

**SHARI'AH AND LEGAL ISSUES IN AL-BAY' BITHAMAN AJIL FACILITY IN
THE CASE OF ARAB-MALAYSIAN FINANCE BHD V TAMAN IHSAN JAYA
SDN BHD & ORS [2008] 5 MLJ**

Zulkifli Hasan*

1.0 Introduction

Most of Islamic financial institutions (IFIs) operate in the environment where the legislative framework consisting of mixed jurisdictions and mixed legal systems. As such, every transaction, product, document and operation must comply with the *Shari'ah* principles as well as other laws. In the case where the *Shari'ah* law is the ultimate legal authority such as in Iran and Saudi Arabia, any issue in Islamic banking cases may not be a big problem whereas in the countries of mixed legal systems as in the case of Malaysia and Pakistan¹ or in a non-Islamic legal environment such as in the UK², the issue is very significant. This raises the question of how *Shari'ah* principles apply with the laws of the jurisdiction and how it will be adjudicated in a court.

After nearly more than 25 years of the implementation of Islamic financial system in Malaysia, the Islamic banking players are about to face the reality from the recent High Court ruling³ that the application of the *Al-Bay' Bithaman Ajil* (BBA) is contrary to the Islamic Banking Act 1983 (IBA) and the Banking and Financial Institutions Act 1989 (BAFIA). This landmark case is involving of 12 separates civil suits in the High Court of Malaya where Bank Islam Malaysia Berhad and Arab-Malaysian Finance Berhad as the plaintiffs⁴. The respective banks are now appealing to the Court of Appeal with hope that the recent judgment could be overturned to be in favor of them. The 54-page written judgment clearly indicates the new constructive approach of the court towards Islamic banking cases particularly in resolving issues pertaining to BBA facility. It is expected that the recent judgment may affect the Islamic financial sector in Malaysia as the expert estimates that 70 per cent of Islamic financing facility was granted under BBA facility⁵.

* Doctoral candidate of School of Government and International Affairs, University of Durham Tel: +44 (0)7761457686 E-mail: zul361977@yahoo.com Blog: <http://zulkiflihasan.wordpress.com>

¹ See Usmani, M.T. (2001). *The Historic Judgment On Interest: Delivered In The Supreme Court Of Pakistan*. Karachi, Pakistan: Idaratul Ma'arif.

² See *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] 1 Lloyd's Rep 1 and *Islamic Investment Company of the Gulf (Bahamas) Ltd. V. Symphony Gems N.V. & Ors*. The London High Court, 13th February 2002, 2001, 2001 Folio 1226 per Justice Tomlinson, 2002 West Law 346969, QBD (Comm. Ct.). For case commentaries refers Balz, K. (2004). *A Murabaha Transaction in English Court*. Islamic Law and Society. Volume 11. pp. 117-134.

³ *Arab Malaysian Finance Bhd V Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631.

⁴ Habhajan Singh. *Banking Sector Braces for Impact from BBA Ruling*. The Malaysian Reserve. September 11, 2008. p. 4.

⁵ According to the International Association of Islamic Banks, debt-based financing covered more than 80 percent of investments made by Islamic banks world-wide (1996 figures) and the Islamic Development Bank has so far not used equity-based financing in its financial business except in a few small projects. See Humayon, A. Dar and John R. Presley. (2000). *Lack of Profit Loss Sharing in Islamic Banking: Management and Control Imbalances*. International Journal of Islamic Financial Services. Volume 2. No. 2. Another literature mentions that mark-up transactions represent 80 to 95 per cent of all investments by

This article aims at examining judgment in the recent High Court of Malaya dated 8th July 2008 by highlighting *Shari'ah* and legal issues embedded in BBA facility.

2.0 The Evolution of Islamic Banking Cases in Malaysia

Although, Islamic financial system has been implemented for more than 45 years since the formation of the Mitr Ghams Savings Bank on 23rd July 1963 in Egypt and numerous court cases have been brought to the court, it is found however that until to date there are only few published court decisions relating to Islamic banking cases. Fortunately, Malaysia is one of the jurisdictions where Islamic banking cases were published in various law reports such as the *Malayan Law Journal* and the *Current Law Journal*. From 1987-2008, there were several Islamic banking cases have been published in the respective law reports, 10 of them were famously quoted and referred to and majority of the cases involved BBA facility except in the case of *Tinta Press Sdn Berhad v BIMB* (1987) 1 MLJ 474; 1 CLJ 474 where it dealt with *Ijarah* financing facility. The attitude of the Malaysian court upon BBA facility could be examined in three main phases of the Islamic banking cases in Malaysia.

