



CONTEMPORARY *FATWĀS* OF MUSLIM JURISTS
ON BBA PRODUCTS: A COMPARATIVE STUDY
BETWEEN THEORY AND PRACTICE

BY

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ABSTRACT

Among the popular Islamic banking and financing products is *Bai' Bithaman Ajil* (BBA) which is being widely employed in today's banking institutions. Muslim economists and jurists categorically define BBA as a type of sale where the buyer can pay installment on a differed basis, which includes profit margin agreed on by both the customer and the bank. Because it offers various flexible schemes that are compatible with *Shari'ah* rulings, BBA has increasingly become the most dominant product offered by Islamic banks and financing institutions. However, today BBA financial schemes are facing some crucial theoretical and practical challenges. Because of the similarity between some of the BBA financing schemes and conventional interest based financing practices, Justice Abdul Wahab Patail of the High Court of Malaysia ruled that the application of the BBA is contrary to the Islamic Banking Act 1983 taking note that the sale element in BBA "is not bona fide sale", bringing into question the profit portion of the facility. This and many other questions which concern procedural elements of BBA, particularly about the execution of PPA (Property Purchase Agreement) and PSA (Property Sale Agreement), shows that there is a missing link between theory and practice of BBA schemes thus challenging the financial applications of BBA in contemporary banks which offer Islamic banking products and services. Through comparative and analytical methods, this paper attempts to evaluate the structure, validity and the procedural relevance of BBA financing schemes. Analysis will be extended to the *Fatwās*/guidelines issued by AAOIFI, SAC and IFA to find out if there is any possibility of mismatch between BBA *Fatwās* and practice. Finally, the paper will provide some suggestions on how to overcome the contemporary challenges faced by BBA and improve its schemes.

ملخص البحث

تتناول هذه الدراسة إحدى المنتجات البنوك الإسلامية الماليزية المستخدمة في تمويل شراء البيت، وهو البيع بثمن آجل. ويعتبر هذا المنتج التمويلي أكثر المنتجات استخداما لدى البنوك الإسلامية في ماليزيا، وأكثرها إثارة للمناقشة لدى المستشارين الشرعيين ورجال البنوك الإسلامية. فلذلك يرى الباحث أن هنالك حاجة قوية لدراسة تطبيقات هذا المنتج في البنوك المعاصرة. فنقوم هذه الدراسة بالاستطلاع ومقارنة، ومناقشة الفتاوى التي تصدرها الهيئات الشرعية تجاه هذا المنتج. ثم تقوم الدراسة بمراجعة إجراءات هذا المنتج والاتفاقيات المنعقدة بين البنوك والعملاء فيه. وقد تبين من خلال هذا الاستطلاع والمراجعة بعد القضايا التي تحتاج إلى المناقشة والتحليل مثل بين العينة، وبيع المعدوم، وبيع، وشرط وغير ذلك. توصل الباحث من خلال هذه الدراسة المتواضعة أن تطبيقات البيع بثمن آجل لدى البنوك الإسلامية في ماليزيا وإن كانت بشكل عام موافقة للشريعة، ولكن إجراءاتها تخالف تماما متطلبات الفتاوى الشرعية التي من المفترض أن تكون مطابقا لها. وتقترح هذه الدراسة بعض التوصيات لتحسين تطبيقات هذا المنتج من المنظور الفقهي والقانوني.

APPROVAL PAGE

I certify that I have supervised and read this study and that, in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a research paper for the degree of Master of Science of Islamic Banking and Finance (IiBF).

