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***IJARAH MAUSUFAH FI ZIMMAH ISLAMIC HOME FINANCE IN
DEALING WITH ABANDONED HOUSING PROJECTS IN
MALAYSIA: FEATURES, ISSUES, AND PROSPECTS***

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Abstract

There have been many Islamic Home products introduced in Malaysia since the establishment of its first Islamic bank – Bank Islam (M) Berhad in early 1980s. However, hitherto, it is still doubtful that these products have fully complied with Islamic law. This is evident in the issue of justice and *gharar* in face of the problems of abandoned housing projects. This paper discusses *Ijarah Mausufah Fi Zimmah* (IMFZ) as one of the Islamic Home Finance products that are currently applicable in Malaysia. The discussion entails the issues of abandoned housing projects and examines as to whether the terms in IMFZ can fully deal with the issues. This paper used *shariah* (Islamic Law), legal doctrinal and qualitative research methodologies. This paper shows that the current applicable terms in IMFZ are inadequate and warranted them to be replaced with terms that provide better equitable protection to aggrieved purchaser in abandoned housing projects, comply with the *shariah* and dispense justice to the contracting parties. The outcome of this paper will improve the theory and practice of Islamic banking industry in dealing with this issue in Malaysia.

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1. Introduction

It is a common practice that to Muslims in Malaysia who wish to purchase houses to use Islamic Home Finance products offered by Islamic banks. The purpose of such an act is to ensure that their house transaction follows the requirements of Islamic law, i.e. to avoid *riba'*(usury) and other elements affronting Islamic law such as *gharar* (uncertainty) and injustice. This also indicates a sign of their obedience to God. It is normal practice in Malaysia that purchaser consumers execute housing contracts with the housing developers purchasing the pending completed houses. Once the relevant contractual documents, between the purchaser consumers and the housing developers, are validly enforced, the purchaser consumers will then apply to Islamic bank to finance the house purchase using any of their choices of Islamic Home Finance products (Md Dahlan & Aljunid, 2011; Md Dahlan & Syed Abdul Kader, 2010; *Khozim Malim v Bank Kerjasama Rakyat Malaysia Bhd* [2012] 3 CLJ 860 (High Court of Malaya at Kuala Lumpur); *Pripiah Permata Sdn Bhd lwn. Bank Muamalat Malaysia Bhd* [2015] 6 CLJ 135 (High Court of Malaya at Melaka); *Public Bank Bhd v. Mohd Isa Mohd Nafidah* [2013] 1 CLJ (Sya) 448 (High Court of Malaya at Kuala Lumpur); *Bank Muamalat Malaysia Berhad v Noriza Tajudin* [2013] 1 LNS 854).

Nonetheless, it is the observation of the authors that there are inadequate terms under the Islamic Home Finance products that are able to provide protection to customers against losses in abandoned housing projects. Thus, this paper will highlight this issue and attempts to explain and provide suggestions for the improvement of Islamic Home Finance product, with particular emphasis on *Ijarah Mausufah Fi Zimmah*.

2. Problem Statement

One of the chronic problems in housing industry in Malaysia is the problems of abandoned housing projects. This problem has been persisted since 1970s. Despite there are many laws enacted and introduced by government to deal with this problem, until today this problem has not been fully and effectively addressed and eliminated. The victims are the purchaser consumers. They suffer irreparable damage, sufferings, grievances and losses, pecuniary and non-pecuniary, without getting adequate equitable and appropriate remedies.

Initially in Malaysia, just after the Merdeka day (Independence) in 1957, the Federal Government was the sole provider of public housing. However, as the Federal Government had inadequate funds to provide public houses and that the demand for the housing was huge, the Federal Government offered the private housing developers to participate in providing houses to mass public in Malaysia. The Federal Government only govern the activities of these private housing developers via the housing law, specifically the Housing Developer's (Control & Licensing) Act 1966 (Act 118) and regulations made thereunder (Md Dahlan, 2009).

