

Issues in Bay' Bithaman Al-Ajil Islamic Home Finance ('BBA') in Abandoned Housing Projects In Malaysia: An Examination of 'Gharar'

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Abstract

Islamic Banking has been established since 1980s in Malaysia. It was initially commenced with the incorporation of Bank Islam Malaysia Berhad (BIMB) in 1983. Until today, Islamic Banking has robustly developed in Malaysia providing various kinds of Islamic transaction products including Islamic Home Finance. Various Islamic Home Finance products have been introduced and practised in Malaysia. Among the products are: *Bay' Bithaman al-Ajil* (BBA), *Musharakah al-Mutanaqisah* (MM), *Commodity Murabahah* and *Ijarah*. Nonetheless, there are many issues in these products when faced with the problems of abandoned housing projects. One of the issues is the issue of 'gharar' in BBA. It is evident that, the application of BBA is proven to be defective and contains many flaws, if involves abandoned housing projects in Malaysia. This paper aims to highlight and analyse this issue (*gharar*) and provide solutions to the issues discussed. This paper used shariah (Islamic Law) doctrinal and qualitative case study research methodologies. This paper finds that the current terms in the BBA are inadequate and warranted it to be provided with terms that can prevent the occurrences of *gharar* thus can fully comply with the requirements of the shariah (Islamic Law). The outcome of this paper will help the Islamic banking industry in dealing with the issues of *gharar* in abandoned housing projects in Malaysia and protect the rights and interests of the purchaser consumers.

Keywords: *Gharar*; Abandoned Housing Projects; *Bay' Bithaman al-Ajil* (BBA); Purchaser Consumers' Losses and Grievances; Proposal for Reform

1. Introduction

It is a trite practice in Malaysia that those who wish to purchase houses, particularly involving transaction that fall under the purview of Housing Development (Control & Licensing) Act 1966 and its regulations (Act 118), to apply for home financing from Islamic banks. Normally, purchaser consumers will enter into housing contracts with the housing developers purchasing the pending completion houses. Once the relevant documents are signed, the purchaser consumers will then apply to Islamic bank to finance the balance purchase price via any Islamic home finance products, normally BBA (Md Dahlan & Aljunid, 2011; Md Dahlan & Aljunid, 2010; *Khozim Malim v Bank Kerjasama Rakyat Malaysia Bhd* [2012] 3 CLJ 860 (High Court of Malaya at Kuala Lumpur)).

In BBA, purchaser consumers are required to sign two (2) agreements *viz* Property Purchase Agreement (PPA) and second Property Sale Agreement (PSA). The first agreement i.e PPA states that the purchaser agrees to sell the purported house, being the house that the purchaser bought from the vendor developer, to the Islamic Bank. The price must the same price as that used between the purchaser and the vendor developer (Md Dahlan & Aljunid, 2011; Md Dahlan & Aljunid, 2010; *Muhammad Daud bin Radzuan v. AmIslamic Bank Bhd* [Civil Appeal No. (R2)-12B-2009](High Court of Malaya at Kuala Lumpur)).

The second agreement is PSA. Under this agreement, the said house purchased by the Islamic Bank will be re-sold back to the purchaser at a mark-up price (the price being higher than the purchase price that was used by the purchaser and the vendor developer and between the purchaser and the Islamic Bank effected via PPA). The purchaser is required to repay the whole mark-up price to the Islamic bank in installment for certain duration until full settlement. The Islamic banks will get profit being the difference between the price stated in the PPA and the price stated in the PSA (Md Dahlan & Aljunid, 2011; Md Dahlan & Aljunid, 2010; *Bank Islam Malaysia Berhad v. Azhari Md Ali* [2012] 5 CLJ 920 (High Court of Malaya at Shah Alam)).

The above transaction, between the purchaser borrower and the Islamic Bank, is called *Bay' al-Inah* (Bank Negara Malaysia, 2009). Apart from *Bay' Inah*, in the opinion of the authors, BBA also consists of *Murabahah* transaction as it involves selling price at a mark-up rate as profit by Islamic banks effected via PSA.

It should be emphasized here that the theory and practice of *Bay' al-Inah* is still subject to debate among the *fiqh* schools of law as the transaction may fall into *riba'* (difference of prices involving time) or *helah* (trick) to justify *riba'* in transaction (al-Zuhayli, 1988).

Majority of Islamic Jurists reject *Bay' al-Inah* as the transaction is a void transaction. To Abu Hanifah, *Bay' Inah* is permissible if it involves a third party as an intermediary premised on *Istihsan* (equity) supported by the story of Zayd bin Arqam (*Arab-Malaysian Finance Berhad v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party)*) [2008] 5 MLJ 631; al-Zuhayli, 1988).

According to Islamic Jurists, *Bay' Inah* transaction can fall into prohibited business activities based on a hadith (tradition) of the Prophet Muhammad (PBUH)– ‘there will come a time where people permit *riba*’ in business’ (al-Zuhayli, 1988).

In the opinion of Assohibayn (Abu Yusuf and Muhammad al-Shaybani), Hanafi, Maliki and Hanbali schools, *Bay' al-Inah* will be void if there is a proof that shows an intention to commit sins (*riba* (usury)) on the ground of the principle of *sadd dhara'i* (blocking the means). Secondly, they argued on the story of Zayd bin Arqam where Aishah R.A did not approve a transaction of buying and selling slaves via *bay' al-Inah*. Thirdly, on the reason that there exist payment and ownership in the first transaction. Further, the jurists argued on the basis of a hadith of the Prophet Muhammad (PBUH) which prohibits *Bay' al-Inah* (al-Zuhayli, 1988).

