

**A Affin Bank Bhd v Zulkifli bin Abdullah**

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO  
D4-22A-159 OF 2003

**B** ABDUL WAHAB PATAIL J  
29 DECEMBER 2005

**C** *Banking — Banks and banking business — Islamic banking — Home Islamic financing facility — Al-Bai Bithaman Ajil — Default payment of instalments — Notice of default in Form 16D of the National Land Code — Application for order of sale and order to recover such sums in the event of a deficiency in the proceeds of sale — What is the amount that a customer has to pay to the provider of Al-Bai Bithaman Ajil facility in the event of a default — Whether provider of an Al-Bai Bithaman Ajil facility can, in the event of a default before the end of tenure, claim as part of the sale price or bank selling price the profit margin for the unexpired tenure of the facility*

**D** *Banking — Banks and banking business — Islamic banking — Home Islamic financing facility — Terminated before end of its tenure — Demand of bank selling price — Calculation of profit margin — When tenure shortened, whether profit margin could be recalculated with equal certainty*

**E** *Land Law — Charge — Order for sale — Default of instalments — Charge an ad rem right to dispose of security to recover a secured debt — National Land Code 1965 s 256*

**F** The defendant bought a double storey link house and secured the loan under the Syariah principle of Al-Bai Bithaman Ajil from the plaintiff, 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.

**G** However, at the end of December 1997, the defendant resigned from the plaintiff bank and at his request, the loan facility was restructured whereby under the revised facility, the bank selling price of the house was RM992,363.40, payable over a period of 25 years. No fresh set of documents was executed, although earlier, the bank had requested. After making several payments totaling RM33,454.19, the last of which was in June 2001, the defendant again defaulted. The plaintiff issued a notice of default in Form 16D of the National Land Code seeking the repayment of

**H** RM958,997.21. Subsequently, two actions were filed, namely an order for sale and an order to recover such sums in the event of a deficiency in the proceeds of sale. The issue before the court was the actual amount that a customer has to pay to the provider of an Al-Bai Bithaman Ajil facility in the event of a default, in this case, after

**I** having paid RM33,454.19 in instalments.

**Held**, granting the order for sale and reducing the amount of repayment:

- (1) If the customer is required to pay the profit for the full tenure, he is entitled

to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure. To allow the bank to also be able to earn for the unexpired tenure of the facility, means the bank is able to earn a profit twice upon the same sum at the same time (see para 29).

- (2) The profit margin that continued to be charged on the unexpired part of the tenure cannot be actual profit. It was clearly unearned profit. It contradicted the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider was entitled to. Obviously, if the profit had not been earned it was not profit, and should not be claimed under the Al-Bai Bithaman Ajil facility (see para 29).
- (3) The profit margin could be calculated and derived with certainty. Even if the tenure was shortened, the profit margin could be recalculated with equal certainty (see para 34). The total due on the date of the judgment was RM616,080.99 and after crediting the defendant with all the payments he had made of RM33,454.19, the balance due on the date of judgment was RM582,626.80 (see para 37).
- (4) Once it was established that there had been a default, then unless there was cause to the contrary, the order for sale must be given since a charge is an ad rem right to dispose of the security to recover a secured debt (see para 45).

**Obiter:**

When the gratification of being able to satisfy the pious desire to avoid financing containing the elements of Riba gives way to the sorrow of default before the end of tenure of an Al-Bai Bithaman Ajil facility, the revelation that even after the subject of security had been auctioned at full market value there remains still a very substantial sum still owing to the bank, comes as a startling surprise. All the more shocking when it is further realized that a borrower under conventional loan is far better off. The consequence of a default under the Al-Bai Bithaman Ajil facility proved to be far more burdensome upon the unfortunate and bewildered defaulter (see paras 16–17).

**[Bahasa Malaysia summary**

Defendan membeli sebuah rumah teres dua tingkat dan memperoleh pinjaman perumahan melalui prinsip Syariah Al-Bai Bithaman Ajil daripada plaintif yang pada ketika itu majikannya, sejumlah RM346,000. Pinjaman tersebut perlu diperjelaskan dalam tempoh 18 tahun melalui bayaran ansuran selama 216 bulan dan gadaian terhadap hak milik tersebut didaftar. Walau bagaimanapun, pada penghujung bulan Disember 1997, defendan meletak jawatan dari bank plaintif dan atas permintaannya kemudahan pinjaman tersebut telah disusun semula, di mana di bawah penyusunan semula tersebut keseluruhan pinjaman adalah RM992,363.40 dan dikehendaki dibayar balik dalam tempoh 25 tahun. Tiada set dokumen baru dimeterai, walaupun sebelum ini, bank telah memintanya. Setelah membuat beberapa bayaran berjumlah RM33,454.19, iaitu bayaran terakhir pada bulan Jun 2001, defendan sekali lagi mengingkari. Plaintif telah mengeluarkan notis ingkar dalam Borang 16D, Kanun Tanah Negara menuntut bayaran balik sebanyak RM958,997.21. Seterusnya, dua