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DECLARARTION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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CHAPTER ONE

INTRODUCTION

Islamic finance has emerged on the international financial landscape in a relatively short time. From humble beginnings in the 1960 the concept was put into practice in the 1970 when the first I.B. Dubai Islamic bank was launched. This was followed by the establishment of Jeddah based multilateral development institution, Islamic Development Bank (IDB), in 1975. Since then the Islamic finance industry has enjoyed consistently high growth (10%-15%) and continues to grow rapidly. Besides, Islamic banking is becoming more visible. There are more than 300 institutions in more than 65 countries, i.e. Malaysia, Pakistan, Bahrain, Kuwait, the UK, and Sudan engaged in some form of Islamic finance and according to some conservative estimates the total assets classified as Islamic exceeds USD600 billion.¹

The term “Islamic banking” means conduct of banking operation in consensus with Islamic teachings. It offers various schemes that are compatible with *Shari’ah* ruling including B.B.A (*Bai’ bithaman Ājil*) financing, joint venture (*Mushārah* and *mudhrabah*), *Bai’ al-Salam* or Islamic hire purchase, *Bai’ al-Īnah* overdraft, *al-Ijārah* and leverage leasing, *Salam and Istisna’* financing, Islamic hire purchase, (*Ijārah Thumma al-Bai’*) car financing, Islamic factoring, Active and Passive BBA, diminishing partnership (*mushārah mutanāqishah*) home financing, etc.

Among the popular Islamic banking schemes is BBA which is being widely employed by today’s banking institutions. Over the years since the inception of

¹ Askari, Hossein. Iqbal, Zamir. and Mirakhor, Abbas, (2009). *New Issues in Islamic Finance and Economic: progress and Challenges*, Asia: Willey and Sons, p. 123.

Islamic Banking, B.B.A has increasingly become the most dominant product offered by Islamic banks. BBA is a type of sale where the buyer can pay installment on a differed basis, which includes profit margin agreed on by customer and the bank.² It is widely used in various Islamic financing instruments, including for bridging finance, cash line facilities, contract financing and letters of credit. In theory, the structure of B.B.A has been approved by various *Sharī'ah* scholars. Al-Barakah Banking Group on their *Fatwā* concluded that sale of *murābaḥa* or B.B.A that is known in Islamic *Fiqh* is permissible and agreed upon unanimously. According to the Islamic *Fiqh* Academy Resolution No 40-41 (2/5 and 3/5) *murābaḥa* sale by purchase orderer is permissible on goods already in the physical possession of the seller as required by the *Sharī'ah*, provided the seller carries the risk of loss before delivery or the consequences of returning the purchased goods because of concealed defect or any other reason justifying the return of the goods after the reception, provided the condition of the sale are met and with the absence of any impediments.

However, increasing criticism of the practices of these products in Islamic banks has created more concern that shows that something is missing, which makes many scholars doubt its compliance with *Sharī'ah* rulings. According to Saleem, accepting the B.B.A mode of financing as Islamic allows Islamic banks to engage in deceptive and dishonest practices.³ He says it is just a translation of Western financial structure from English to Arabic. Rosly is of the view that BBA is drawn as a loan

² Rosly S. Azhar, *Critical Issues on Islamic Banking and Financial Market. Islamic Economic, Banking and Finance, Investments, Takaful and Financial Planning*, (USA: Library of Congress Control, 2004), 89.

³ Saleem, Muhammad, *Islamic Banking. A \$300 Billion Deception: Observation and Argument on Ribā. Islamic Banking Practices, Venture Capital and Enlighten*, (USA: Xlibris, 2005), 21.