2.1 First Phase: 1994-2002

- (i) *Bank Islam Malaysia Berhad v. Adnan Omar* [1994] 3 CLJ 735; [1994]3 AMR 44; [1994] 4 BLJ 372
- (ii) *Dato' Nik Mahmud Bin Daud v. Bank Islam Malaysia Berhad* [1996]4 MLJ 295

In the first phase, the court seems to be in favor of Islamic banks by referring to the two older cases on BBA facility. The judges in both cases dealt more on applying the civil technical aspects and did not tackle the actual *Shari'ah* issues. In the case of *Bank Islam Malaysia Berhad v. Adnan Omar*, the High Court held that the defendant was bound to pay the whole amount of the selling price based on the grounds that he knew the terms of the contract and knowingly entered into the agreement. In this respect, the court applied the classic common law approach where the parties are bound with the terms and conditions of the contract. The court did not look into the issue further whether BBA facility involves an element not approved by the *Shari'ah* as stipulated under the IBA and the BAFIA.

2.2 Second Phase: 2003- 2007

- (i) *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn. Bhd.* (2003) 2 MLJ 408; 1 CLJ 625
- (ii) *Bank Islam Malaysia Berhad v. Pasaraya Peladang Sdn Berhad* [2004] 7 MLJ 355
- (iii) *Arab Malaysian Merchant Bank Berhad v. Silver Concept Sdn Bhd* [2005] 5 MLJ 210

IFIs worldwide. See Warde, Ibrahim (2000). *Islamic Finance in the Global Economy*. Edinburgh: University Press. p. 133.

- (iv) *Malayan Banking Berhad v. Marilyn Ho Siok Lin* [2006] 7 MLJ 249; 3 CLJ 796
- (v) *Affin Bank Berhad vs Zulkifli Abdullah* (2006) 3 MLJ 67
- (vi) *Malayan Banking Berhad v Yakup bin Oje & Anor* [2007] 6 MLJ 398

In the second phase, the court indicates its interest to examine critically the underlying principles and financing facility offered by the IFIs. The judgment on the application of BBA facility is widely discussed especially in the case of *Affin Bank Berhad vs Zulkifli Abdullah*. Unlike in the case of *Bank Islam Malaysia Berhad v. Adnan Omar* and *Dato' Nik Mahmud Bin Daud v. Bank Islam Malaysia Berhad*, the judge in this case preferred a different approach in resolving issues in BBA facility. It passed a ruling on the calculation of the amount to be paid in the event of a foreclosure. The learned judge criticized the attitude of early court by applying classic common law approach. The proper approach is that for the court to examine further as to the implementation of Islamic banking whether it is contrary to the religion of Islam. The judgment in this case however did not mention as to the validity and legality of profit derived from BBA facility. The court also is silent upon the interpretation of *riba* and usury and did not declare the profit gained from BBA facility is unlawful. Moreover, the learned judge in the case of *Malayan Banking Berhad v Ya'kup bin Oje & Anor* presents a comprehensive examination on the application of BBA facility in his 30-page judgment by analyzing the overall aspect of the facility both from legal and *Shari'ah* perspectives.

2.3 Third Phase: 2008 onward

The recent judgment of the High Court dated 8th July 2008 is the beginning of pro-active attitude of the court in examining the validity and determining issues involved in Islamic banking cases. The case encompassed of twelve separate civil suits involving Bank Islam Malaysia Berhad and Arab-Malaysian Finance Berhad as the plaintiffs⁶. All the twelve civil suits involved issues pertaining to BBA facility where the defendants were asked to pay the whole amount of the selling price in the event of default. In short, the court's decision can be summarized as follows⁷:-

- (i) The Federal Constitution, the IBA and the BAFIA do not provide the interpretation of which *madhhab* is to prevail. BBA facility must not contain any element which is not approved by the religion of Islam under the interpretation of any of the recognized *maddhab*.

