"BAY’ BITHAMAN AL-AJIL (BBA) IN HOUSE FINANCING PRACTICED BY BANKS IN MALAYSIA IS A SHARIAH COMPLIANT PRODUCT? : IS IT TRUE?

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Abstract

It is trite practice in Malaysia that for some who wish to purchase a house, especially a transaction falling under the Housing Development (Control and Licensing) Act 1966 (Act 118), they would seek to obtain a loan from an Islamic bank or the Islamic Window Bank (IWB). Before the purchasers apply for a housing loan from an Islamic Bank or IWB, they should have entered into agreements of sale and purchase (Schedules G, H, I or J) (‘the said agreement’) with the developers. Once the said agreements are executed and enforceable, the purchasers may apply for loans from an Islamic Bank or IWB to finance the balance purchase price of the property. The effect this housing transaction, the purchasers are required to execute two agreements to facilitate this, firstly, the Property Purchase Agreement (PPA) and secondly, the Property Sale Agreement (PSA). This method is known as Bay’ Bithaman al-Ajil (BBA). Nonetheless in the writers’ opinion, the BBA on housing purchase as practiced in Malaysia may not be valid on the ground of elements of gharar contained in it, especially when facing the problems of abandoned housing projects. Hence, this paper elaborates on the elements of gharar which may vitiate the legality of the BBA itself. Following this, the writers will suggest ways to improve the current practice of BBA in housing transactions practised by Islamic Banks and IWB in Malaysia.

Keywords: Bay’ Bithaman al-Ajil (BBA), Islamic Banks, Malaysia, Gharar, Abandoned Housing Projects

Introduction

It is trite practice in Malaysia that for some who wish to purchase a house, especially a transaction falling under the Housing Development (Control and Licensing) Act 1966 (Act 118), they would seek to obtain a loan from an Islamic bank or the Islamic Window Bank (IWB). Before the purchasers apply for a housing loan from an Islamic Bank or IWB, they should have entered into agreements of sale and purchase (Schedules G\(^1\), H\(^2\), I\(^3\) or J\(^4\)) (‘the said agreement’) with the housing developers.

\(^1\) Schedule G has been amended in 2007 and inserted by regulation 13 of the Housing Development (Control and Licensing) Regulations 2007 (P.U.(A) 395), enforced since 1 December, 2007.
\(^2\) Schedule H has been amended in 2007 and inserted by regulation 14 of the Housing Development (Control and Licensing) Regulations 2007 (P.U.(A) 395), enforced since 1 December, 2007.
\(^3\) Schedule I has been amended in 2007 and inserted by regulation 15 of the Housing Development (Control and Licensing) Regulations 2007 (P.U.(A) 395), enforced since 1 December, 2007.
Once the said agreements are executed and enforceable, the purchasers may apply for loans from an Islamic Bank or IWB to finance the balance purchase price of the property (usually representing 90% of the purchase price). The purchasers are required to execute two agreements to facilitate this, i.e:

a) firstly, the Property Purchase Agreement (PPA); and,

b) secondly, the Property Sale Agreement (PSA).

The first agreement (PPA) provides that the purchasers agree to sell the property (housing unit), which he purchased from the developer, at the price similar to the price he agreed to purchase from the developer, to that particular Islamic Bank or IWB and on the undertaking that they (the purchasers) are to re-purchase the property from the Bank.

The second agreement is the Property Sale Agreement (PSA). Under this agreement (PSA), the property (which has been vested in the Bank) is sold by the Bank back to the purchasers, at an increased price. The purchasers are required to repay the Bank, this price, by way of installments for a specified duration until the sale price is fully settled. The Bank will get a profit, being the difference between the price stipulated in the PPA/the said agreement and the price stated in the PSA (the sale price).

The type of transaction between the purchasers and the Bank described above is called Bay al-Inah.\(^4\) It should be noted that the theory and application of Bay al-Inah are still subject to debate by the schools of Islamic Law as the sale involves riba' (difference of prices) or a trick (helah), in sale and purchase activities, by applying riba' method of borrowing transaction.\(^5\) The majority of Muslim jurists reject Bay al-Inah.\(^6\) However, the minority (such as the Shaffie and Zahari Schools) permit it, but the application of Bay al-Inah must be used with circumspection and if warranted by circumstances. Otherwise, its application should be limited.\(^8\)

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\(^4\) Schedule J has been amended in 2007 and inserted by regulation 15 of the Housing Development (Control and Licensing) Regulations 2007 (P.U.(A) 395), enforced since 1 December, 2007.


\(^7\) Abu Hanifah opines that this type of sale is fasid (defective) if there is no person acting as an intermediary between the owner who lends and the purchaser who borrows. See Wahhab al-Zuhayli, p 186, 468. According to al-Sahibany (the two friends – Muhammad al-Shaybani and Abu Yusof), Malik and Hanbali, Bay al-Inah involves sinful intention and thus rendered the contract void. Malik and Hanbali applied sadd al-zarai in deducing the decision. See Wahhab al-Zuhayli. 1988, ibid. at 196, 469, 508. They base this on a story involving Zayd bin Arqam and a hadith of the Prophet (SAW). The majority of the jurists except Shafie school opinie that this type of sale is void as it may cause riba'. However it is permissible but is detestable (karahah) according to the Shafie school and Zahari school. See Wahhab al-Zuhayli. 1988 at pp. 469, 508. See also Arab-Malaysian Finance Berhad v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd, third party) [2008] 5 MLJ 631.

\(^8\) Resolutions of Shariah Advisory Council of Bank Negara Malaysia BNM/RH/GL/012-2, 14 at <http://www.bnm.gov.my/guidelines/01_banking/04_prudential_stds/07_shariah_resolution.pdf> (accessed on 20 October, 2009). See also Mohd Daud Bakar. 2009 Pembuyaan peribadi mengikut perspektif Islam, Prosiding Muzarakah Penasihat Shari’ah Kewangan Islam, CERT Publications Sdn Bhd, at p 9. See also judgment of Justice Maulana Muhammad Taqi Usmani in the Supreme Court of Pakistan, quoted by Hamid Sultan JC (as he then was) in Malayen Banking Bhd v Ya’kub bin Oje & Anor [2007] 6 MLJ 389 (High Court at Kuching), at page 412 of the report. Murabahah or Bay’ al-Inah is not a favourable mode of trade
**Gharar**

There are many verses from the Quran, calling for the doing of justice and abstaining from committing any cruelty, fraud and injustice, especially in business and transactions. The following are examples of the relevant verses:

1) ‘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): verse 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! (al-Nisa’(4): verse 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’. (al-Nahl (16): verse 90).

4) ‘O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor; for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do. (al-Nisa’(4): 135).

5) ‘...To the Madyan people We sent Shu’aib, one of their own brethren: he said: “O my people! worship Allah: Ye have no other god but Him. Now hath come unto you a clear (Sign) from your Lord! Give just measure and weight, nor withhold from the people the things that are their due; and do no mischief on the earth after it has been set in order: that will be best for you, if ye have Faith.” (Al-A’raf (7): 85).