Through certain research, the main grounds causing abandonment of housing projects due to the failure of the government to adopt and implement policy and law that require the mandatory system of "full build then sell" by the developers, no mandatory requirement for the developer to possess housing development insurance and, there is specific regulations that can duly control rehabilitation of abandoned housing projects.

To aggravate the above problem, it is evident that the housing loan agreements between the financiers and the purchaser consumers including the Islamic Home Finance too, are dearth of conditions that can protect the rights of the purchasers if the housing unit purchased are abandoned (Md Dahlan, Mohd Noor., & Shuib, 2017a; Md Dahlan, Mohd Noor., & Shuib, 2017b; Md Dahlan, Shuib., & Mohd Noor, 2017; Md Dahlan, Abdul Jalil, Zainol., & Maamor, 2016; Md Dahlan., & Masum, 2014; Md Dahlan, 2014).

It is evident that the terms in Islamic Home Finance products are inadequate to protect the rights and interests of the aggrieved purchasers in abandoned housing projects. This tantamount to injustice and a breach of the Islamic concept of *al-Ghunmu bi al-Ghurmi* and prohibition against *gharar* in that, there is no corresponding and reciprocal responsibility on part of Islamic bank to protect the interests of purchaser customers in the event of abandonment of housing projects despite clear terms that the purchaser customers must repay to the Islamic bank (Md Dahlan, Mohd Noor & Shuib, 2017).

Thus, this paper aims to analyse the conditions in the Islamic Home Finance IMFZ vis-à-vis the abandoned housing projects in Malaysia. Islamic law warrants that all contracts must follow with the requirements of Islamic law. For example the requirement that the contract must not contain any *gharar* (uncertainty) elements and that the conditions must be just and balance between the promisor and promises contracting parties.

3. Research Questions

- i. Whether IMFZ as applicable in Malaysia is sufficient to provide protection to customers in abandoned housing projects?
- i. If insufficient, why?
- ii. If the terms are insufficient, how to improve IMFZ?
- iii. What are new suggestions to improve IMFZ?

4. Purpose of the Study

- i. To study the terms in IMFZ.
- ii. To study the issues in IMFZ in face of the problems of abandoned housing projects.
- iii. To propose improvement in the terms of IMFZ in face of the problems of abandoned housing projects.

5. Research Methods

This paper used Islamic legal research methodology in order to examine the IMFZ contractual terms, issues and proposal. The legal research is a hybrid in nature. It consists of applied research, academic research, analytical/critical research, descriptive research, library-type and experimental study. The research process entails the discovery of the principles and case law for the purpose of identifying and examining the problems and proposing appropriate suggestions (Zahraa, 1998).

The subsequent methodology is a social research methodology. It uses textual analysis and interviews with relevant parties. The authors chose a qualitative case study in order to enable authors to examine in depth the issues arising from IMFZ that involve abandoned housing projects. Qualitative

methodology involves exploring people's life, histories or everyday behaviour. This aspect is not grasped through quantitative research methodology. By using the qualitative method, the collected information and data will be more and in depth as it involves a deeper study of a particular situation. The data sources are substantially from the files of KNM Consulting Services, Jalan Medan Tuanku, Kuala Lumpur ('KNM') and from a legal firm of Khamdan & Co, Advocates & Solicitors in Shah Alam, Selangor. In addition, the authors also interviewed other relevant parties to ensure validity, reliability and triangulation of the research. These parties namely are the shariah advisors of Islamic banks, lawyers and bank officers (Silverman, 2000; Yin, 2003).

6. Findings

Islamic Home Finance Product *Ijarah Mausufah Fi Zimmah* (IMFZ) is an innovation in Islamic Home Finance Product. To illustrate this product, the authors will elaborate this product through a sample product documentation as practised by Kuwait Finance House (Malaysia) Berhad (No. Syarikat 672174-T) ('KFH'). The authors managed to obtain a sample document relating to IMFZ from the above law firm – Messrs Khamdan & Company in Shah Alam, Selangor. This product involves several documents *viz* *Asset Purchase Agreement* (APA) and *Ijarah Facility Agreement* (IFA). Below are the salient features of IMFZ.

