Foreclosure Proceedings Involving Islamic Banking Facilities: The Current Legal And Shariah Development Within The Conventional Statutory Framework [2013] 2 MLJ lii

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FORECLOSURE PROCEEDINGS INVOLVING ISLAMIC BANKING FACILITIES: THE CURRENT LEGAL AND SHARIAH DEVELOPMENT WITHIN THE CONVENTIONAL STATUTORY FRAMEWORK

Hizri Bin Hasshan

LLB (Hons) UKM, EDIL (Islamic Banking & Finance) IIUM

Senior Associate

Messrs Che Mokhtar & Ling

Advocate & Solicitor

High Court of Malaya

INTRODUCTION

In our Islamic banking and financial industry, there are various aspects which need to be taken into account by Islamic banking institutions to satisfy the Shariah requirements as well as to distinguish the Islamic financial products offered by them from the interest-bearing loans offered by the conventional counterpart. The Islamic banking legal documentation is one of the crucial aspects not only to govern the contractual relationship between the banker and customer but also to ensure that the Islamic

banking products are free from any elements which are not approved by the religion of Islam such as *riba*[1] (usury) and *gharar*[2] (uncertainty). This is in line with s 2 of the Islamic Banking Act 1983 which defines '*Islamic banking business*' as '*banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam*'. In the event that the Islamic bank is pursuing aims, or carrying on operations, involving any element which is not approved by the religion of Islam, the Minister may, on the recommendation of Bank Negara Malaysia ('BNM'), revoke the license issued to such Islamic bank.[3]

In conventional banking system, most of the banking facilities are based on lending transaction and hence the parties will only be required to execute a single loan document, usually a loan agreement or facility agreement. However, for Islamic banking products, the security agreements involved may be more than one depending on the type of Shariah concept used for the financial product offered. For the financing granted under the concepts of *al-Bai Bithaman Ajil* ('BBA'), *Bai' al-Murabahah* and/or *Bai' al-Inah*, there are two separate and distinct contracts namely asset purchase agreement and asset sale agreement. For *Musyarakah Mutanaqisah* financing for instance, some of our local Islamic banks have used *Musyarakah* Co-Ownership Agreement, *Ijarah* Agreement, Service Agency Agreement, Purchase Undertaking and other documentation to reflect the underlying transaction between Islamic banks and their customer. Before any Islamic financial products are offered to prospective customers, the relevant contractual agreements and legal documentation for the said products will be vetted and approved by the Shariah Committee (or Shariah Board) of each Islamic bank. By having the agreements vetted and approved by the Shariah Committee, it seems quite difficult for the customers to raise challenges on Shariah non-compliance to these contractual agreements or to the Islamic banking products granted by the Islamic bank.

Notwithstanding the above, when it comes to creation and enforcement of legal charge in

respect of properties which have been issued with individual/strata title, the Islamic banks are still required to follow the same forms and instruments used by conventional banks as prescribed under the National Land Code. All the relevant statutory provisions under the National Land Code ('NLC') and the Rules of the High Court 1980 ('RHC')[4] which are normally used by the conventional banks are applicable to Islamic banks even though some of the provisions are not be suitable to the Islamic financing concept. In view that there is no legislative amendment made to cater for the creation and enforcement of charge involving Islamic banking facilities, the civil court judges have no alternative but to adopt the same procedure as being practiced by the conventional banks with some modification as the court deems necessary and proper.

However, it must be noted that different judges of the civil court may have different approaches in dealing with Shariah issues raised by the defaulting chargor/customer in opposing the foreclosure action initiated by Islamic banks. Hence, this article will focus and discuss the problems and issues that Islamic banks may face when they realise or foreclose the charged properties under the conventional statutory provisions namely the NLC and RHC.

Can the chargor/customer raise issues on Shariah non-compliance to defeat the application for order for sale by the Islamic banks? What is the approach taken by the civil courts in dealing with these Shariah non-compliance or statutory non-compliance issues when the same are raised by the chargor in opposing the foreclosure proceedings initiated by Islamic banks? All these issues are real challenges faced by our civil court judges as they have to balance between the need to preserve the sanctity of Shariah principles and the need to ensure compliance with the existing conventional statutory provisions for protection of the rights of the chargor in accordance with the intention of Parliament.

THE LEGAL PROCEDURE GOVERNING FORECLOSURE PROCEEDINGS INVOLVING ISLAMIC BANKING FACILITIES

The Court of Appeal's decision in the case of *Bank Kerjasama Rakyat Malaysia Bhd v EMCEE Corporation Sdn Bhd*[5] can be regarded as a landmark case for foreclosure proceedings relating to Islamic banking facilities.

In *EMCEE*'s case above, the appellant bank had granted to the respondent/chargor an Islamic financing facility of RM20m under the Shariah principle of *al-Bai Bithaman Ajil*. Both parties have executed two agreements on 2 May 1996. Under the first agreement ie the property purchase agreement ('PPA'), the respondent had sold 22 pieces of land to the appellant bank for RM20m. Subsequently, the appellant bank under the second agreement ie property sale agreement ('PSA') sold to the respondent the same properties at the sale price of RM23,571,864 which is repayable by 36 monthly instalments. As a security for the repayment of the sale price of RM23,571,864 under the PSA, the respondent had charged to the appellant bank 15 pieces of land under the provisions of the NLC.

As a result of the respondent's failure to pay the instalments as contractually agreed under the PSA, the appellant had issued a statutory demand (Form 16D) under the NLC against the respondent. The respondent still refused and failed to comply with the Form 16D. The appellant therefore filed an originating summons against the respondent for an order for sale under s 256 of the NLC.

The learned High Court judge has dismissed the application for an order for sale by the appellant bank on the ground that the appellant had breached its promise to release the

sum of RM5m to the respondent. Dissatisfied with the High Court decision, the bank appealed to the Court of Appeal.

The Court of Appeal in dealing with the application for order for sale involving *al-Bai Bithaman Ajil* financing facility has held as follows:

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

In *EMCEE*'s case, the Court of Appeal followed the Federal Court's decision in *Low Lee Lian v Ban Hin Lee Bank Bhd*[6] in determining whether the issues raised by the respondent fell within any of the three categories of the cause to the contrary. Since the respondent had failed to show existence of any cause to the contrary, the Court of Appeal had allowed the appellant's appeal and granted the order for sale.