- A tindakan telah difailkan iaitu suatu perintah jualan dan perintah untuk menuntut sejumlah bayaran sekiranya terdapat sebarang kekurangan dalam harga jualan tersebut. Isu yang timbul di mahkamah adalah jumlah sebenar yang harus dibayar oleh pelanggan kepada pemberi kemudahan Al-Bai Bithaman Ajil sekiranya terdapat keingkaran di dalam pembayaran, dalam kes ini, setelah membayar ansuran sebanyak RM33,454.19.
- B

**Diputuskan**, membenarkan perintah jualan mengurangkan jumlah pembayaran balik:

- C (1) Sekiranya pelanggan dikehendaki membayar keuntungan sehingga tempoh matang, dia berhak menerima faedah sehingga tempoh matang tersebut. Oleh tu, adalah tidak konsisten dengan haknya kepada tempoh matang sekiranya dia dinafikan tempoh tersebut dan sebaliknya dikehendaki membayar keuntungan margin bank sehingga sepenuh tempoh tersebut.
- D Dengan membenarkan bank membuat keuntungan dari tempoh kemudahan tersebut yang belum matang bermakna Bank akan mendapat keuntungan dua kali ganda di atas jumlah yang sama pada masa yang sama (lihat perenggan 29).
- E (2) Keuntungan margin yang seterusnya dikehendaki dibayar ke atas tempoh belum matang tidak boleh dikatakan keuntungan sebenar. Ianya jelas bukan keuntungan yang peroleh. Ianya bercanggah dengan prinsip Al-Bai Bithaman Ajil berkaitan keuntungan margin yang berhak diterima oleh pemberi. Sememangnya, jika keuntungan tersebut tidak peroleh ianya bukanlah keuntungan dan tidak boleh dikatakan kemudahan di bawah Al-Bai Bithaman Ajil (lihat perenggan 29).
- F (3) Keuntungan margin boleh dikira dan diperoleh dengan tepat. Walaupun tempoh dikurangkan, keuntungan margin boleh dikira semula dengan ketetapan yang sama (lihat perenggan 34). Jumlah sebenar yang perlu dibayar pada tarikh penghakiman adalah sejumlah RM616,080.99 dan setelah menolak bayaran sejumlah RM33,454.19 yang telah dibayar oleh defendan, baki yang perlu dibayar pada tarikh penghakiman adalah sejumlah RM582,626.80 (lihat perenggan 37).
- G (4) Setelah disabitkan bahawasanya terdapat keingkaran, melainkan jika terdapat sebab-sebab yang munasabah, perintah jualan perlu dibenarkan memandangkan gadaian adalah hak ad rem untuk meluputkan jaminan bagi mendapat balik hutang yang dijamin (lihat perenggan 45).
- H

**Obiter:**

- I Apabila kehendak untuk menunaikan keperluan agama untuk menolak pinjaman yang mengandungi unsur-unsur Riba tidak ditunaikan kerana keingkaran pembayaran sebelum tempoh matang sesuatu kemudahan Al-Bai Bithaman Ajil, sebenarnya walaupun jaminan tersebut dilelong pada harga pasaran, masih wujud sejumlah besar yang masih terhutang kepada bank dan ini adalah suatu kejutan yang amat menghairankan. Lebih menghairankan lagi bahawa peminjam di bawah pinjaman konvensional adalah lebih selamat. Akibat keingkaran di bawah kemudahan Al-Bai Bithaman Ajil jelas lebih menyusahkan ke atas peminjam yang ingkar yang kurang bernasib baik (lihat perenggan 16–17).]

**Notes**

For cases on Islamic banking, see 1 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2052–2157.

For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–1954.