- 1) Vide a sale and purchase agreement between a customer and a developer/vendor, the customer agreed to purchase a property from the developer/vendor. Through this agreement, the customer is considered as the beneficial owner of the said property (Recital B-Asset Purchase Agreement; Recital A – *Ijarah Facility Agreement*; Recital C-Asset Purchase Agreement; Recital C – *Ijarah Facility Agreement*).
- 2) To finance the purchase of the said property, the customer applied to KFH and through a finance facility provided by KFH known as *Ijarah Mausufah Fi Zimmah Asset Acquisition Financing-I* KFH would finance the purchase of the said property from the developer/vendor (Recital A – Asset Purchase Agreement; Recital A – *Ijarah Facility Agreement*; clause 2.1(i)(ii) Asset Purchase Agreement).
- 3) Through the *Asset Purchase Agreement*, the customer sold the said property to KFH and in turn KFH purchased the said property from the customer. Via the said agreement also, KFH becomes the beneficial owner of the said property. KFH later paid the balance purchase price to the developer/vendor (Recital C-Asset Purchase Agreement; Recital C – *Ijarah Facility Agreement*; clause 2.4 *Ijarah Facility Agreement*; clause 2, 3.1(b), 3.6 Asset Purchase Agreement).
- 4) KFH agreed to sell the said property to the customer by way of lease sale (hire purchase) under the principles of *Shariah Ijarah Mausufah Fi Zimmah* via an agreement known as *Ijarah Facility Agreement* for certain duration at a certain price until the said property becomes fully owned by the customer. The difference between the prices stated in the *Asset Purchase Agreement* and *Ijarah Facility Agreement* is a profit obtained by KFH (Recital D-Asset Purchase Agreement; Recital D – *Ijarah Facility Agreement*; clause 2.1, 2.2, 2.3

Ijarah Facility Agreement; clause 3.1 *Ijarah Facility Agreement*; clause 3.2(b) *Ijarah Facility Agreement*).

- 5) Throughout the lease sale period (hire purchase period) of the said property, KFH, generally, would be responsible to repair any damage, provide replacement and carry out maintenance of the said property. KFH as the beneficial owner of the said property would be responsible to obtain insurance of the said property against fire, civil commotion, damage due to malicious intent, explosion and other relevant risks (clause 2.8, 11.1 *Ijarah Facility Agreement*).
- 6) While the customer, on behalf of KFH, shall be responsible to carry out repairing work, replacement and maintenance of the said property, generally and substantially – being the ordinary maintenance and repair; major maintenance including responsibility to obtain insurance from the KFH approved panels. In the event, the insurance coverage is insufficient to provide protection to the said property, the customer shall personally be liable for the balance risk uncovered by the insurance. The customer shall also be liable for any loss/damage risk of the said property (clause 2.6, 10.1, 11.2, 12.2 *Ijarah Facility Agreement*; clause 6.01 Annexure - First Party Legal Charge).
- 7) If the purchaser made full settlement of the lease sale (hire purchase) and that the period of the lease sale has completed or the said property has been a total loss not due to any negligence of the customer, the customer shall need to pay RM 1.00 (Residual Value) as an exercise price (clause 3.3(a), 15.2(a)(c) *Ijarah Facility Agreement*).
- 8) If the customer terminates the lease sale facility (hire purchase facility) before the lease sale expiry period and during the construction period, the customer shall be charged with an exercise price covering the whole purchase price paid by KFH to the developer/vendor under the *Asset Purchase Agreement*, advance lease sale rental to KFH and a sum equivalent of 3% of the purchase price (clause 3.3(b)(i)(1)(2)(3), 15.2.(b) *Ijarah Facility Agreement*).
- 9) If the customer terminates the lease sale (hire-purchase) facility before the expiry period and during the lease sale (hire-purchase) period, the customer is imposed with an exercise price covering the arrears on lease sale (hire-purchase) sum unpaid; arrears on variable element portion of the lease sale rental, if any, arrears on compensation imposed on late payments of lease sale rental, if any; all costs and expenses borne by KFH, if any; a sum of 3% of the purchase price; a charge of one month lease sale rental payment (a sum equivalent to one month prevailing variable element) on the customer, in lieu of one month notice (clause 3.3(b)(ii)(1)(2)(3)(4)(5)(6), 15.2(b) *Ijarah Facility Agreement*).
- 10) If the lease sale facility is terminated due to the default of the customer or the property is of a total loss due to customer's negligence and this happens during the construction period, then the customer is required to make the following repayments: full purchase price paid by KFH to the developer/vendor under the *Asset Purchase Agreement*; an advance lease sale rental payment made by the customer to KFH and an amount of 3% of the purchase price (clause 3.3(c)(i)(1)(2)(3); 15.1(a)(b) *Ijarah Facility Agreement*).