than a sale.⁴ He mentions that unjustified enrichment is against the concept of *Ta'awun* as *Ta'awun* will not allow only one party risking their assets while the others do not. He also opines that there is no risk taking in the current BBA financing. Meera and Abdul Razak found that the wide spread application of BBA has put customers as well as bankers in jeopardy particularly during volatile economic conditions.⁵ Siddiqi suggest that *Bai' muajjal* contract is removed from the list of permissible methods altogether in order to save interest-free banking from being sabotaged from within.⁶ This is because the BBA is similar to fixed rate debt financing. Recently, for example, Justice Abdul Wahab of the High Court of Malaysia ruled that the application of BBA is contrary to the Islamic Banking Act 1983, taking note that the sale element in BBA "is not bona fide sale" and bringing into question the profit portion of the facility. In another case related to Dato HJ Nik Bin Daud versus BIMB (1996) 1CLJ, the court found that the execution of PPA (Property Purchase Agreement) and PSA (Property Sale Agreement) merely constitutes part of a process required by Islamic bank procedure to enable the bank to provide financing. All these criticisms show that there is a missing link between theory and practice of BBA. Are the practitioners marketing their own ways in offering BBA that contradict what has been approved by *Shari'ah* Scholars? Is the present banking structure incompatible with the practice of BBA? Are the theory and *fatwās* of BBA outdated and irrelevant to modern banking practice? Is there any possibility for mismatch between *fatwās* and practice?

⁴ Rosly S. Azhar, *Critical Issues on Islamic Banking and Financial Market. Islamic Economic, Banking and Finance, Investments, Takaful and Financial Planning*, (USA: Library of Congress Control 2004), 89.

⁵ Meera, Ahmed Kamil, and Dzuljastri Abdul Razak, "Home Financing through Musharakah Mutanaqisah Contracts: Some Practical Issues", *Journal of King Abdul Aziz University*, Vol. 22, No. 1 (2009), 122.

⁶ Siddiqi, Muhammad Nejatullah, *Teaching Economic From Islamic Perspective. Islamic Economic Research Series*, (Riyadh: Scientific publishing Center, King Abdul Aziz University, 1996), 44.

Presently, to the best knowledge of the author, there has so far never been any formal study tracing the *Fatwās* on Islamic banking products specifically related to BBA. The present study intends to fill this research gap.

STATEMENT OF THE PROBLEM

Though Islamic banking has been expanding rapidly and offering various products, nonetheless, some elements within Islamic banking products have created the criticism of many scholars. (Like BBA financing) With regard to the concept of *Bai' Bithamanin Ājil*, a problematic aspect related to contemporary banking application is in what it seems to some scholars to be an attempt by some banking institutions to dilute the concept of BBA. This increases the difficulty faced in today's BBA banking practices and whether or not the current practice of BBA by Islamic Banks is *Shari'ah* compliant. According to Saleem who is one of the contemporary Islamic finance scholars and practitioners, "an honest evaluation of BBA as currently practiced would seem to indicate that Islamic banking is a terrible failure".⁷ Perhaps, this is why Justice Abdul Wahab on his ruling stated that application of BBA is contrary to the Islamic Banking Act (IBA 1983) and Banking and Financial Institutions Act (BAFIA 1993). Besides, some contemporary Muslim scholars insist that the current practice differs only cosmetically from those of conventional commercial banks. Yet, in theory, there is no dispute that the concept of BBA in principle is Islamic in nature and hence, does not contradict the *Qur'ānic* concept of *al- Bai'*.

⁷ Saleem, Muhammad, *Islamic Banking. A \$300 Billion Deception: Observation and Argument on Ribā. Islamic Banking Practices, Venture Capital and Enlighten*, (USA: Xlibris, 2005), 21.

Though a number of studies pertinent to the realm of BBA have been conducted,⁸ nevertheless, such studies focused mainly on the concept and substance of BBA. Thus, to the best of knowledge of the researcher there has so far never been any formal study tracing back the *Fatwās* on Islamic banking products related to BBA, and how to bridge the gap between the theoretical position and practical applications of BBA banking schemes. Therefore, the research attempts to investigate if the widening gap is attributed to other factors such as, the structure, legal framework or the *Fatwās*? At the same time, the research investigates the modern practice of BBA in light of general principles and *Maqāsid al-Sharī'ah*. In conclusion, this study attempts to provide practical suggestions and advice to the practitioners and industry in general.