From the above authority, it is clear that the same legal procedure and judicial precedent for conventional banking are used in foreclosure proceedings involving Islamic banking facilities. However, the issue which will arise is whether the existing conventional legal framework is compatible with the Shariah requirements.

MANDATORY REQUIREMENTS TO COMPLY WITH O 83 R 3 OF THE RHC 1980

For properties which are held under the registry title, the order for sale can only be granted by the High Court and not the land administrator. Sub-sections 256(1) and (2) of the NLC provides that:

(1) This section applies to land held under —

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

The application for order for sale at the High Court is normally commenced by way of originating summons supported by an affidavit in accordance with O 83 of the RHC 1980. The requirement under O 83 of the RHC 1980 must be strictly complied with by the chargee bank failing which the originating summons may be dismissed or order for sale obtained can be set aside *ex debitio justitae*.[7]

The said O 83 r 1(1) of the RHC 1980 provides:

(1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs namely—

(a) payment of moneys secured by the charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

The O 83 r 3 of the RHC 1980 further provides:

Action for possession or payment (O 83 r 3)

(1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.

This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.

(2) The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.

(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of—

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

(4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property.

(5) If the charge creates a tenancy other than a tenancy at will between the chargor and chargee, the affidavit must show how and when the tenancy was determined and if by service of notice when the notice was duly served.

(6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the *affidavit must state the amount of a day's interest*.

From the aforesaid provisions, it appears that O 83 r 3(3) and r 3(7) of the RHC 1980 imposes requirements which are impossible to be complied with by Islamic banks since

such requirement for amount of interest to be stated is in clear contravention with the Shariah principle which prohibits any elements of *riba* (usury).[8]

How does the civil court deal with this issue to ensure the application for order for sale complies with both the conventional procedural requirements under O 83 of the RHC 1980 and Shariah principle? Basically, there are two main approaches taken by our courts, which are as follows:

Contractual approach

Under this contractual approach, the civil court has given recognition to the nature of the Islamic banking contract such as the financing under *al-Bai' Bithaman Ajil*. Since both the Islamic bank and the customer have mutually agreed to enter into a sale transaction for the purpose of financing, the court will therefore enforce and preserve the sanctity of such sale contract and exempt the bank from furnishing the particulars of interest as done in a conventional lending transaction. Islamic banks are allowed to claim full sale price in the application for order for sale. The earliest authority which pioneered this approach is the case of *Bank Islam Malaysia Berhad v Adnan Omar*.[9] In this case, the bank had applied for an order for sale due to the default by the customer in paying the outstanding balance due and owing under the *al-Bai' Bithaman Ajil* financing facility. In opposing the bank's application, the customer has raised, inter alia, the issue of non-compliance of O 83 r 3(3) and r 3(7) of the RHC 1980. The learned judge however held that:

> [1] The transactions between the parties were above board and made with the full knowledge of the defendant who knew that the entire exercise was to implement the grant of a loan to him in such a way as to bring the loan transaction within the limits of Islamic Law. His knowledge of this is evidenced by his acceptance of the letter of offer containing all the terms of the loan. In the circumstances the parties were ad idem in treating the amount of RM583,000 as the facility amount given to the defendant by the plaintiff, which amount coincided with the price of the land in the second sale and purchase agreement whereby the land was resold to the defendant and for which the charge was meant to secure. This being the case, *this*

court can only accept the plaintiff's statement of the amount of advance under O 83 r 3(3)(a) as being RM583,000. The amount is in accord with the intention of the parties and the defendant cannot now dispute the amount.

[2] In any event the words '*except where the court in any case or class otherwise directs*' in the preambular part of r 3(3) of O 83 of the RHC indicates *that the court may exercise its discretion to allow a certain flexibility in the requirements of that provision in particular cases*. The instant case is one instance where such discretion should be exercised.

[3] A reading of O 83 r 3(3)(c)of the RHC in the context of the purpose of the whole order can only lead to one reasonable interpretation and that is, that there must be an amount of interest or an amount of instalment in arrears at the given date, but not necessarily both. The crucial precondition is the fact of default of payment of whatever amount. In the present case there is no question of there being any interest because of the Islamic nature of the loan. Be that as it may, as the defendant's default is in respect of the instalment payments and as this has been duly particularised by the plaintiff, there has been compliance with the said provision.

Based on the aforesaid decision, it appears that the court had accepted the amount of sale price as the amount of advance under O 83 r 3(3)(a) of the RHC. This sale price is the agreed amount to be paid by the customer to the bank. The bank is not required to furnish particulars of the interest in arrears. Despite the decision which is in favour of the Islamic bank, some of the Islamic scholars have criticised the decision as the learned judge had inappropriately used the term 'loan' and 'Islamic loan' in her grounds of decision to describe the *al-Bai' Bithaman Ajil* facility.[10]

In another case of *Bank Islam Malaysia Bhd lwn Pasaraya Peladang Sdn Bhd*,[11] the bank had applied for an order for sale at Alor Setar High Court to auction off ten pieces of land duly charged by the defendant as security for repayment of the financing facilities granted under *al-Bai' Bithaman Ajil*. In opposing the said application, the defendant had argued, inter alia, that the plaintiff bank had failed to furnish the particulars required under O 83 r 3(3) of the RHC 1980. The learned judge, in granting the order for sale, has held that the relevant particulars under O 83 r 3(3) of the RHC 1980 have been provided by the plaintiff bank in the three affidavits filed by the bank's attorney. All the

particulars have been provided except for the amount of interest which is not allowed under Islamic financing.

The approach taken in the two cases involving Bank Islam Malaysia Bhd above is also adopted by the court in the case of *Arab-Malaysian Merchant Bank Berhad v Silver Concept Sdn Bhd*,[12] which is a reported case involving foreclosure proceedings initiated by a conventional bank offering Islamic banking scheme under s 124 of the Banking and Financial Institutions Act 1989 ('BAFIA'). In this *Silver Concept*'s case, the learned Suriyadi J (as he then was) in granting the order for sale stated that:

> [45] The want of information, as regards the interest in the supplementary affidavits, does not mean that there is non-compliance of O 83 r 3(c) of the RHC 1980. Bearing in mind that this is a non-bearing interest transaction, and I have not directed the impossible ie, for the plaintiff to particularise the interest, but the instalment in arrears at the date of issue of the originating summons, and at the date of the 'last amount due' affidavit are sufficiently supplied (and the information of sub-paragraph (b), (d) and (a) reflected by the repurchase sums ('the amount of the advance') having been sufficiently particularised), the papers thus are in order.