7) ‘O ye who believe! fulfill (all) obligations. Lawful unto you (for food) are all four-footed animals, with the exceptions named: But animals of the chase are forbidden while ye are in the sacred precincts or in pilgrim garb: for Allah doth command according to His will and plan’ (al-Maidah (5): 1).

Examples of practices involving fraud and injustice are the practice of *riba*’ (interest/usury) in lending transactions and the ‘gharar’ sale and purchase. The practice may be necessary and

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financing in Islamic Bank as it is considered a borderline transaction with very fine lines of distinction as compared to an interest bearing loan. These fine lines of distinction can be observed only when all the basic requirements are fully complied with. To ignore any one of them makes the Murabahah/Bay-al-Inah an interest-bearing financing, thus it should always be effected with due care and precaution. Notwithstanding the permissibility of the murabahah/bay al-inah transaction, it is susceptible to misuse and keeping in view the basic philosophy of an Islamic financial system, it is not an ideal way of financing. Hence it should be used only where musharakah and mudarabah are not applicable.

appropriate for investors and businessmen as being creative and devious capitalist business devices to maximise profits with no or less risk but they are unlawful and injustice according to Islamic law. Thus, Islam prohibits the practice of *riba* (interest/usury) and *gharar* transactions. This is explained in the following Quranic verses:

1) ‘Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (for ever).’ (Al-Baqarah (2): verses 275).

2) ‘This because they love the life of this world better than the Hereafter: and Allah will not guide those who reject Faith. Those are they whose hearts, ears, and eyes Allah has sealed up, and they take no heed. Without doubt, in the Hereafter they will perish’ (al-Nahl (16): verses 107-109).

3) ‘If any do wish for the transitory things (of this life), We readily grant them - such things as We will, to such person as We will: in the end have We provided Hell for them: they will burn therein, disgraced and rejected.’ (al-Isra’(17): verse 18).

Similarly, the hadith of the Prophet Muhammad (Peace Be Upon Him - PBUH) also, call for similar practice in carrying out any transaction:

1) ‘Muslims are brothers. It is not permissible for a Muslim to sell a thing which contains faulty elements/flaws/defects (atb) to his fellow brother (Muslim) except if he discloses it’

2) ‘Those who cheat us, is not from us’.

3) It was reported that the Prophet Muhammad (PBUH) while he was passing a vendor selling foods, and became attracted to the bunch of foods before him. He put his hand into the bunch and found the part below the foods were wet. He asked the seller: What is this? The seller replied: the foods were wet because they were poured with rain water and to prevent public from knowing this fact, he put the wet foods at the bottom part of the bunch. On hearing of this, the Prophet (PBUH) said: ‘He who cheats us, is not from us’.


4) ‘It is not permissible for someone to sell a thing except after he has explained about it, nor is it permissible for a person who knows such a state of condition of a thing, except he explains about it’.  

5) Yahya related to me from Malik from Abu’r-Rijal Muhammad ibn Abd ar-Rahman ibn Haritha from his mother, Anra bint Abd ar-Rahman that the Messenger of Allah, may Allah bless him and grant him peace, forbade selling fruit until it was clear of blight. Malik said, "Selling fruit before it has begun to ripen is an uncertain transaction (gharar)." (muwatta’ Imam Malik).

Contract of Sale Involving a Non-Existent Subject Matter

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. Hence, 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 any party to the contract. A contract which involves a non-existent subject-matter is prohibited pursuant to a hadith, 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 is not part of the sale. Similarly, is the selling of milk whilst it is still within the udder of the animal. This sale is void as there is a possibility the udder being perhaps void of milk, and instead, only containing air. In one hadith, the Prophet (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 purchase the female goat on the pretext of it containing a lot of milk. The Prophet (PBUH) too prohibited the sale of things which one does not own.

However, 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 purcahser 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-plants. In this particular case, Muslim jurists in general have agreed to allow the sale of the

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fruits which have already appeared but disallow the sale of fruits which have yet appeared.\textsuperscript{20} This contract falls under the category – 'the subject matter exists in essence, then comes into existence thereafter'.\textsuperscript{21}

As regards the subject-matter which does not exist at the time of contract and it is established that it also could not exist in the future, Muslim jurists do not accept this kind of contract as this contract contains the element of \textit{gharar}.\textsuperscript{22} Transactions containing \textit{gharar} element is prohibited based on the verses of the Quran above and the Hadith of the Prophet (PBUH)\textsuperscript{23}. 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 \textit{gharar} contract and thus it is void, not binding and having no legal effect.\textsuperscript{24}

\textit{Gharar} is forbidden in Islam as its existence would harm the well-being, rights and interests of contractual parties and cannot ensure satisfactory outcomes, justice and fairness in their contractual dealings.\textsuperscript{25} It is also forbidden by the Shariah because this element typically causes enmity, dispute, hardship, injustice and losses to the parties.

\textbf{ABANDONED HOUSING PROJECTS IN PENINSULAR MALAYSIA}

Abandoned housing projects in Peninsular Malaysia are one of the spillover problems of the housing industry. This problem is a nightmare for the affected purchasers and becomes a burdensome social obligation for the government to tackle. As of June, 2005, there were 28 new projects which had been listed under the category of abandoned housing projects. These projects involved 5,716 purchasers, 7,946 units of houses and projects’ sales value of RM 479.67 million. From the overall newly identified abandoned housing projects, majority of the projects, as of June, 2005, occurred in Johor, Selangor and Pulau Pinang which respectively have 5 projects (18%), followed by Kedah - 4 projects (14%), Perak - 3 projects (11%), and for Negeri Sembilan, Melaka and Terengganu, each of these states has 2 newly identified abandoned housing projects (7%). In other states (Perlis, Federal Territory and Kelantan), there are no new abandoned housing projects which have been identified or reported.\textsuperscript{26} These statistics are provided in Table 1 below.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
State & Number of Projects \\
\hline
Johor & 5 \\
Selangor & 4 \\
Pulau Pinang & 3 \\
Kedah & 2 \\
Perak & 2 \\
Negeri Sembilan & 2 \\
Melaka & 2 \\
Terengganu & 2 \\
Perlis & 1 \\
Federal Territory & 1 \\
Kelantan & 1 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{20} Ala‘uddin Abi Bakr bin Mas‘ud Al-Kasani, \textit{Bada‘i al-Sana‘i}, vol. 5, Matba‘at al-Jamaliyyah, Qahirah Misr, 1328H, p. 137. Also a hadith of the Prophet (PBUH), reported by Bukhari and Muslim from Anas said that the Prophet (PBUH) prohibits selling of fruits until the fruits have existed (the fruits have ripen and ready for harvesting). See Naylu al-Awtar, Vol. 5, p. 172, cited in Wahbah al-Zuhaili. 1988, ibid. at p. 175. School of Malik, school of Shah Imamiah, Ibnu Taimiyah, and Ibnu Qayym from Hanbal school, allow the selling of fruits which are seen physically ripen or otherwise as a facility for sale and to hinder hardship in business dealing. However, for Hanafi, Hanbali, Zaidiah, Zahiri and Ibdahiah schools, selling of the mixture between ripen and not ripen fruits, is prohibited. See Wahbah al-Zuhaili. 1988, ibid. at p. 176.