⁶ *Arab Malaysian Finance Berhad v Taman Ihsan Jaya Sdn Berhad & Ors* (Suit No: D4-22A-067-2003), *BIMB v Ghazali Shamsuddin and Ors* (Suit No: D4-22A-215-2004), *BIMB v Nordin Suboh* (Suit No: D4-22A-1-2004), *BIMB v Peringkat Kaya (M) Sdn. Berhad. and Anor* (Suit No: D4-22A-185-2005), *BIMB v Ramli Shuhaimi and Anor* (Suit No: D4-22A-399-2005), *BIMB v Azhar Osman* (Originating Summons No: D4-22A-395-2005), *BIMB v Mohd Razmi A. Rahman and Anor* (Writ No: D4-22A-166-2006), *BIMB v Nor Azlina Baharom* (Writ No: D4-22A-167-2006), *BIMB v Zawawi Osman and Anor* (Writ No: D4-22A-178-2006), *BIMB v Mohammad Rizal Othman and Anor* (Suit No:d4-22a-192-2006, *BIMB v Baharom Harun and Anor* (Writ No: D4-22A-203-2006 and *BIMB v Nadiah Chai Abdullah and Anor* (Writ No: D4-22A-204-2006).

⁷ *Supra* note 3. pp. 658-660.

- (ii) The court accepts that BBA facility is a bona fide sale transaction and the interpretation of selling price in the case of *Affin Bank Berhad v Zulkifli Abdullah* was referred to where the court rejects the plaintiffs' interpretation and applies the equitable interpretation.
- (iii) Where the bank recalls BBA facility at a higher price in total, the sale is not a bona fide sale but a financing transaction and rendered the facility contrary to the IBA and the BAFIA.
- (iv) The court holds that the plaintiffs are entitled under section 66 of the Contracts Act 1950⁸ to return the original facility amount they had extended. It is equitable that the plaintiffs must seek to obtain price as close to the market price as possible and account for the proceeds to the respective defendants.

3.0 Legal and *Shari'ah* Issues

3.1 Civil Court and Islamic Financing Cases

In Malaysia, separate Islamic legislation and banking regulations exists side-by-side with those of the conventional banking system. Islamic banking and finance was put under Federal List since it refers to commercial dealings although it actually falls under the purview of Islamic law. Thus, it is the parliament to pass any law governing the IFIs and *takaful* operators. Being so, the only avenue available to try cases or disputes on Islamic banking and *takaful* are the civil courts. This is due to the fact that Islamic banking and *takaful* could not be interpreted under the ambit of 'personal' but under the item 'finance' as stipulated in article 74 of the Federal Constitution.

In the light of the above, it is almost settled law that the jurisdiction of Islamic banking cases was put under the auspices of civil court. This position is clearly mentioned by the Court of Appeal in the case of *Bank Kerjasama Rakyat Malaysia v Emcee Corporation* where the learned judge states that, "*The law was mentioned at the beginning of this judgment the facility is an Islamic banking facility but that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under the conventional banking*". Indeed, in actual fact, the disputed cases relating with Islamic banking are normally involving a mixture of issues and not Islamic law per se. Therefore, the function of the civil court in dealing with Islamic banking cases is to render a judicially considered decision on the particular facts of the specific case before it according to law. The civil court has a constitutional duty to ensure that Islamic financial instruments are within the spirit of the IBA and the BAFIA⁹. In the event where the court needs deliberation on *Shari'ah* issues, the judge may refer the National *Shari'ah* Advisory Council (SAC) and take into consideration the SAC's decision.

⁸ Section 66 of the Contracts Act 1950 states that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it".

⁹ Hamid Sultan Abu Backer. *Is There a Need for Legislative Intervention to Strengthen Syariah Banking and Financial Instruments?* [2002] 3 MLJ clxx.

