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ORIGINATING SUMMONS
MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT SIBU
ORIGINATING SUMMONS NO. 24-64 OF 2007

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IN THE MATTER of Memorandum of Charge
executed by BASS BIN LAI as the Chargor
AND MAJLIS AMANAH RAKYAT as the
Chargee registered at the SibU Land Registry
Office as Instrument No.L.12595/2000 on 17th
day of October, on 2000 affecting Parcel No.
76 in Block No. 45 Oya-Dalat Land District.

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AND IN THE MATTER of Section 148 of the
Land Code(Cap.81).

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BETWEEN

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MAJLIS AMANAH RAKYAT
(Sebuah Perbadanan Yang Ditubuhkan di bawah
Akta Majlis Amanah Rakyat No. 20, Tahun 1966)
129, Bangunan MARA, Jalan Satok,
93400KuchingSarawak.

... Plaintiffs

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AND

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BASS BIN LAI (WN. KP 250930-13-5019)
Kampung The Oya
96300 Dalat

...Defendant

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5 **BEFORE THE HONOURABLE JUDICIAL COMMISSIONER**
Y.A. DR. HAJI HAMID SULTAN BIN ABU BACKER

OPEN COURT

10 **JUDGMENT**

This is my judgment in respect of the plaintiffs' originating summons to foreclose the property under section 148 of Sarawak Land Code (SLC) which was given as a third party charge in relation to a banking facility under the Islamic principles of *Bay Al-Inah*. I have dealt with this area of law in great detail, in two judgments namely (i) *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389; [2007] 5 CLJ 311 (ii) *Yong Fuat Meng v. Chin Yoon Kew* [2008] 5 CLJ 705; [2008] MLJ xiv; 6 MLJA 14. [See Article, *Critical Thoughts: Legislative Intervention Imperative To Support Islamic Financing On A Global Scale* [2009] 1 MLJ 1xiii] I do not wish to repeat the concepts, principles, jurisprudence and rationale etc. stated in these cases in relation to Islamic Banking save to say that this judgment must be read with those two judgments for purpose of comprehensiveness only.

On the day of hearing, the defendant's representative was present in court and objected to the application, without filing any affidavit or submission.

30 **Brief facts**

(a) The plaintiffs at the request of the customer had agreed to grant the sum of RM21,000.00 in accordance with the Islamic principles of *Ba*

5 *Al-Inah* (the said Facility”) to the said Customer whereby the plaintiffs shall sell an asset to the said customer on a deferred payment and then the plaintiffs shall immediately re-purchase the assets for cash at a discount. (b) Pursuant to the said Facility, the plaintiffs had entered into two agreements namely, Property Sale Agreement and
10 a Property Purchase Agreement. (c) Pursuant to the said Property Sale Agreement, the plaintiffs agreed to sell one unit of Proton Saga and Suzuki Jeep (“the said Property”) and the said customer agreed to purchase the said Property at a Sale Price of RM24,137.81 by deferred payment that was to be paid by way of 48 monthly
15 instalments of RM502.87 each(“the Sale Price”). However, no payment was made to the plaintiffs and the tenure of the 48 months had also expired and lapsed. (d) By the said Property Purchase Agreement, the plaintiffs had agreed to re-purchase the said Property for cash at a discount in the sum of RM21,000.00 in accordance with
20 the Islamic principles of *Bal Al-Inah* . (e) The aforesaid transaction was further secured by way of a charge executed by a third party chargor, the defendant in this action. (f) As the said Customer and the Chargor had defaulted in the repayment of the Sale Price under the said Facility, the Plaintiffs had filed this action. (g) The defendant
25 who has died after the commencement of this proceeding, was represented by a personal representative by order of court. (h) When the case came for hearing, the parties were ordered to file written submission to justify whether the facility is shariah compliant, to provide the appropriate relief in view of the recent High Court Case of
30 *Arab-Malaysia Finance Bhd v Taman Ihsan Jaya Sdn. Bhd & ors*

5 (Koperasi Seri Kota Bukit Cheraka Bhd, Third party [2008] 5 MLJ
631(Taman Ihsan) where it was held:

- 10 (i) *When dealing with cases involving Islamic financing facilities, the civil court functions strictly as a civil court and does not become a Syariah Court. The civil court's function, in this regard, is to render a judicially considered decision before it according to law and not apply Islamic law as if it were a Syariah Court. Its function is to examine the application of the Islamic concepts and to ensure that the transactions in the cases before it do not involve any element not approved in Islam*
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- (ii) *In Islamic financing there is nothing that prohibits the giving of a loan. It is only the riba element in the loan that is prohibited. Hence, loans without riba ie benevolent loans or qard al-Hasan are allowed*
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- (iii) *The term Al-Bai' Bithaman Ajil is no more than a sale and deferred payment of the price as agreed to between the parties. As such, the selling price is ordinarily paid upon delivery. However if the payment is to be made later, the seller is in effect extending a credit or a loan of that selling price. At the same time it must be remembered that the deferred payment of the selling price is a credit or a loan permissible only because no riba is charged. Furthermore, the key to the argument that the Al-Bai' Bithaman Ajil scheme does not involve any element not approved by Islam is to read the PSA independently. Therefore it is essential to maintain a bona fide sale in order that the profit or selling price should not be an element disapproved by Islam. Even so, an interpretation of the selling price must not be such as to impose a heavier burden than on a loan with interest*
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- 30
- 35 (iv) *The court has the authority to look beyond the words of the agreement to the actual facts of the case in order to determine the substance of the transaction between the plaintiffs and the defendants before it draw any conclusions on the nature of the Al-Bai' Bithaman Ajil transactions. It is necessary to look beyond the labels used and look at the substance particularly in the light of the fact that the interpretation advanced by the plaintiffs resulted in the defendants being burdened with a debt far in excess of that if they had taken interest based on a conventional loan).*
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5 (v) *Thus when the bank became the owner of the property by a direct purchase from the vendor or by a novation from its customer, as in the present cases, and then sold the property to the customer, the plaintiffs' interpretation of the selling price ought to be rejected and the equitable interpretation applied. Where the bank purchased directly from its customer and sold back to the customer with deferred payment at a higher price in total, the sale was not a bona fide sale but a financing transaction and the profit portion of such an Al-Bai Bithaman Ajil transaction rendered the facility contrary to the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be.*

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20 (vi) *Since the plaintiffs' actions resulted most likely from a misapprehension rather than intent afterthought, the plaintiffs were entitled under s 66 of the Contracts Act 1950 to a return of the original facility amount they had extended. It was equitable that the plaintiffs seek to obtain a price as close to, if not more than, the market price as possible, and account for the proceeds to the respective defendants*

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Plaintiff's Argument

2. The learned counsel for the plaintiffs says that the foreclosure proceeding is made pursuant to SLC. Although it is related to Islamic Banking facilities, the plaintiffs assert that the court must apply the same principle as done for conventional banking facilities and relies on the case of *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn. Bhd [2003] 2 MLJ 408* where the Court of Appeal observed:

35 *"As was mentioned at the beginning of this judgment the facility is an Islamic banking facility But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under 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*

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5 *that would be, if made, and the same principles that should be applied in deciding the application."*

3. Further, the learned counsel says that the decision made in Taman Ihsan's case or other cases which dealt with rebates will not apply in
10 the instant case, as the tenure of the facility has been completed. In the alternative, the learned counsel says that if the court takes the view that the *bay al inah* principles contravenes Islamic principles then to grant an order for sale for the sum of RM21,000.00 based on section 66 of Contract Act, 1950 (CA 1950), as was done by the
15 learned judge in Taman Ihsan's case.

Bay al inah

4. The term '*bay*' means sale. *Bay al inah* transaction generally means a sale followed by a buy back transaction at a discounted price. The
20 contemporary practices by Islamic financial institution can be said to be an agreement where the financier purportedly sells an asset to the customer on a deferred payment and then the financier immediately repurchases the asset for cash at a discounted price. The general complaint in respect of such transaction is that, the sale is fictitious
25 and the whole purpose is to grant a loan with a profit. In consequence, it breaches the '*riba*' rule. In essence, the '*riba*' rule does not permit one to earn profit directly from cash transaction, unless it is a trade related transaction with the employment of capital, labour and risk.

30 5. Much literature on the subject, inclusive of the concept of *bay al inah* is found in books, articles and web sites. (*see articles by Dr. Rani*

5 *Kamarudin [2007] 6 MLJ IXXVI; Dr. Ashgar Ali [2008] 6 MLJ xiv])*
 The learned jurist, author and well known Islamic Scholar in Malaysia
 Dr. Saiful Azhar Rosly and Mohmood M. Sanusi has captured the
 argument in a nut shell in the article “The application of Bay Al-Inah
 and Bay Al-Dayn in Malaysian Islamic Bonds. An Islamic Analysis”
 10 (International Journal of Islamic Financial Services” Vol. 2) as follows:

15 *“Bay al-inah is generally known as sale based on the transaction of
 Nasi’ah (delay). The (prospective) debtor sells to the (prospective) creditor
 some object for cash which is payable immediately; the debtor
 immediately buys simultaneously the same object for a greater amount for
 a future date. (13) Thus the transaction amounts to a loan. The difference
 between the two prices represent the interest. Such contract was evolved
 in the early period of Islam and it exists for the fundamental reason that a
 loan for interest is forbidden because it is equivalent to usury (riba). (14) In
 20 this contract, there is an economic interest for both the borrower and the
 lender, which at the same time circumvents the prohibition of usury.*