**Cases referred to**

*Arab-Malaysian Merchant Bank Bhd v Silver Conccent Sdn Bhd* [2005] 5 MLJ 210 (refd)

*Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735; [1994] 3 AMR 44 (refd)

*Bank Islam Malaysia Bhd v Shamsuddin bin Hail Ahmad* [1991] 1 LNS 275 (refd)

*Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408 (refd)

*Co-Operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373 (refd)

*Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (refd)

*Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 (refd)

*Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 (refd)

**Legislation referred to**

Hire Purchase Act 1967

National Land Code s 257(1)(e), (f), (g), (h), Form 16D

Rules of the High Court 1980 O 83

*Allen Miranda (Malathi Subramaniam with him) (AI Nathan & Isa Aziz Ibrahim) for the plaintiff.*

*Muhamad Nazri bin Muhamad (Khatijah Chia & Nazri) for the defendant.*

**Abdul Wahab Patail J:**

[1] The defendant Zulkifli bin Abdullah ('the defendant') is sued by the plaintiff, Affin Bank Bhd ('the bank') in D4–22A–159 of 2003 for an order for sale to recover sums outstanding under a 1997 Al-Bai Bithaman Ajil facility ('the 1997 facility') released on 8 December 1997 and amended by revision in 1999 ('the 1999 revised facility'); and in D4–22A–67 of 2005 for amount outstanding from the 1999 revised facility amounting to RM958,997.94 as at 30 June 2002; interest thereon at 8% from the date of judgment to date of full settlement, costs and such other orders as the court thinks fit.

[2] The defendant bought a double storey corner link house from the vendor, Mohamed Nazir bin Mohamed Yusoff ('the vendor') for the sum of RM385,000 ('the principal agreement'). He paid a deposit of RM39,000. A balance of RM346,000 remained to be paid.

[3] He requested the bank, who was his employer at that time, for a home Islamic financing facility under the Syariah principle of Al-Bai Bithaman Ajil. The Al-Bai Bithaman Ajil is the Syariah principle which involves the purchase of a property and

- A** the sale and payment of the sale price which includes a profit margin upon deferred payment terms. The bank agreed and granted to the defendant the 1997 facility.

THE 1997 FACILITY

- B** [4] As is usual at the time under an Al-Bai Bithaman Ajil facility, the bank at the request of the defendant and with the consent of the vendor became a party to the principal agreement with the intent that the bank be deemed to be the purchaser in place of the defendant from the date of the principal agreement to pay the vendor the balance price of RM346,000. This is effected through a novation agreement executed on 8 December 1997 ('the novation agreement'). The defendant was, therefore, given
- C** a RM346,000 facility. That facility amount was described as the bank purchase price. On the same date, the bank sold the property to the defendant. The defendant signed as purchaser a property sale agreement ('the property sale agreement') pursuant to which the defendant agreed to purchase the property from the bank and to pay the bank's selling price by the instalments set out in the second schedule. The defendant
- D** was also required to execute a registered charge ('the charge') against the title to secure the instalments payments. The novation agreement, the property sale agreement and the charge comprise the documentation of the 1997 facility.

- E** [5] The 1997 facility was to be repaid over an 18-year tenure by 216 monthly instalments of RM3,582.80 subject to a reduction, by the application of the Islamic principle of Ibra, for so long as the defendant remained the bank's employee, of RM1,421.47. Thus, the monthly instalments was  $RM3,582.80 - RM1,421.47 = RM2,161.33$ . The total payments over 216 installments, so long as he remained an employee, was therefore  $RM2,161.33 \times 216 = RM466,847.28$ . This RM466,847.28 was described in the letter of offer of 26 May 1997 as the bank selling price and the
- F** property sale agreement as the sale price. For this reason, the terms 'sale price' and 'bank selling price' can be used interchangeably.

THE 1999 REVISED FACILITY

- G** [6] At the end of December 1997, the defendant left his employment with the bank. Having paid RM7,500 in instalments he defaulted, he requested a restructuring of the RM346,000 facility. By a letter dated 1 November 1999, the bank agreed. The terms set out in the letter dated 1 November 1999 was accepted by the defendant on 3 November 1999 ('the 1999 revised facility'). Although the letter
- H** of 1 November 1999 required the parties to execute a fresh set of documentation, no such documentation was executed. The letter of 1 November 1999 and acceptance thereon on 3 November 1999 constitute the sole document for the 1999 revised facility. It described the purpose of the revised terms as:

- I** To restructure the existing al-Bai Bithaman Ajil facility by recapitalization the current outstanding of RM335,251.60 plus the profit income in arrears for twenty months amounting to RM58,920.46.