- 11) If the lease sale facility is terminated due to the default of the customer or the property is a total loss as a result of the customer's negligence and this happens during the effective period, then the customer is required to make the following payments: the outstanding fixed element portion for the lease sale rental for the remaining term of the lease sale term; arrears of the advance lease sale rental according to variable element portion; arrears on the damages chargeable due to the late lease sale rental payment, if any; and all costs and expenses borne by KFH under the *Ijarah Facility Agreement* (clause 3.3(c)(ii)(1)(2)(3)(4), 15.1(a)(b) *Ijarah Facility Agreement*).
- 12) If Certificate of Completion and Compliance ('CCC') for the property has not been issued by the authority during the construction period, the exercise price that shall be used by the customer on KFH must involve a portion of purchase price paid by KFH under the *Asset Purchase Agreement*; and advance lease sale rental that is payable by the customer to KFH until the execution date (clause 3.3 (d)(i)(ii), 15.1(c) *Ijarah Facility Agreement*).
- 13) Nevertheless, if CCC is not issued by the authority even after the expiry period stated in the letter of offer or any other extended period prescribed by KFH, KFH shall return all advance lease sale rental payment made by the customer except administration costs, fees, costs, expenses and expenditures incurred by KFH throughout the lease sale period with the customer (clause 5.3 *Ijarah Facility Agreement*).
- 14) To secure the lease sale facility granted to the customer, the customer shall charge the property that is being subject to the sale and purchase entered into with the developer in favour of KFH as a security to the lease sale facility (Annexure; clause 4 *Ijarah Facility Agreement*).
- 15) The customer shall ensure that the interest of KFH shall not be affected throughout the lease sale facility period and if necessary, shall pay damages to KFH (clause 2.5, 7.2, 22.1 *Ijarah Facility Agreement*; clause 5.1 *Asset Purchase Agreement*).

It is submitted that, the customer shall be liable to take out insurance on the property and to ensure that the property is in good order and he shall also be responsible to repair any damage to the property until expiry of the lease sale facility period.

If at the end of the construction period, the developer/vendor still fails to obtain CCC, KFH shall reimburse all moneys paid by the customer. It is submitted, this term provides a protection to customer. Nonetheless, there is no clear term in the said Islamic Home Finance product that provides rights and responsibilities of KFH and customer if the property becomes abandoned. For an example, a term imposing a responsibility on the developer/vendor and/or KFH to rehabilitate or that KFH agrees to take action against the defaulting developer/vendor and ensure that the rights and interests of the customers are protected.

7. Conclusion

It is opined that there is no specific term in the IMFZ Islamic Home Finance product offered to public that provide duly protection to purchaser customers in face of abandoned housing projects. The duly protection that is intended here is the responsibility of the Islamic bank to ensure that the abandoned

housing projects can be rehabilitated and/or the Islamic bank pay fair compensation to the aggrieved purchaser customers. Nonetheless, it is submitted that, there is a term providing a right to the purchaser customers for a refund of all moneys they paid to the Islamic bank in the event that the property does not get a CCC, i.e. including the property that has been abandoned and cannot be completed and duly delivered to the purchaser customers. It is submitted that, through this term some relief is given to the aggrieved purchaser customers. To further enhance this protection, it is submitted that, the Islamic bank can require that the developers must apply 'full build then sell' system of housing delivery and in possession of housing development insurance as a 'backup' in the event the housing projects become abandoned, before they approve the customer's application for Islamic Finance Product IMFZ to finance property pending completion.