Nonetheless, majority of the jurists such as Shafie and Zohiri schools allow it (*Bay' al-Inah*) but it is considered detestable/abominable (*makruh*). Abu Hanifah is of the same opinion with Shafie and Zohiri schools on *Bay' al-Inah*, viz it is valid as it complies with the contract pillars -- offer and acceptance (*ijab* and *qabul*). These two schools do not emphasize intention (i.e intention to use trick (*helah*) in order to justify *bay' al-Inah*) as only Allah knows what is the intention of each individual. According to these schools, *Bay al-Inah* is valid if there is no plan to apply time period of excessive price volatility. If otherwise, the application of *Bay' al-Inah* is void. To these schools, the hadith of the Prophet disallowing *Bay al-Inah* is not rejected by Imam Shafie and secondly, Zayd bin Abi Arqam himself did not follow it (al-Zuhayli, 1988; Bank Negara Malaysia, 2009; Bakar, 2009; *Malayan Banking Bhd v Ya'kup bin Oje & Anor* [2007] 6 MLJ 389 (High Court of Sabah & Sarawak at Kuching); al-Shawkani, 1357H).

Dr. Wahbah al-Zuhayli himself is the same opinion with the majority of the jurists i.e *Bay' al-Inah* is void (al-Zuhayli, 1988).

1.1 Abandoned Housing Projects in Malaysia

Abandoned housing projects is one of the hot topics and unending difficult issues for the Malaysian government to tackle and settle. As the result many purchaser consumers have suffered irreparable damage and losses without getting equitable and appropriate remedies.

Previously, just after Independence in 1957, the main provider for public housing was the government itself. However, as the government faced upsurges in demand for housing accommodations and suffered shortage of funds to finance the construction of public housing for public purchase, the government had opened this programme to the private sector housing developers as well to participate. The government only controls the conducts of these private sector housing developers through the Housing Developer's (Control & Licensing) Act 1966 (Act 118) and its regulations (Md Dahlan, 2009).

Despite there are federal and states' laws governing housing development generally through the housing laws implemented through the above statute, the National Land Code 1965 (Act No. 56) governing land development, planning law through the Town and Country Planning Act 1976 (Act 172) governing development planning and the building laws through the Street, Drainage and Building Act 1974 (Act 133) and Uniform Building By-laws 1984, abandoned housing projects is still cannot be totally curbed to the detriment and chagrin of the aggrieved purchasers (Md Dahlan, 2009).

In the observation of the authors, the major reasons leading to the abandonment of housing projects are these: There is no mandatory system of “full build then sell” of housing delivery by the developers; there is no mandatory requirement that the developer must possess housing development insurance serves as a support in the event the developer is unable to complete the project; and, there is no specific regulation governing rehabilitation of abandoned housing projects to the detriment of the rights and interests of the purchasers. Apart from these, it is found that the loan agreements between the bank financiers and the purchaser consumers including the Islamic Home Finance BBA, MM, CM, *Istisna'* and *Ijarah* also, do not have terms and conditions that can equitably protect the rights and interests of the purchasers if the housing projects are terminated mid-stream by the developers (Md Dahlan, 2015).

Among the losses that the purchaser consumers have to bear are as follows (Md. Dahlan, 2009):

- 1) They cannot obtain the duly completed houses as promised by the housing developer and as prescribed under the sale and purchase agreement on time;
- 2) They have to incur additional costs in the event new rehabilitating parties agree to undertake rehabilitation, as the end-finance funds are not adequate to cover the costs of rehabilitation;
- 3) They have to incur additional costs for renting houses pending the completion of the rehabilitation of the abandoned housing projects complete; and,
- 4) They may have to suffer irreparable damage and losses as the abandoned housing projects cannot be

rehabilitated as there is no party interested to revive the project or the projects are not feasible for rehabilitation.

Thus, this writing intends to highlight and analyse the terms and conditions in the Islamic Home Finance BBA in dealing with abandoned housing projects and protect the rights and interests of purchaser consumers in abandoned housing projects in Malaysia. Islamic law emphasizes that contracts must comply with the requirements of Islamic law for example the requirement that the contract must not contain any *gharar* elements and that the terms and conditions must be fair and justifiable to the parties. These commands are enshrined under the Quran and al-Hadith (Traditions of the Prophet Muhammad (PBUH)).

2. Research Methodology

The authors used shariah (Islamic Law) and Islamic legal research methodology to explain and analyse the issues, problems and proposal in this academic paper. The sources of research are the al-Quran and al-Hadith. The authors also look into the opinions of the jurists on issues raised in this paper. The legal research is in a form of hybrid in nature. It consists of applied research, academic research, analytical/critical research, descriptive research, library-type and experimental study. The research activities under this heading include the discovery of the principles, rules and case law in order to explain and resolve the identified problems guided by the set objectives (Zahraa, 1998).

