

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
WILAYAH PERSEKUTUAN

[COMMERCIAL DIVISION]

CIVIL NO: D4-22A-380-2005

Between

**BANK KERJASAMA RAKYAT
MALAYSIA BERHAD**

- **PLAINTIFF**

And

1. **FADASON HOLDINGS SDN BHD**
(Company No: 47223-M)

2. **HARUN BIN FAUDZAR**
(I/C No: 530301-02-5753/8370900)

3. **SARINA BTE FAUDZAR**
(I/C No: 640131-02-5378/7278735)

4. **AMIR BIN FAUDZAR**
(I/C No: 611029-02-5045/6318440)

- **DEFENDANTS**

JUDGMENT

1. In this action, the Plaintiff Bank Kerjasama Rakyat Malaysia Berhad ("the Facilitator") claimed against the Defendants Fadason Holdings Sdn Bhd ("the Client"), Harun Bin Faudzar, Sarina Bte

Faudzar and Amir Bin Faudzar (“the Guarantors”) the sum of RM2,472,793.10 as at 10.6.2004 being the balance claimed under facilities granted by the Facilitator to the Clients under the Islamic Bai Al-Inah concept totalling RM10,000,000.00 (“the Facilities”).

Islamic Banking Legislation

2. Islamic banking and financial business is authorised in Malaysia under the Islamic Banking Act 1983 (Act 276) as well as the Banking and Financial Institutions Act 1989 (Act 372). In the latter, Islamic financial business is defined as meaning “any financial business, the aims and operations of which, do not involve any element which is not approved by the Religion of Islam”, while Islamic banking business is stated to rely upon the definition in Act 276 wherein it was defined as meaning “banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam”.

3. Elements are the necessary component or constituent parts of a whole. It is a fundamental, essential or irreducible necessary part of the whole. In the realm of thoughts and ideas, it is a necessary basic and fundamental assumption or principle of it. The elements of the Religion of Islam therefore refer not to Islamic laws generally, for instance, that part that is referred to as the laws of the *muamalat* (*Fiqh al-Muamalat*), but the fundamental assumptions or principles that underpin the laws of the *muamalat*. It is to be observed that the

definition in Act 276 and Act 372 looks not to conformity, but to non-conformity with the elements of the Religion of Islam.

Elements of the Religion of Islam

4. It is trite that a primary element in *Fiqh al-Muamalat* in the Religion of Islam is the prohibition and condemnation of *riba* in loans and the approval of trade to make profit. This is found in the *Surah al-Baqarah Verses 275-280*, translations of which were reproduced in the "*Tafsir Pimpinan ar-Rahman Kepada Pengertian Al-Qur'an*", a translation of the Al-Qur'an by Sheikh Abdullah Basmeih, edited and certified by Sahibul Fadhilah Datuk Haji Muhammad Noor Bin Haji Ibrahim, and published by Bahagian Hal Ehwal Islam, Jabatan Perdana Menteri, is the approved translation. It is therefore accepted as authoritative in Malaysia. It provides the following translation in Bahasa Malaysia of the *Surah Al-Baqarah: 275-280* in respect of the prohibition of *riba*:

"275.

Orang-orang yang memakan (mengambil) *riba* itu tidak dapat berdiri betul melainkan seperti berdirinya orang yang dirasuk Syaitan dengan terhayong-hayang kerana sentuhan (Syaitan) itu. Yang demikian ialah disebabkan mereka mengatakan: "Bahawa sesungguhnya berjual beli itu sama sahaja seperti *riba*". Padahal Allah telah menghalalkan berjual beli (berniaga) dan

mengharamkan *riba*. Oleh itu sesiapa yang telah sampai kepadanya peringatan (larangan) dari Tuhannya lalu ia berhenti (dari mengambil *riba*), maka apa yang telah diambilnya dahulu (sebelum pengharaman itu) adalah menjadi haknya, dan perkaranya terserahlah kepada Allah. Dan sesiapa yang mengulangi lagi (perbuatan mengambil *riba* itu) maka mereka itulah ahli neraka, mereka kekal di dalamnya.