[7] The sum  $RM335,251.60 + RM58,920.46 = RM394,172.06$  is not disputed. This is described by the bank as the 'Revised Bank Purchase Price' ('revised purchase price'). Thus, the facility for RM346,000 in the 1999 facility was revised as facility for RM394,172.06 in the 1999 revised facility. The tenure under the revised facility was 25 years. The tenure would end 31 October 2024. The defendant was to pay by 60 monthly instalments of RM2,500 and thereafter 240 monthly instalments of RM3,509.84. The total payments over 25 years would be  $(RM2,500 \times 60) + (RM3,509.84 \times 240) = RM992,361.60$ . The bank gave its revised bank selling price as RM992,363.40 ('revised selling price'). The difference  $RM992,363.40 - RM992,361.60 = RM1.80$  arises out of rounding-up to two decimal points and is immaterial. For all purposes, therefore, the revised selling price is RM992,363.40.

A

B

C

#### DEFAULT OF 1999 REVISED FACILITY AND THE CLAIM

[8] After making several payments totalling RM33,454.19, the last of which was on 5 June 2001, the defendant again defaulted. On 1 August 2002, a notice of default in Form 16D of the National Land Code ('the NLC') was issued, seeking the repayment of RM958,997.94. Subsequently two actions were filed. This action D4-22A-159 of 2003 was filed to obtain an order for sale. The second action D4-22A-67 of 2005 was filed to recover such sums in the event of a deficiency in the proceeds of sale. Since the primary issue is the amount that is due from the defendant in the circumstances of a default under an Al-Bai Bithaman Ajil Facility, the parties agreed that the decision in D4-22A-159 of 2003 would be binding in D4-22A-67 of 2005.

D

E

[9] At trial, the bank claims that since the bank selling price is RM992,363.40, and the defendant had paid only RM33,454.19, the balance due from the defendant under the 1999 revised facility is  $RM992,363.40 - RM33,454.19 = RM958,909.21$ .

F

#### AMOUNT PAYABLE UPON DEFAULT OF AL-BAI BITHAMAN AJIL FACILITY

G

[10] The general issue before this court is what is the amount that a customer has to pay to the provider of an Al-Bai Bithaman Ajil facility in the event of a default. In this case, that issue is what is the amount the defendant, after having paid RM33,454.19 in instalments, has to pay to the bank under the 1999 revised facility on the date of the order for sale?

H

[11] In plain terms, the defendant's predicament is that two years and eight months after it was given, the 1999 revised facility became a claim for a debt of RM958,909.21. Even if the market value of the security under the charge were, say, RM400,000, and that price is obtained at auction, the defendant would still owe another RM558,909.21.

I

[12] In contrast, under a conventional loan, the defaulter would only be required to pay the loan amount plus accrued interest and other charges, including late

A payment interest. Upon a similar assumption of disposal of the property at market value, there is usually little the defaulter has to add in order to be released from further liability.

B [13] The reason for the difference is that in the event of a default before the end of tenure, the sum the borrower in a conventional loan has to pay over and above the sum borrowed, ie the interest and late payment interest, is limited to the period from release of the loan until full settlement and not for the full original tenure of the loan; while in this case, the bank claims under the Al-Bai Bithaman Ajil facility the 'sale price' or 'bank selling price' which is the sum of the facility given out as 'purchase price' or 'bank purchase price' and the profit margin thereon for the full tenure of the facility. In other words, while in a conventional loan no interest is applied upon the unexpired tenure, the bank in this case seeks to claim a profit on the unexpired tenure also.

#### CASE LAW

D [14] The case of *Bank Islam Malaysia Bhd v Adnan bin Omar* [1994] 3 CLJ 735; [1994] 3 AMR 44 involved an Al-Bai Bithaman Ajil facility of RM265,000 to Adnan bin Omar. The tenure was 180 months = 15 years from 2 March 1984. The bank purchase price was therefore RM265,000. The bank selling price was RM583,000. E The payment of monthly instalments was secured by a charge. He defaulted on instalment payments since April 1985. An originating summons was filed in 1992. The bank claimed RM583,000. The judgment on 18 July 1994 granted an order for sale to 'recover the amount of the advance under O 83 r 3(3)(a) as being RM583,000'. Thus, a facility of RM265,000 became a debt of RM583,000, and even if on auction the full purchase price of RM265,000 was obtained, the defendant F still owed RM318,000.

G [15] In *Bank Islam Malaysia Bhd v Shamsuddin bin Hail Ahmad* [1991] 1 LNS 275, the Al-Bai Bithaman Ajil facility obtained was RM150,000. The learned judge followed *Bank Islam Malaysia Bhd v Adnan bin Omar*. The defendant was ordered to pay the bank selling price of RM217,500. Again if the market value of the property were RM150,000 and that price were obtained on auction, the defendant still owed RM67,500.