The second methodology is the social research methodology using a case study. The authors chose a qualitative case study as the authors wish to examine in detail issues and discussion in BBA that involved abandoned housing projects. Qualitative methodology is concerned with exploring people's life, histories or everyday behavior that quantitative research is unable to grasp. By using the qualitative method, information gathered will be more and enriching as it involves an in-depth and deeper understanding and study of a particular matter. The sources of data are from the accessible files of KNM Consulting Services, Jalan Medan Tuanku, Kuala Lumpur ('KNM'). KNM is a private agency set up with a purpose to resolve issues arising from abandoned housing projects and to help aggrieved purchaser consumers. In addition, the authors also interviewed the purchaser involved, shariah advisors of Islamic banks, lawyers and bank officers as a way to achieve triangulation and multiple evidences and thus can ensure reliability and validity of the research undertaken (Silverman, 2000; Yin, 1994; Yin, 2000).

2.1 The Case Study

The case study involves a customer/purchaser by name of Ahmad Ismadi Bin Mat Husin and Ana Marlina Binti Sarian ('purchaser') and Bank Islam Malaysia Berhad ('BIMB'). The purchaser bought a unit of apartment known as parcel No. B-8-10, Block B, Level 8 which is also known as Indah Heights (Service Apartment), Pulau Indah, Klang with a measurement of 733 square feet ('the said property'). The said property has no separate issue document of title. The said property is held under a Title Master No. EMR 7847, Lot No. 5740 and EMR Lot No. 7848, Lot No. 5741, Pulau Indah, Mukim dan District of Klang, Selangor. The land on which the said property is erected is owned by one Mokhtar b. Ahmad dan Siti Mariam bt. Ahmad. The address of the said property is Parcel No. B-8-10, Level 8, Block B, Indah Heights, Pulau Indah, Klang, Selangor. The developer of the project is known as Simpulan Cemerlang Sdn Bhd (No. 355877-P). The said property was sold to the purchaser at the price of RM 98,000.00 (Ringgit Malaysia: Ninety Thousand Only) (USD 24,500.00). The purchaser paid the deposit. While BIMB finances the balance of RM 88,200.00 (Ringgit Malaysia: Eighty Eight Thousand Two Hundred)(USD 22,050.00) effected through BBA(KNM Consulting Services, 2002a).

The said housing development project was terminated and became abandoned. There is no construction activities and constructed building on the said land. Nevertheless, BIMB paid to the vendor developer the progressive payment amounted to RM 26,700.00 (Ringgit Malaysia: Twenty Six Thousand and Seven Hundred)(USD 6,675.00) being payment for work done for stage 2(b) - 'being a work of commencement the work below ground level including piling, pile cape and footing of the said building comprising of the said parcel'. The payment was made by BIMB after they received an architect certificate and a request of the vendor developer. After knowing that the said housing development has become abandoned, the purchaser stopped making further monthly installment payment to BIMB. As a consequence, BIMB commenced a legal action against the purchaser for an amount of RM 239,945.72 (Ringgit Malaysia: Twenty Hundred Thirty Nine Thousand Nine Hundred Forty Five and Seventy Two)(USD 59,986.43) being the full sale price stated in the PSA and costs incurred by BIMB. This happened in 2005. Finally, on 22 February 2011, the purchaser settled BIMB demand by making settlement payment of RM 30,000.00 (Ringgit Malaysia: Thirty Thousand)(USD 7,500.00) (KNM Consulting Services, 2002b).

3. Result

There is no term in the BBA transaction that provide protection to the purchaser/consumer against losses due to the abandonment of housing project. As a result, the agreements contain flaws and are defective and fall into

gharar transaction. *Gharar* transaction here means, the inability of the Islamic bank to deliver the duly completed house as promised and/or provide compensation to the aggrieved purchaser/consumer by way of indemnity and restitution.

4. Issues

There are certain issues that can be extracted from the case study namely:

- 1) Why and how *gharar* occurred in the BBA transaction in abandoned housing projects?
- 2) If *gharar* occurred in abandoned housing development, whether the *gharar* is *al-fashish* (exorbitant) or *al-yasir* (minor)?
- 3) What are the losses suffered by the purchaser consumers/consumers who used BBA and whose houses pending completion become abandoned?
- 4) How to prevent occurrences of *gharar* in the BBA transaction in abandoned housing projects?

5. Discussion

Gharar means ‘detrimental act’ which can cause injuries and losses. *Gharar* transaction means sale transaction activities that involve uncertain terms and subject matter of the contract and unclear contractual terms. It also involves failure of the seller to deliver the subject matter of the contract (Majma’ al-Lughah al-Arabiah al-Idarah al-‘ammah Lil Mu’jamat Wa Ahya’ al-Turath, 2005; Hasanuzzaman & Saleh, 1991; al-Zuhayli, 1988). *Gharar* transaction is prohibited in Islam as its existence can cause harm against the rights and interests of the contracting parties. It can cause enmity, hatred, injustices and losses to the contracting parties (Md. Dahlan & Aljunid, 2010). *Gharar* transaction is a void transaction under Islamic Law (al-Zuhayli, 1988).

According to article 363 of the Mejlle referring to *gharar* transaction as follows:

“A thing, which admits of consequences of a sale, is a thing sold, which exists, is capable of delivery, and is Mal Mutaqavvim. Therefore the sale of things which are not existing, and not capable of delivery, and not Mal Mutaqavvim, is void (Batil)”.

