank directly purchase the duly completed houses from the vendor developer for onward sale to the customers at new prices with profit margin (sale price). The customer has to repay the sale price by way of installment until full settlement or in cash. This mode can be done through *musharakah mutanaqisab* or *ijarah* (lease) agreements. In addition, the Islamic bank can also become a developer or contractor. Under this concept, the Islamic bank will get orders from customers. The Islamic bank will erect houses in accordance with the wishes of the customer. Once duly completed, the houses will be sold to the customers at market price (sale price). The repayment of the sale price may be in cash or installment. Similarly, the mode of *musharakah mutanaqisab* or *ijarah* can be applied in the situation.

Further, the new provisions in the CBM conferring full authority and immunity of the SAC and their rulings and advice on Islamic financial products are also contrary to Islamic law as this will hamper the open and free progress of Islamic products and curtail the possible enriching *ijtihad* and undermine any possible meritorious check and balance by relevant quarters against their rulings and advice for the betterment and development of Islamic banking and financial products.

Finally, as an addition, in order to support the development of Islamic banking and financial businesses in Malaysia, certain administrative, legal, judicial and statutory logistics, as suggested above, should be introduced and promulgated by the government.

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