H [16] When the gratification of being able to satisfy the pious desire to avoid financing containing the elements of Riba gives way to the sorrow of default before the end of tenure of an Al-Bai Bithaman Ajil facility, the revelation that even after the subject security had been auctioned at full market value there remains still a very substantial sum still owing to the bank, comes as a startling surprise. All the more shocking when it is further realized that a borrower under a Riba-ridden loan is far better off.

I [17] The consequences of a default under the Al-Bai Bithaman Ajil facility proved to be far more burdensome upon the unfortunate and bewildered defaulter. It spawned various reactions.

## THE REACTIONS

A

[18] In an article *Islamic/Interest-Free Banking in Malaysia: Some Legal Considerations*, Mohd Illiyas summarized the defendant's challenge in *Bank Islam Malaysia Bhd v Adnan bin Omar* as follows:

- (i) that there was non-compliance with O 83 r 3(3)(a) in that the sum of RM583,000 (that is, the price inclusive of the bank's profit at which was to be paid by 180 monthly installments) stipulated as payable by the defendant in the charge and in the affidavit in support of the originating summons was wrong as the amount actually disbursed by the bank under the facility was only RM265,000 (that is, the price at which the bank first purchased the property from the defendant under the facility);
- (ii) that there was non-compliance with O 83 r 3(3)(c) and 3(7) in that the affidavit did not provide particulars of the interest due to the bank; and
- (iii) that there was non-compliance with O 83 r 3(3)(d) as the amount stated in the affidavit as remaining unpaid under the charge was not correct for it was subject to a reduction by 'muqassah' (a rebate) that the bank had granted to the defendant on account of the early recovery of the sum owing, that is prior to the 15-year payment period under the facility.

B

C

D

[19] The writer commented in that article:

E

The Shah Alam High court's decision in *Bank Islam Malaysia Bhd v Adrian bin Omar* showed how glaringly inadequate the existing legal framework is in the implementation and the enforcement of Islamic banking documents in Malaysia.

The writer's suggestion was to amend O 83 and various laws, and to consider setting up of an Islamic division in the High Court with judges qualified in both civil law and Islamic law. In the latter suggestion, he referred to a similar suggestion in *Conveyancing, Banking and Commercial Practice: An Islamic Perspective* [1994] 4 BLJ lxxi by Mohamed Ismail Shariff who incidentally was the counsel for the defendant Adnan bin Omar. The writer, Mohd Illiyas, also suggested that in the meantime it may be necessary, in the documents relating to Islamic transactions, to provide for disputes arising thereunder to be referred to mediation or arbitration by suitable persons, which would entail suitable changes to existing laws and procedural rules.

F

G

[20] Like the submissions in the cases, these suggested solutions do not address specifically the question whether the provider of an Al-Bai Bithaman Ajil facility can, in the event of a default before the end of tenure, claim as part of the sale price or bank selling price the profit margin for the unexpired tenure of the facility.

H

## REFERENCE TO THE NATIONAL SYARIAH ADVISORY COUNCIL

I

[21] An initial thought was to consider referring the question to the National Syariah Advisory Council under the banking and financial Institutions Act after first ascertaining all the relevant facts. In considering that course of action, this court is

A guided by the Court of Appeal in *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408 where Abdul Hamid Mohamed JCA writing the judgment for the Court of Appeal said (at p 411):

B 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 NLC. The remedy available and sought is a remedy provided by the NLC. 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.

C [22] Since the question before the court is the interpretation and application of the terms of the contractual documents between the parties and of the decisions of the courts, reference of this case to another forum for a decision would be an indefensible abdication by this court of its function and duty to apply established principles to the question before it. It is not a question of Syariah law. It is the conclusion of this court, therefore, that there is no necessity to refer the question to another forum.

#### APPLICATION OF LAW

E [23] To understand the ratio decidendi or the basis of the decision in *Bank Islam Malaysia Bhd v Adnan bin Omar*, it must be kept in mind that the submissions put before the learned judicial commissioner were that the amount disbursed was not RM583,000, that O 83 of the Rules of the High Court 1980 were not complied with or did not apply, and because a rebate was due the sum claimed was incorrect.

F When the submissions were rejected, an order for the payment of RM583,000 was, procedurally speaking, correctly made. The submissions, however, did not address the substance of the term 'sale price' itself and the actual amount due pursuant to it. Similarly in *Bank Islam Malaysia Bhd v Shamsuddin bin Haji Ahmad; Arab-Malaysian Merchant Bank Bhd v Silver Concent Sdn Bhd* [2005] 5 MLJ 210, It cannot, therefore,

G be said that these cases have specifically established case law that the provider of an Al-Bai Bithaman Ajil facility is entitled to the profit margin for the whole original tenure when the facility is terminated before the end of its tenure.