Based on the authorities stated above, the court appears to reject the issues on procedural non-compliance as raised by the defaulting chargors and the court has exercised its discretion to give some flexibility to Islamic banks in the compliance with the requirement under O 83 of the RHC 1980. Since the Islamic financing contract is entered into with mutual consent, the customers/chargors are contractually liable to pay the agreed sale price. However, we need to bear in mind that all the three cases discussed above are decided prior to the Federal Court's decision in *Lum Choon Realty*'s case. Hence, there is no clear position on whether the requirement under O 83 of the RHC 1980 must also be strictly complied with by Islamic banks in view of the ratio given by the Federal Court in *Lum Choon Realty*'s case.[13] It is the writer's view that the court may invoke their inherent jurisdiction under O 92 r 4 of the RHC 1980 as well as O

1A of the RHC 1980 to give certain flexibility to the requirements under O 83 of the RHC 1980 for foreclosure action involving Islamic banking facilities.

Equitable approach

Under the second approach (equitable approach) which has been developed in late 2005, there are some civil court judges who seem to deviate from the contractual approach which allows Islamic banks to recover the full sale price as agreed in the PSA in a foreclosure action. The civil court adopting this equitable approach is of the view that it will be unjust and inequitable to allow the Islamic bank to claim for full sale price when the tenure of the facility has been determined prematurely. The first case which introduced this equitable approach is the controversial case of *Affin Bank Bhd v Zulkifli bin Abdullah*.[14]

In *Zulkifli Abdullah*'s case, the defendant/customer had in year 1997, bought a double storey corner link house from a vendor, for the sum of RM385,000. He paid a deposit of RM39,000 and obtained financing of RM346,000 under BBA scheme from Affin Bank Bhd (who was his employer at that time). After purchasing the property at RM346,000, the bank then sold the property to the defendant at RM466,847.28 (the sale price) which is repayable by 216 monthly instalments.

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 to the request for restructuring and required the parties to execute a fresh set of documentation; however, no such documentation was executed. The letter of 1 November 1999 and acceptance thereon on 3November 1999 constitute the sole document for the 1999 revised facility. It described the purpose of the revised terms as below:

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

The sum of RM335,251.60 + RM58,920.46 = RM394,172.06 is not disputed by the parties. This is described by the bank as the 'Revised Bank Purchase Price' (revised purchase price). Thus, the facility for RM346,000 in the 1997 facility was revised as facility for RM394,172.06 in the 1999 revised facility. The tenure under the 1999 revised facility was 25 years. The tenure would end on 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 x 60) + (RM3,509.84 x 240) = RM992,361.60. The bank gave its revised bank selling price as RM992,363.40 (revised selling price).

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 was issued, seeking the repayment of RM958,997.94.

In the foreclosure proceedings initiated by the bank, the court was asked to decide the amount that a customer has to pay to the bank for BBA facility in the event of a default. Should the bank be allowed to claim for total sale price? The learned High Court judge had observed and stated as follows:

> [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.
>
> [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 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.

[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.

After hearing the arguments put forth by both parties, the learned judge Abdul Wahab Patail J (as he then was) has granted an order for sale in favour of the bank. However, the bank is not allowed to claim the full sale price but only for a reduced sum. The learned judge had come out with a new method to calculate the amount due and owing under the charge as follows:

[37] According to the calculations placed before the court for the bank, the bank profit at the agreed profit rate of 9% pa on RM394,172.06 is RM35,475.49 pa 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 2 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.

[38] The bank is also entitled to profit per day hereafter until full payment at (RM2,956/30) = RM98.54.

The decision in *Zulkifli Abdullah*'s case has been criticised by some of the Shariah scholars because the court seems hesitant to recognise the nature of BBA financing, which is based on sale transaction. Further, the method employed by the court to calculate profit per day is questionable since it has created an element of uncertainty (*gharar*) to the sale price. The calculation is also similar to the conventional banking practice where interest per day need to be stated in accordance with requirement under O 83 r 3(7) of the RHC 1980.

Despite the various criticisms on the decision by the learned judge in *Zulkifli Abdullah*'s case, there is no appeal filed by the bank against the said decision. In fact, the decision was followed and quoted with approval by other High Courts. In the case of *Malayan Banking Bhd v Marilyn Ho Siok Lin*,[15] the learned judge David Wong Dak Wah J had granted the order for sale for a reduced amount and held as follows:

> [47] My approach is fortified by the conclusion reached in the *Affin* case which, with utmost respect to the learned judge in the AMMB case, I agree with. The learned judge may have approached the issue purely on construction of the contract basis and came to the conclusion that the real intention of the parties was that the sale price could be recovered only if the purchaser had the full use of the tenure of the facility. The path which the learned judge took to come to his conclusion is creative in view of the clear definition of the sale price in the property sale agreement. However in substance the learned judge had applied the principle of equity in his deliberations in redefining the meaning of 'sale price' contained in the property sale agreement. This can be discerned from the words used by His Lordship, words like 'unearned profits', 'inconsistent with the borrower's right to the full tenure if he is required to pay the full bank's profit and denied the enjoyment of the full tenure' and' ... the bank being able to earn a profit twice upon the same sum at the same time'. The aforesaid words are words used by the courts when they are referring to the doctrine of unjust enrichment. Hence I have no hesitation in regarding Affin case as an authority for the proposition that it would not be equitable to allow the bank to recover the sale price as defined when the tenure of the facility is terminated prematurely.
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> [48] Further it is in the public interests that the Islamic Banking industry continues to flourish in this country and abroad. Adopting the interpretation given by the learned judge in the *Affin* case would enhance that process. It is common knowledge that people have a preference to a BBA facility for the simple reason that they are better off than that of a conventional bank loan in terms of ringgits and cents as the amount of repayments in the nature of profits are slightly lower to the normal interests charged in conventional loans and fixed. In conventional loans the interests for the loans move up and down according to market forces. That is how it is being marketed by the banking industry and the reason for its popularity. As such, people who take up a BBA loan should not be put in a worse position than had they taken a conventional bank loan. If the plaintiff in this case succeeds in its claim, there is no doubt that the defendant would be put in a worse position than had she taken a conventional one. In a conventional bank loan, the borrower will only be required to pay an amount outstanding as at the date of the recovery of the loan, which is the date of the sale of the charged property. This is of course one of the grounds which the learned judge in *Affin* case relied on in coming to his conclusion.

