

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
WILAYAH PERSEKUTUAN

[COMMERCIAL DIVISION]

SUIT NO: D4-22A-257-2004

*Between*

AFFIN BANK BERHAD - PLAINTIFF

*And*

ABDUL AZIZ BIN HIDZIR - DEFENDANT

JUDGMENT

1. In a buoyant stock market back in 1996, MRCB in an exercise to raise capital decided to issue shares to its employees under a scheme known as the Employee Share Option Scheme (hereinafter referred to as "ESOS"). The Defendant Abdul Aziz Bin Hidzir was an employee of a company known as Malaysian Resources Corporation Berhad (hereinafter referred to as "MRCB"). It is quoted on the

Malaysian Bourse. Eligible employees determined by MRCB were offered to purchase the shares of MRCB at a pre-determined price. To help pay the purchase price, MRCB approached the Plaintiff to finance the purchase by eligible employees. The Plaintiff agreed to do so vide a Letter of Offer dated 11.9.1996 addressed to MRCB to finance all purchases of MRCB ESOS shares by the eligible employees amounting to RM20 Million. An Al-Murabahah Short Term ESOS financing was offered as the pre-determined profit margin would avoid fluctuations of interest rate.

2. The Al-Murabahah Short Term ESOS financing contained the following essential features:

- a. It offered 100% margin of financing so that the employees need not come up with cash themselves;
- b. The Plaintiff's profit margin was fixed at 10.35% per annum;
- c. Payment may be deferred up to 180 days from the date of disbursement;
- d. The facility was available only if the price of the MRCB ESOS shares are quoted at the stock market at least RM1.00 above the offer price of the shares by MRCB to its employees;

- e. The employee was required to deposit additional shares or cash, failing which the Plaintiff have a right to dispose off the shares in the event the price of the shares financed by the Plaintiff fell below the offer price + RM0.50 or any price determined by the Plaintiff;
- f. The shares financed by the Plaintiff were to be pledged to and deposited with the Plaintiff under a Memorandum of Deposit of Stocks and Shares.

3. The Asian financial crisis in 1997 caused the share prices quoted on the Kuala Lumpur Stock Exchange (as it was known then) to plummet suddenly and dramatically, as would bring into operation the term to require the Defendant to deposit additional shares or cash or failing which the Plaintiff was authorised to dispose off the shares. From RM6.00-RM8.00 per share it plunged to less that RM2.00.

4. It is plain under those circumstances that even if the shares were sold off at RM2.00 per share, there were still substantial shortfall outstanding which the Defendant would have to pay in order to settle the Al-Murabahah Short Term ESOS facility he had taken from the Plaintiff to pay for the ESOS shares offered by MRCB to him. The Court accepts that the wisdom of resort to immediate disposal of the shares was at the time debateable primarily because even though the prices of shares fell dramatically, it was arguable that the fundamental value of the shares remained since the origins of the turmoil was the financial markets of Korea and Thailand, which

cause investment funds to stampede out of East and South-East Asia. Where intrinsic value remained but market price fell, it would be reasonable to believe that market prices would recover, and in such circumstances a hasty disposal was not to anyone's interest.

5. In the event, the Plaintiff did not enforce the clauses mentioned above to force sell the pledged shares. Nor did the Plaintiff insist on additional security to be deposited. Instead, the Plaintiff offered a refinancing package to the affected employees. On 16.9.1997, Plaintiff issued a Letter of Offer to all employees offering new terms for payment:

- a. fixed profit margin to Plaintiff at 11.75% per annum;
- b. 12 months repayment period;
- c. Entitlement of Plaintiff to dispose off the pledged shares if the shares reached a price sufficient to recover all outstanding balance;
- d. In the event of forced selling, the Plaintiff would not be held accountable for losses or damage suffered by the employees.

6. The market prices of shares never returned to the earlier market levels.

## **Element Contrary to the Religion of Islam**

7. Since the Al-Murabahah Short Term ESOS financing facility purported to be an Islamic financing facility, the parties had been directed along with parties in other Islamic financing cases, to submit upon the issue “whether there is any element contrary to the Religion of Islam”, to see if the action could be disposed off economically upon that legal issue on submissions.

8. The question of “element contrary to the Religion of Islam” originates, in the case of banks licensed under the Banking and Financial Institutions Act 1989 (Act 372), from section 124 thereof, which provides:

### **“124. Islamic banking or financial business.**

- (1) Except as provided in section 33, nothing in this Act or the Islamic Banking Act 1983 shall prohibit or restrict any licensed institution from carrying on Islamic banking business or Islamic financial business, in addition to its existing licensed business, provided that the licensed institution shall consult the Bank before it carries on Islamic banking business or any Islamic financial business.