\textsuperscript{22} 'Ibid. See also surah al-Nisa’ (4): verse 29: ‘O ye who believe!, eat not up your property among yourselves in vanities...’

\textsuperscript{23} Ibn Umar said the Prophet (PBUH) prohibits the sales involving \textit{gharar} elements. See Al-Baihaqi, al-\textit{Sunan al-Kubra}, vol. 5, Dar al-Fikri, Bayrut Lubnan, undated, p. 338.

\textsuperscript{24} Wahbah al-Zuhaili. 1988, ibid. at pp. 429-432.

\textsuperscript{25} www.zaharuddin.net--\textit{Gharar} & Gambling in Daily Transactions (accessed 4 December, 2008).

\textsuperscript{26} Bahagian Pengawasan dan Penguatkuasa, Kementerian Perumahan dan Kerajaan Tempaan (English: Division of Supervision and Enforcement, Ministry of Housing and Local Government (‘MHLG’)),
### Table 1
The Number of New Projects Which Has Been Identified As Abandoned Housing Projects According to States in Peninsular Malaysia As of June, 2005

<table>
<thead>
<tr>
<th>States</th>
<th>Number of Projects</th>
<th>Number of Houses</th>
<th>Number of Purchasers</th>
<th>Sales Value (RM Million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perlis</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Kedah</td>
<td>4</td>
<td>687</td>
<td>333</td>
<td>69.51</td>
</tr>
<tr>
<td>Pulau Pinang</td>
<td>5</td>
<td>2,495</td>
<td>1,965</td>
<td>125.73</td>
</tr>
<tr>
<td>Perak</td>
<td>3</td>
<td>161</td>
<td>106</td>
<td>21.47</td>
</tr>
<tr>
<td>Selangor</td>
<td>5</td>
<td>2,074</td>
<td>1,527</td>
<td>123.21</td>
</tr>
<tr>
<td>Federal Territory</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Negeri Sembilan</td>
<td>2</td>
<td>123</td>
<td>43</td>
<td>23.37</td>
</tr>
<tr>
<td>Melaka</td>
<td>2</td>
<td>165</td>
<td>47</td>
<td>14.9</td>
</tr>
<tr>
<td>Johor</td>
<td>5</td>
<td>1,897</td>
<td>1,462</td>
<td>206.24</td>
</tr>
<tr>
<td>Kelantan</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Terengganu</td>
<td>2</td>
<td>344</td>
<td>234</td>
<td>18.45</td>
</tr>
<tr>
<td>Pahang</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>28</strong></td>
<td><strong>7,946</strong></td>
<td><strong>5,716</strong></td>
<td><strong>479.67</strong></td>
</tr>
</tbody>
</table>


However, according to another report, until December, 2006, seven (7) new projects have been identified as abandoned.\(^{27}\) These projects involved 1,278 purchasers, 2,114 housing units and sales value of RM 462.14 million.\(^{28}\) Most of the abandoned projects occurred in Selangor—3 projects (43%), Negeri Sembilan—2 projects (29%), Melaka and Johor, respectively have an abandoned housing project, newly identified in December, 2006.\(^{29}\) The statistics for these are provided in Table 2.

### Table 2
The Number of Newly Identified Abandoned Housing Projects According to States As of December, 2006

<table>
<thead>
<tr>
<th>States</th>
<th>Number of Projects</th>
<th>Number of Houses</th>
<th>Number of Purchasers</th>
<th>Sales Value (RM Million)</th>
</tr>
</thead>
</table>

---


\(^{28}\) ibid.

\(^{29}\) ibid.
<table>
<thead>
<tr>
<th>States</th>
<th>Number of Projects</th>
<th>Number of Houses</th>
<th>Number of Purchasers</th>
<th>Sales Value (RM Million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perlis</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Kedah</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pulau Pinang</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Perak</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Selangor</td>
<td>3</td>
<td>1,448</td>
<td>801</td>
<td>424.8</td>
</tr>
<tr>
<td>Federal Territory</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Negeri Sembilan</td>
<td>2</td>
<td>249</td>
<td>231</td>
<td>12.31</td>
</tr>
<tr>
<td>Melaka</td>
<td>1</td>
<td>240</td>
<td>160</td>
<td>19.2</td>
</tr>
<tr>
<td>Johor</td>
<td>1</td>
<td>177</td>
<td>86</td>
<td>5.83</td>
</tr>
<tr>
<td>Kelantan</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Terengganu</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Pahang</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>7</td>
<td>2,114</td>
<td>1,278</td>
<td>462.14</td>
</tr>
</tbody>
</table>


In 2008, the Division of Rehabilitation of Abandoned Projects in the Department of National Housing, Ministry of Housing and Local Government (‘MHLG’), Kuala Lumpur was established.\(^30\) If previously, the duty to manage the abandoned housing projects and their rehabilitation was on the shoulder of the Division of Enforcement and Supervision, MHLG which was also overburdened with enforcement and supervision works, the establishment of this new specialized division (Division of Rehabilitation of Abandoned Projects) would help and facilitate the government to reduce the problems emanating from the abandoned housing projects and to speed up the rehabilitation and thus help the fates of the aggrieved purchasers.

As at 31 July, 2010, the number of the abandoned housing projects which is subject to rehabilitation under the management of this division is 151 projects involving 48,623 units of house and 31,123 purchasers. Out of these numbers, 57 projects are being rehabilitated and 47 projects are completed projects.\(^31\) Below are the statistics of abandoned housing projects as at 31 July, 2010 (Table 3 and Table 4).

### Table 3

**Summary Of The Overall Status Of Abandoned Housing Projects In Peninsular Malaysia**


\(^31\) Bahagian Pemulihan Projek Perumahan Terbengkalai, Jabatan Perumahan Negara (English: Division of Rehabilitation of Abandoned Housing Projects, Department of National Housing), *Status Projek Perumahan Terbengkalai Semenanjung Malaysia (sehingga 31 Julai 2010)*, tt. (English: Status of Abandoned Housing Projects in Peninsular Malaysia (Until 31 July 2010)), n.d. This division is funded with an initial fund of RM200 million by the government to help and facilitate rehabilitating parties to revive the projects.
(Until 31 July 2010)

<table>
<thead>
<tr>
<th>NO.</th>
<th>STATUS</th>
<th>31 JULY 2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Initial Planning (in the course of getting rehabilitating developer)</td>
<td>47 (31%)</td>
</tr>
<tr>
<td>2</td>
<td>In the course of rehabilitation</td>
<td>57 (38%)</td>
</tr>
<tr>
<td>3</td>
<td>Occupied/Completed Projects</td>
<td>47 (31%)</td>
</tr>
<tr>
<td></td>
<td>i) 2009:15 Projects</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ii) 2010:32 Projects</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>151</strong></td>
</tr>
</tbody>
</table>

Note: Occupied/Completed Projects
i) 2009:15 Projects (100% achievement based on the 2009 Minister’s Key Performance Index (‘KPI’))
ii) 2010:32 Projects (Up to 31 July 2010 92% achievement based on the 2010 Minister’s KPI)

Source: Bahagian Pemulihan Projek Perumahan Terbengkalai, Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan, Status Projek Perumahan Terbengkalai di Semenanjung Malaysia (Sehingga 31 Julai 2010) (English: Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, Status of Abandoned Housing Projects in Peninsular Malaysia (Until 31 July 2010)).