In *Marilyn Ho*'s case, the court seems to agree with the equitable approach adopted by the learned judge in *Zulkifli Abdullah*'s case. These two High Court decisions were also referred in the decision of the learned judicial commissioner Dr Hamid Sultan Abu

Backer JC (as he then was) in the subsequent case of *Malayan Banking Bhd v Ya'kup bin Oje & Anor*[16] where the judicial commissioner stated as follows:

> [3] In this case, BBA was entered in 15 July 2003 and the defendants defaulted after paying the sum of RM16,947.62. From the facts it is clear that the sum actually received by the defendants is only RM80,065, but the amount they have to repay is RM167,797.10 as at 26 June 2006, which sum on the face of it for the purpose of repayment only, will be seen to be excessive, abhorrent to the notion of justice and fair play when compared and contrasted with the secular banking facilities. In consequence of this glaring injustice, there are at least now two High Court decisions which have restricted the plaintiffs suing under BBA facility from recovering the full profits that they are entitled to under the agreement. (See *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67; [2006] 1 CLJ 438; *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249; [2006] 3 CLJ 796). The issue now for me to decide is whether I should allow the order for sale for the repayment of the sum in the original form or restrict the order for sale as set out in the above two cases or make suitable orders or directions as the justice of the case requires and demands. I would have to take into consideration the commercial impact of the said decision at a time Malaysia is seen and promoted to become one of the world leaders in Islamic Banking and balance it with need for the courts to protect the consumers within the parameters of justice and equity, as entrusted to the courts under the Federal Constitution.

In *Ya'kup Oje*'s case above, the court however does not calculate the profit per day but directed the plaintiff Bank to demonstrate equitable conduct by filing an affidavit stating:

(a) that upon recovery of the proceeds of sale the bank will give a rebate (*ibra'*); and

(b) specify the rebate. The amount specified must not be a nominal rebate but a substantial one taking into account the prevailing market force by banks generally.

CONTRACTUAL APPROACH VS EQUITABLE APPROACH

From the above discussion, we can see that there are at least three High Court decisions favouring the contractual approach and three other High Court decisions adopting the equitable approach. Under the contractual approach, the Islamic bank is entitled to claim for full sale price less payments made by customer as per the terms in the property sale agreement/asset sale agreement. But, under the equitable approach, the court will not allow the bank to claim full sale price for early termination of the facility. Hence, what is

the correct approach to be followed in dealing with foreclosure proceedings involving Islamic banking facilities particularly *al-Bai' Bithaman Ajil*/BBA facilities? What is the amount due and payable by the chargor in the event of a default?

In the case of *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)*,[17] Justice Datuk Abdul Wahab Patail J (now JCA) had delivered his decision for 12 suits (including foreclosure actions) on how to determine the amount due to the bank. In this *Taman Ihsan*'s case, the learned judge has distinguished between the BBA financing through bona fide sale and non-bona fide sale as follows:

> [68] This court accepts that where the bank is the owner or had become the owner under a novation agreement, the sale to the customer is a bona fide sale, and the selling price is as interpreted in *Affin Bank Bhd v Zulkifli Abdullah*. Thus, where the bank was the owner of the property, by a direct purchase from the vendor or by a novation from its customer, and then sold the property to the customer, the plaintiffs' interpretation of the bank's selling price is rejected and the court applies the equitable interpretation.
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> [69] This court holds that 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 is not a bona fide sale, but a financing transaction, and the profit portion of such Al-Bai' Bithaman Ajil facility 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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> [70] Acting upon the basis that the bank's action resulted more likely from a misapprehension rather that of intent aforethought, the court holds the plaintiffs are entitled under s 66 of the Contracts Act 1950 to return of the original facility amount they had extended.

Based on the reasoning above, the judge had decided that if the sale is bona fide, then the bank is entitled to claim the amount as per calculation of sale price in *Zulkifli Abdullah*'s case. However, if the sale is not a bona fide one, the legality of BBA financing is affected and the bank is only entitled to claim the actual financing amount released ie the purchase price from the customer under s 66 of the Contracts Act.

Being adversely affected with the said High Court's decision, Bank Islam Malaysia Bhd have filed appeals separately to the Court of Appeal for a clearer ruling on the legality of the BBA facility and the amount claimable by Islamic banks when a customer commits an event of default.

The Court of Appeal in the case of *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals*[18] has heard the nine of the 12 appeals and delivered a common judgment where the High Court's decision in *Taman Ihsan*'s case is reversed. Raus Sharif JCA in delivering the judgment of the Court of Appeal held that:

> [24] We have no hesitation in accepting that *riba'* or interest is prohibited in Islam. But the issue at hand is whether such comparison between a BBA contract and conventional loan agreement was appropriate. With respect, we do not think so. This is because the two instruments of financing are not alike and have different characteristics. BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction. The two transactions are diversely different and indeed diametrically opposed.
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> [25] Thus, the learned judge was plainly wrong when he equated the profit earned by BIMB as being similar to riba' or interest. The two cannot be similar as BBA contract is in fact a trade transaction. It is a transaction between the customer and the bank. In such transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank.
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> [28] Thus, the learned judge in coming to the conclusion that BBA contract is in fact a loan agreement and consequently by:
>
> (a) replacing the sale price under the Property Purchase Agreement with an 'equitable interpretation' of the same; and
>
> (b) substituting the obligation of customer to pay the sale price with a 'loan amount' and 'profit' computed on a daily basis,
>
> as he expounded in *Affin Bank Bhd v Zulkifli Abdullah*, was in fact rewriting the contract for the parties. *It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable*. This principle has been clearly expressed in numerous cases.