#### BASIS OF CLAIM BY THE BANK

H [24] The basis of the sale price claimed by the bank is s 7.02 of the property sale agreement on consequences of a default by the customer of a facility. The section provides:

I If the Customer shall commit a default pursuant to Section 7.01 or if any of the events stipulated in Section 7.01 hereof shall happen and which if capable of remedy is not remedied within a period of seven (7) days from the date of notice by the Bank requesting remedy of the same, or is not remedied within the time specifically stipulated therefor (if any) in respect of the event in question, the *Sale Price and ail other sums payable under this Agreement shall before and be deemed to be*, notwithstanding anything contained herein

to the contrary, *forthwith due and payable* and whereupon the Bank shall be entitled without further notice to the Customer to enforce the Charge and or the Letter of Set-Off and all of the remedies available under the law.

A

(Emphasis added.)

That 'Sale Price' that became forthwith due and payable is set out in s 1.01 of the property sale agreement as follows:

B

The Bank hereby agrees to sell and the customer hereby agrees to purchase the Property free from all encumbrances but subject to the conditions of title express or implied in the document of title to the Land and with vacant possession at the purchase price stated in Section 8 of the First Schedule hereto (hereinafter called the Sale Price).

C

Section 8 of the First Schedule provides as 'The Sale Price':

Ringgit Malaysia: FOUR HUNDRED SIXTY SIX THOUSAND EIGHT HUNDRED AND FORTY SEVEN AND SEN TWENTY EIGHT (RM466,847.28) ONLY.

In the revised selling price in this case, that sale price is RM992,363.40. This is the sale price that the Bank now relies upon in its claim.

D

MEANING OF 'SALE PRICE' OR 'BANK SELLING PRICE'

[25] Although the term 'sale price' appear to be set out clearly enough in the property sale agreement, that is only the appearance of the term at face value.

E

[26] In *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 (SC) where the appellant had admitted it had granted the borrower a new facility, and the new interest rate was no longer 9% as in the previous facilities but 10%, and the question before the Supreme court on appeal was whether it was indeed a new facility as stated, the Supreme Court said (at p 410):

F

It may also be true that the appellant had admitted that it had granted to the borrower a new facility of RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10%pa, and therefore different from the first and second facilities of 9%pa. *However it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance* (see *Woo Yew v Yong Yong Hoo* [1979] 1 MLJ 131 and *Addiscombe Garden Estates Ltd v Crabbe* [1957] 3 All ER 563).

G

H

(Emphasis added.)

[27] The substance of the sale price in the property sale agreement in an Al-Bai Bithaman Ajil facility, is that it is not a sale price paid by a single payment but it is a series of equal monthly instalments. It is a substance of the transaction that profit margin is not a profit arising from a sale price arrived at in a bargain, but is based upon the agreed amount and tenure of the facility and the profit rate of the provider. The sale price is then the sum of the provider's purchase and the profit margin.

I

**A** [28] The essence of the profit rate is that it is based on an agreed real or actual profit of the provider expressed as a percentage, and not an interest rate that is being charged regardless. The profit margin is a function of the bank purchase price, the agreed profit rate on a constant rate of return and monthly rests, and the agreed tenure of the facility. It must be borne in mind that profit margin is calculated with the profit rate applied to the full tenure of the facility during which the instalments are to be made. The sale price is then paid by monthly instalments according to the number of months in the tenure of the facility.

**B**

**C** [29] That being the case, it follows that if the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure. Furthermore, the sum that is recovered from the facility in the event of default before the end of tenure is applied to other facilities and the bank continues to earn its profit rate on the same sum. To allow the bank to also recover a profit margin for the unexpired tenure of the facility, means the bank is able to earn a profit twice upon the same sum at the same time. That profit margin that continues to be charged on the unexpired part of the tenure cannot be actual profit. It is clearly unearned profit. It contradicts the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider is entitled to. Obviously, if the profit has not been earned it is not profit, and cannot be claimed under the Al-Bai Bithaman Ajil facility.

**E**

THE REBATE

**F** [30] It was submitted for the bank that the bank receiving the profit margin for the full unexpired tenure could give a rebate but such rebate is discretionary. The muqassah referred to in *Bank Islam Malaysia Bhd v Adnan bin Omar* is the rebate. There is some question whether the rebate is properly termed muqassah or Ibra. Whether the rebate is actually muqassah or Ibra is of academic interest only in this case. It has not been raised as a relevant dispute in this case.