OBJECTIVES OF THE STUDY

Besides the controversy over the permissibility of current BBA practices, according to Islamic *Fiqh* Academy, *murābaḥa* or BBA sale by purchase orderer is permissible. Hence, due to the development in contemporary business environment, there is always a need to bridge between theory and practice. Thus, the researcher strongly believes that there is urgent need to investigate whether the failure of the current BBA banking practice is due to the *Fatwās* issued on BBA product and schemes, particularly, whether the *Fatwās* have failed to bridge between BBA in theory and BBA in banking practices.

⁸ Rosly S. Azhar, *Critical Issues on Islamic Banking and Financial Market. Islamic Economic, Banking and Finance, Investments, Takaful and Financial Planning*, (USA: Library of Congress Control, 2004), 89. : Saleem, Muhammad, *Islamic Banking. A \$300 Billion Deception: Observation and Argument on Ribā. Islamic Banking Practices, Venture Capital and Enlighten*, (USA: Xlibris, 2005), 21: Meera, Ahmed Kamil, and Dzuljastri Abdul Razak, "Home Financing through *Musharakah Mutanaqisah* Contracts: Some Practical Issues", *journal of King Abdul Aziz University*, Vol. 22, No. 1, (2009), 122.

The research attempts to investigate the missing links between the theory and the practice of BBA, and will broadly review and trace the *Fatwās* issued by scholars, such as, Accounting and Auditing of Islamic Financial Institution (AAOIFI), *Sharī'ah* Advisory Council (BNM), and Islamic *Fiqh* Academy (IFA) on BBA banking schemes. This is because, despite the fact that more than two decades have lapsed since the inception of the Islamic banking and finance, this research hypothetically argues that the present Islamic banking strategy to achieve economic development is still under trial.

The paper begins with analysis of BBA and review of the current banking practices. Furthermore, the research aims to compare and cross-examine various *Fatwās* of classical and contemporary Muslim jurists on BBA banking schemes in order to find out the act and the proper applications of BBA. Likewise, in order to give some evidence about the development of BBA, the research will review the *Fatwās* issued on the stages of BBA such as promise to purchase phase, possession phase, selling phase, and delivering phase, in light of the general principles and *maqāsid al-Sharī'ah* and public welfare (*maslaḥa*).

Therefore, this research aims to do the following process:

1. Identify issues that require *Fatwās* concerning BBA and hence, identify *Fatwās*/guidelines issued on these issues by IFA (Islamic *Fiqh* Academy), AAOIFI (Accounting and Auditing of Islamic Financial Institution), and SAC (*Sharī'ah* Advisory Council).
2. Analyze these *Fatwās* in relation to these issues and investigate modern practice of BBA in light of the general principles and *Maqāsid al-Sharī'ah*.

3. Discuss the evidence or justification in supporting the validity or invalidity of the *Fatwās*.
4. If any, what are the suggestions or modifications that could be made to improve the practice of BBA from the *Fiqh* point of view?

NECESSITY OF THE STUDY

The study is indeed of great necessity as the practice of BBA in the Malaysian Islamic banking industry represents the largest mode of Islamic financing applied by financial institutions. Hence, the soundness and the validity of this mode of financing are crucial. This is what makes a thorough and objective study or evaluation of this particular mode of financing indeed, a great necessity. This is also due to the fact that most of the literature either condemn or support the practice of BBA, and lack objectivity and details on the *Fatwās* issued.

LIMITATION

The scope of the study will be on the current practice of *Bai' Bi Thaman Ājil* (BBA) in Malaysian financial institutions, be it the full-fledged Islamic financial institutions or the conventional financial institutions operating Islamic banking business through their “Islamic windows.” Through reading the available BBA banking products of Malaysia, the researcher is convinced that the documents and procedures applied by Islamic financial institutions in Malaysia are similar. As such, BBA documents of some financial institutions would be analyzed. For the sake of comparison and contrast, the study will also analyze the *fatwās*/guidelines issued on the four stages of BBA by three Islamic organizations, i.e. Islamic *Fiqh* Academy (IFA), Accounting

and Auditing for Islamic Financial Institutions (AAOIFI), and *Shari'ah* Advisory Council of Central Bank of Malaysia (SAC). Other areas of BBA will not be covered.