From the Court of Appeal's decision in *Lim Kok Hoe*'s case, it appears that the contractual approach is to be preferred than the equitable approach since the courts are not allowed to rewrite the terms of the contract as has been duly agreed between the Islamic bank and the customer. The nature of the BBA contract needs to be recognised by the civil courts. However, in *Lim Kok Hoe*'s case, the Court of Appeal does not grant judgment or order for sale in favour of the banks but has directed the cases to be sent back to the High Court to be heard on merits.

Even though the Court of Appeal has affirmed the legality of BBA financing in Malaysia, the issue on how much the amount is claimable by Islamic banks under BBA financing in the event of default by the customer/chargor was not precisely determined.

CALCULATION OF OUTSTANDING AMOUNT DUE UNDER THE CHARGE FOR THE PURPOSE OF SS 257(1)(c) AND 266 OF THE NLC

Pursuant to s 257(1)(c) of the NLC, the court in granting an order for sale shall specify the total amount due to the chargee bank at the date on which the order is made. This is to ensure that the chargor knows the outstanding amount due and payable by him so that the chargor is able to calculate and tender payment pursuant to s 266 of the NLC, if he intends to redeem his property before it is being auctioned off.[19] However, for Islamic banking cases, should the bank be allowed to claim full sale price as per the terms of order for sale if the chargor wishes to tender payment under s 266 of the NLC which tantamount to an early settlement?

In the case of *Bank Islam Malaysia Bhd v Azhar bin Osman and other cases*,[20] the learned High Court judge stated that even if the legality of BBA financing has been affirmed by Court of Appeal, the High Court is still entitled to decide on the issue of

quantum to be paid by the chargor since the Court of Appeal has not made any ruling on the issue of quantum. In her grounds of decision at paras [13], [14], [18] and [27], the learned judge stated, inter alia:

> [13] With due respect, I find this argument untenable. Whilst it is true that the Court of Appeal in *Lim Kok Hoe* held that a BBA contract in a way differs from conventional banking because it is a sale transaction, it cannot however be regarded as a sale transaction simpiliciter. The BBA contract is secured by a charge and concession as *ibra'* is given as a matter of practice to all premature termination. Further, it is not a simple sale because even if the bank does not make payment of the full purchase price under PSA the bank would still be entitled to claim the amount already paid. Whereas in a simple sale if the first leg of the transaction fails, the bank's right to the amount paid will not ipso facto accrue since the sale was never completed.
>
> [14] If we were to take Encik Oommen Koshy's argument to the extreme, is this court expected to order that a full sale price be paid by a customer even if the bank had not made payment of the full purchase price under the PPA? That is quite difficult to reconcile and surely cannot be so. In fairness the bank cannot be allowed to argue that a sale transaction must be adhered strictly to the letter only on the part of the customer. Why a bank should insists on payment of the full sale price and thereafter as a matter of practice grant a rebate to the customer simply to show that it is a sale transaction may have its purpose but to place the customer in such a precarious position is quite something else, particularly when such grant is at the bank's absolute discretion. From the practice of the bank it is clear that the insistence on enforcing payment of the full sale price appears to be merely an attempt to adhere to written text but I doubt if such appearance achieve its purpose. This is because, despite the written term of the agreement, the bank in reality does not enforce payment of the full sale price upon a premature termination. It always grants rebate or *ibra'* based on 'unearned profit'.
>
> [18] In all the above decisions, when a BBA contract is prematurely terminated upon default by the borrower, the court did not allow the bank to enforce the payment of the full sale price in a premature termination. The underlying principles which come to fore, derived from these decisions is clear. The court does not enforce payment of the full sale price but intervene on equitable grounds, albeit based on different approaches. I am doing the same for the following reasons. …
>
> [27] Coming back to the present case, the pertinent question to be asked is what then of the Court of Appeal decision in Lim Kok Hoe that binds this court, bearing in mind that under the doctrine of stare decisis that binding precedent is the ratio decidendi. It must be noted at the outset that the decision of the Court of Appeal in Lim Kok Hoe revolves around the issue of validity and enforceability of BBA contracts. Having deliberated on the arguments of counsel, the Court of Appeal upheld the validity of BBA agreement as enforceable contract. The reasons are stated in the judgment of His Lordship Mohd Raus JCA (now FCJ) at p 23. *Applying the doctrine of stare decisis to Lim Kok Hoe, this court is bound to hold that a BBA contract is valid and enforceable agreement. In fact, the Court of Appeal did not make any finding on the issue of quantum of claim*. The way I see it, it was not raised at the Court of Appeal and it is for that reason that the cases are sent down for the quantum of claim to be determined.

In *Azhar Osman*'s case, the High Court has held that the bank must grant *ibra'* on the unearned profit for premature termination of the BBA facility and directed the banks to file supplemental affidavits to state the outstanding sum after deducting unearned profit. This is due to the fact that BBA financing is not a sale transaction simpliciter. Again, the bank had appealed to the Court of Appeal against the said High Court decision.

According to Mr Oommen Koshy (counsel for the appellant bank), the Court of Appeal (presided by a panel consisting of YA Datin Paduka Zaleha Zahari, YA Datuk Zainun Ali and YA Datuk Clement Allan Skinner) had heard the three related appeals on 13 October 2010 arising from the High Court decision in *Azhar Osman*'s case. The Court of Appeal had reserved its decision initially and on 20 October 2010, allowed the bank's appeal.[21] The Court of Appeal's oral grounds in allowing the appeal, in summary, were as follows:

(a) BBA contracts are sale contracts and the court must give full effect to the same;

(b) *Ibra'* (rebate)is applicable in early settlement cases and not in default cases;

(c) *Ibra'* is not unearned profit;

(d) the Bank is allowed to claim the balance sale price; and

(e) the court should not interfere in the contract, as there are no vitiating factors to do so.

With the Court of Appeal's decision above, the High Courts in granting the application for order for sale are now bound to allow the bank's claim for balance of the full sale price under BBA financing.

INTRODUCTION OF RULES OF COURT 2012 AND ITS EFFECT ON FORECLOSURE PROCEEDINGS INVOLVING ISLAMIC BANKING FACILITIES

With effect from 1 August 2012, the new Rules of Court 2012 has come into effect replacing the Rules of High Court 1980 and the Subordinate Courts Rules 1980. There are various amendments introduced under the new Rules which have changed the civil litigation practice in Malaysia.