Bay’ Fasid pursuant to Article 371 of the Mejlle reads as follows:

“A *Bay’ Fasid*, after receipt has a beneficial effect, that is to say, when the buyer has received the thing sold with the permission of the seller, he becomes owner of it. Therefore, if a thing which has been sold by a *Bay’ Fasid*, is destroyed in the hands of the purchaser, compensation is necessary”

Meanwhile, *Bay’ Batil* according to Article 370 of the Mejlle states:

“A sale which is void in its essential part, cannot confer any beneficial consequences. Therefore, when the purchaser under a void sale has received the thing sold by the leave of the seller, since the thing sold is in consequence of its receipt an emanet in the possession of the purchaser, it is not necessary for the purchaser to make compensation if it is destroyed without his fault”.

Further, pursuant to article 372 of the Mejlle: “In *Bey’ Fasid*, either party has the right to annul the sale”.

The position of Islamic law is clear on contracts involving a non-existent subject-matter. Islamic law lays down a condition that the subject matter must actually exist at the conclusion of the contract. Thus, if the subject matter does not exist, generally, the contract is void even though it could probably exist thereafter, or even if it is established then that it would exist in the future but the existence is still to the detriment of the contract party. A contract which involves a non-existent subject matter is prohibited pursuant to a hadith (tradition), whereby the Prophet Muhammad (PBUH) prohibited a person from selling an animal foetus yet to be born while it is still in the mother’s womb, when the mother was not part of the sale (al-Zaila’i, n.d.; Nawawi, 1999; al-Zuhayli, 1988). Likewise, is the selling of milk while it is still within the udder of the animal. The sale is void for there may be a possibility of the udder being void of milk, and instead, only, containing air (al-Zuhayli, 1988). In one hadith (tradition) the Prophet Muhammad (PBUH) prohibited the act of stopping the milk of udder of the female goat for a certain duration for the purpose of enticing the public to buy the female goat on the pretext of it containing a lot of milk (al-Shawkani, 1357H; al-Zuhayli, 1988). The Prophet (PBUH) also prohibited the sale of things which one does not own (al-Kasani, 1328H).

Nonetheless, Muslim jurists allow the contract of a non-existent subject matter, as one of the exceptions to the above, relating to the sale of agricultural products before they become ripe. However, this is subject to the knowledge that the products have already appeared even before the signs of ripeness are shown. Further, this type of contract is allowed if the purchaser immediately harvests them. The position is the same in respect of the sale of fruits and agricultural products, which yield successively one after another during one harvest as in the case of water melons and egg-plans. In this particular case, Muslim jurists in general have agreed to allow the sale of fruits which have already appeared but will disallow the sale of fruits which are yet to appear (al-Kasani, 1328H; al-Shawkani, 1357H). This contract falls under the category – ‘the subject matter exists in essence, then comes into existence thereafter’ (Nawawi, 1999).

As regards the subject matter which did not exist at the time of contract and it is established that it could not also exist in the future, Muslim jurists reject this kind of contract as this contract contains element of *gharar* (Nawawi, 1999). A transaction containing element of *gharar* is prohibited based on the verses of the Quran and the hadith of the Prophet (PBUH) (al-Baihaqi, 1971.). Majority of the jurists are also unanimously of the opinion that the contract which its subject matter generally could not be surrendered to the parties at the conclusion of the contract or at the promised date, is a *gharar* contract and thus it is void, not binding and having no legal effect (al-Zuhayli, 1988).

Muslim jurists allow the sale of non-existence subject-matter known in arabic as *Bay' al-Ma'dum* as an exception to the above situations, *viz* they allow sales of agricultural products before the products are fully matured. Nonetheless, this position is dependent on the knowledge that the products are in existence before the signs of ripeness appear. Further, this type of contract is allowed if the purchaser could immediately harvest the products, once he discovered signs of ripeness of the products. Similarly with the position of sales of fruits and agricultural products which continuously mature throughout the year for example watermelon and eggplant. In these situations, Muslim jurists generally allow sales of fruits which begin to show the signs of ripeness on the trees but they disallow sales of fruits that are still cannot be seen (al-Kasani, 1328H). There are also Hadiths (Traditions) of the Prophet (PBUH) narrated by Bukhari and Muslim from Anas, that the Prophet (PBUH) disallowed sales of fruits until the fruits are seen on the trees (i.e the fruits are matured and ready for harvest)(al-Zuhayli, 1988). Schools of Maliki, Shiah Imamiyah, Ibnu Taimiyyah and Ibnu Qayyim from Hanbali School, allow sales of fruits which are matured or unmatured as a human facility in transaction and to prevent difficulties in trade. Nevertheless, according to Hanafi, Hanbali, Zaydiah, Zahiri dan Ibadhiya Schools, sales of mixture of matured and unmatured fruits are disallowed (al-Zuhayli, 1988).

There is no mention on *gharar* transaction in the Quran. Nonetheless there are many verses that enjoin people to do justice and prohibit any fraudulent acts and oppression in trade and business. The examples are as follows:

- 1) "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property" (al-Baqarah(2): 188).
- 2) "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!" (Surah al-Nisa(4): 29).
- 3) "Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition" (Surah al-Nahl(16): 90).

There is no term in the BBA transaction (PPA, PSA and Deed of Assignment (DoA)) in the case study that provides a liability and responsibility of BIMB as the vendor to guarantee that the purchaser/consumer would obtain the duly completed house. The BBA transaction does not provide adequate provision purported to give protection to purchaser/consumer against any losses arising from abandoned housing projects. It should be noteworthy that in abandoned housing projects, the subject matter being the purported housing unit does not exist at the time the BBA transaction are executed nor does it exist after the expiry of the construction period. This situation has caused a *gharar* transaction being a transaction prohibited under Islamic law for want of the pillar and condition of a valid contract (al-Zuhayli, 1988; Md. Dahlan & al-Junid, 2010).