The learned judge in the current case however views that the court does not have to refer the SAC for any ruling or deliberation as there is no dispute on the validity of BBA facility since BBA is one of the products approved by the SAC under the Central Bank of Malaysia Act 1958 (Revised 1994). In fact, section 16B (8) of the Central Bank of Malaysia (Amendment) Act 2003 (CBA) provides two different positions of the SAC rulings where they are binding upon the IFIs and the arbitrator and not the court. At this point, the writer opines that the court may need to refer the SAC or expert evidence¹⁰ to clarify the *Shari'ah* issues involved. By referring to the arguments made by the learned judge particularly in explaining *riba* and elaborating BBA, it indicates that the SAC's deliberation or Islamic law expert in *fiqh muamalat* may be needed. There is no wrong for the court to seek the SAC's view and indeed it could strengthen the court's reasoning and arguments in making the decision¹¹.

3.2 Examining *Riba* and Usury: Common law, Equity and *Shari'ah*

In explaining *riba* and usury in the context of BBA facility, the court critically examines the approach of common law, equity and *Shari'ah*.

3.2.1 Common Law and Equity

The concept of usury as understood under the common law and equity was condemned because the terms of the loans were usurious in nature¹². The common law approach requires that the parties are bound by the terms of the contract regardless of whether it involves usurious element. The equitable principle then was developed in order to remove injustices from the operation of common law. The prohibition of usury arose from the hardships and usurious terms suffered by those who were unable to meet their obligations under their loan agreement were removed by applying the principle of equity. Thus, the equitable principle in English law provides legal solution to ensure justice due to the strict application of classic common law approach.

In BBA facility, the court uses an equitable interpretation as to the definition of selling price whether the defendant was bound to pay the whole amount of the selling price even in the event of early termination of the contract. The classic common law approach will require the defendants to pay the whole amount of the selling price as they are bound by the terms of the contract but the court in this case chooses to apply an equitable principle. An equitable interpretation of the selling price removes the excessive amount of profit

¹⁰ Islamic law is regarded as local law or *lex loci* and this rule prevents expert evidence from being called to the court to clarify issue on Islamic law. Section 16B (8) of the CBA relaxes the said rule by specifically allowing the court to seek the opinion of the SAC.

¹¹ The Federal Court of Pakistan in the historic judgment on *riba* has cited the opinions of various experts such as Umer Chapra, Hasan-us-Zaman, Abdul Rahman Al-Jaziri, Mawlana Taqi Usmani, Ghulam Rasool Saedi, Munawar Iqbal, Afzalur Rahman and has referred numerous views of jurist from al-Kasani, Zaila'i, al-Sarkhasi, Ibnu Qudamah, Fatawa Alamgir, Council of Islamic Ideology of Pakistan, Islamic Fiqh Academy of OIC countries, Islamic Fiqh Academy of India and the resolution of the Seminar Indexation held at Jeddah in 1987. See Khan, M.A. (1994). *The Federal Court Judgment on Riba and The Unresolved Issues*. Review of Islamic Economic. Volume 3 No. 3. pp. 19-27.

¹² *Supra* note 3. pp. 644-645.

derived from BBA transaction and therefore the defendants will only have to pay the principal sum of the facility. The court affirms the judgment in the case of *Affin Bank v Zulkifli Abdullah* where it rejected the interpretation of the selling price by the plaintiff and applied the equitable interpretation of the term. The sum as the calculated selling price is calculated for the date when the facility was to be paid off. It also verifies the decision in the case of *Malayan Banking Berhad v Ya'kup bin Oje & Anor* where the court applies the principle of equity to demand the plaintiff to grant substantial rebate to the defendant upon the disputed BBA facility.

3.2.2 *Shari'ah*

The court attempts to resolve the issue of *riba* and usury from *Shari'ah* perspective by referring to *Tafsir Pimpinan al-Rahman* and an English translation of holy *Quran* by Yusuf Abdullah Ali, Pickthal and Shakir. Interestingly, a reference to the prohibition of *riba* in other religion such as Judaism and Christianity has also been made¹³. Generally, the length explanation and various quotations by the learned judge seem to offer better understanding on the prohibition of *riba* as envisaged in *al-Quran* and *al-Sunnah*.

Nevertheless, the judge's contention that the prohibition of *riba* is only against the lender and not the borrower¹⁴ seems to be inaccurate. In *hadith* narrated by Abu Juhaifa: *The Prophet cursed the lady who practices tattooing and the one who gets herself tattooed, and one who eats (takes) Riba' (usury) and the one who gives it. And he prohibited taking the price of a dog, and the money earned by prostitution, and cursed the makers of pictures* (Sahih Bukhari Volume 7, Hadith No.259). This *hadith* clearly mentions that the prohibition of *riba* is not solely upon the giver but to include the taker as well.

