

A **Arab-Malaysian Merchant Bank Bhd v
Silver Concept Sdn Bhd**

B HIGH COURT (KUALA LUMPUR) — SUIT NO D4-22A-145A OF
2003
ABDUL WAHAB PATAIL J
18 JULY 2008

C *Banking — Bank and banking business — Islamic banking — Al-Bai’
Bithaman Ajil facility — Default of instalment — Default provision in
instalment sale agreement ascertained amount payable when contract
pre-maturely determined — Binding effect — Whether defendant estopped from
denying liability*

D *Banking — Bank and banking business — Islamic banking — Syariah Advisory
Council — Issue on Syariah compliance — Whether reference discretionary or
mandatory — Central Bank of Malaysia Act 1958 s 16B*

E The defendant acquired a large piece of land from Ng Eng Hiam Plantations
Sdn Bhd, the vendor, at the price of RM125,000,000. To finance the said
F acquisition, the defendant had obtained a loan under the Al-Bai’ Bithaman
Ajil (‘ABBA’) facility from the plaintiff, a consortium of financial institutions,
where the sale price was RM216,875,000 in aggregate made up of a purchase
price and a profit element. In connection with the above, the parties had
entered into a sale and purchase novation agreement. The plaintiff also
G entered into the instalment sale agreement, a component of the ABBA
facility. The defendant defaulted in the instalment payment and accordingly,
the plaintiff claimed a sum of RM185,536,908.64, being the unpaid sale
price pursuant to the default provisions in the instalment sale agreement.

H **Held**, allowing the claim with costs:

I (1) While a question as to what was the amount due might arise in the
event of an early termination, it was plain in this case that the date of
payment was well past due which meant the agreed profit for the time
period agreed to had already been exhausted and there could be no
question that any of the agreed profit had not been re-earned by the
plaintiff (see para 15).

- (2) It was the defendant who sought financing. The ABBA facility was offered and the defendant accepted it. The defendant signed the novation agreement so that the plaintiff was the legal purchaser. It then on the same day bought from the plaintiff under the instalment sale agreement, giving the plaintiff a profit. Under the terms of the sale and purchase novation agreement and instalment sale agreement, the plaintiff had the right to cancel the ABBA facility upon default. It was not for the defendant now to say it was a loan with interest to seek to avoid paying back. The defendant was estopped from denying liability (see para 17).

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[Bahasa Malaysia summary

Defendan telah memperolehi sebidang tanah yang luas daripada Ng Eng Hiam Plantations Sdn Bhd, penjual pada harga RM125,000,000. Untuk membiayai pemerolehan tersebut, defendan telah mendapatkan pinjaman di bawah kemudahan Al-Bai' Bithaman Ajil ('ABBA') daripada plaintiff, sebuah konsortium institusi kewangan, di mana harga jualan adalah RM216,875,000 jumlah yang diperolehi daripada harga belian dan elemen keuntungan. Bersangkutan dengan perkara di atas, pihak-pihak telah memasuki satu perjanjian novasi jual beli. Plaintiff juga telah memasuki perjanjian jualan ansuran, salah satu komponen kemudahan ABBA. Defendan telah gagal dalam pembayaran ansuran dan oleh itu plaintiff telah menuntut sejumlah RM185,536,908.64 sebagai harga jualan yang belum dibayar menurut peruntukan di dalam perjanjian jualan ansuran.

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Diputuskan:

- (1) Sementara persoalan berkenaan dengan berapakah jumlah yang tertunggak berkemungkinan timbul semasa penamatan awal, ianya adalah jelas dalam kes ini bahawa tarikh pembayaran telah luput yang bermaksud keuntungan yang dipersetujui bagi tempoh masa yang dipersetujui telah digunakan dan tiada persoalan bahawa apa-apa keuntungan yang di pertsetujui tidak diperolehi semula oleh plaintiff (lihat perenggan 15).
- (2) Defendan yang memohon pembiayaan kewangan. Kemudahan ABBA adalah ditawarkan dan defendan telah menerimanya. Defendan telah menandatangani perjanjian novasi oleh itu plaintiff adalah pembeli yang sah. Ia kemudiannya pada hari yang sama membeli daripada plaintiff di bawah perjanjian jualan ansuran, memberikan plaintiff satu keuntungan. Di bawah terma-terma perjanjian novasi jual beli dan perjanjian jualan ansuran, plaintiff mempunyai hak untuk membatalkan kemudahan ABBA apabila berlakunya kegagalan. Bukan bagi defendan

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- A sekarang ini untuk mengatakan ianya adalah pinjaman dengan faedah untuk mendapatkan pengelakan pembayaran balik. Defendan adalah diestop daripada menafikan liabiliti (lihat perenggan 17).]

Notes

- B For cases on Islamic banking, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1952–1954.