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References

- Bank Muamalat Malaysia Berhad v Noriza Tajudin* [2013] 1 LNS 854.
- Khozim Malim v Bank Kerjasama Rakyat Malaysia Bhd* [2012] 3 CLJ 860 (High Court of Malaya at Kuala Lumpur).
- Kuwait Finance House Berhad. (n.d.). *Asset Purchase Agreement*. Kuwait Finance House Berhad: Kuala Lumpur.
- Kuwait Finance House Berhad. (n.d.). *Ijarah Facility Agreement*. Kuwait Finance House Berhad: Kuala Lumpur.
- Md Dahlan, N.H. & Aljunid, S.Z.S.A.K. (2011). *Shariah and legal issues in house buying in Malaysia: The legality of Bay' Bitham-Al-Ajil ('BBA') with special reference to abandoned housing projects*. *Pertanika Journal of Social Sciences & Humanities*, 19 (2). 349-361.
- Md Dahlan, N.H. & Syed Abdul Kader, S.Z. (2010). *Shariah And Legal Issues In The Bay' Bithaman-Al-Ajil (BBA): A Viewpoint*. *Malayan Law Journal*, 6, lxxv—cxiii.
- Md Dahlan, N.H. (2009). *Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework* (Unpublished Phd in Law Thesis). International Islamic University Malaysia: Gombak.
- Md Dahlan, N.H. (2014). *Issues in the rehabilitation of failed residential projects in Malaysia: Clash between the interests of purchasers and secured creditor chargee*. *Journal for Global Business Advancement*, 7 (2), 139-150.
- Md Dahlan, N.H., & Masum, A. (2014). *Feasibility of corporate voluntary arrangement ("CVA") in solving insolvency issues in abandoned housing projects: a comparative legal analysis between Malaysia and the United Kingdom*. *The Law Review*, 546-572.
- Md Dahlan, N.H., Abdul Jalil, A.Z., Zainol, Z., & Maamor, S. (2016). *The Shariah Advisory Council in the Malaysian Islamic financial institutions: features and legal issues*. *Journal for Global Business Advancement*, 9 (3), 284-298.
- Md Dahlan, N.H., Mohd Noor, F., & Shuib, M.S. (2017a). *Is Malaysian Islamic home financing bay' bithaman al-ajil ('BBA') compatible with Islamic law? A critical examination on the issue of 'beneficial ownership'*. *Mediterranean Journal of Social Sciences*, 8 (2), 27-36.
- Md Dahlan, N.H., Shuib, M.S., & Mohd Noor, F. (2017). *Issues in bay' bithaman al-ajil Islamic home finance ('BBA') in abandoned housing projects in Malaysia: an examination of 'gharar'*. *Journal of Law, Policy and Globalization*, 57, 122-132.

- Md. Dahlan, N.H., Mohd Noor, F., & Shuib, S. (2017b). *Teori Dan Amalan Pembiayaan Perumahan Islam: Ke Arah Model Pembiayaan Perumahan Yang Bertambah Nilai*. Unpublished FRGS Research Report. Universiti Utara Malaysia: Sintok.
- Pripih Permata Sdn Bhd lwn. Bank Muamalat Malaysia Bhd* [2015] 6 CLJ 135 (High Court of Malaya at Melaka)
- Public Bank Bhd v. Mohd Isa Mohd Nafidah* [2013] 1 CLJ (Sya) 448 (High Court of Malaya at Kuala Lumpur).
- Silverman, D. (2000). *Doing Qualitative Research, A Practical Handbook*. SAGE Publications Ltd: London.
- Yin, R.K. (2003). *Case Study Research, Design and Methods*. 3rd edn. SAGE Publications Ltd: London.
- Zahraa, M. (1998). *Research Methods for Law Postgraduate Oversea Student*. Stilglow Sdn Bhd, Univision Press: Kuala Lumpur.