The above opinion is supported by Islamic bank's shariah advisors namely Associate Professor Mohd Ridzuan Awang (Interview at Puri Pujangga, Universiti Kebangsaan Malaysia, Bangi, on 7th Oktober 2015 (Wednesday)), Burhanuddin Lukman (11th August 2015 being a research officer at International Shariah Research Academy (ISRA), Petaling Jaya and a member of Shariah Advisor Council (SAC) of Bank Negara Malaysia – Malaysian Central Bank), and Professor Dr Abdul Basir Mohamad (at Puri Pujangga, Universiti Kebangsaan Malaysia, Bangi, on 7th October 2015 (Wednesday)).

It is further opined that, in abandoned housing projects, the inability of the purchaser consumers/consumers to obtain duly completed houses together with the Certificate of Fitness for Occupation (CF) or Certificate of Completion and Compliance (CCC), failure of the vendor to register their names into the issue documents of title to the said houses due to the abandonment and that they have suffered grievances and losses are situations that fall under the heading of *gharar al-fahish* (exorbitant *gharar*).

On the other hand, if a *gharar* is minor/trivial, the said *gharar*, for it being only minor/trivial, will not void the contract (al-Zuhaili, 1988). According to Shatibi:

"...the law in many cases does not provide what is to be considered as a grave *gharar* and what is a trivial *gharar*. What has been done by the jurists is to compare between what was prohibited by direct provisions of the texts and what was not...**trivial *gharar* is the one which the people feel at ease with, no dispute will arise from it and people are very much in need of such a contract'**(Buang 2000; Razali, 2008).

In the opinion of the authors, losses, injuries and grievances suffered by the purchaser consumers/consumers in abandoned housing projects are the results of the *gharar al-fahish* features in the BBA transaction due to the absence of terms in the BBA transaction (PSA, PPA and DoA) that can protect the rights and interests of the purchaser consumers/consumers in face of abandoned housing projects.

The authors are of the opinion that, due to the abandonment of the housing projects and the fact that the purchaser consumers/consumers are unable to obtain the vacant possession of the houses and occupy the said houses as the vendors fail to obtain CF or CCC, the BBA transaction is a *gharar al-fahish* transaction (*exorbitant gharar*). It needs to be stressed here that the duty of the vendor to obtain CF and deliver vacant possession of the house is provided in clause 10.4 and clause 10.7 of the Sale and Purchase agreement dated 9 September 2002 (KNM Consulting Services, 2002a). On this, the authors would like to stress that under Uniform Building By-Laws 28 of the Uniform Building By-Laws 1984 applicable in Malaysia, states:

- (1) **No person shall occupy or permit to be occupied** any building or any part thereof, other than a singly built detached house, **unless a certificate of fitness for occupation, a partial certificate of fitness for occupation or a temporary certificate of fitness for occupation** has been issued under these By-laws for such building and any failure to comply with this by-law shall render such person liable to prosecution under the Act.
- (2) **No person shall occupy or permit to be occupied** any singly built detached house **unless a certificate of completion and compliance** has been issued under these By-laws for the singly built detached house and any failure to comply with this paragraph shall render such person liable to prosecution under the Act. (emphasis added).

It is noteworthy that pursuant to Article 271 of the Mejlle, the delivery of a house is complete if the vendor gives the key of the house. In the case study, there is no CF, CCC and house key that have been given by the vendor (BIMB/developer) to signal the completion of the transaction. Thus, following the above building and construction law, there was no delivery of the duly completed subject matter to the detriment and chagrin of the purchaser consumer. Thus, *gharar al-fahish* (*exorbitant gharar*) occurred in the situation as illustrated in the case study. This contention is also made on the basis of *uruf* (custom) and protection of religion and wealth/property (*maqasid al-shariah*) recognized under Islamic jurisprudence (*Usul al-Fiqh*).

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6. Case Law on Abandoned Housing Projects Involving BBA

The authors found the following cases dealt with abandoned housing projects of which involved BBA, viz:

- 1) *Pripih Permata Sdn Bhd v. Bank Muamalat Malaysia Bhd* [2015] 6 CLJ 135;
- 2) *Bank Muamalat Malaysia Berhad v. Norizan Tajudin* [2013] 1 LNS 854;
- 3) *Khozim Malim v. Bank Kerjasama Rakyat Malaysia Bhd* [2012] 3 CLJ 860; and,
- 4) *Muhammad Daud bin Radzuan v. Amlslamic Bank Bhd* [Civil Appeal No. (R2)-12B-2009](High Court of Malaya at Kuala Lumpur).

6.1. *Pripih Permata Sdn Bhd v. Bank Muamalat Malaysia Bhd* [2015] 6 CLJ 135 (High Court of Malaya at Melaka).

In this case, the Plaintiff purchased three (3) units of shophouses/office (the property) from a developer to run a medical clinic business. To finance the purchase of the property, the plaintiff entered into a contract with the defendant bank using the principle of *Bay' Bithaman al-Ajil* (BBA). The price stated in the PPA was MYR (Malaysia Ringgit) 384,000.00 (USD 85,475.82). While the price stated in the PSA was MYR 764,051.40 (USD 170,072.62). the Plaintiff was to pay MYR 4,244.73 (USD 944.69) as monthly installment for 180 months.