- (2) For the avoidance of doubt, it is declared that a licensed institution shall, in respect of the Islamic banking business or Islamic financial business carried on by it, be subject to the provisions of this Act.
- (3) Any licensed institution carrying on Islamic banking business or Islamic financial business, in addition to its existing licensed business may, from time to time seek the advice of the Syariah Advisory Council established under subsection (7), on the operations of its business in order to ensure that it does not involve any element which is not approved by the Religion of Islam.
- (4) Any licensed institution carrying on Islamic banking business or Islamic financial business shall comply with any written directions relating to the Islamic banking business or any other Islamic financial business, carried on by such licensed institution, issued from time to time by the Bank, in consultation with the Syariah Advisory Council.

- (5) Any licensed institution carrying on Islamic banking business or Islamic financial business shall be deemed to be not an Islamic bank.
- (6) This Act shall not apply to an Islamic bank.
- (7) For the purposes of this section-
  - (a) "Syariah Advisory Council" means the Syariah Advisory Council established under section 16B(1) of the Central Bank of Malaysia Act 1958;

*[Am. Act A1121 - Prior text read - "(a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank to advise the Bank on the Syariah relating to Islamic banking business or Islamic financial business;"]*

- (b) "Islamic banking business" has the meaning assigned thereto under the Islamic Banking Act 1983; and

(c) "Islamic financial business" means any financial business, the aims and operations of which, do not involve any element which is not approved by the Religion of Islam." "

9. Notwithstanding the curious subsection (5) of section 124, a bank licensed under Act 372 is not prohibited from carrying on Islamic banking business or Islamic financial business. Whether it is Islamic banking business or Islamic financial business, it means banking or financial business the aims and operations of which, do not involve any element which is not approved by the Religion of Islam.

10. The confluence of the elements of the Religion of Islam and civil jurisdiction presents an interesting dilemma which was dealt with in the Court of Appeal in **Bank Kerjasama Rakyat Malaysia v Emcee Corporation [2003] 1 CLJ 625** where Dato' Abdul Hamid Mohamed JCA (as the Chief Justice then was), writing the judgment for the Court of Appeal had said:-

“As was mentioned at the beginning of this judgment, the facility is an Islamic facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a



remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.”

11. In Islamic financing cases, civil court proceeds as a Syariah Court, but remains a civil court. The rules and procedures as well as the law that it applies remain civil law. Its findings of fact are made on the basis of civil law. What concerns the civil court are not *Syariah* laws, but, as enjoined by Act 372, the elements of the Religion of Islam and whether there is any provision in the transaction and agreements that is contrary to any element in the Religion of Islam.

12. The Al-Murabahah Short Term ESOS facility is an Al-Murabahah transaction. The documentation of it comprises the following:

- a. Letter of Offer dated 11-9-1996;
- b. Application Form by the employees/Defendants to the Plaintiff;

- c. Option Certificate for the ESOS Shares issued by MRCB to the employees/Defendants;
- d. Al-Murabahah Short Term Financing (Purchase) Form A;
- e. Al-Murabahah Short Term Financing (Sale) Form B;
- f. Bill of Exchange;
- g. Letter of Authority issued by the employees/Defendants to the Plaintiff to dispose the shares;
- h. Memorandum of Deposit of Stocks and Shares;
- i. Refinancing Letter of Offer dated 16-9-1997;
- j. Refinancing Application Form by the employees/ Defendants to the Plaintiff.

13. The fact the approach to the Plaintiff was made by MRCB and not the Defendant, and the Letter of Offer dated 11.9.1996 was issued to MRCB are irrelevant since the employee was required to make an application to the Plaintiff and as evidence of his entitlement to purchase the shares, the employee was required to produce an Option Certificate issued by MRCB addressed to the employee specifying the number of shares, the price of shares and the validity period for exercise that was offered. When the Defendant made the

application to the Plaintiff, that transaction was entirely between the Defendant and the Plaintiff. By the subsequent Refinancing Offer Letter of 16.9.1997 referring to the 11.9.1996 letter, only then it became part of the documents in relation to the employees to whom the letter of 16.9.1997 was addressed.