For foreclosure proceedings, amendment has been made to the O 83 r 3(3) of the RHC 1980 and the new provision of O 83 r 3(3) of the Rules of Court 2012 reads as follows:

> (3) Where the plaintiff claims delivery of possession the affidavit shall show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the *particulars of the amount remaining due under the charge as at the hearing date of the originating summons*.

From the above new provision, the Islamic bank (as well as conventional bank) is only required to state the total outstanding sum due under the charge as at the date of hearing of the originating summons. The previous statutory requirements under O 83 r 3(3) of the RHC 1980 for particulars of amount of advance, amount of repayment and amount of arrears/interest have been removed. Further, there is also no requirement to state daily interest since such requirement under O 83 r 3(7) of the RHC 1980 has been taken out under the new Rules of Court 2012. The new provision of O 83 of the Rules of Court 2012 is now consistent with s 257 of the NLC where the court is required to state the outstanding amount due as at the date of hearing of the originating summons in granting the order for sale.

Despite the above, there is no special provision inserted in the new O 83 of the Rules of Court 2012 for foreclosure proceedings relating to Islamic banking facilities. There is nothing mentioned in O 83 r 3(3) of the Rules of Court 2012 pertaining to applicability of *ibra'* for sale-based financing such as BBA, *Bai' al-Inah* and etc.

If we look at the new provision in O 42 r 12A of the Rules of Court 2012, we can see that there is an amendment inserted with regards to the issue of late payment charges and *ta'widh* (compensation) in relation to civil proceedings for monetary claim (action in personam). The said O 42 r 12A of the Rules of Court 2012 provides as follows:

> *12A Late payment charge on judgment debts arising from financial transactions in accordance with Shariah (O 42, r 12A)*
>
> (1) *Every judgment debt arising from financial transactions in accordance with Shariah shall carry a late payment charge* calculated from the date of judgment until the judgment debt is fully satisfied at the rate provided under Order 42, rule 12 and subject to the following conditions:
>
> (a) the judgment creditor shall only be entitled to *ta'widh* as a result of late payment;
>
> (b) the amount of late payment charge shall not exceed the outstanding principal amount; and
>
> (c) if the amount of *ta'widh* is less than the amount of late payment charge, the balance shall be channelled to any charitable organizations as determined by the Shariah Advisory Council.
>
> (2) For the purpose of this rule —
>
> (a) 'Shariah Advisory Council' means the Shariah Advisory Council established under the Central Bank of Malaysia Act 2009 [Act 701] and the Capital Markets and Services Act 2007 [Act 671]; and
>
> (b) '*ta'widh*' means compensation for actual loss and shall be calculated at the rate determined by the Shariah Advisory Council.

It is interesting to note that there is special provision made for late payment charges for judgments made in relation to financing granted under Shariah. The Shariah concepts of *ta'widh* and *gharamah* have now been recognised and incorporated into our civil procedural law. It is the author's view that a special provision should also be inserted in the O 83 of the Rules of Court 2012 on application of *ibra'* (rebate) in the foreclosure proceedings for sale-based financing so that it will be in line with the guideline issued by Bank Negara Malaysia.

IBRA': RULING BY SHARIAH ADVISORY COUNCIL & LATEST GUIDELINES BY BANK NEGARA MALAYSIA

Ibra' means surrendering one's right to a claim on debt either partially or fully. Initially, the grant of *ibra'* is purely at the discretion of the Islamic bank and there is no necessity for the Islamic bank to give any formula on how *ibra'* is to be calculated and granted to the customer for early settlement.

However, in view of the various arguments in litigation cases insisting on Islamic banks to grant *ibra'* for the sake of justice and fairness to the customers/chargors, the Shariah Advisory Council ('SAC') of Bank Negara Malaysia in its 101st meeting held on 20th May 2010 had arrived at the following decision:[22]

> *Ibra' (Rebate) for Financing based on Buy and Sell Contracts*
>
> In line with the need to safeguard *maslahah* (public interest) and to ensure justice to the financiers and customers, *Islamic banking institutions are obliged to grant ibra''to customers for early settlement* of financing based on buy and sell contracts (such as *bai' bithaman ajil* or *murabahah*). In order to eliminate uncertainties pertaining to customers' rights in receiving *ibra'* from Islamic banking institutions, the granting of *ibra'* must be included as a clause in the legal documentation of the financing. The determination of *ibra'* formula will be standardised by Bank Negara Malaysia.
>
> The effective date for the implementation of the resolutions on *ibra'* and late payment charge mechanism will be determined in the guidelines to be issued by Bank Negara Malaysia.

Based on the ruling by the SAC above, the Bank Negara Malaysia has issued Guidelines on Ibra' (Rebate) for Sale Based Financing[23] pursuant to its power under s 53A of the Islamic Banking Act 1983 ('IBA'), s 126 of the Banking and Financial Institutions Act 1989 ('BAFIA') and s 126 of the Development Financial Institutions Act 2002 ('DFIA'). The Guidelines shall be effective from 1 November 2011 and the requirements under para 6 of the Guidelines shall take effect immediately. The requirements under paras 7, 8, 9, and 10 of the Guidelines shall be fully implemented from 1 July 2012.

Under para 7.4 of the Guidelines, it is provided that:

> Islamic Banking Institutions (IBIs) are required to ensure that *the customers are duly informed on the applicability of ibra' in the redemption statement or other documents issued by IBIs to the customers for the purpose of recovery (such as letter/notice of demand) and in the Statement of Claim prepared for litigation cases*. At minimum, IBIs are expected to disclose the following:
>
> (i) Commitment to provide *ibra'* in the Statement of Claim, redemption statement and other documents such as letters or notices of demand for the purpose of recovery; and
>
> (ii) The formula or the manner of *ibra'* computation and the relevant conditions relating to the granting of ibra' in the redemption statement and other documents such as letters or notices of demand.

Based on the above SAC's ruling and Guidelines by BNM, it will be advisable for the Islamic banks to inform all their panel solicitors to incorporate the applicability of *ibra'* and the formula to calculate the same for litigation/recovery purpose whether for civil action (*action in personam*) or foreclosure action (*action in rem*). Non-disclosure of applicability of *ibra'* may be raised as an issue by the customer/chargor to oppose the bank's claim.