RESEARCH METHODOLOGY

This study is based on primary and secondary data available on the subject. The primary data of the study includes contractual agreements, offer letters and other legal documentations used in executing BBA contracts in Malaysian Islamic banks. Besides, banking manuals and operating procedures will also be the source of primary information for the study. Similarly, the *fatwās*/guidelines issued by (IFA), (AAOIFI), and (SAC) will remain essential source for the study. Literature and academic texts on the application of BBA, including academic journals and periodicals, books, theses, and internet resources, would be analyzed as secondary resource. Hence, the study employs both analytical and comparative methods. For the analytical method, it will be employed to analyze the procedures applied in executing BBA contracts and their legal effect on the obligations and liability of the contracting parties. The findings would then be compared and reviewed with the SAC's *Fatwās* and that of AAOIFI, and the *Maqāsid al-Shari'ah*.

CHAPTER TWO

LITERATURE REVIEW

Contemporary Muslim jurists and professionals in the banking industry have provided useful contributions throughout the last two decades to present an interpretation of what they perceived to be authentic and correct applications of BBA product. A more appropriate manner to start with the research is to look, first, into the jurists' interpretations of BBA, then into the works and writings of contemporary banking scholars. Whilst various writings are available today on BBA schemes, nonetheless, at the time of writing this proposal, the writer could not find any formal study tracing *Fatwās* on Islamic banking product specifically related to BBA. Most of the writings either discuss it in general or rather focus on other aspects of it such as its performance, benefits, or comparisons made with the conventional mode of house financing. Indeed, there are quite a number of works by jurists and financial researchers on the subject, though this effort varies in nature from age to age and from one country to another. However, for the purpose of precision and clarification, the researcher will look at some of the scholars' contributions in the following sections.

Meera and Abdul Razak carry out a comparative analysis between BBA and *Mushārahah Mutanāqīshah* (MMP)⁹ as a means of house ownership. In this regard the paper attempts to argue in favour of MMP as a better alternative to the conventional mortgage and Islamic BBA. The paper concludes that the MMP has several advantages over the BBA for the customer. Apart from achieving *Shari'ah*-compliant consensus, it can be made to avoid interest (*Ribā*) totally and can reduce the cost of

⁹ Meera, Ahmed Kamil, and Dzuljastri Abdul Razak, "Islamic Home Financing through *Musharakah Mutanāqīshah* Contracts: Some Practical Issues", *Journal of King Abdul Aziz University*, Vol. 9, No. (2009), pp 5-30.

homes and the duration of financing. Meera and Razak find that MMP is less attractive to the bankers compared to BBA. As a benchmark for rental, the paper suggests the use of a Rental Index or House Price Index in determining the rental to be charged for each specific *Ijārah* contract period. However, the paper does not give much emphasis on the implementation of MMP and the consequences in case of default by the customer.

Osman Sabran's monumental work on BBA namely "the Contract of *al-Bai' Bithaman Ajil* in Interest-Free Financing Scheme" remains one of the important contemporary writings on the subject.¹⁰ This book covers quite well both aspects *Fiqh* and the operational side of the BBA. Focus is not given to any particular asset financed through this mode of financing. The study has been conducted on a few financial institutions such as Bank Islam Malaysia Berhad, Bank Bumiputera Malaysia Berhad, Malayan Banking Berhad, Abrar Finance Berhad and the Housing Loan Unit, Government of Malaysia.

The writer highlights a few issues in the procedures of BBA and gives a few suggestions on how to resolve them. However, these suggestions are too brief and vague. Most of the information given, especially on the procedures of BBA, is also not properly referred to which can cause a lack of credibility in the arguments made.