As to *Shari'ah* perspective on *riba* and usury in modern financial system, the learned judge tries to examine as to what constitutes *riba* in Islam. The understanding is that the interest from loan facility is *riba* and *riba* is prohibited in Islam¹⁵. In this aspect, it is crystal clear that interest is unlawful and prohibited in Islam by referring to the Resolution No. 10(10/2) of the Council of Islamic Fiqh Academy of the Organization of the Islamic Conference where the council upholds the consensus on the prohibition of interest¹⁶. In addition, the Supreme Court of Pakistan has declared that interest charge

¹³ For further reading it may be beneficial to refer Wilson, Rodney. (1997) *Economics, Ethics and Religion*. New York: New York University Press.

¹⁴ *Supra* note 3. p. 655.

¹⁵ Siddiqi and Al-Amin write comprehensively on the differences of interest and profit from an economic perspective. See Mohammad Nejatullah Siddiqi. (2004) *Riba, Bank Interest and Rationale of Its Prohibition*. Jeddah: Islamic Research and Training Institute and Hassan Abdullah Al-Amin. (2000). *Shariah Ruling (Hukm) on Contemporary Transaction with Interest*. Jeddah: Islamic Research and Training Institute.

¹⁶ See Fatwas of the Egyptian Office of the Mufti 1900-1989, Fatwas by the Council of Islamic Studies, Al-Azhar, Cairo, Egypt (Second Conference, May 1965), Fatwas by the Council of Islamic Fiqh, Muslim World League and Fatwas by the General's Presidency of Ifta' in Saudi Arabia in Abdel Hamid El-Ghazali. (1994) *Profit v Bank Interest in Economic Analysis and Islamic Law*. Jeddah: Islamic Research and Training Institute. pp. 33-57.

from a credit or loan as unlawful and prohibited in Islam¹⁷. As such, the actual issue in this case is not regarding with the interpretation of interest but to examine whether the profit derived from BBA facility is justifiable in Islam.

In examining *riba* in the actual context of BBA, the court has decided that the profit portion of BBA facility is unlawful and rendered the facility contrary to the IBA and the BAFIA. To deal with this issue, it is essential to have better understanding on the conceptual framework of BBA facility. In general, contracts classified under the Islamic law of transaction can be divided into unilateral contract and bilateral contract. The former comprises of transactions which are gratuitous in nature the latter refers to a contract which require consent of both parties and this includes BBA facility. Having in mind that people are sometime confused with BBA and *Bay' al-Inah*, it is worth mentioning the difference between the two. BBA is only a mode of payment and BBA facility is actually structured under *Bay al-Inah* concept. *Bay' al-Inah* refers to the concept of buying and selling between two parties where the bank sells an asset to the customer on a deferred payment and then the financier immediately repurchases the asset for cash at a discount or vice versa. A reference to BBA by the learned judge as a sale transaction is not precise as the rightful concept of sale transaction for this type of facility is *Bay al-Inah*.

In justifying that profit portion of BBA facility is unlawful and contrary to the religion of Islam, the court arrives at its decision based on the following four main observations:-

(a) Deferred Payment of the Sale Price is a Loan.

The court considers deferred payment of the selling price is a credit or a loan and any profit claimed or charged by the bank as an additional to the facility amount is interest. The court signifies that the profit derived from BBA facility is lawful if the transaction is considered as a bona fide sale. Nevertheless, BBA facility in this case abandon the element of bona fide sale in which making the profit derived from it would be prohibited as *riba*¹⁸. The court considers the transaction is a bona fide sale if the bank has become the owner of the properties under a novation agreement while in this case the said element is absent where the plaintiff purchased directly from the defendants at a purchase price and immediately sold back to them at a higher price.

In contrast, the learned judge in the very recent case of *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2008] 6 MLJ 295 decided that BBA facility is a bona fide sale since there was a novation agreement which indicates that the bank is the legal purchaser and rightful owner of the properties and therefore rendered the transaction as a *Shari'ah* compliant facility. By the way, the court asserts that there must be a conscious effort in the form of novation agreement or any other valid instruments to make the

¹⁷ Usmani, M.T. (2001). *The Historic Judgment On Interest: Delivered In The Supreme Court Of Pakistan*. Karachi, Pakistan: Idaratul Ma'arif.