276.

Allah susutkan (kebaikan harta yang dijalankan dengan mengambil) *riba*, dan Ia pula mengembangkan (berkat harta yang dikeluarkan) sedekah-sedekah dan zakatnya. Dan Allah tidak suka kepada tiap-tiap orang yang kekal terus dalam kekufuran, dan selalu melakukan dosa.

277.

Sesungguhnya orang-orang yang beriman dan beramal salih, dan mengerjakan sembahyang serta memberikan zakat, mereka beroleh pahala di sisi Tuhan mereka, dan tidak ada kebimbangan (dari berlakunya sesuatu yang tidak baik) terhadap mereka, dan mereka pula tidak akan berdukacita.

278.

Wahai orang-orang yang beriman! Bertaqwalah kamu kepada Allah dan tinggalkanlah (jangan menuntut lagi) saki baki *riba* (yang masih ada pada orang yang berhutang) itu, jika benar kamu orang-orang yang beriman.

279.

Oleh itu, kalau kamu tidak juga melakukan (perintah mengenai larangan *riba* itu), maka ketahuilah kamu: akan adanya peperangan dari Allah dan RasulNya, (akibatnya kamu tidak menemui selamat). Dan jika kamu bertaubat, maka hak kamu (yang sebenarnya) ialah pokok asal harta kamu. (Dengan yang demikian) kamu tidak berlaku zalim kepada sesiapa, dan kamu juga tidak dizalimi oleh sesiapa.

280.

Dan jika orang yang berhutang itu sedang mengalami kesempitan hidup maka berilah tempoh sehingga ia lapang. Dan (sebaliknya) bahawa kamu sedekahkan hutang itu (kepadanya) adalah lebih baik untuk kamu, kalau kamu mengetahui (pahalanya yang besar yang kamu akan dapati kelak).”

5. Accepted translations of the same verses of the Qur'an in the English language from other sources are as follows:

Verse 002.275

YUSUF ALI: 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 (for ever).

PICKTHAL: Those who swallow usury cannot rise up save as he ariseth whom the devil hath prostrated by (his) touch. That is because they say: Trade is just like usury; whereas Allah permitteth trading and forbiddeth usury. He unto whom an admonition from his Lord cometh, and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. As for him who returneth (to usury) - Such are rightful owners of the Fire. They will abide therein.

SHAKIR: Those who swallow down usury cannot arise except as one whom Shaitan has prostrated by (his)

touch does rise. That is because they say, trading is only like usury; and Allah has allowed trading and forbidden usury. To whomsoever then the admonition has come from his Lord, then he desists, he shall have what has already passed, and his affair is in the hands of Allah; and whoever returns (to it)-- these are the inmates of the fire; they shall abide in it.

Verse 002.276

YUSUF ALI: Allah will deprive usury of all blessing, but will give increase for deeds of charity: For He loveth not creatures ungrateful and wicked.

PICKTHAL: Allah hath blighted usury and made almsgiving fruitful. Allah loveth not the impious and guilty.

SHAKIR: Allah does not bless usury, and He causes charitable deeds to prosper, and Allah does not love any ungrateful sinner.

Verse 002.277

YUSUF ALI: Those who believe, and do deeds of righteousness, and establish regular prayers and regular charity, will have their reward with their Lord: on them shall be no fear, nor shall they grieve.

PICKTHAL: Lo! those who believe and do good works and establish worship and pay the poor-due, their reward is with their Lord and there shall no fear come upon them neither shall they grieve.

SHAKIR: Surely they who believe and do good deeds and keep up prayer and pay the poor-rate they shall have their reward from their Lord, and they shall have no fear, nor shall they grieve.

Verse 002.278

YUSUF ALI: O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers.

PICKTHAL: O ye who believe! Observe your duty to Allah, and give up what remaineth (due to you) from usury, if ye are (in truth) believers.

SHAKIR: O you who believe! Be careful of (your duty to) Allah and relinquish what remains (due) from usury, if you are believers.

Verse 002.279

YUSUF ALI: If ye do it not, Take notice of war from Allah and His Messenger: But if ye turn back, ye shall have

your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly.