The plaintiff made the payment as required under the agreement without failed. When the said property was abandoned and the developer was wound up, the plaintiff informed this to the defendant to stop making further payment. Nevertheless, the defendant requested the plaintiff to proceed with the instalment payment as usual and mentioned that legal action would be taken if the plaintiff failed to comply with the defendant's demand. The plaintiff paid all the balance of the selling price which was still outstanding but they had not yet obtained vacant possession of the said property. As the result, the plaintiff commenced a legal action against the defendant on the contention that (i) all documentations relating to the said agreement were null and void due to the concept of *Gharar al-Fahish* (*exorbitant gharar*); and (ii) The security interest contained element of *riba* (usury). The plaintiff claimed damages on the property price, compensation on rental payment and costs of refurbishing the clinic.

The High Court decided that the principle of *Gharar al-Fahish* (*exorbitant gharar*) is clearly applicable in this case from the commencement until the conclusion of the contract. The plaintiff had cautioned the defendant bank about the problematic housing development project and thus requested the defendant bank to stop making any progressive payment to the defaulting developer but this had not been heeded by the defendant bank. The court also held that the BBA documentation is also void. Further, according to the court, at the first look, the word 'security interest' can be interpreted as a 'guarantee interest'. 'Guarantee interest' is unlike 'profit

margin'. Thus, there is a conflict of meanings and that the 'guarantee interest' also known as 'security interest' that falls under the category of the prohibited *riba*' (usury). In implementing finance facility approved by Shariah, the defendant bank should stay away from any element of *riba*' (usury). The court also, on the balance of probability, allowed the application and claims of the plaintiff. Finally, the court ordered that (i) the amount of MYR 577,168.42 (USD 128,473.72) being the total instalments paid to the defendant bank be refunded to the plaintiff; (ii) the defendant bank pays to the plaintiff MYR 387,600.00 (USD 86,277.16) as damages for the rental of clinic and MYR 4,200 (USD 924.00) as damages for the cost of refurbishing the clinic, being the expenditures incurred by the plaintiff purchaser consumer.

6.2. Bank Muamalat Malaysia Berhad v. Norizan Tajudin [2013] 1 LNS 854 (High Court of Malaya at Shah Alam).

In this case, the defendant - Norizan Tajudin, being a purchaser, obtained an Islamic Home Finance Facility of *Bay' Bithaman al-Ajil* (BBA) to finance the purchase of a property from the plaintiff bank (Bank Muamalat Malaysia Berhad). The amount of the finance was MYR 292,405.42 (USD 65,123.705) inclusive of MYR 21,405.42 (USD 4,767.354) as Takaful Mortgage Plan and Long Term Houseowner's Takaful, MYR 154,414.00 (USD 34,390.65) for the purchase of land on which the said property would be erected thereat and MYR 116,586.00 (USD 25,965.70) as the cost to develop the land and the property. The property was a single-story unit of a bungalow house to be built on a land known as Plot No. 01, Nusa Lestari, Hulu Langat, Selangor under the holding of a master title GM 219(EMR 4873) of Lot No. 3022, Mukim of Ulu Langat, Selangor.

The said property was developed by a housing developer by name of Kamara Land Sdn Bhd ('Kamara'). Nevertheless, in the course of construction, Kamara stopped the construction of the said property and the said property was left abandoned. There was no vacant possession of the said property given to the defendant. The plaintiff had paid the progressive payment to Kamara. However, the plaintiff had not yet released two (2) progressive payment stages *viz* payment stage No. 9 and No. 10. The defendant too failed to pay the monthly instalment to the plaintiff. The defendant only made a partial payment of the purchase price.

As the defendant had failed to pay monthly instalment to the plaintiff, the plaintiff commenced a legal action and claimed an amount of MYR 902,188.50 (USD 200,932.86) being the sale price after deducting against the instalment paid by the defendant.

The issues that needed to be solved by the court are as follows:

- (a) Whether the plaintiff is responsible to ensure that the Kamara had a valid housing developer's licence on the Nusa Lestari housing development project?;
- (b) Whether the plaintiff had been negligent in releasing progressive payment to Kamara?; and,
- (c) Whether the plaintiff's act in commencing the legal action against the defendant was a pre-mature action as there was an undertaking letter of the developer given to the plaintiff?

The court held that it was not a duty and responsibility of the lending bank to investigate as to whether the certificate issued by the architect was valid and true. Thus, the bank is entitled to rely on the certificate of the architect in accordance with the provision under the agreement on the procedure to release progressive payment.

The court also held that the plaintiff does not have any responsibility to ensure the developer to possess housing developer's licence from the Ministry of Housing and Local Government (MHLG) and nor do they have any duty to ensure the project had obtained approval from Majlis Perbandaran Kajang (MPKj) (Municipal/Town Board) before the financing agreement can be executed by the defendant and plaintiff.

Further, the court held that the undertaking letter of the developer to refund all monies in the event they are unable to register the name of the purchaser into the issue document of title does not absolve the defendant from all obligations as the borrower to repay all instalment payments as agreed under the financing agreement.

In this case, the court found that the plaintiff had succeeded in providing his case on the balance of probability as required under the law. The court allowed the plaintiff's claim against the defendant on the amount of MYR 902,188.50 (USD 200,932.86) as at 13 October 2011 and additional damages at the rate of 1% per annum on the amount of MYR 82,529.51 (USD 18,380.74) as at 13 October 2011 calculated from 14 October 2011 until full settlement. The plaintiff's claims were allowed with costs.