**Table 4**
Summary Of The Overall Status Of Abandoned Housing Projects In Peninsular Malaysia (Until 31 July 2010)

<table>
<thead>
<tr>
<th>NO.</th>
<th>PROJECTS STATUS</th>
<th>NO. OF PROJECTS</th>
<th>NO. OF HOUSING UNITS</th>
<th>NO. OF PURCHASERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>INITIAL PLANNING</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>Under Rehabilitation Plan&lt;sup&gt;32&lt;/sup&gt;</td>
<td>13</td>
<td>3,206</td>
<td>2,055</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Wound Up Companies(^3^3)</th>
<th>23</th>
<th>9,854</th>
<th>5,896</th>
</tr>
</thead>
<tbody>
<tr>
<td>(iii)</td>
<td>Sold to Third Party (Non-Performing-Loans)(^3^4)</td>
<td>9</td>
<td>1,159</td>
<td>505</td>
</tr>
<tr>
<td>(iv)</td>
<td>Return of Deposit to Purchasers(^3^5)</td>
<td>2</td>
<td>289</td>
<td>105</td>
</tr>
<tr>
<td></td>
<td>Sub-total:</td>
<td>47</td>
<td>14,508</td>
<td>8,561</td>
</tr>
<tr>
<td><strong>II</strong></td>
<td><strong>UNDER REHABILITATION</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>Original Developer/Rehabilitating Developer(^3^6)</td>
<td>41</td>
<td>18,202</td>
<td>11,617</td>
</tr>
</tbody>
</table>


\(^3^4\) Examples of the projects which fall under this category are: Taman Subang Permai or now known as “Coral Vista Condominium”, Subang Jaya, Selangor (original developer: Coral Land Corporation Sdn. Bhd. (this project was sold to Sinesinga Sdn. Bhd by the chargee bank)), Taman Serosa Kajang (double-storey-terrace-houses), Kajang, Hulu Langat, Selangor (Developer: Serosa Resources Sdn. Bhd.)(wound up on 11 June, 2003 and 26 February, 2004) (this project was sold to Gale Force Sdn. Bhd by the chargee bank)(Liquidator: Crowe Horwath Sdn. Bhd), Taman Serosa Kajang (Low-Cost-Flat-House) Kajang, Hulu Langat, Selangor (Developer: Serosa Resources Sdn. Bhd.)(wound up on 11 June, 2003 and 26 February, 2004)(this project was sold to Gale Force Sdn. Bhd by the chargee bank)(Liquidator: Crowe Horwath Sdn. Bhd) and Taman Kencana, Phase 3, Ampang, Selangor (Developer: Syarikat Jaya Kencana Sdn. Bhd.)(wound up on 16 March,1999) (this project was sold to Sinesinga Sdn. Bhd by the chargee bank) (Liquidator: Kuala Lumpur Department of Insolvency as the Official Receiver)). Ibid.  

\(^3^5\) The housing projects are Kondominium Delima, Labu, Seremban, Negeri Sembilan (Developer: Idealmon Sdn. Bhd) and Taman Repah Baru Phase 2B, Tampin, Negeri Sembilan (Developer: Nilai Tinggi Construction Sdn. Bhd). Ibid.  

\(^3^6\) Example of these housing projects are Taman Melor Phase 4, Sungai Petani, Kuala Muda, Kedah (Developer: Double-On Corporation Sdn. Bhd), Taman Terubong Indah, Timur Laut, Pulau Pinang (Developer: Majestic Heights Sdn. Bhd (wound up on 16 October, 2001) (Liquidator: Deloitte Corporation Solution Sdn. Bhd), Mengkuang Heights, Mengkuang, Pulau Pinang (Developer: Sri Jeluda Sdn. Bhd (wound up on 13 July, 2006), (taken over by UDA Holdings Sdn. Bhd)(Liquidator: Lam Ah Kow @ Lam
<table>
<thead>
<tr>
<th></th>
<th>Syarikat Perumahan Negara Berhad</th>
<th>11</th>
<th>4,832</th>
<th>4,562</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ii)</td>
<td>Completed without CFO</td>
<td>5</td>
<td>985</td>
<td>570</td>
</tr>
<tr>
<td></td>
<td>Sub-Total:</td>
<td>57</td>
<td>24,019</td>
<td>16,749</td>
</tr>
<tr>
<td>III</td>
<td>COMPLETED</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(i)</td>
<td>Completed With CFO</td>
<td>16</td>
<td>3,731</td>
<td>3,219</td>
</tr>
<tr>
<td>(ii)</td>
<td>Variation of Development Proposal</td>
<td>18</td>
<td>4,113</td>
<td>1,235</td>
</tr>
</tbody>
</table>

Wai Min from AljeffriDean Sdn. Bhd, Taman Orkid Indah, Pulau Pinang ((Developer: Sri Jeluda Sdn. Bhd (wound up on 13 July, 2006), taken over byUDA Holdings Sdn. Bhd (Liquidator: Lam Ah Kow @ Lam Wai Min from AljeffriDean Sdn. Bhd). Id.


40 The projects which fall under this category have been subject to variation of their planning permission, from housing development project to become commercial projects. As they have become commercial projects, they are not subject to the provisions under Act 118 and the control of the MHLG. Examples of these project are Taman Junjung Jaya, Junjung, District of Kulim, Kedah (Developer: Cayman Development Sdn. Bhd)(wound up on 13 August, 2007)(Liquidator: Rimbun Corporate Advisory Sdn. Bhd)), Taman Cemerlang, Lebuh Kaya Their Teik, Pulau Pinang (Developer: Penangan Maju Holdings
<table>
<thead>
<tr>
<th></th>
<th>Return of Deposit</th>
<th>Sub-Total</th>
<th>OVERALL TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>13</td>
<td>2,252</td>
<td>1,359</td>
</tr>
<tr>
<td></td>
<td>47</td>
<td>10,096</td>
<td>5,813</td>
</tr>
<tr>
<td></td>
<td><strong>151</strong></td>
<td><strong>48,623</strong></td>
<td><strong>31,123</strong></td>
</tr>
</tbody>
</table>

Source: Bahagian Pemulihan Projek Perumahan Terbengkalai, Jabatan Perumahan Negara, Kementerian Perumahan dan Kerajaan Tempatan, Status Projek Perumahan Terbengkalai di Semenanjung Malaysia (Sehingga 31 Julai 2010) (English: Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, Status of Abandoned Housing Projects in Peninsular Malaysia (Until 31 July 2010))

What can be deduced from the above latest statistics and tables in 2010, there is a drastic decrease of the number of abandoned housing projects in Peninsular Malaysia. Secondly, the abandoned housing projects are subject to rigorous planning for rehabilitation under the strict surveillance by the Chief Secretary General of the Government (KSN). The decrease is, it is opined, due to the following factors:

1) The establishment of the Division of Rehabilitation of Abandoned Projects under the Department of National Housing, which is entrusted by the government to specifically tackle and settle the problems of abandoned housing projects, including undertaking pro-active steps to rehabilitate the abandoned housing projects and help the aggrieved purchasers;

2) The KPI (Key Performance Index) as set out by the government and the concrete plan monitored by the Chief Secretary to the Government (in Malay is called ‘Ketua Setiausaha Negara’ (KSN)), and the Secretary General of MHLG with regular scheduled meetings and checks; or,

3) The revised definition of abandoned housing project in 2010\(^{42}\) which may still open for abuse of the power of the Minister of Housing and Local Government to endorse or not to endorse that certain problematic housing projects are considered

\(^{41}\) The housing projects fall under this category are projects which are not suitable for rehabilitation, thus MHLG directed the developers to return the deposit to purchasers. The housing projects are Taman Singgahsana Putera, Mukim of 7, Seberang Prai, Pulau Pinang (Developer: Bagan Masyhur Sdn Bhd), Taman Gelugur Mukim 13, North East District, Pulau Pinang (Developer: Rethiko Sdn Bhd), Sentul Indah, Sentul, Kuala Lumpur (Developer: Homeng Realty Sdn. Bhd)(wound up on 19 November 2003)(taken over by Alam Rio Builders Sdn Bhd)(Liquidator: Shah Alam Department of Insolvency as the Official Receiver), Taman Suria Indah Dengkil Sepang, Selangor (Developer: DDR Properties & Development Sdn,Bhd), Taman Lingkaran Nur Phase 1B, Cheras, Hulu Langat, Selangor (Developer: Saktimuna Sdn. Bhd)(wound up on 11 March 2005)(NPL sold to one Sinesinga Sdn Bhd)(Liquidator: Kuala Lumpur Department of Insolvency as the Official Receiver), Belimbing Heights Seremban, Negeri Sembilan (Developer: OCL Capital Sdn. Bhd)(wound up on 5 April 2002)(NPL sold to Sinesinga Sdn Bhd)(Liquidator Federal Territory Department of Insolvency as the Official Receiver)) and Taman Ria Jasmin Merlimau, Melaka (Developer: Wawasan Nusantara Sdn. Bhd). Id.

\(^{42}\) Junaid Izzuddin Abdul Aziz (being the administrative officer at Division of Rehabilitation of Abandoned Projects, National Housing Department, Ministry of Housing and Local Government, Pusat Bandar Damansara, Kuala Lumpur), personal communication, 14 July 2010.
'abandoned housing project'. This power may be abused by the Minister in that the
Minister may, in order to create a short list and statistics of abandoned housing
project (distorted list), not endorse certain troublesome housing projects as
'abandoned housing projects' even though they should have been so categorised.

Nonetheless, even though based on the latest statistics as tabled above, the number of abandoned
housing projects is decreasing and that the projects so abandoned are subject to rehabilitation, this
is still not satisfactory, in the opinion of the author. The following are some observations and
grounds of the author in respect of the above latest statistics and tables of abandoned housing
projects in Peninsular Malaysia:

1) The above current list of abandoned housing projects (as at 30th July, 2010) does not
take into account the closed abandoned housing projects’ files (i.e abandoned housing
projects found in 1970s and 1980s, which are deemed totally not suitable for
rehabilitation), abandoned housing projects of the parties which are not fallen under
the jurisdiction and control of the MHLG and Act 118 and abandoned housing
projects in Sabah and Sarawak (East Malaysia). Thus, if these abandoned housing
projects were to be taken into consideration, the list of abandoned housing projects in
Malaysia would be more; and,

2) The establishment of the Rehabilitation of Abandoned Projects Division also seemed
not to have fully been able to help the aggrieved purchasers to have their (the
aggrieved purchasers) abandoned housing units be duly rehabilitated. This is evident
based on the above tables, in that there are 47 projects which are clearly cannot be
rehabilitated at all. These hopeless projects have either been ousted from the
jurisdiction of the MHLG by way of changing the development proposal of the
projects which previously was ‘housing development projects’ into ‘commercial
projects’ (18 projects) or the defaulting developers should return the deposit paid by
purchasers and nullify the sale and purchase agreements (13 projects) to the effect
that as if there was no contract between the housing developers and the aggrieved
purchasers.

Causes of Abandonment of Housing Development Projects in Peninsular Malaysia

Among the reasons leading to the abandonment of housing projects, in Peninsular Malaysia, are\textsuperscript{43}:

1) Financial problems faced by the developers. The cause of this problem is owing to
the problems with the developers’ financial and construction management (severe
liquidity problems and high gearing) to meet the construction costs and to repay
creditors;

2) Loose approval of the applications for housing developer licences by MHLG.
MHLG fails to obtain the requisite advice and opinions from economists, legal
experts, property experts and other experts in approving the applications;

3) Challenges and problems of dealing with and clearing the project site of squatters;

4) Ongoing conflicts, feuds and squabbles ensuing between and among the developers,
land proprietors, purchasers, contractors, consultants and financiers causing further
difficulty to coordinate and streamline the development and construction activities;

\textsuperscript{43} Ibid.
5) Insufficient coordination between the land administration authority, planning authority, building authority, housing authority and other technical agencies in respect of the approval for the alienation of land, land uses, subdivision of lands, planning permission, building/infrastructure plans’ approval, housing developers’ licences and issuance of the Certificate of Fitness for Occupation (CF) and Certificate of Completion and Compliance (CCC), as the case may be;

6) Fraudulent practices of the housing developers for example by instructing the architects or engineers to issue false claims for the release of the purchasers housing loans’ funds from the end-financiers dishonestly;

7) Lacking of and insufficient experience and skills in handling housing development projects and showing irresponsibility on part of the developers. Some have even absconded after realising that they could not complete the projects;

8) Blatant disregard for the laws by developers, throughout the course of development of the housing projects. These laws are the Housing Development (Control and Licensing) Act 1966 (‘Act 118’) and its regulations made thereunder, the Street, Drainage and Building Act 1974 (‘SDBA 1974’), the Uniform Building By-Laws 1984 (‘UBBL 1984’), and the planning and building guidelines issued by the planning authority and the building authority;

9) Weaknesses in enforcement on the part of the land administration authority, planning authority, building authority and the housing authority over the development of the housing projects;

10) Absence of a better housing delivery system such as the full ‘build then sell’ system;\(^{41}\)