The article written by Rosly, Sanusi, and Norhashimah, on the role of *khiyār al-ayb* in *al-Bai' bithaman ājil* financing is among the literature available on BBA.¹¹ The article addresses specifically the issue of *khiyār al-ayb* (option of defect) in BBA financing. Quoting examples of BBA home financing, the writers point out the absence of *khiyār al-ayb* in BBA, which is a significant element in a sale contract.

¹⁰ Osman Sabran, *The Contract of al-Bay Bithaman Ajil in Interest-Free Financing Scheme*, (Johor: University Teknologi Malaysia, Darul Takzim, 2000), 40.

¹¹ Saiful Azhar Rosly, Mahmood Sanusi, and Norhashimah Mohd, "The role of *khiyār al-ayb* in *al-bay bithaman ajil* financing", *International Journal of Islamic Financial Services*, Vol. 2, No. 3. (nd).

According to them, this is evident in the provision stated in the Property Purchase Agreement (PSA) where the bank is exempted from any liability pertaining to any defects in the house. The writers conclude that a sort of legal device (*'illah fiqhiyyah*) is made to affect BBA.

Nevertheless, it is felt that a more in-depth study on the nature of *khiyār al-‘ayb* and the rules regarding it is still needed. This is especially so, when such a negative conclusion is made on the application of BBA. A more objective discussion which includes the views and arguments of the other party i.e. the Islamic financial institutions practicing BBA should be conducted.

Al-Qardāwī, who is one of the prominent contemporary scholars, discusses the current implementation of *Bai‘ al-murābaḥa* in Islamic financial institutions.¹² The writer begins by stating a number of decrees and rulings made at a few conventions and by some scholars on the legitimacy of the practice of *murābaḥa lil-Āmir bi al-siira’* (*Murabaha* to the purchase orderer). He then states some guidelines on the nature of Islamic commercial law. Then he defends the practice and rebuts certain allegations made against the legitimacy of the practice.

The significance of this book to the purpose of the present study is that BBA was originally initiated based on *Bai‘ al-Murābaḥa*. Until the present moment, *Bai‘ al-Murābaḥa* is very synonym to BBA. In this sense, a study on the relation of both contracts is much needed. As the book was written in 1987, it is also important that a cross-check be made on the current practice of *Bai‘ al-Murābaḥa* and the practices described in the book.

¹² Yussuf Al-Qardawi, *Bay‘ al-murabaha li al-amir bi al-shira’ kama tujrihi al-masarif al-islamiyyah: dirasah fi al-nusus wa al-qawa’id al-shar’iyyah*, (Al-Cahirah: Maktabah Wahbah, , 1987), 25.

One of the important articles for the literature review of the study is Norhashimah's article.¹³ It is basically a case commentary involving particularly *Bai' Bi Thaman Ajil* (BBA) in Malaysia. Two cases i.e. *Bank Islam Malaysia Bhd v Adnan bin Omar* and *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* which involve BBA are presented in the article. This article is essential as it discusses BBA from the legal perspective. As it is well known, *Shari'ah* pays great attention to the legal perspective of a contract as it is the law that describes and gives the true picture of a contract.

Another important book for the study is a book written in 1987 by Dr Muhammad 'Aqlah.¹⁴ It discusses the ruling of *Bai' al-taqsid*, or installment-sale, from the *Shari'ah* and legal perspectives. Generally, the concept of *Bai' al-taqsid* is similar to BBA as it involves price increment from deferred payment. The book is very relevant especially as it analyzes a number of *Fiqh* issues at great length and is based on recognized *Fiqh* textual references.

Saifur Azhar, in another article, discusses the performance of Islamic banks in a high interest rate regime, the salient features of BBA and the relationship between interest rates in loans and profit rates in BBA during periods of interest rate volatility.¹⁵ The study's concern is in the second part which are the salient features of BBA. However, it is noted that the procedures involved in transacting BBA are different from the current practice since in the procedures presented, the innovation agreement is still used.