What is clear is that the court in this case allowed the plaintiff's application to apply the whole selling price (MYR 902,188.50 (USD 200,820.99)) even though the repayment period has not yet expired. This decision is also the decision in *Maybank Islamic Berhad & Malayan Banking Berhad v. Goh Siew Lan & Chong Peng* [2012] 1 LNS 1013, *Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22, *Bank Islam Malaysia Berhad v Adnan bin Omar* [1994] 3 CLJ 735, *Dato Haji Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605 and *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9. However, in other cases, the court does not allow the financier bank to use the whole selling price when the repayment period has not yet expired. These cases are *Bank Islam Malaysia Berhad v. Azhar Osman & Ors* [2010] 5 CLJ 54, *Affin Bank Bhd v. Zulkifli bin Abdullah* [2006] 1 CLJ 438, *CIMB Islamic Bank Bhd v. LCL Corporation Bhd & Anor* [2011] 7 CLJ 594, *Affin Bank Bhd v. Zulkifli Abdullah* [2006] 1 CLJ 438 and *Malayan*

Banking Bhd v. Marilyn Ho Siok Lin [2006] 3 CLJ 796.

6.3 *Khozim Malim v Bank Kerjasama Rakyat Malaysia Bhd* [2012] 3 CLJ 860 (High Court of Malaya at Kuala Lumpur).

In this case, the plaintiff purchased a piece of land and a house that would be erected on it – one unit of double storey house in Gombak, Selangor known as Lot No. 863, Ukay Bistari, PH 1 held under the master title H.S.(D) 27426, P.T. No. 14325 and H.S.(D) 27427 P.T. No. 14326, Ulu Kelang, Gombak, Selangor ('the said property') from a developer (Platinum 88 Sdn Bhd (developer) and Daya Tenaga Muda Sdn Bhd (land proprietor)) at the price of MYR 246,400.00 (USD 54,855.53) to finance the purchase of the said property.

The plaintiff as the purchaser consumer applied for an Islamic Home Finance facility from the defendant (Bank Kerjasama Rakyat Malaysia Bhd) viz *Manzili Facility of Bay' Bithaman al-Ajil* (BBA). The defendant bank released an amount of MYR 70,000.00 (USD 15,583.95) and MYR 24,000.00 (USD 5,343.07) to EON Bank Bhd (developer's bank) and to the developer. The payment of RM 70,000.00 (USD 15,583.95) was to redeem the said property from EON Bank Bhd and that the amount of MYR 24,000.00 (USD 5,343.07) was for the first progressive development payment to the developer. The plaintiff had paid monthly instalment amounted to MYR 55,361.02 (USD 12,330.40) to the defendant bank but after the said property had been abandoned, the plaintiff stopped making further instalment payment. The plaintiff argued that the defendant bank had breached the BBA contract by releasing the said redemption amount to EON Bank Bhd, purportedly in contravention of clause 2(a) of the PPA read together with the Third Schedule of the Sale and Purchase agreement. To the plaintiff, the defendant bank should have only paid to EON Bank Bhd an amount of MYR 24,640.00 (USD 5,488.48) being the progress development payment when he executed the BBA and not the redemption sum of RM 70,000.00 (USD 15,583.95).

Thus, according to the letter dated 6 August 2004 issued by Messrs Khairil & Co being the defendant's lawyer mentioning that the payment that would be made by the defendant to EON Bank Bhd should comply with the Third Schedule. If the defendant bank failed to comply, the disbursement payment made would be in contravention of the BBA contract and the sale and purchase agreement. This could lead to the breach of the BBA contract and thus would entitle the plaintiff to terminate the contract. The plaintiff also relied on section 40 of the Contracts Act 1950.

The plaintiff also applied for a declaration that the defendant bank had breached the BBA agreement as the defendant had made a payment of MYR 70,000.00 (USD 15,592.62) to EON Bank Bhd in breach of the Third Schedule; a declaration that the plaintiff was not responsible to make any instalment payment to the defendant as the defendant had breached the BBA agreement; that the defendant to refund all instalment payments made (MYR 55,361.02 (USD 12,331.77)) which were paid by the plaintiff; that the defendant to repay a premium amount of Takaful Mortgage amounting to MYR 3,600.00 (USD 801.621); and, damages on breach of contract, exemplary damages and costs.

The issues that the court has to deal with in this case are as follows:

- 1) Whether the payment made by the defendant bank amounted to MYR 70,000.00 (USD 15,587.35) to EON Bank Bhd was a breach of the BBA contract?;
- 2) If in the affirmative, whether the plaintiff has a right to terminate the BBA contract?

The court rejected the plaintiff's application with costs. The court referred to section 40 of the Contracts Act 1950 which contains a phrase 'in its entirety'. Pursuant to this phrase, in order to consider the defendant bank had breached the BBA contract, the court opined that, the defaulting party must have refused to carry out or caused not to be able to carry out the whole contract. In other words, to prove the existence of breach of contract, the defendant bank should have been fully refused to carry out the BBA contract, the breach of which had caused the essential part of the contract could not be fulfilled.