¹⁸ *Supra* note 3. p. 659.

transaction into a true and formal sale which is acceptable under the *Shari'ah* principles¹⁹.

The above reasoning is in line with judgment of the Federal *Shari'ah* Court of Pakistan (FSC) where the FSC has decreed that “*transaction which contains excess or addition over and above the principle amount of a loan, which is pre-determined in relation to time or period or is conditional to the payment of predetermined excess or addition, payable to the creditor constitutes riba and any sale, transaction or credit facility, in money or in kind has been considered to be a transaction of riba which is unlawful in the territory of Islam and in Muslim society*”²⁰. The FSC further states that any excess which is pre-determined over the principal sum in a loan transaction regardless of the rate is low or high and simple or compound will constitute *riba*.

In addition, the court also mentions that excessive selling price under BBA facility imposed a heavier burden upon the defendants that would be contrary to the intent and purpose of verses 275-280 of *surah al-Baqarah*²¹. Al-Ghazali insists the practice of *ihsan* or doing good deeds in business rather than merely advocating the maximization of profit²². The element of tolerance and benevolence should be the basis upon which the Islamic banking business transactions are conducted. As in the case of *Affin Bank Berhad v Zulkifli Abdullah*, the original facility of RM346, 000.00 became RM992, 363.40 after the defendant resigned from the plaintiff. In this instance, the sale price increases to more than 100 per cent which is obviously excessive and prohibited in Islam under the principle of *Ghabnu Fahish*. Some of the jurists such as al-Shaibani views that a price of an approximate 50 per cent over a subject matter is excessive and Malikis and Hanbalis considers exorbitant price when the sale price is more than one third of the subject matter's value²³. The learned judge in the current case however does not discuss further the element of *ghabnu fahish*. The prohibition of *ghabnu fahish* shall also be the corroborating argument in declaring the profit derived from BBA facility is contrary to the spirit of religion of Islam.

(b) Element of the Omniscient

Interestingly, the learned judge also highlights the essence to observe the basic element of Islam that Allah is Omniscient. The element of omniscient is actually refers back to the principle of *Tawhid* which is the foundation of Islamic faith²⁴. The principle of *Tawhid* derives important concept of vicegerency (*khilafah*), trustee (*amanah*) and justice (*al-adl*

¹⁹ Supra note 3. p. 655.

²⁰ Khan, M.A. (1994). *The Federal Court Judgment on Riba and The Unresolved Issues*. Review of Islamic Economic. Volume 3 No. 3. p. 20.

²¹ Supra note 3. p. 658.

²² Al-Ghazali, Abu Hamid. (n.d) *Revival of Science of Religion, Ihya Ulum al-Din*. Trans. Fazlul Karim. Volume II. Book of Worldly Usages. Lahore. p. 67.

²³ See Rahman, H. *Affin Bank Berhad v Zulkifli Abdullah-Perspective*. [2006] 4 MLJ i and Razali Nawawi (1999). *Islamic Law of Transactions*. Kuala Lumpur: CT Publications Sdn. Bhd pp.33-36 .

²⁴ Al-Faruqi, I.R. (1982). *Al-Tawhid: Its Implications for Thought and Life*. Herndon, Virginia: The International Institute of Islamic Thought.

wal Ihsan). Therefore the element of injustice contained in BBA transaction to overcome the prohibition of *riba* would not be acceptable.

To support this argument, we may refer to the issue of *iwad* in BBA transaction. Although the court in the current case does not mention anywhere this specific issue, it is observed that BBA facility has apparently neglected the requirement of *iwad* (equal counter value or compensation) where the obligation of warranty to the properties sold has been shifted to the vendor and not the plaintiffs as the sellers. Moreover, it is evident in most of BBA legal documentations that the bank holds no liability arising from all defective assets sold. Ibnu Arabi, one of the most respected jurists says that every increase which is without “*iwad or an equal counter value is riba*”²⁵. In this aspect, BBA facility in the current case has failed to comply with the requirement of *iwad* and therefore rendered the transaction illegitimate. Allah says in al-Quran “*O my son! If it be (anything) equal to the weight of a grain of mustard seed, and though it be in a rock, or in the heavens or on the earth, Allah will bring it forth. Verily, Allah is Subtle, Well-Aware*” (31:16). As Allah knows everything and all mankind is answerable to Him, any attempt to legalize the unlawful things is prohibited in Islam.