WHETHER SHARIAH NON-COMPLIANCE MAY AMOUNT TO 'CAUSE TO THE CONTRARY' UNDER S 256(3) OF THE NLC

From the numerous cases discussed in this article, the writer observes that nowadays there is a tendency that chargors/customers will raise issues on Shariah non-compliance after they have defaulted in payment. The Shariah non-compliance issues are sometimes a mere afterthought and are purposely pleaded as defence to challenge the legality of the Islamic banking transaction so that in the event that the transaction is declared as invalid, the chargors/customers may escape from their contractual liability or at least they can mitigate the amount to be paid to the bank. Alternatively, by raising Shariah non-compliance issues which may need to be referred to the SAC for clearer

ruling, the customers may buy some time and delay the litigation proceedings against them. However, there are also genuine cases where the Shariah non-compliance issues may have led to injustice to the chargors/customers and in such situation, the customers/chargors should be allowed to address the issues to the court to seek judicial intervention.

Hence, in foreclosure proceedings, the court needs to decide whether the Shariah non-compliance may amount to 'cause to the contrary' under s 256(3) of the NLC. The Federal Court in the case of *Low Lee Lian*[24] has defined 'cause to the contrary' as follows:

> In our judgment, cause to the contrary within s 256(3) may be established only in three categories of cases.
>
> *First*, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary.
>
> ....
>
> *Secondly*, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee.
>
> ...
>
> *Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity*. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1938] 1 LNS 42.

If we look at the third category of the 'cause to the contrary' as laid down by the Federal Court, the scope is wide enough to cover issue of Shariah non-compliance. If the court is satisfied that the chargor has demonstrated that the grant of order for sale would be contrary to rule of law (which may include Shariah law) or equity,[25] then order for sale can be refused by the court.

In the case *Silver Concept Sdn Bhd*,[26] Suriyadi J (as he then was) stated that:

> [13] This case involves the marriage of two distinctly diverse worlds, namely the Islamic world and the common-law sourced civil law, both protected and enabled by the Federal Constitution. The agreements here have Islam as their foundation whilst the foreclosure proceedings come under the civil law jurisdiction, specifically the National Land Code and the Rules of the High Court 1980.
>
> [26] Typical of cases of this nature, the defendant here has ventilated that the impugned contracts cannot be enforced on several grounds, inter alia, it being tainted by interest or riba. It canvassed that this originating summons must fail as there exists issues or facts that may be construed as 'causes to the contrary.' The burden is on the defence to show that 'cause to the contrary', and invariably discharged by filing the relevant affidavits. Needless to say, *if the defendant can successfully establish that there exists fatal-procedural defects, deceit, bribery, un-Islamic practices in the like of usury, amongst others, having tainted the transaction then the originating summons must fail*.

From the above authorities, it is the writer's opinion that the Shariah non-compliance issues or un-Islamic practices may amount to 'cause to the contrary'. However, is it proper and suitable for such Shariah non-compliance issues to be adjudicated in foreclosure proceedings?

WHETHER SHARIAH NON-COMPLIANCE ISSUES SHOULD BE ADJUDICATED IN FORECLOSURE PROCEEDINGS WHICH IS AN ACTION IN REM

In order for the Islamic banks to foreclose the charged properties upon default by the chargor under BBA financing or other Islamic banking facilities, Islamic banks must follow the conventional legal framework as prescribed under the NLC and RHC. This

position has been affirmed by the Court of Appeal in *EMCEE Corporation*'s case. The court hearing the application for order for sale needs to decide whether there is any cause to the contrary shown by the chargor under s 256(2) of the NLC. The Federal Court in *Low Lee Lian*'s case has stated that cause to the contrary can be established if the chargor can show that the grant of order for sale would be contrary to any rule of law and equity. From this Federal Court decision, which is binding on all High Courts, the High Courts therefore have the power and jurisdiction to refuse an order for sale if there is any element which would be contrary to equity or Shariah. However, the Court of Appeal in *Lim Kok Hoe*'s and *Azhar Osman*'s cases does not allow the courts to rewrite the terms of the contracts as duly agreed by the parties.

From the above brief analysis, we can see that if the court finds that the grant of order for sale would be contrary to Shariah law or equity, the only remedy is for the court to dismiss the originating summons. If the court grants an order for sale and uses its discretion to vary the terms which are not in accordance with the terms of contract, then the decision may be wrong as it amounts to rewriting the contract. The options and reliefs in a foreclosure action seem quite limited and if the order for sale is refused, the bank will be seriously prejudiced and will not be able to realise its security and reduce their bad debts (non-performing financing).

The above issue has actually been discussed and pointed out by the learned Justice Dr Hamid Sultan Abu Backer J in the case of *Majlis Amanah Rakyat v Bass bin Lai*[27] where His Lordship stated that:

> 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 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*

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 Ihsan*. The relief was provided pursuant to s 66 of the Contracts Act which reads as follows:

> *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.

Besides the above case, the Supreme Court in the case of *Kandiah Peter v Public Bank Bhd*[28] has explained the function of the court in foreclosure proceedings as follows:

> Held:
>
> [1] A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. *The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issues*.

Since the role of the court in hearing and adjudicating Shariah non-compliance issues in foreclosure proceedings seems quite limited, it is the writer's view that the High Court judges may convert the originating summons into a writ action in accordance with O 28 r 8 of the Rules of Court 2012 instead of dismissing the originating summons. In a writ action, the parties can be directed to file the statement of claim and counter claim to seek appropriate reliefs from the court.

CONCLUSION

In view that the foreclosure proceedings involving Islamic banking facilities are governed under the conventional legal framework, the civil court therefore plays an important role to ensure that all Shariah issues raised by the customer/chargor in opposing the application for order for sale are dealt with judiciously in order to preserve the sanctity of the Shariah principles.

In case of uncertainty or doubt on any Shariah matter, reference should be made by the court either by its own motion or through application by any of the parties to the SAC of Bank Negara Malaysia in accordance with s 56 of the Central Bank of Malaysia Act 2009. In the recent case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd*,[29] the Kuala Lumpur High Court had allowed the defendant's application to refer certain questions to the SAC of Bank Negara Malaysia.