25 *The issue which concerns us here, is how does Islamic law view such
 contract: whether the sales be allowed prima facie, or disallowed because
 the motive behind the sales is to legalize that which is illegal or usurious.”*

Associate Professor, Dr. Engku Rabiah in her article “Bay Al-Inah
 and Tawarruq [see Essential Reading In Islamic Finance”, [2008],
 CERT Publication] at pg. 136 says:

30 *“In terms of the Islamic legal rules on bay'al-inah, it has been
 welknown that the Shafi'i school of Islamic law legalized and validated
 bay' al-inah transactions, though some of them considered the
 practice as discouraged (makruh). Following the same, the Shari'ah
 35 Advisory Council (SAC) of the Malaysian Securities Commission (SC)
 and the National Shari'ah Advisory Council (NSAC) of the Central
 Bank of Malaysia (Bank Negara Malaysia – BNM) had officially
 endorsed bay'al-inah transactions in their legal rulings and
 resolutions. One of the arguments raised to support their adoption of
 the Shafi'is view in legalizing bay' al' inah is public interest
 40 consideration (maslahah), i.e to overcome the problem of liquidity
 shortage in the country, without having to resort to conventional riba-
 based borrowing. The legalization of bay'al'inah may also be said to*

5 *be in line with the legal maxim on the lesser of two evils (akhaf al dararain)*

10 *Nevertheless, it is also well known that the legality and validity of bay'al'inah is not an agreed matter amongst the jurists of Islam. The controversy on bay'al'inah had been elaborately documented in many Islamic fiqh manuals."*

6. I have read the originating summons, affidavit and submission in detail. On the facts of this case, I think it will be a proper exercise of judicial discretion to allow the application without any curial scrutiny of the facility document in this action. My reasons are as follows:

15 (a) The law of contract does not recognise fiction or legal trick. There is a greater prohibition in the Holy Qu'ran and Hadiths to ensure that legal trick and fiction are not used to defeat justice, equity and/or Qur'anic commands. The only persons within the Islamic academia who propounded legal trick or fiction are a small number of isolated jurists, who by themselves were able to justify their conclusion based on the trade practice of that particular area, taking into consideration need and necessity and justifying their action with some related jurisprudence. Most often nowadays, Bankers cum traders, with the help of some contemporary Islamic jurists/or lawyers, for fiscal reasons, are keen to give prime recognition to obscure, unacceptable and/or dubious concept which are not recognised by the Holy Qu'ran and/or Sunnah or by vast majority of the muslim jurists. This is done primarily to make profits using the shariah label. What is surprising is that the jurists or the

5 shariah advisors themselves who have approved this product, attempt to justify this product. The learned justice and scholar Mohamed Taqi Usmani, has captured this concern in the following words:

10 *“Undoubtedly, Shariah supervisory boards, academic councils, and legal seminars have given permission to Islamic banks to carry out certain operations that more closely resemble stratagems than actual transactions. Such permission, however, was granted in order to facilitate, under difficult circumstances, the figurative turning of the wheels for those*
 15 *institutions when they were few in number [and short of capital and human resources]. It was expected that Islamic banks would progress in time to genuine operations based on the objectives of an Islamic economic system and that they would distance themselves, even step by step, from what resembled interest-*
 20 *based enterprises. What is happening at the present time, however, is the opposite. Islamic financial institutions have now begun competing to present themselves with all of the same characteristics of the conventional, interest-based marketplace, and to offer new products that march backwards*
 25 *towards interest-based enterprises rather than away from these. Oftentimes these products are rushed to market using ploys that sound minds reject and bring laughter to enemies.”*

30 Is it a correct proposition for muslims, more importantly jurists to support a product which is not shariah compliant and tainted with *riba*? The answer to some extent is adumbrated in Taman Ihsan’s case. It must be asserted that Islam being a universal religion, imposes an obligation on muslims to live within the precinct of Islamic Constitution as set out in the Holy Qur’an. No form of compromise
 35 can be recommended to a muslim. Unlike other major religions, Islamic jurisprudence has developed an advanced legal code based on religious injunctions contained in the Holy Qur’an and the Sunnah. Al-Qur’an, (ash-shura: 13) states:

5 *“He had ordained (syariah) for you that religion which the
commanded unto Noah, and that We inspire in thee (Mohamed),
and that which We commanded unto Abraham and Moses and
Jesus.”*

Al-Qur’an, (al—Jathiya: 18) reads:

10 *“And now have we set thee [O Mohamed] on a clear road of (our)
commandment (shariat-in-min-al-amr); so follow it and follow not the
whims of those who know not”*

From the above verses, it is not difficult to appreciate the
sentiments of the muslim community for wanting to comply with
15 Islamic principles and law.