\(^{41}\) It is opined, one of the problems in the housing industry Peninsular Malaysia is the lack of political will on part of the government to introduce and adopt the ‘full build then sell system’. Under this system, the developers are to build the purported housing units until full completion with Certificate of Fitness for Occupation (CF) or Certificate of Completion and Compliance (CCC), as the case may be, and they (the developers) must ensure that, the titles to the completed housing units are ready for due transfer to purchasers on settlement of the purchase price. Only then can the developer sell the completed units to purchasers. This system would eliminate altogether the problem of abandoned housing projects, as the purported housing purchased has been completed with CF or CCC and ready for full occupation. The current system which is mainly a ‘full sell then build’ (through Schedules G and H (the statutory standard sale and purchase agreements) in the Housing Development (Control and Licensing) Regulations 1989) has many weaknesses that can lead to the abandonment of housing projects. Under this system, purchasers have to pay a deposit of the full purchase price (usually 10 per cent of the purchase price) with the balance (90 per cent) paid progressively in accordance with the development stages. Each of these development stages once completed, must be supported by the architect of engineer’s certificate, indicating that the particular development stage has been duly completed. Full completion of the respective development stages (supported by the architect or engineer’s certificates) will entitle the developer to payment by the end-financier of the purchaser. Even though there is a requirement of the law (clause 4(2) in the schedule of payment of Schedules G, H, J and J), specifying that the completion of the development stages shall be supported by the architect or engineer’s certificate, this certification can be abused by these professionals on the instruction of the developer to the detriment of the purchasers’ interests. As a consequence, if the project is abandoned and there is plan for rehabilitation, the available loan fund still in the hands of the end-financiers or in the Housing Development Account (HDA) may not be sufficient to meet with the rehabilitation costs. This means that, unless there is additional fund to cover the shortfall of the balance loan, the rehabilitation may not be duly carried out. Nonetheless, very recently, the Malaysian government introduced the ‘quasi build then sell system’ through the promulgulation of Schedules I and J (the statutory standard sale and purchase agreements). Under this type of housing delivery system, the purchasers are to pay a deposit (usually 10 per cent of the purchase price) to developer. The balance 90 per cent of the purchase price shall then be paid on the completion of the house on the issuance of the CF or CCC, as the case may be, and with the title to the housing unit ready for registration in favour of the purchasers on full
11) No legal requirement for obtaining housing development insurance imposed on applicant developers as a condition precedent for the approval of the application for a housing developer's license;

12) Insufficient legal requirements and practices allowing purchasers, MHLG and the local authority to supervise, inspect, check and monitor the due progress of the housing development works undertaken by the developers;

13) No legal requirement and practice to get the necessary endorsement and verification from purchasers, MHLG and local authority over each and every progress claim made by the developers for the release of the loan funds from the end-financiers;

14) No specific legal provisions governing rehabilitation schemes that has led to abuse and misuse of power and authority by the rehabilitating parties to the detriment of the purchasers. Even though there is a standard practice in the letter of undertaking of the housing developer to the purchasers’ lender that the developer would reimburse and return all moneys paid by the purchasers’ lender if the developer abandoned their housing project. Nonetheless, this undertaking is still not adequate to guarantee that the developer would return back all the moneys they received especially when the developer is liquidated or considered insolvent and unable to settle the debts owing to their creditors;

15) Economic slowdown and recession faced by the nation resulting in strict banking control over loans’ approvals, regularization of the loans’ repayment and this also has affected the housing industry and the related sectors;

16) No legal provisions regulating the loans (bridging loan) and repayment of loans on part of the banks and financial lenders leading to the possibility of abuse and misuse of power on part of the banks and financial lenders to the detriment of the borrower developers;

17) Excessive immunity enjoyed by the State Authorities and the local authorities against any legal action from aggrieved parties, even though they are negligent and in breach of the duty of care in the implementation of the provisions contained in the Street, Drainage and Building Act 1974 (SDBA) and the Uniform Building by-Laws 1984 (UBBL), pursuant to section 95(2) of the SDBA;

18) Insufficient professional staff, insufficient legal and technical training and knowledge, insufficient office facilities, inefficient administration and administrative logistics on part of the housing authority (MHLG), land administration authority, local authority, local planning authority, appropriate authority and technical agency in Peninsular Malaysia which have indirectly, by and large, contributed to the problems of abandoned housing projects.\(^{45}\)

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\(^{45}\) See the news in the New Strait Times (NST) dated 12\(^{th}\) September, 2007, about the Auditor-General’s Report conducted by the Auditor General’s Office in 2006, reporting that inefficient and poor management of funds, lack of enforcement and man-power, lack of appropriate training, mal-administration and poor monitoring, unreasonable overspending, and corruption in the states and federal agencies (including the MHLG and local councils) has caused huge losses to government. See http://www.malaysianbar.org.my/content/view/11164/2/ on 12\(^{th}\) September, 2007. Also NST, Wednesday, 12\(^{th}\) September, 2007, pp.1, 4 and 12.
19) Insufficient terms in the statutory standard sale and purchase agreements (Schedules G, H, I and J) of the Housing Development (Control & Licensing) Regulations 1989 or the usual standard of sale and purchase of house in the protection of the purchasers interests if housing units they purchased inevitably abandoned;

20) Insufficient terms in the bridging loan agreement between the developer and the bridging financier to the effect of protecting the rights and interests of the affected stakeholders in the development of housing projects;

21) Insufficient provisions in the Housing Development (Control and Licensing) Act 1966 (Act 118) in the protection of the rights and interests of purchasers if the housing projects abandoned; and,

22) Insufficient terms and conditions in the housing loan agreement (including the Bay’ Bithaman al-Ajil - BBA) effected by the purchaser/borrower and the end-financiers to finance the purchase of the housing unit of the purchaser/borrower against any possible grievances consequent to abandonment of housing projects.

Grievances of Purchasers in Abandoned Housing Projects in Peninsular Malaysia


1) They are unable to get vacant possession of the units on time as promised by the vendor developers;

2) The construction of the houses is terminated or partly completed resulting in the houses being unsuitable for occupation for a long duration of time,\footnote{See for example the abandoned housing project at Taman Bistari Kamunting, Taiping, Perak developed by Sri Ringgit Properties Sdn. Bhd, where this project had been abandoned since the middle of the 1980s. There were several attempts made by certain interested parties to rehabilitate the project but the attempts were proven futile. However, fortunately, with the injection of welfare funds and rehabilitation carried out by Syarikat Perumahan Negara Berhad (SPNB), a government linked company (GLC) funded by the Ministry of Finance, in early 2001, the project has now fully been rehabilitated and ready for occupation, after it had been abandoned for almost 20 years. This is based on File number: KPKT/08/824/3957/E.} unless the units can expeditiously be revive;

3) In the course of the abandonment of the project, purchasers still have to bear all and keep up the monthly installments of the housing loans repayable to their respective end-financiers, failing which, the purchased lots being the security for the housing loan would be sold off and with the possibility of the borrower purchasers be made bankrupts by their lender bank;

4) Further, as the purported purchased unit has been abandoned and cannot be occupied, purchasers have to rent other premises, thus adding up their monthly expenses;

5) Inability of the purchasers to revoke the sale and purchase agreements and claim for the return of all the purchase moneys paid to the developers as the developer may have absconded or may have no monetary provisions at all to meet the claims;
6) Many problems and difficulties happen in attempts to rehabilitate abandoned housing units. The problems are because the projects may have too long been overdue without any prospect of revival and to rehabilitate them, needing additional costs and expenditure on part of the purchasers;