Pursuant to clause 2(a) of the Property Purchase Agreement (PPA), the defendant bank is not just required to pay the sale price of the said property by way of progressive development release to the developer according to the Third Schedule of the Sale and Purchase agreement, the defendant bank too is subject to 'other documents' which provide the method of making disbursements to the developer and EON Bank Bhd (developer's bank). The term 'other documents' is wide and can cover the redemption sum issued by EON Bank Bhd to the defendant bank as well. Thus, the act of the defendant bank who had paid MYR 70,000.00 (USD 15,587.35) as the redemption payment was not a breach of the BBA contract, as this is also allowed in the BBA itself.

6.4. *Muhammad Daud bin Radzuan v. AmIslamic Bank Bhd* [Civil Appeal No. (R2)-12B-2009](High Court of Malaya at Kuala Lumpur).

In this case, the defendant purchased a property known as Lot No. 99, Type: Jasmine (Zone 2-3) at Lembah Beringin, Selangor ('the said property'). To finance the purchase of the said property, the defendant obtained an Islamic Home Finance facility from the plaintiff under the principle of *al-Bay' Bithaman al-Ajil* (BBA). The

price of the said property was MYR 100,000.00 (USD 22,248.14). The defendant paid MYR 11,888.00 (USD 2,644.86) to the developer (Lembah Beringin). The balance purchase price was financed through BBA. Through BBA, the defendant was required to repay the plaintiff an amount of MYR 241,440.00 (USD 53,715.98) in 240 months with monthly instalment of MYR 1,006.00 (USD 223.817). The defendant had paid 12 times the monthly installments amounted to MYR 12,072.00 (USD 2,685.92).

However, the development of the said property was abandoned. The developer undertook to refund all monies received to the plaintiff as the development of the property became abandoned.

The plaintiff had made a payment of MYR 38,461.60 (USD 8,558.99) to the developer. Due to the abandonment also, the defendant refused to make monthly installment to the plaintiff. The plaintiff commenced a legal action in the Sessions Court and the court allowed the plaintiff's claim. The defendant who was dissatisfied with the decision, appealed against the decision to the High Court. The High Court allowed the appeal.

The High Court was of the opinion that the main issue in this case was whether the plaintiff bank had proved the amount of debt of the defendants?

To the High Court judge, in this case there was no certificate issued by the responsible person who superintended the computer operation as required under sub-section 90A(2) of the Evidence Act or that the computer superintendant was called to give testimony on the computer operation. As the result, the said account could not be used as an evidence.

The High Court also found that the plaintiff had failed to produce the statement of account as required under clause 28 of the Sale Agreement Cum Assignment signed by the plaintiff. There was no evidence produced that showed the statement of account had been signed by the bank's manager or any authorized person. When examined, the said document did not have any signature as it was a computer printed statement.

Further, the High Court found that plaintiff's witness – SP 2 did not explain on how the financed amount paid by the plaintiff to the developer amounted to MYR 38,461.60 (USD 8,558.99) had become the defendant's debt of MYR 172,309.55 (USD 38,364.772). SP 2 when was cross-examined agreed that he had no knowledge on how the financed amount of MYR 38,461.00 (USD 8,558.99) had become MYR 172,000.00 (USD 38,296.52) and he said this amount was arrived based on computer system.

Following the above matter, the plaintiff had failed to prove the indebtedness of the defendant to him. The defendant's appeal was allowed with costs. The costs are to follow scale and the cost is MYR 2,000.00 (USD 445.264). The High Court also ordered that the deposit be refunded to the defendant.

7. Conclusion

In the opinion of the authors, *gharar al-fahish* occurred in the BBA contract involving abandoned housing projects as illustrated above. As the result, the BBA contract is void and the bank as the vendor should be responsible to refund all payment made by the purchaser customers or the vendor undertake to rehabilitate it (restitution and indemnity).

In order to ensure that the existence of *gharar*, particularly *gharar al-fahish* be eliminated in the BBA contract, the following suggestions should be considered. These suggestions are made on the basis of the methods under the Islamic Jurisprudence (*Usul al-Fiqh*) - *Maslahah Mursalah* (considerations of public interest) and *Sadd al-Dhara'i* (blocking the means to an it is expected end that is that is likely to materialize if the means towards it is obstructed)(Kamali, 2003 & Mahmassani, 1987). The following suggestions also, it is submitted, would comply with the objectives of *Shariah (Maqasid al-Shariah)*(Ibn Ashur, 2006). The followings are suggestions to resolve the issues illustrated above, namely:

- 1) The Islamic banks should only use BBA in the completed housing development projects which received CCC(Certificate of Completion and Compliance) or CF (Certificate of Fitness for Occupation) as the case may be;
- 2) The Islamic banks should require the housing developers to possess housing development insurance as a support in the event the housing projects they undertake become abandoned. Otherwise, Islamic Banks should not finance the purchase of the pending completed houses. The purpose of this insurance is to ensure that once the housing development becomes abandoned, the rehabilitating parties and/or the defaulting housing developers could have sufficient funds to run the rehabilitation and/or to pay equitable compensation to the aggrieved purchaser consumers; and,

The membership of the Shariah Advisory Council (SAC) of Malaysian Central Bank and Shariah Advisory Board (SAB) of the respective Islamic banks in Malaysia should also comprise of representatives from the consumer associations (for example, Persatuan Pengguna Islam (PPIM), National House Buyers Association (NHBA), Federation of Malaysian Consumers Associations (FOMCA) and Consumers Association of Penang (CAP)) in order to ensure that the decision making process in these bodies is sound and inclusive, thus can ensure that the products approved are truly 'consumer friendly', practical, equitable and fair to consumer public, not just being one sided and being banker-centric.

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