The ruling of the SAC shall be binding on the court.[30] In the case of *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor*,[31] the learned judge Mohd Zawawi Salleh J held that the provisions in ss 56 and 57 of the Central Bank of Malaysia Act 2009 are constitutional and should not be regarded as an attempt by the Executive to take over gradually the judicial power traditionally exercised by the courts and replacing by persons who have neither a judicial background nor specialised knowledge and by persons who retain lien and loyalty to the executive branch. The SAC cannot be said to perform a judicial or quasi-judicial function since the process of ascertainment of Islamic law by the SAC has no attributes of a judicial decision.

As there are various new Islamic banking products created and offered by our local banks using Shariah concepts such as *Musyarakah Mutanaqisah*, Commodity *Murabahah*, *Ijarah Thumma al-Bai'*, *Bai' al-Istisna'* and etc, the writer foresees that there are more Shariah issues which have yet to be tested and argued in court. Hence, the

role of civil court judges and the SAC are very crucial in the legal development of Islamic banking system in Malaysia.

FURTHER READINGS:

1. Dr Noor Inayah Yaakub & Hizri Hasshan, *Kekeliruan Terhadap Pembiayaan Bai' Bithaman Ajil di Malaysia* [2007] LR 83.
2. Ruzian Markom & Sharina Ali Pitchay, *Enforcement of Islamic Banking and Finance Laws in the Civil Courts of Malaysia* [2010] 3 ShLR 42–78.
3. Justice Dr Hj Hamid Sultan bin Abu Backer, *Critical Thoughts: Legislative Intervention Imperative to Support Islamic Financing on a Global Scale'* [2009] 1 MLJ lxiv.
4. Fakihah Azahari, *Islamic Banking: Perspectives on Recent Case Development* [2009] 1 MLJ xci.
5. *'Dispute Resolution in Islamic Banking. ISRA Monograph Series: 1'*, 2009, International Shari'ah Research Academy for Islamic Finance (ISRA).

[1] '*Riba*' literally means increase, growth, addition or expansion. In Shariah, '*riba*' technically refers to the premium or interest that must be paid by the borrower to the lender along with the principal amount as a condition for the grant of the loan or for an extension of its maturity. '*Riba*' (usury) is also prohibited in Christianity and in Judaism (see Exodus 22:25, Ezekiel 22:12 and Deuteronomy 23:19).

[2] '*Gharar*' is commonly defined as uncertainty, doubtfulness, risk, hazard and/or deceit. There are two types of gharar, namely '*gharar saghir*' which is a minor/slight *gharar* and '*gharar kabir*' which is a major/excessive *gharar*. A contract will become invalid if it involves a major *gharar*.

[3] See s 11(1)(a) of the Islamic Banking Act 1983.

[4] With effect from 1 August 2012, both the Rules of the High Court 1980 and the Subordinate Courts Rules 1980 have been combined into a new Rules of Court 2012.

[5] [2003] 2 MLJ 408; [2003] 1 CLJ 625.

[6] [1997] 1 MLJ 77; [1997] 2 CLJ 36.

[7] The Federal Court (by majority decision) in the case of *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21; [2005] 4 CLJ 345 has held that the requirement under O 83 r 3 of the RHC 1980 is a mandatory requirement which

must be strictly complied with by the chargee bank. Non-compliance with such O 83 r 3 of the RHC 1980 will render the order for sale irregular and liable to be set aside.

[8] See surah *al-Baqarah* (2):275: '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 (forever).'

[9] [1994] 3 CLJ 735.

[10] See Norhashimah Mohd Yasin, '*Bay' Bithaman Ajil (BBA): Sale Or Loan Contract?*,' in Syed Ahmad Idid (Ed), *Judicial Decisions Affecting Bankers and Financiers*, Kuala Lumpur, LexisNexis, 2003. (See also: Noor Inayah Yaakub & Hizri Hasshan, *Kekeliruan Terhadap Pembiayaan Bai' Bithaman Ajil di Malaysia* [2007] LR 83).

[11] [2004] 7 MLJ 355.

[12] [2006] 8 CLJ 9.

[13] [2006] 5 MLJ 21; [2005] 4 CLJ 345].

[14] [2006] 3 MLJ 67; [2006] 1 CLJ 438.

[15] [2006] 7 MLJ 249; [2006] 3 CLJ 796.

[16] [2007] 6 MLJ 389; [2007] 5 CLJ 311.

[17] [2008] 5 MLJ 631; [2009] 1 CLJ 419.

[18] [2009] 6 MLJ 839; [2009] 6 CLJ 22.

[19] James Foong Cheng Yuen J (now FCJ) in the case of *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283; [1993] 1 CLJ 487 has stated that 'defendants must be offered every opportunity to repay the said loan before his property, which is only a security, is taken from him for good. This opportunity for repayment, as seen in s 266 of the National Land Code, extends to 'any time before the conclusion of the sale' by public auction subsequent to an order for sale by the court'.

[20] [2010] 9 MLJ 192; [2010] 5 CLJ 54.

[21] See: Oommen Koshy, *Recent Court of Appeal Decision on Islamic Banking Cases*, Tuesday, 21December 2010 at http://www.malaysianbar.org.my/members_opinions_and_comments/recent_court_of_appeal_decision_on_islamic_banking_cases.html.

[22] See: Bank Negara Press Statements by Secretariat, Shariah Advisory Council of Bank Negara Malaysia on 29 June 2010 at http://www.bnm.gov.my/index.php?ch=8&pg=14&ac=2078.

[23] See the Guidelines on Ibra' (Rebate) for Sale-Based Financing — BNM/RH/GL 008-13.

[24] [1997] 1 MLJ 77; [1997] 2 CLJ 36.

[25] The principle of equity is similar to the principle of *istihsan* (juristic preference) in Islamic law. (See also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (2nd Revised Ed), Ilmiah Publishers at Chapter 12).

[26] [2006] 8 CLJ 9.

[27] [2009] 2 CLJ 433.

[28] [1994] 1 MLJ 119; [1993] 4 CLJ 332.

[29] [2012] 7 MLJ 597; [2012] 3 CLJ 249.

[30] See s 57 of the Central Bank of Malaysia Act 2009.

[31] [2011] 3 MLJ 26; [2011] 4 CLJ 654.

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