In the light of this point, the judge himself reminds everyone to observe the principle of omniscient where he asserts that “*in developing a fiqh muamalat caution must therefore be exercised for it is all too easy, when creating and then relying on legal fiction, to fall into the pit of complacency and inadvertently developing a fiqh hiyal*”²⁶. Over utilization of BBA facility with its all controversial issues contributes less to the real development of Islamic financial sector as it brings little difference to the present system. Whatever is a degree of the success of IFIs in Malaysia, they have so far neglected the equity-based financing which is more desirable in Islam. With the strong reminder from the court in this case, it is hoped that there will be an enormous change to Islamic financial industry landscape in Malaysia particularly from heavy reliance upon debt-based financing towards more ideal mode of financing that fully conforms to the principle of Islamic jurisprudence.

(c) Form against Substance

The true nature of contracts and transactions is the substance and not the words and the structure. The distinction between a sale and a loan is not maintained in its form alone but it must also be maintained in substance²⁷. Although the plaintiff contended that the court must look at the form i.e. an *aqad* or contract, the court views that it does not prevent an examination of the terms of the transaction. In this case, the court opines that BBA facility may be classified as pretence of sale transaction unless there was a novation agreement to make the bank a genuine seller. If this is pretence of a sale transaction the

²⁵ Saiful Azhar Rosly, Mahmood Sanusi and Norhashimah Mohd Yasin. (2000) *The Role of Khiyar Al-Ayb in Al-Bay Bithaman Ajil Financing*. International Journal of Islamic Financial Services. Volume 2. No. 3.

²⁶ *Supra* note 3. p. 646.

²⁷ *Supra* note 3. pp. 645-646.

profit derived from BBA facility is considered unlawful since there is no genuine sale transaction has been concluded²⁸.

The court's argument of considering BBA facility which is structured under the concept of *Bay al-Inah* has an element of legal device is actually supported by numerous views of the recognized *maddhab*. The concept of *Bay al-Inah* which is used in BBA facility is considered invalid by the Maliki and Hanbali jurists. According to them *Bay al-Inah* constitutes a legal device to get a loan with interest²⁹. Ibnu Qayyim himself insists the prohibition of *Bay al-Inah* by referring the hadith that the Messenger of Allah says: *A time is certainty coming to mankind when they legalise the Riba under the name of Bay'*. Contemporary jurist such as Al-Qaradawi also clearly states that *Bay al-Inah* is a clear case of usury as it contains elements of devices to overcome the prohibition of *riba*. Indeed, even *madhhab Shafi'i* recognizes the validity of *Bay al-Inah*, there is hardly any satisfactory evidence to prove that *al-Shafi'i* has expressly declared that it to be permissible³⁰. Therefore, in actual fact, the permissibility of BBA facility in the Malaysian market is based on very weak arguments.

(d) Approval by any of the Recognized *Madhhab*

In interpreting the requirement under the IBA and the BAFIA that the financing facilities offered do not involve any element not approved by the religion of Islam, the court declares that the facility must not contain any element not approved by any of the recognized *madhhab* unless the financing agreement states the specific to a particular *madhhab*³¹. Since *Bay al-Inah* concept is only acceptable in *madhhab Shafi'i*, it fails to meet the IBA and the BAFIA's requirement and renders the transaction null and void.

Considering to the court's interpretation to require all Islamic banking scheme to be approved by the recognized *madhhab*, it actually raises another significant issues as to the interpretation of the recognized *madhhab* and to what extent Islamic banking products could meet the requirements of all *madhhab*. As to the former issue, even though majority of Muslims in Malaysia is *madhhab al-shafi'i*, there is no provision in the IBA or the BAFIA which gives clarification to the *madhhab* applicable in Islamic banking and finance. Perhaps, a proper interpretation will be that only *sunni madhhab* will be acceptable and all Islamic financing scheme must be approved at least by the four main *sunni madhhab* namely *Shafi'i, Hanafi, Maliki and Hanbali*³².