14. The Al-Murabahah concept is a cost-plus sale. The payment of the sale price may be in a lump sum at the time of sale, or follow the Al-Bai' Bithaman Ajil concept of deferred payment by a single payment or by periodic instalments. Dr. Nik Norzrul Thani, Mohamed Ridza Mohamed Abdullah and Megat Hizaini Hassan wrote in their book published in 2003 entitled Law and Practice of Islamic Banking and Finance also explained how Al-Murabahah works:

**Financing working capital under the principle of Al Murabahah**

“The customer may approach Islamic banks to provide financing for his working capital requirements to purchase stock and inventories, spares and replacements or semi-finished goods and raw materials. The banks provide this financing under the principle of Al-Murabahah. The bank first purchases or appoints the customers as its agent to purchase the required goods on its behalf and settles the purchase price from its own funds. The bank subsequently sells the goods to the customer

at an agreed price comprising its purchase price and a profit margin, and allows the customer to settle this sale price on a deferred term within a stipulated period. On the due date the customer pays the bank the agreed sale price.”

15. Maulana Taqi Usmani in an article “Murabahah” explained it in this way:

“The best way for murabahah, according to Shariah, is that the financier himself purchases the commodity and keeps it in his own possession, or purchases the commodity through a third person appointed by him as agent before he sells it to the customer. However, in exceptional cases, where direct purchase from the supplier is not practicable for some reason, it is also allowed that he makes the customer himself his agent to buy the commodity on his behalf. ....”

16. Counsel for the Plaintiff submitted that a financial institution can use the Murabahah as a mode of finance by adopting the following procedure:

- i. Firstly: The client and the institution sign an over-all agreement whereby the institution promises to sell and the client promises to buy the commodities from

time to time on an agreed ratio of profit added to the cost. This agreement may specify the limit up to which the facility may be availed.

- ii. Secondly: When a specific commodity is required by the customer, the institution appoints the client as his agent for purchasing the commodity on its behalf, and an agreement of agency is signed by both the parties.
- iii. Thirdly: The client purchases the commodity on behalf of the institution and takes its possession as an agent of the institution.
- iv. Fourthly: The client informs the institution that he has purchased the commodity on his behalf, and at the same time, makes an offer to purchase it from the institution.
- v. Fifthly: The institution accepts the offer and the sale is concluded whereby the ownership as well as the risk of the commodity is transferred to the client.

17. Consistent with this, Counsel proceeded to submit, quite correctly:

- i. All these five stages are necessary to effect a valid murabahah. If the institution purchases the commodity directly from the supplier (which is preferable) it does not need any agency agreement. In this case, the second phase will be dropped and at the third stage the institution itself will purchase the commodity from the supplier, and the fourth phase will be restricted to making an offer by the client. THE MOST ESSENTIAL ELEMENT OF THE TRANSACTION IS THAT THE COMMODITY MUST REMAIN IN THE RISK OF THE INSTITUTION DURING THE PERIOD BETWEEN THE THIRD AND THE FIFTH STAGE. This is the only feature of murabahah which can distinguish it from an interest-based transaction. Therefore, it must be observed with due diligence at all costs, otherwise the murabahah transaction becomes invalid according to Shariah.
  
- ii. It is also a necessary condition for the validity of murabahah that the commodity is purchased from a third party. The purchase of the commodity from the client himself on 'buy back' agreement is not allowed in Shariah. Thus murabahah based on 'buy back' agreement is nothing more than an interest based transaction.

18. It was submitted for the Defendant :

“2. There are basically 3 (sic) major grounds that we believed that the Facility’s structure failed to complied to Islamic Doctrine in regards to Islamic transaction:-

- (a) The uncertainty of the share price for approval;
- (b) The imposition of ‘additional condition’ or ‘shurut’ towards the shares price depending upon certain circumstances;
- (c) The subject matter of is not permitted because it was a Non-Halal counter at the BSKL;
- (d) The element of betting which is highly forbidden under the Shariah principles.”

19. It is in the very nature of share prices to fluctuate. Does it mean that the requirement of certainty as to price means there can be no valid Islamic based contract to sell or purchase shares upon a given day or time? Dato’ Sheikh Ghazali Haji Abdul Rahman (the then Syariah Chief Justice of Malaysia) in a foreword to the publication “Resolutions of the Securities Commission Syariah Advisory Council” made this rather apt description of the proper approach:

“It cannot be denied that there may be a few SAC resolutions that differ from the opinion of Syariah experts in other countries. These differences exist due to the difference in time and place, and also differences in needs and background of a country. If we should go back to the ancient times of Islamic communities, such varied opinions with regard to certain principles are not uncommon. Even Imam Syafi’e, founder of the Syafi’e school of thought (mazhab), occasionally had two differing opinion on the same issue due to differences in context, background, time and place of occurrence.