**G** [31] Rebates are commonly to be found in the event of pre-payment in hire purchase agreements. In the case of goods where the Hire Purchase Act 1967 applies, the hirer is entitled to a statutory rebates on terms charges and insurance in the event of pre-payment. Even though the Al-Bai Bithaman Ajil facility is not a hire purchase agreement, it does not necessarily follow that because it is not a hire purchase then the opposite must be true, that is that no rebate is payable except on a purely discretionary basis.

**H**

**I** [32] The argument that the bank can give a rebate, and that it is entirely discretionary is, in my view, irrelevant and is not an answer to the question before this court which is whether in the event of early termination of the facility upon default, the bank is entitled to the profit margin on the unexpired tenure and therefore unearned. Since the matter is disputed and is before the court, and it is a triable issue, the court cannot leave it to one party to decide at its discretion to give back as a rebate.

## CERTAINTY AND REALITY OF THE PROFIT MARGIN

A

[33] An important feature of the profit margin resulting from it being a part of the sale price is that it must be certain.

[34] The profit margin in an Al-Bai Bithaman Ajil facility is calculated from: (a) the agreed profit rate; (b) tenure the facility is required and (c) the amount of the facility. The amount of the facility is the bank purchase price. In this case, the applicable profit rate at the time was 9%pa. The tenure was 300 months. The profit margin could be calculated and derived with certainty. Even if the tenure is shortened, the profit margin could be recalculated with equal certainty.

B

C

[35] That the sale price is recalculated and profit margin is not charged for the full tenure in the event of default has been demonstrated and practised by the bank in its letter dated 1 November 1999 where it explained in respect of the original facility that the defendant had defaulted upon, that the bank recapitalized the then current outstanding amount of RM335,251.60 plus profit arrears from 20 months amounting to RM58,920.46 to arrive at the sum of RM394,172.06. This RM394,172.06 is then termed in the letter of 1 November 1999 as the bank's purchase price.

D

[36] It is clear that in doing so, the bank did not demand from the defendant the full sale price, without the Ibra deduction, as at the end of December 1997 which would have been  $RM3,582.80 \times 216 = RM773,884.80$ , or even with full Ibra deduction, RM466,847.28, but set the amount at RM335,251.60 on that date and made revised terms upon that basis sum.

E

## BALANCE DUE 29 DECEMBER 2005

F

[37] According to the calculations placed before the court for the bank, the bank profit at the agreed profit rate of 9% per annum on RM394,172.06 is RM35,475.49 per annum or  $RM35,475.49/12 = RM2,956.29$  per month or on a 360 day year basis as agreed, RM98.54 per day. Between 1 November 1999 to the date of judgment on 29 December 2005 is a period of 74 months less two days. The profit, by simple arithmetic since the payments meantime is not very significant, for 74 months less two days is RM218,767.49. As agreed the bank is also entitled to penalty of RM3,141.44 as on today. Added to the bank purchase price of RM394,172.06 the total due on the date of judgment is RM616,080.99. After crediting the defendant with all the payments he had made of RM33,454.19, the balance due on the date of judgment is RM582,626.80.

G

H

[38] The bank is also entitled to profit per day hereafter until full payment at  $(RM2,956.30) = RM98.54$ .

I

## THE CHARGE AND THE ORDER FOR SALE

[39] It was submitted for the defendant that the bank cannot proceed under the charge because the terms are no longer current, and that the bank cannot proceed at

A all under the letter since there are no new security documents executed under the letter of 1 November 1999 as accepted on 3 November 1999.

[40] These submissions must fail since the defendant had accepted the terms and conditions of the letter of 1 November 1999 by signing acceptance thereto. As such a binding agreement has emerged between the parties ad personam as from 3 November 1999. Although the bank had prescribed conditions in the letter of offer, it is trite law that a person having the benefit of a stipulation in a contract may waive it. In *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633. Edgar Joseph Jr SCJ, delivering a decision in the High Court held:

B

C By definition, waiver is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right (*Keene v Biscoe* at p 203). A person who is entitled to the benefit of a stipulation in a contract may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist ...

D [41] The conditions requiring the execution of a fresh set of documents are deemed to have been waived when the bank made its demand for the instalments to be forthwith due and payable. Since it was the defendant who failed to sign the security documents, firstly delaying signing on the excuse of seeking alternative facilities, and thereafter not responding to reminders to execute the security documents, the defendant is estopped from relying upon this ground of objection.