PICKTHAL: And if ye do not, then be warned of war (against you) from Allah and His messenger. And if ye repent, then ye have your principal (without interest). Wrong not, and ye shall not be wronged.

SHAKIR: But if you do (it) not, then be apprised of war from Allah and His Messenger; and if you repent, then you shall have your capital; neither shall you make (the debtor) suffer loss, nor shall you be made to suffer loss.

Verse 002.280

YUSUF ALI: If the debtor is in a difficulty, grant him time Till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.

PICKTHAL: And if the debtor is in straitened circumstances, then (let there be) postponement to (the time of) ease; and that ye remit the debt as almsgiving would be better for you if ye did but know.

SHAKIR: And if (the debtor) is in straitness, then let there be postponement until (he is in) ease; and that you remit (it) as alms is better for you, if you knew.

6. Clearly there is a consensus that *riba* is prohibited and condemned while trading is allowed. This *riba* is the same usury prohibited in Judaism and Christianity because Surah An-Nisaa Verse 161 mentions explicitly that *riba* was prohibited for the Jews also. The following excerpts from Deuteronomy, Psalms, Proverbs, Nehemiah and Ezekiel dealt with usury:

"Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury." [Deuteronomy 23:19]

"Lord, who shall abide in thy tabernacle? Who shall dwell in thy holy hill? He that walketh uprightly, and worketh righteousness and speaketh the truth in his heart. He that putteth not out of his money to usury, nor taketh reward against the innocent." [Psalms 15:1, 2, 5]

"He that by usury and unjust gain increaseth his substance, he shall gather it for him that will pity the poor." [Proverbs 28:8]

"Then I consulted with myself, and I rebuked the nobles, and rules and said unto them, Ye exact usury, every one of his brother. And I set a great assembly against them." [Nehemiah 5:7]

"He that hath not given forth upon usury, neither hath taken any increase, that hath withdrawn his hand from iniquity, hath executed true judgment between man and man, hath walked in my statutes, and hath kept my judgments, to deal truly; he is just. He shall surely live, said the Lord God." [Ezekiel 18:8.9]

"In thee have they taken gifts to shed blood; thou hast taken usury and increase, and though hast greedily gained of thy neighbors by extortion, and hast forgotten me, said the Lord God." [Ezekiel 22:12]

7. It is evident from these verses that it is not the loan that is prohibited and condemned but the element of profit imposed upon the loan. Thus, a benevolent loan (*Qard al-Hasan*) is allowed. It is the profit on a loan that is *riba*. It is *riba* regardless whether it is expressed as a percentage or as a sum. The fact a sum is not expressed as a percentage does not make it to be not *riba*. But since benevolent loans provide no profit, there is no business incentive to offer these in Islamic or for that matter in any financing business. Islamic financing business is, therefore, built around the sale and purchase concept as its center piece. Each of these concepts must be examined on their own merits, and they do not become Islamic simply because an Arabic name has been given. The test, as mandated by the Islamic Banking Act 1983 and the Banking and

Financial Institutions Act 1989 is the same, and the test is whether there is any element in the concept that is not approved by the Religion of Islam.

8. The reasoning in the judgment of this Court in **D4-22A-067-2003 Arab-Malaysian Finance Berhad v. Taman Ihsan Jaya Sdn Bhd & 2 Ors & Koperasi Seri Kota Bukit Cheraka Berhad (Third Party) and Other Cases** is applicable and to be read as part of the judgement in this case as to the basic principles.

9. One of these Islamic financing concepts built around the sale and purchase is the Bai Al-Inah concept.

Bai Al-Inah

10. The Bai Al-Inah concept is a combination of two separate agreements, the first being the Al-Bai, meaning a sale by the financier to the client, and the second being the buy-back by the financier from the client. The purchase price paid by the financier under the second agreement and the deferred payments under the first agreement provides the client with the immediate funds that he desired, and the facility to pay back over a period of time.