(b) There is a common notion in Malaysia that it is in the hands of
Islamic jurist and or syariah advisory board to be the sole
arbiter to determine whether a syariah financial instrument is
syariah compliant. Such a notion is flawed, and support for the
proposition can be found in Justice Khan’s report in *Shamil
20 Bank Bahrain v Beximo Pharmedicals Limited & ors [2003]
EWHC 2118* case where it was stated in no uncertain terms,
that in syariah there is no opinion of any person, body or jurist
which binds a court in deciding a syariah issue. Further the
25 court is the Supreme Body under the Federal Constitution to
decide what is right and what is wrong in a given
circumstances. The Federal Constitution does not permit the
courts to abdicate its role by submitting to decision of lesser
bodies or tribunal such as the instant case to Shariah
30 Supervisory Board or fatwas or any purported legislation, rules
etc. made thereunder. Having said that, courts will at all times
listen receptively to the views and opinions expressed by these

5 bodies but the final decision maker under the Federal
Constitution is none other than the courts. In essence, whether
a contract or Islamic product, based on murabaha or bay al
inah or mudarabah etc., principle is valid must be decided by
the courts. As long as it does not breach the Qur'anic
10 prohibition of riba or gharar etc., the courts will have no
hesitation in upholding the same. It all depends on the terms of
the contract and not the concept *per se*, because, the court is
concerned with the terms and not the concept.

15 (c) The proper procedure in law to challenge the legality of a
contract, is by filing an originating process and seeking relief as
set out in the Specific Relief Act 1950. That does not mean that
the court has no power or jurisdiction to consider such issues if
properly raised and argued in a foreclosure proceeding, as was
20 done in Taman Ihsan's case. However in a foreclosure
proceeding, the court is focused on whether to allow the
application for foreclosure as prayed or restrict the sum
claimed at its discretion according to the justice of the case.
(See Ya'kup's case). The court *per se* will not make declaratory
25 order when there is no counterclaim for declaratory relief to set
aside, annul or declare the contract null and void etc., in the
legal sense save for the purpose of providing the appropriate
relief and remedy in a given circumstance, as was done in an
articulate manner by the learned judge in the case of Taman
30 Ihsan. The relief was provided pursuant to section 66 of
Contracts Act which reads as follows:

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“Obligation of person who has received advantage under void agreement, or contract that becomes void. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

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- () In the instant case, the challenge to the contract was not taken according to law for curial scrutiny as to whether the contractual terms said to be pursuant to bay al inah was in fact shariah compliant. Thus it is not necessary for me to deal with the issue. However, for the purpose of the relief I can consider whether the sum claimed is equitable as done in Ya'kup's case. In this respect the learned counsel for the plaintiffs say that the tenure of the facility had expired and in consequence there is no issue of rebate and the sum as prayed must be allowed. The plaintiffs' submission has merits.

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7. For reasons stated above, I allow the plaintiffs' originating summons as prayed. *En passant* I will say Parliament is at liberty to enact laws for economic reason or for liquidity purpose or need and necessity as often advocated by jurists/and or lawyers in support of concepts which are often criticised to be tainted with riba. For example, the law can permit cash sale and immediate buy back agreement with discount without saying it is shariah compliant. However, when shariah label is used for a product which is said to be tainted with riba and is said to be shariah compliant, then it will be objectionable, and the court is obliged to act accordingly under the Federal Constitution.

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5 As there are too many Islamic financial products in the market which
are said to be an infringement of the Qur'anic injunction and/or
Sunnah of the Holy Prophet, and there is rampant challenge in court,
it is timely for parliament to pass law to address this issue. And
provide adequate relief if such products are found by the courts to
10 have infringed the riba rule. The relief to financiers may be such as
compensation according to market rate etc, wider than that envisaged
in section 66 of the Contracts Act 1950, provided it is just and
equitable. It must be asserted here that in the History of Islamic
Jurisprudence, Honest solution to a contemporary problem is
15 generally accepted by Muslim community. However, dubious
concepts or arguments to justify a wrong are often seen as heretical
by the majority.

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SGD
(Y.A. DR. HAJI HAMID SULTAN BIN ABU BACKER)
Judicial Commissioner
High Court
SIBU.

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Date: 10th February 2009

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5 For the Appellant / Defendant:

Not represented.

10 For the Respondents / Plaintiff:

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