²⁸ In the case of *Dato' Nik Mahmud Bin Daud v. Bank Islam Malaysia Berhad*, the court affirms that there was no transfer being affected in BBA facility and hence make the execution of BBA agreement did not transgress the provisions of the Kelantan Malay Reserve Enactment. This clearly indicates that there is no sale transaction in BBA facility as the instrument is a credit device and not a bona fide sale transaction.

²⁹ Saiful Azhar Rosly and Mahmoud M. Sanusi. (1999). *The Application of Bay Al-Inah and Bay Al-Dayn in Malaysian Islamic Bonds: An Islamic Analysis*. International Journal of Islamic Financial Services Vol. 1 No. 2.

³⁰ *Ibid.*

³¹ *Supra* note 3. pp. 658-659.

³² Section 54 of the Administration of Religion of Islam (State of Selangor) Enactment 2003 provides that in issuing fatwa, the Fatwa Committee shall ordinarily follow the accepted views of the *madhhab Shāfi'ī*

In the light of the latter issue, the requirement that Islamic banking scheme to be approved by all the recognized *madhhab* may affect Islamic financial sector considerably since there are numerous differences of opinions amongst the jurists upon principles in Islamic law of transaction. As an illustration, we may refer to the permissibility of *bay' ma'dum* or the purchase of something that does not yet exist³³ in the warrants and futures contracts on crude palm oil. The *Shafi'i's* view pronounced that the subject matter of the sale must be existent at the time of the contract and therefore *bay' ma'dum* is prohibited. This is based on *hadith* whereby the Prophet prohibited a sale of an unborn baby camel and a sale of non-existing object. In this regard the *Shari'ah* Advisory Council prefers the *Hanbali's* view which is supported by Ibn Qayyim and Ibn Taimiyyah³⁴ where the sale does not require the subject matter to be existed but the most important thing is the contract does not contain element of excessive *gharar*, which is forbidden by *Shari'ah*. At this point, the writer insists that the freedom to choose any particular *maddhab* should be given as this approach creates flexibility to Islamic banks to offer creative products with the purpose to meet the market and people need. The privilege of selecting any particular *madhhab* nevertheless should be subjected to certain ethical principles.

4.0 Concluding Remarks

As the case demonstrates, the contractual practices of IFIs may not be reduced to the mere application of *Shari'ah* since the Malaysian legal environment consists of mixed legal systems. The recent High Court case discusses in length issues involved in BBA facility which is widely utilized by Islamic banks in Malaysia. The early cases of BBA in the first phase of Islamic banking cases witness the application of classic common law approach by the court whereas in the second phase, the court indicates interest to exercise its constitutional duty to ensure that Islamic financial instruments are complied with the IBA and the BAFIA. Finally, the current High Court case offers constructive and proactive approach by the learned judge upon the disputed issues in BBA facility by examining the overall facts of the case and applying the equitable principle as well as considering *Shari'ah* as the grounds of judgment.

After careful consideration and meticulous analysis, the court arrives at conclusion to decree that the profit derived from BBA facility is unlawful and rendered the transaction null and void. This decision will notably affect Islamic financial institutions in Malaysia since the judgment obviously declares that defaulters in BBA facility are only liable as to the original facility amount and not the selling price unless the current appeal made by the respective plaintiffs is allowed by the Court of Appeal in the future. The recent judgment strongly demonstrates that the court with its constitutional duty to ensure that Islamic financial instruments are in accordance with the IBA and the BAFIA also provides very significant contribution to the development of Islamic financial system particularly in the aspect of administration of justice.

and if the opinion will lead to situation which is repugnant to public interest, the Fatwa Committee may follow any of the *Madhab Hanafi* or the *Maliki* or the *Hanbali*.

³³ Securities Commission. (2002). *Resolutions of the Securities Commission Shari'ah Advisory Council*. Kuala Lumpur: National Library of Malaysia. pp. 23-25.

³⁴ Ibnu Qayyim. (1995). *I'lam Al-Muwaqqi'in*. Vol 2. Beirut: Dar al-Fikr. p 8-10.