This Case

11. The Facilities was provided under the Bai Al-Inah concept by the Facilitator selling Five (5) blocks of shares quoted in the Kuala

Lumpur Stock Exchange to the Clients for RM12,310,272.00 ('the Sale Price') to be paid by the Clients to the Facilitator by way of Deferred Payments of Eighteen (18) monthly instalments. On the same day, the Facilitator purchased from the Clients the quoted shares at the purchase price of RM10,000,000.00 ('the Purchase Price'), thus providing a profit to the Facilitator amounting to RM2,310,272.00, while the Clients obtained funds amounting to RM10,000,000.00.

12. The relevant documents were exhibited in the Affidavit (Enclosure 8) filed for purposes of Summary Judgment application:-

- a) Asset Purchase Agreement ("the APA") dated 18-4-2000 (Exhibit 'AA-1');
- b) Asset Sale Agreement ("the ASA") dated 18-4-2000 (Exhibit 'AA-2');
- c) Power of Attorney dated 25-4-2000 (Exhibit 'AA-3');
- d) Deed of Assignment of Proceeds dated 18-4-2000 (Exhibit 'AA-4');
- e) Deed of Assignment of Privatisation Agreement (Exhibit 'AA-5');

- f) Master Guarantee for End-Financing Facility dated 18-4-2000 (Exhibit 'AA-6');
- g) Joint and Several Guarantee by the 2nd, 3rd and 4th Defendants dated 18-4-2000 (Exhibit 'AA-7').

13. These are the transactions and the documents therefor that the Plaintiff relied upon for its action. The documents show the contractual structure relied upon. As a sale with payment by deferred instalments and buy-back, it enabled the client to obtain immediately the assets which the client can then sell to obtain the facility desired, and to pay for the assets over time. By any measure the sale with deferred payment provided is a loan. So long as a loan does not involve *riba* it does not involve any element not approved by the Religion of Islam. To that extent a Bai Al-Inah transaction would not involve any element not approved by the Religion of Islam.

14. The issue is, in this case, is whether in the Bai Al-Inah transaction there is any element not approved by the Religion of Islam.

15. Under the Bai Al-Inah structure in this case, "profit from trading" was made by the Facilitator by the sale of the 5 blocks of shares to the 1st Defendant under the APA, and the 1st Defendant obtained immediate cash it desired as payment from the sale of the 5 blocks of shares to the Facilitator under ASA. The 2nd, 3rd and 4th Defendants were joint and several guarantors.

16. Both the APA and ASA when read individually, and without knowledge of the other, cannot be said, of each, to contain any element not approved by the Religion of Islam. They individually comply with Islamic requirements as to the formation of binding contract in the Islamic laws of financial transactions (*Fiqh al-Muamalat*).

17. The APA and the ASA do not separately constitute to be a Bai Al-Inah transaction. The essence of the Bai Al-Inah transaction is that it is a combination of two transactions, being a sale with deferred payments and a buy-back. When the APA and the ASA are read together, it is apparent that the 1st Defendant who wanted the Facilities obtained it from the Facilitator from the Purchase Price when the 5 blocks of shares were sold to the Facilitator under the ASA. Now, it must be observed that in the first place the 1st Defendant had proceeded to the Facilitator to obtain the Facilities, and at that time it did not have the 5 blocks of shares. It obtained the 5 blocks of shares by buying the same when it had no money, from the Facilitator, for RM12,310,272.00. It bought with money it did not have. Immediately upon buying the 5 blocks of shares, the 1st Defendant sold it to the Facilitator to obtain the Facilities of RM10,000,000.00 at the same time on 18-4-2004. The 5 blocks of shares need not even change hands. Delivery of the 5 blocks of shares did not arise. Shorn of the cloak of the APA and the ASA, it was no different from a personal loan secured with personal guarantees and other security arrangements. A question that obviously emerges relating to the profit of RM2,310,272.00. It is

equally obvious that the profit arises from a loan. The next question arises whether the RM2,310,272.00 is *riba*, an element prohibited and condemned in the Religion of Islam.