7) Possible difficulties in reaching consensus and towards getting cooperation from purchasers, defaulting abandoned developers, end-financiers, bridging loan financiers, contractors, consultants, technical agencies, local authority, land administration authority, state authority and planning authority to rehabilitate the projects. This may be due to technical and legal problems faced in the attempt to rehabilitate the projects;

8) Insufficient funds to generate the rehabilitation as the outstanding loan funds of the purchasers are not enough, purchasers refuse to part with their own money, no financial assistance from any agencies and the fact that the rehabilitating parties would incur losses if they were to proceed with the purported rehabilitation;

9) Purchasers themselves need to top-up using their own money, as the available funds are insufficient for meeting the rehabilitation costs and they themselves personally have to rehabilitate the projects left abandoned. Thus, they have to face all kinds of music in consequence of the abandonment and initiating efforts for rehabilitation;

10) Purchasers would not get any compensation and damages from the defaulting abandoned developers as they (the defaulting abandoned developers) may have no monetary provisions to meet the claims;

11) There may be no party agreeable to rehabilitate the abandoned housing projects, causing the project to be stalled for an indefinite period of time or for a long period of time or at the worst, the abandoned project may not altogether be rehabilitated;

12) Other pecuniary and non-pecuniary losses subtle or otherwise, suffered by purchasers due to the abandonment and in the course of rehabilitation of the projects pending full completion, such as divorces, family breakdowns, dismissals from employment, nervous shocks, mental breakdowns and losses of future earnings; and,

13) Due to the abandonment and the ensuing complications occurring thereafter, the ordinary machinery and enforcement of the housing, planning, building and development laws becomes dysfunctional at the expense of the purchasers. This also includes the inability of the purchasers to take legal actions against the defaulting developer because the actions might not be beneficial nor feasible.

OUR STANCE ON THE BBA OF HOUSE FINANCING IN MALAYSIA

In the writers’ opinion, BBA as practiced in Malaysia may not be valid on the ground of elements of gharar contained in it. Hence, following the elaboration on gharar al-fahish (exorbitant gharar), the following are the findings of the writers in respect of the BBA as practiced in Malaysia by the Islamic financial institutions.

1) The BBA is void for it inherently involves gharar al-fahish elements, particularly in the case of a transaction financing a house pending completion. The elements of gharar al-fahish are the grievances of the purchasers in abandoned housing projects which have been elaborated above;

2) In houses pending completion, where the transaction involves the application of Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989 or otherwise, normally the purchaser/borrower may pay some portion

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48 For further explanation, please refer to Nuarrul Hilal Md. Dahlan, 2009 Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework (Part One and Part Two), Unpublished PhD Thesis, International Islamic University Malaysia
of the price as deposit. However, on payment of the deposit and on the execution of the sale and purchase agreement with the developer, the purchaser applies for a housing loan (BBA) from an Islamic bank to finance the balance purchase price. This is effected by PPA and PSA as well as other documents such as the charge document or deed of assignment or power of attorney (PA), as the case may be. Normally, in the purchase of house, purchaser pays a deposit representing 10% of the purchase price. The balance purchase price (90%) will be paid by the Bank to the vendor/developer progressively. The bank granting the loan (90% of the purchase price) to the purchasers to complete the sale will charge the said house as collateral to the loan. The title to the housing unit will not be registered into the purchaser’s name until and unless the purchaser has fully settled that loan (90% of the purchase price) together with the profit margin (the sale price) to the bank. Once the purchaser has fully settled the sale price (usually in installment), then will the bank discharge the collateral (the house as the security to the loan) and will allow the transfer of the house into the purchaser’s name. However, the issue is, whether the purchaser/borrower had acquired full ownership (milk al-tam) warranting him to become the full and absolute legal owner (not just being an equitable and beneficial owner) to the purported house on the payment of the deposit and on the execution of the sale and purchase agreement when his name has yet to be registered as the registered proprietor of the property at the land office? It is still doubtful that he has obtained any legal ownership (milk al-tam) to the purported house to warrant him to ‘sell’ the purported house to the Islamic bank for the latter to re-sell the purported house to him (the purchaser/borrower) in accordance with Bay’ al-Inah or Murabahah principles. Thus, in transactions involving houses pending completion, the issue of ownership of the purported uncompleted house is still unresolved. In other words, the ownership is not a full (milk ghair al-tam) and unconditional ownership but an incomplete ownership (equitable/beneficial ownership). Incomplete ownership, it is opined, would not give any absolute power/authority on part of the purchaser to sell the purported house to Islamic Bank. However, it may be argued that, the purchaser/borrower can sell the purported house to the Islamic Bank, even though his ownership of the house is still incomplete, in order to get the housing loan from Islamic Bank, on the condition that the actual owner (the developer or the like) has agreed to such an undertaking. Be that as it may, in the opinion of the author, still this is not acceptable under Islamic law, as the ownership of the purchaser over the house is still incomplete (milk ghair al-tam) which can justify the selling of the house by the purchaser to the bank and for the bank to re-sell the house to purchaser, under bay’ al-Inah and murabahah modes. This is to avoid possibility of gharar in the transaction. It follows that the charge created over the house (which still under milk ghair al-tam) as the security to the BBA may also not valid under Islamic law, as the house is still not absolutely/fully owned (milk ghair al-tam) by the purchaser/borrower to warrant to selling the said house to the bank for the bank to re-sell the bank under the BBA transaction.

3) It is opined that, the current practice of BBA seems absurd, in the sense that, the housing unit which is subject to the charge being a security to BBA, is also considered under the ownership of the bank (effected through PPA and PSA). The bank’s ownership over the house is explicitly stated in the PPA and PSA. How could the bank as the ‘owner’ of the house, become ‘chargee’ to their own asset? Thus, the positions and status of the house, the charge, the ownership/proprietorship, the purchaser, the chargor, the borrower, the bank, the chargee and the developer in BBA transaction are ambiguous and not certain. This can lead to gharar. It should be noted, notwithstanding a charge has been created

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against the land/the housing unit and in abandoned housing project, in the event of
default on the BBA repayment by the purchaser, the bank may also not be able to enforce
the charge and foreclose the security as the house is still not complete and it is doubtful
there is any interested buyer to bid for the purchase of the house/project. Note also that
pursuant to the terms in Schedules G, H, I and J there are terms that prohibiting the bridging lender bank to sell off the unit purchased by the buyer by way of foreclosure in
Court.