Cases referred to

- C *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67 (folld)
Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631 (distsd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)

D Legislation referred to

Central Bank of Malaysia Act 1958 s 16B

Fadzilah Mohd Pilus (Rozali Ismail & Co) for the plaintiff.
VK Lingam (VK Lingam & Co) for the defendant.

E Abdul Wahab Patail J:

- F [1] By a sale and purchase agreement dated 15 June 1995 (the said sale and purchase agreement) between the defendant and Ng Eng Hiam Plantations Sdn Bhd ('seller') for the sale and purchase of 2,075 acres 1 rood and 24.52 poles of land in the District of Ulu Selangor, State of Selangor, known as Rasa Estate ('the land') and other assets.

G AL-BAI' BITHAMAN AJIL FACILITY ('ABBA FACILITY')

- H [2] To part finance the acquisition of the land and other assets ('project property'), the defendant requested a consortium of financial institutions with the plaintiff as the arranger and agent; comprising of Perwira Affin Bank Bhd, Bank Islam Malaysia Bhd, Mayban Finance Bhd and Kewangan Industri Bhd ('vendors') for an ABBA facility with a sale price of RM216,875,000 in aggregate made up of a purchase price of RM125,000,000 and a profit element.

- I [3] In connection with the above, the defendant, the plaintiff as agent and Ng Eng Plantations Sdn Bhd entered into a sale and purchase novation agreement dated 29 March 1996 ('the novation agreement') whereby certain rights and obligations between Ng Eng Hiam Plantations Sdn Bhd and the defendant under the said sale and purchase agreement were novated from the

defendant to the vendors or as the case may be, to the plaintiff on behalf of the vendors. The plaintiff as agent and arranger, the defendant and vendors entered into an instalment sale agreement dated 29 March 1996 ('the instalment sale agreement') whereby the defendant agreed to the conditions set out therein, to purchase from the vendors whatever right, title or interest they had thereto ('the title) in the project property immediately after the sale and transfer of the project property by Ng Eng Hiam Plantations Sdn Bhd to the vendors pursuant to the provisions of the novation agreement. The instalment sale agreement purports to be the ABBA facility. It was agreed the payment be made by instalments of RM3,281,250 on each date as defined as the instalment payment date in the instalment sale agreement.

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[4] The defendant defaulted in the instalment payment due on the instalment payment date ie, on 22 January 1998; thereby precipitating a default pursuant to the instalment sale agreement; the novation agreement and the remaining transaction documents (as defined in the instalment sale agreement). The plaintiff as agent for the vendors, informed the defendant by a letter dated 26 February 1998 to pay the instalment due on 22 January 1998 in default of which, inter alia, the payment of the unpaid sale price would be accelerated pursuant to the default provisions in the instalment sale agreement. The defendant failed to pay the instalment due for payment on 22 January 1998.

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[5] On the instructions of the instructing group (as defined in the instalment sale agreement) by a letter dated 10 March 1998, the plaintiff recalled the entire unpaid sale price in respect of the ABBA facility and cancelled the total purchase price commitment pursuant to the provisions of the instalment sale agreement.

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[6] The defendant by a letter dated 30 June 1998 appealed to the plaintiff to restructure the facilities. The plaintiff and the other co-lenders agreed to meet with the defendant on 10 July 1998. The defendant by its letter dated 16 July 1998 thanked the plaintiff and the co-lenders for agreeing to discuss to solve the defendant's dilemma. The defendant's letter to the plaintiff dated 6 August 1998 and the plaintiff's letter to the defendant dated 7 October 1998 show that the plaintiff had requested from the defendant for further information for consideration, and the plaintiff had informed the defendant to 'revert' to the plaintiff on or before 9 October 1998. The defendant failed to do so.

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[7] The defendant had sought a rebate.

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A [8] The plaintiff's solicitors submitted that the defendant is not entitled to any rebate under the instalment sale agreement if, at all, any rebate is at the plaintiff's sole discretion. That is a correct statement with regard to *ibra'* (also known previously as *muqassah*). In my view, the fact that it is purely discretionary however makes it all the more necessary to determine what precisely was agreed to under the ABBA facility.

B [9] The defendant denied liability.

C [10] The plaintiff maintained that the defendant is estopped from denying liability with regard to the ABBA facility as payment was made by the defendant on 28 March 2001 in the sum of RM12,027,563. I accept that the defendant is estopped from denying liability, but the payment of that amount is not necessarily a statement of admission of the quantum that is due.

D [11] The mechanism of the Al-Bai' Bithaman Ajil or 'deferred instalment sale' employs three separate agreements. In the first, the bank bought the property from the customer. In the second, the bank resold to the customer.