18. In this case, the sum of RM2,310,272.00 is expressed as a profit and not as interest. Before making a finding upon the point, it is worthwhile to consider the words attributed to *Ibn Qayyim Al-Jawziya, I'lam Al-Muwaqqi'in `an Rabb Al-'Alamin, Beirut: Dar al-Kutub al-'Ilmiyya, 1996, vol.3, p. 92* by Professor Mahmoud A. El-Gamal at Rice University, Houston:

“It is impossible for the Law of the Wisest of the wise [God] that He would forbid a harmful dealing [riba, or usury], curse its perpetrators and warn them of a war from God and his Messenger, and then to allow a ruse to result in the same effect with the same harm and added transaction costs in constructing the ruse to deceive God and his Messenger. This cannot be in accordance with the law, because *riba* on the ground is more facile and less harmful than *riba* with a tall ladder atop of which the two parties conduct the *riba*...

I wonder, which of the harmful effects of *riba* was removed by this deception and lies?”

19. Since the prohibition and condemnation of *riba* is contained in the *Surah al-Baqarah*, then it is the belief in the Religion of Islam that it is from *Allah*. Whether the Court is a Syariah Court or not, it is a fact that it is a fundamental element of the Religion of Islam that *Allah* is omniscient. It is the fundamental element upon which depends the belief in the inevitability of *Allah's* justice, convincing His followers to abide by his teachings, and assuring them of their reward for compliance. The effect of that omniscience is that legal devices or trickery (*hila*) would fail in the eyes of *Allah*. In developing *Fiqh al-Muamalat*, caution must be exercised for it is all too easy to fall into the pitfall of inadvertently developing a *fiqh al-hiyal* by creating and then relying on legal fiction. Transactional schemes must be viewed as a whole rather than as separate components so that they are seen for what they are, before forming an opinion on permissibility. It has been said with much justification that what matters in discerning the true nature of contracts and transactions are the substance and not the words and structure.

20. The Bai Al-Inah concept received the approval of the Syariah Advisory Council. The advice and ruling of the Syariah Advisory Council is not lightly made, nor should be taken lightly. There is no difficulty to accept that the Plaintiff clearly never intended, in its Islamic financing business, to involve any element not approved by the Religion of Islam. The fact of approval by the Syariah Advisory Council is also not lightly dismissed by the Court. For this reason, the Bai Al-Inah concept is accepted. However, decisions of a Court is based upon the facts of the individual case, and not upon the concept

in general. In essence, the Court is looking at the manner in which that concept is being applied. The finding by the Court is a finding of fact based upon the particulars of facts of the case before it, a function that it cannot delegate or abdicate to another authority, body or person.

21. The decision and reasoning in the judgment of this Court in **Arab-Malaysian Finance Berhad v. Taman Ihsan Jaya Sdn Bhd & 2 Ors & Koperasi Seri Kota Bukit Cheraka Berhad (Third Party) and Other Cases (D4-22A-67-2003)** is applicable and is to be read as part of this judgment.

22. Clearly a person cannot buy with money he does not have. He could do so only if payment is deferred. There is no real reason why he cannot sell, if he had title and possession even before paying the full selling price. But, if the buyer is the very same person who sold to him, and did so at the very same time, there is, even to the inexperienced and naive human much more than meets the eye, let alone *Allah*, who would know the RM10,000,000.00 facility is a loan, and the RM2,310,272.00 is the increase when the loan is repaid at RM12,310,272.00. Such increase or profit may not have been expressed as a percentage but as a sum, but it is no less *riba* in a usurious loan. Upon the facts of this case, the foregoing reasoning leads to the conclusion that the Bai Al-Inah transaction as implemented contains the element of *riba*, an element not approved by the Religion of Islam.

23. In the event, the Plaintiff is entitled against the Defendants to the sum made available under the facility it extended and not to the part that is *riba*. Costs shall be borne by each party.

Sgd.

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

Dated: 18th July 2008

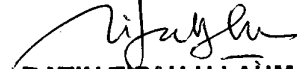
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Salinan Diakui Sah



DATIN TIPAH HJ AHMAD
Setiausaha Kepada
Y.A. Datuk Abdul Wahab bin Petali
Hakim Mahkamah Tinggi Malaya
Kuala Lumpur
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