4) There will be no adversity (hardship) in rejecting the Malaysian style of BBA. In other
words, the degree of necessity (darurah) does not exist currently in Malaysia for allowing
the practice of BBA (hybrid of Bay’ al-Inah and murabahah), which are rejected by
majority of jurists as it may involve riba’ elements. Instead other modes which are more
equitable must be implemented such as musharakah (partnership) or ijarah (rental/lease).
Some quarters may argue that the practice of BBA is for the maslahah/maslahah
amah/maslahah al-mursalah (public interest) of the ummah (Muslim society) or comply
with the principles of istihsan, in line with the maqasid al-Shariah. However, to reply
this, the maslahah and the istihsan must not be in derogation of the express provisions of
the primary texts (al-Quran and al-Sunnah) which clearly prohibit gharar and other
inequitable/unjust practices. It (BBA) may be applicable if there is necessity (darurah)
for it. However, the degree of necessity (darurah) for the practice of BBA in Malaysia
warranting the application of BBA, it is opined, has not yet actualized. We have the
means to replace BBA with better products, but we do not resort to them. This is sinful.
This is akin to the requirement that to perform the obligatory prayer (solah fardu), one
shall have to stand up (qiyam). If he has the ability to stand up (qiyam) without any
difficulty or hardship, but instead he chooses to pray by sitting down, his prayer is
rejected as the rukun (pillar) of the prayer (solah) has not been fulfilled. Similarly in
BBA, we have the ability and means to use better Islamic products such as musharakah
and ijarah in house financing, but we choose BBA (the Malaysian BBA). The reason for
this may be economic and/or maximization of profit factors. Thus on this footing, it is
opined, the rationale and reason for adopting the Malaysian BBA is not satisfactorily
sound.

5) If the housing project fails and is subsequently abandoned, the purchasers are still
required to pay the monthly installments to the Bank. There is no term in the BBA that
protects the interest of the purchasers if in the course of construction, the houses are
abandoned.

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50 Pursuant to clause 2(2) of the Schedules G, H, I and J of Housing Development (Control and Licensing)
Regulations 1989

51 What is meant by maslahah is the preservation of the objectives of the five (5) maqasid al-shariah
(religion (din), self, mental strength (intellect), progeny (dignity) and property or wealth). Any policy and
action resulting in the elimination of these objectives is considered harmful against the necessities of
mankind. See Abd al-Wahab Khalaf, Ilmu al-Usul al-Fiqh, (al-Qahirah: Dar al-Ilimi, 1972), 197-207 and
Wael b. Hallaq, The Origins and Evolution of Islamic Law, (Cambridge: Cambridge University Press,
2005) 145-146. The purpose of maqasid al-shariah is to achieve, justice (‘adl), securing benefits to
mankind in this terrestrial world and Hereafter, protecting mankind against corruption, harmful elements,
hardship and evil, providing human comfort and satisfying human emotional needs. See Shams al-Din Abi
Abdullah Muhammad bin Abi Bakar (Ibnu Qayyim al-Jawziyah), ‘Ilam al-Muwaggi in ‘An Rab al-Alamin,
Wan Ahmad. 2003 Public Interests (Al-Masalah al-Mursalah) in Islamic Jurisprudence, An Analysis of the
Concept in the Shahe I School, (Kuala Lumpur: ISTAC IUM, 2003), 1-16 (Introductory Chapter) and Dr.

52 See Dr. Waibah al-Zuhayli. 1988, ibid. at pp.635-645.
6) The banks absolve any liability for ensuring the completion of the houses. The banks do not consider the grievances faced by the abandoned housing projects’ purchasers. What the bank want is the installment moneys of the BBA must be fully settled by aggrieved purchasers;

7) Purchasers are persons aggrieved if abandonment occurs. They must pay monthly installments yet they cannot occupy the purported houses. Consequently, they have to rent other premises and have to face other grievances, pecuniary and non-pecuniary. There is no term in the BBA which can provide measures to face these problems.

8) In BBA, through the PSA, the banks are owners of the property. Logically, the owner is obligated to ensure that the purported houses will be duly completed and duly handed over to purchasers and the titles can be registered in the purchasers’ names. There is no guarantee that at the end of the day, if the project is abandoned or the property has not been duly constructed, the bank as owner must either do whatever is necessary to protect the interests of the purchasers or to compensate the purchasers or to return back all the moneys paid to them (restitution and indemnity). There is no term prescribing this duty on the banks in the PPA and PSA.

9) There are no preventive and curative measures provided in the BBA, especially in the PSA, to avoid losses on part of the purchasers due to the abandonment of houses they purchased.

10) There is no term in the BBA which provides the purchasers with the right to sue the bank for the calamities that have occurred or the right to claim compensation and damages. Provisions such as defect liability period, protection against sub-standard housing constructions, the guarantee that the titles to the property are to be registered into the purchasers’ name on full settlement of the loan and compensation for late delivery of vacant possession and the obligation of the bank to obtain certificate of completion and compliance (CCC), must also be made clear and provided in the BBA.

SUGGESTIONS

In facing the above problems, the following are suggested:

1) The practice of BBA should be abolished. Instead, Islamic financial institutions should use other modes of transaction such as *musharakah* and *ijarah* in house financing. This would prevent the possibility of occurrences of *riba’* and *gharar* transactions and other problems associated with BBA as illustrated above;

2) The new modes in house financing, such as *musharakah* and *ijarah*, must also provide sufficient terms in the protection of the interests of purchasers if abandonment or otherwise inevitably occurs; or

3) If the practice of BBA is to resume, it must substantially be revamped to the effect of protecting the rights of the stakeholders. The following are suggested in this respect:

   a) To avoid any possible occurrence of abandoned housing projects and the grievances and problems consequent to it altogether, the Islamic Bank should only apply BBA for financing houses which have been duly completed only, not for financing houses pending completion;

   b) The BBA should provide for the responsibilities and duties of the Islamic bank as the owner of the houses in the course of construction of the houses and if the construction of the houses is terminated and the project is abandoned. The duty is to ensure that rehabilitation can be carried out. If rehabilitation of the houses is impossible, the duties are to return back all the moneys paid by the purchaser and
pay all incidental compensations consequential to the abandonment and above all
to ensure that the bank shall be fully responsible to the purchasers if
abandonment is inevitable in the protection of the purchasers' interests and
rights. Similarly, as the owner of the property (effected through the PPA and
PSA), the Islamic bank in BBA transaction must observe the duty to deliver the
house on time failing which late delivery damages may be chargeable on them,
the duty to observe defect liability period and the duty to ensure that all the
requirements under the laws (SDBA, UBBL, the requirements for obtaining the
CCC or CF, as the case may be and the guarantee that the title to the property can
be registered into the purchasers' name on full settlement of the loan) relating to
the construction of the houses have been duly and fully complied with. If the
Islamic bank (as the owner to the purported houses under BBA) fails to adhere to
these requirements, the purchasers/borrowers shall have every right to take action
against the bank for specific performance and claim damages in lieu of specific
performance as well other equitable relief insofar as they are just and expedient.

c) In the case of the charge as a security to the BBA which involves incomplete
purchaser's ownership (equitable/beneficial ownership) of the house, it is
proposed that such a practice should be abolished. This is also to avoid gharaib. In
replace of this kind of charge, the purchaser/customer shall have to create third
party legal charge or first legal charge on other property belonging to him, or
there must be some guarantors to the BBA or a special Islamic insurance
(Takaful) should be introduced to guarantee repayment of the purchase price by
the purchaser, if the purchaser inter defaults on the BBA repayment. If the
purchaser defaults, these means can be used to settle the outstanding BBA
repayment.

d) Above all, the terms and conditions in the BBA should strike a balance between
the interests of the bank (i.e profit-oriented interests) and the interests and rights
of the purchasers/customers.