Indeed, these differences in opinions should be seen as a beauty and a blessing for Muslims because, whether consciously or not, they provide a way out for every problem and satisfy the needs of Muslim communities of different geographical and cultural backgrounds. What is needed is that we respect any opinion offered so long as it is based on Syariah arguments.”

20. Modern commercial development saw the introduction of artificial legal entities, private limited and public listed companies, and in the case of the latter, a key aspect is that the shares are traded freely on the stock market. These are differences from the time of the Qur’an. These are differences of time, place, context, needs and



background. Given that the stock market prices are accurately published, and these days in real time, means it is easy to identify that price without dispute. The circumstances are such that fluctuating share prices no longer introduce the nature of uncertainty necessary to warrant the objection. Nor do conditional terms when they are based on clearly identifiable, not necessarily identified, circumstances or events. Thus, the objection of *gharar* cannot arise, be it as to time when purchase price payable to MRCB was paid for by the Plaintiff, or because the prices of the shares in the stock market is variable. Further, it is in the very nature of trade that things may be purchased with the intention of keeping or selling with profit, but may well turn out to be not profitable if prices fell. This is what happened in this case. The loss suffered by the Defendant arose from the subsequent fall in prices of the MRCB shares which were offered to the Defendant. The loss did not arise from any uncertainty or betting element inherent the Plaintiff's Al-Murabahah financing. The Plaintiff's profit in the Al-Murabahah transaction was fixed. The Defendant's loss would occur even if the Defendant had paid for the shares in cash out of his own savings.

21. The submission that MRCB counter is a Non-*Halal* counter is based on the argument that: (a) in offering the MRCB shares there was a representation that the MRCB counter was a *Halal* counter, and that (b) it was only in 2000 that the MRCB counter was listed as a *Halal* counter. Upon consideration, although the MRCB counter was listed as a *Halal* counter until 2000, it does not follow it was, to use the proper term, a *Haram* counter. One would be justifiably

concerned with the employees employment in MRCB if MRCB were *haram*, and especially for the Defendant who was a top management officer of MRCB. Merely because cars have not been specifically listed as a *halal* thing does not mean cars are *haram*.

22. Clause 26(e) specifically provide that:

“The activities of MRCB and its subsidiaries must comply with Shariah requirements and its share are eligible for financing under the Islamic/Interest-free Banking scheme. In the event that MRCB shares become non-halal, the Bank reserves the right to recall the financing facility.”

23. Contrary to the Defendant’s argument, this Clause only stresses there was no intention to finance non-*halal* shares, and it is evident all parties at the time accepted that the MRCB shares purchased under the ESOS scheme was not *haram*.

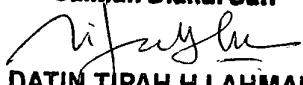
24. Other issues raised do not relate directly as element contrary to the Religion of Islam. The parties cannot understand that the Al-Murabahah Short Term ESOS financing was a short term financing of 180 days, for which an extension was later offered. If the new offer were accepted, this action can only proceed on the basis of the relied terms. If it were not accepted the Plaintiff’s cause of action remained under the original terms.

25. The Defendant argued that the imposition of Margin Trigger and Trigger Price has an element of “shurut” which “invokes the element of unjust to the Defendant and put him at the mercy of the Plaintiff in the event that Plaintiff misused their discretion”. The Court accepts that the Margin Trigger clause and the Trigger Price was part of the contract between the Plaintiff and the Defendant. It was not additionally included by the Plaintiff unilaterally to the detriment of the Defendant. The Defendant was fully aware of the terms of the financing when he accepted the facility from the Plaintiff. The Margin Trigger stipulated that if the price fell below the offer price + RM0.50 cents, the Defendant was required to deposit additional shares or cash to reduce the outstanding balance. The obligation to put in additional security or deposit arise from the fall in the value of the pledged security, being the MRCB shares. The obligation does not arise from any unilateral or arbitrary act of the Plaintiff.

26. The Court, therefore, finds that there is no element in the Al-Murabahah transaction in this case that is contrary to the Religion of Islam.

Sgd.  
**(DATUK ABDUL WAHAB BIN PATAIL)**  
 Judge  
 High Court of Malaya  
 Kuala Lumpur

Dated: 18<sup>th</sup> July 2008

Salinan Diakui Sah  
  
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 Setiausaha Kepada  
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