E [42] The charge registered on 30 December 1999 had remained on the register, and the defendant has not at any time challenged the validity of the charge or sought to remove it from the register.

F [43] A charge registered under the NLC as security is a right ad rem against the property charged, under an order for sale, to auction the property under the NLC so as to release and make available the proceeds to repay monies owed to the chargee. In *Co-Operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373 (CA) it was held (at p 376):

G A registered charge is not a contract. It is a statutory instrument; a dealing; which the Code authorizes. Enforcement of the charge is the assertion of a statutory right. It is not an action upon the covenant.

H [44] The only question in an application for an order for sale under section 256 has been explained in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 by the Federal Court as follows (at pp 88–89):

I Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s 256 is opposed by the charger on the ground that the chargee has acted in breach of contract, e.g., by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s 256(3) and the authorities which have considered the

section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s 256 to properly appreciate their true role assigned them by Parliament.

A

[45] It is, therefore, settled that once it is established that there has been a default, then unless there is cause to the contrary, the order for sale must be given since a charge is an ad rem right to dispose of the security to recover a secured debt. It is also settled law that the amount of a debt to be paid is an ad personam issue and does not affect the ad rem right of the chargee to auction the security to make available funds for repayment.

B

C

[46] Now, the charge provided in s 4.01 that:

The Charger hereby agrees and declares that this *Charge is expressly intended to be and shall be a continuing security* for the payment of the Monies Hereby Secured *and all other moneys and liabilities now or hereafter from time to time owing or payable* by the Chargor to the Chargee under the provisions of this Charge and the Property Sale Agreement.

D

(Emphasis added.)

The above language in the charge itself allows for the charge to be a security not only for the monies secured under the charge but also all other monies and liabilities then or thereafter from time to time owed by the defendant to the bank under the property sale agreement. The language also provided that the charge is a continuing security.

E

[47] By s 5.01 of the property sale agreement, the defendant had agreed:

F

For better securing the payment of the Sale Price or any part thereof as shall be outstanding *and all other moneys whatsoever now or hereafter owing to the Bank by the customer*, the customer shall execute a Charge under the National Land Code 1965 over the Property (hereinafter called 'the Charge'). (Emphasis added.)

G

Even though the execution of fresh agreements is envisaged, the letter of 1 November 1999 was clearly a revision of an existing documented facility. In all the circumstances of this case, the letter of 1 November 1999 was clearly in substance an offer of terms to restructure the existing Al-Bai Bithaman Ajil facility, and upon acceptance by the defendant, has the effect of varying the terms of the property sale agreement. Those original agreements of the Al-Bai Bithaman Ajil facility transaction were not revoked, and are only replaced upon new security documentation being executed. The execution of new security documents in this case serves the purpose of incorporating the amendments under the letter of approval, and does not mean there is a new facility requiring for its validity new documentation. Following the Supreme Court case of *Malayan Banking Bhd v PK Rajamani* that the correct approach would be to look at the substance and not just the label which had been attached to the letter, I find that by accepting the terms and conditions in the 1999 revised facility, and with the waiver of conditions as to execution of a fresh set of documentation after the failure by the defendant to execute the same when requested, there has emerged an agreement that by its application and interpretation amended the

H

I

A property sale agreement, such that the property sale agreement must be read to incorporate a revised bank purchase price of RM394,172.06 and a revised bank selling price of RM992,363.40.

B [48] The bank is, therefore, entitled to rely upon the existing registered charge to recover any sum outstanding from the defendant arising from the terms of the existing property sale agreement and charge as amended by the terms accepted by the defendant on 3 November 1999. The statutory procedural requirements had been complied with. There is nothing then to bring the application before the court within the three categories of cause to the contrary established in *Low Lee Lian* to warrant the refusal of the order for sale.

C [49] The court, therefore, grants order for sale by auction under the NLC to recover the sum of RM582,626.80 plus profit at RM98.54 per day until full settlement. The property shall be auctioned on 29 March 2006 or such other date thereafter as the deputy registrar shall fix. The reserved price shall be fixed by the deputy registrar at the estimated market value, and other orders in accordance with s 257(1)(e)–(h) of the NLC. Costs shall be taxed and paid to the plaintiff bank. Since the defendant's submissions failed in part, the costs recoverable by the plaintiff shall be at 50% of taxed costs.

E *Order for sale granted. Amount of repayment reduced.*

Reported by Ashgar Ali Ali Mohamed

F

G

H

I