¹³ Norhashimah Mohammad, *Islamic Banking: Case Commentaries Involving Al-Bay Bithaman Ajil*, 3rd Edition Malayan Law Journal, 1997 at 125.

¹⁴ Muhammad 'Aqlah al- Ibrahim, *Hukm bay' al-taqsit wa al-qanun*, (Amman: Maktabah Al-Risalah Al-Hadithah, 1987), 22.

¹⁵ . Saifu Azhar Rosly, "Al-Bai Bithaman Ajil Financing: Impact on Islamic banking performance", *Thunderbird International Business Review*, Vol. 41, No. 4/5, (1999): 210.

Saiful Azhar, in this article, comments on the arrangement made between the customer, developer and the bank. According to him, the role of the bank as a trader, namely the buyer of property from the vendor and seller of the same property to the customer, is somewhat clouded and misconstrued. This is because a sale and purchase agreement between the bank and the vendor or developer is relatively absent. He asserts that the role of the Islamic bank as a financier is most revealing (rather than a trader) under this state of affairs. He goes on to say that if the Islamic bank desires to embrace the spirit of *al-Bai'c*, as the Qur'ān has rightfully intended, it must hold the risk of possession of the property before resale. One of the conclusions made by the author is that the Islamic bank should venture into the construction business itself rather than assume the role of a trader as direct production activity produces higher profit.

Another important paper for the study is one written by a renowned lawyer in the Islamic banking industry in Malaysia.¹⁶ Perhaps because BBA is considered as the most commonly used financing facility, Mohammad Illiyas discusses legal issues pertaining to BBA in this paper. The writer asserts that the existing legal framework in the implementation and the enforcement of Islamic banking documents in Malaysia is glaringly inadequate. He then cites one specific case involving BBA which is *Bank Islam Malaysia Bhd v Adnan bin Omar*. The writer highlights four particular issues in the BBA transaction. Firstly, on the interest in the property being transacted, he raises the question of what type of (legal or beneficial) interest or the extent (complete or partial) of interest the customer should have in the property before he can enter into an agreement to sell it to the financier in order to receive the facility amount. While

¹⁶ Mohammadd Illiyas, *Islamic/ Interest-Free Banking in Malaysia: Some Legal Considerations*, 3rd Edition, Malayan Law Journal, 1997 at 133.

discussing this, the writer explains the process involved in transacting BBA, without mentioning it by name. Since the paper was written in 1995, it is noted that the “novation agreement” was still in use at that time.

Secondly, the writer raises the issue of the recovery of the balance of the sale price upon default. It is argued that the bank should be stopped from recovering the full balance of the sale price before the expiry of the period and should be permitted to make a claim only for unpaid installments.

Thirdly, the writer brings up the issue of certain banks stipulating in their documents that they will be entitled to obtain adequate compensation from the customer in the event that their cost of funds increases. Lastly, there is the issue of to what extent the rule in *Re Connolly Bros Ltd (No 2)* applies? The principle used in the case is that a restriction on a company’s power to create subsequent prior ranking charges contained in a debenture creating a floating charge, does not affect a charge created over a property to secure financing with which the purchase price of that property is paid by the company.

Yasmin, Safian, and Amin attempt to study the application of *maṣāliḥ mursalah* (one of the principles of Islamic jurisprudence) in BBA.¹⁷ They start by discussing the meaning of *maṣāliḥ mursalah* and guidelines in applying the principle. Then they go on to describe the modus operandi of BBA in Malaysia as well as the documents involved in executing it. Lastly, they try to answer whether the principle of *masāliḥ mursalah* adopted in BBA is justified or not.

¹⁷ Yasmin Mohd. Safian and Amir Shaharuddin, “*Masalih Mursalah: Its Application in Malaysian Islamic Banking and Finance: A Case Study on BBA*, (Selangor: Kolej University Islam Malaysia, 2004), 55.