E In the third, the customer charged the property to the bank, allowing the bank to sell on default. The agreements are not separate standalone agreements, but are related as they are part of a single transaction, and must be read together. Under the terms of the sale and purchase novation agreement and instalment sale agreement, the plaintiff had the right to cancel

F the ABBA facility upon default, thereby cancelling the contract.

G [12] It was submitted for the plaintiff that the Syariah Advisory Council had determined that the Al-Bai' Bithaman Ajil complied with the Shariah and once the determination is made on the issue of Shariah compliance by the said Syariah Advisory Council any question on their said determination can be referred to the Syariah Advisory Council. Section 16B of the Central Bank of Malaysia Act 1958 (Act 591) however does not make reference mandatory. It clearly did not intend the Syariah Advisory Council in the executive branch of government to be the judicial authority. Thus, its rulings are binding only upon the arbitrator where reference is made by an arbitrator.

H In the case of reference by the court, the ruling is not binding but shall be taken into consideration. Given that reference is discretionary and the rulings are not binding, and taking into consideration the issue is not as to the Shariah compliance of the ABBA facility but the interpretation of its terms,

I the court is of the opinion reference is not necessary.

[13] It was submitted for the plaintiff that the defendant had agreed and covenanted with the plaintiff that the certificate as to the amount payable to

the plaintiff is conclusive of the amount to be paid by the defendant. According to the certificate the amount payable is sum of RM185,536,908.64.

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[14] Indebtedness may be ascertained conclusively by a certificate of indebtedness where the parties have clearly agreed that it may be so ascertained. It is now settled that, notwithstanding agreement that a certificate of indebtedness shall be conclusive proof of indebtedness, a defendant is not prevented from adducing evidence showing a manifest error. This is distinguishable from a defendant applying for further and better particulars to enable him to show if there is manifest error, which would clearly emasculate the force of the conclusive certificate of indebtedness clause, see *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 CA.

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[15] In this case, the evidence before the court is that the property was purchased on 15 June 1995. The defendant sought financing. The ABBA facility was offered. The plaintiff executed the novation agreement on 29 March 1996. The sum paid was RM125,000,000. The plaintiff also entered into the instalment sale agreement, a component of the ABBA facility on 29 March 1996. It was sold under the ABBA facility with a sale price of RM216,875,000. The profit element on the same day was RM91,875,000. The profit was justified on the basis it was to be paid by instalments of RM3,281,250 on the dates specified and a final instalment payment of RM128,281,250. Default was declared as having occurred on 22 January 1998, ie, 22 months later. The sum sought is RM185,536,908.64. While a question as to what is the amount due might arise in the event of an early termination, it is plain in this case that the date of payment is well past due. That means the agreed profit for the time period agreed to had already been exhausted and there can be no question that any of the agreed profit had not been re-earned by the plaintiff.

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[16] The defendant submitted the Al-Bai' facility agreement is illegal, null and void as it is a scheme to defraud the public and the public authority in that although the loan agreement is couched and disguised as a sale transaction, in fact the Al-Bai' facility agreement is a loan transaction with a fixed interest charged for the loan granted by the lenders to the defendant.

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[17] The submission for the defendant stopped short of asserting that the plaintiff came shopping for a customer and made proposals to the defendant out of the blue. It was the defendant who sought financing. The ABBA facility was offered. It was accepted by the defendant. The defendant signed the novation agreement so that the plaintiff was the legal purchaser. It then on the same day bought from the plaintiff under the instalment sale

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- A agreement, giving the plaintiff a profit. It was under no compulsion to agree or sign. It is not for the defendant now to say it was a loan with interest to seek to avoid paying back. The ABBA facility is an established Shariah compliant facility. It is a Shariah form of financing conducted in the form of a sale with payment by instalment. There is a gulf of difference between the
- B legal consequences of a sale and a loan. But having to pay is always having to pay. The defendant made some payments. The defendant defaulted. The defendant sought to restructure but did not follow through. The defendant made a payment after default was called. The defendant is estopped from denying liability. The only issue if at all, is the issue of quantum. It applies
- C however if payment had been made. But to date, well after the date of final instalment payment date, there is no evidence put before the court that payment had been made.

- D [18] Since there was a novation agreement then for the reasons set out in *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)* [2008] 5 MLJ 631 the interpretation of selling price in *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67 is to be applied.

- E [19] And the court enters judgment as to ABBA facility:
- (i) that the defendant pays the plaintiff the sum of RM185,536,908.64;
- (ii) that the defendant indemnifies the plaintiff against all liabilities and losses suffered by the plaintiff and/or the vendors as a result of the default of the defendant in the punctual payment of all amounts due under the instalment sale agreement; and
- F (iii) that the defendant pays cost including costs on a solicitor and client basis.

- G *Claim allowed with costs.*

Reported by Ashgar Ali Ali Mohamed

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