



**TAY & HELEN WONG**  
LAW PRACTICE • AMALAN GUAMAN

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**EDITORIAL NOTES**

This is a special issue published to highlight two very recently reported decisions which we believe are important to the respective areas of law, namely the emerging Islamic banking industry and powers of the sole supplier of electricity in Malaysia.

**IMPORTANT**

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## A GUIDE TO COMPUTATION OF CLAIM IN RECOVERY ACTION IN AL-BAI BITHAMAN AJIL FINANCING

The recently reported High Court decision of *Bank Muamalat Malaysia Bhd v Suhaimi Md Hashim & Satu Lagi*<sup>i</sup> provides a guide to Islamic banking practitioners on how a claim arising from a Al-Bai Bithaman Ajil financing facilities should be formulated. Whilst it may still attract critical comments with regard to the approach of the learned High Court Judge who is the same judge that decided the much criticized case of *Affin Bank Bhd v Zulkifli Abdullah*<sup>ii</sup>, it has at least made known how the sum to be recovered should be computed and how the procedural requirement of the Rules of the High Court 1980 (RHC) is to be fulfilled.

In *Suhaimi Md Hashim's* case, the borrowers were granted a Al-Bai Bithaman Ajil financing facilities of RM37,682.00 to finance the purchase of a house. The borrowers defaulted and the bank applied for an order of sale pursuant to s 254 of the National Land Code read with Order 83 of the RHC.

On the sum to be recovered, the bank claimed for RM68,463.62 as at 12 May 2005. This is based on the amount of the advance of RM69,123.60, which represented the Selling Price (harga jualan). The particulars in the Originating Summons (OS) filed to apply for an order of sale are as follows:

|   | RM        |
|---|-----------|
| (a) Amaun pendahuluan (harga jualan)  | 69,123.60 |
| (b) Amaun pembayaran semula   | 7,165.34  |
| (c) Amaun ansuran yang tertunggak pada :-   |           |
| Tarikh saman pemula (4 Oktober 2005)  | 4,250.36  |
| Tarikh afidavit ini (15 Februari 2006)  | 5,760.36  |
| (d) Amaun yang masih terhutang<br>(4 Oktober 2005)  | 67,798.62 |
| (e) Amaun keseluruhan yang terhutang pada<br>tarikh pendengaran (13 March 2006)   | 66,668.62 |
| (f) Amaun keseluruhan yang perlu dibayar sekiranya<br>penyelesaian dilakukan pada tarikh afidavit ini<br>(15 Februari 2006) | 43,053.73 |
| (g) Amaun keseluruhan yang perlu dibayar sekiranya<br>penyelesaian dilakukan pada tarikh pendengaran<br>(13 Mac 2006)       | 43,330.90 |

The learned judge however held that it was incorrect to regard the Selling Price as the amount of advance, without taking into consideration all the three agreements which form the Al-Bai Bithaman Ajil financing transaction, namely the Property Purchase Agreement, the Property Sale Agreement and the Charge. The Selling Price of RM69,123.60 was for the

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financing period of 180 months and includes the profit made for the entire 180 months, but once the facilities were terminated before the end of 180 months, item (a) was no longer true. The learned judge instead held that **the Buying Price should be properly regarded as the amount of advancement**.

Item (b) and (c) were accepted by the Court. However, item (d), (e) and (f) were put to close scrutiny by the learned judge since the base used by the bank in item (a) was no longer correct. As a result, the learned judge laid down several principles / methods of computation which we take the liberty to summarize as follows :

1. Firstly, **the profit of the bank is to be ascertained**.  
In the instant case, the Selling Price (69,123.60) minus the Buying Price (RM37,862) = Profit (31,261.60).
2. Then, the profit is to be divided by the number of months originally agreed to be financed to get **monthly profit**.  
In the instant case,  $31,261.60 \div 180 = 173.68$ .
3. Thirdly, the number of months that the bank has provided financing is to be ascertained. This is represented by the time lapsed between the date of the facilities agreement and the date of the hearing of the notice of appointment to hear the OS. For ease of reference, let's call it '**the period of financing pre-termination**'.  
In the instant case, 24.7.2002 to 24.5.2006 → 46 months
4. **The profit for the period of financing pre-termination** is then determined by multiplying the monthly profit with the period of financing pre-termination.  
In the instant case,  $173.68 \times 46 = 7989.28$
5. Finally, **the amount remaining due under the charge as at the hearing date** is to be determined by the following method:

|        |  |
|--------|--|
|        | the amount of the advance                              |
| deduct | the profit for the period of financing pre-termination |
| deduct | the amount of the repayments                           |

  
In the instant case,  $37862 - 7989.28 - 7165.34 = 38,685.74$ .

The learned judge thus rejected item (d), (e) and (f) of the OS. Instead, the learned judge proceeded to grant an order for sale for the amount of RM38,685.74 and for each day subsequent to the order of sale until full settlement, the amount of RM5.79<sup>iii</sup> as daily profit.

The learned judge did recognize the fact that under Syariah law, *ibra'a* principle was applicable to give rebate for the remaining period un-financed due to early termination. However, such rebate is at the discretion of the bank and the fact that the bank in the instant case claimed for the total Selling Price was indicative of the bank's intention not to give *ibra'a*. Notwithstanding this, in the learned judge's opinion, '*soal ibra'a itu tidak perlu ditimbulkan kerana pada asasnya plaintiff tidak berhak menuntut "keuntungan" yang sebenarnya adalah bakal keuntungan bagi tempoh masa yang belum habis.*'

In summary, based on the above case and until further determination by the Court of Appeal or another High Court<sup>iv</sup>, insofar as Al-Bai Bithaman Ajil financing is concerned, O. 83 r 3 (3) and (7) of the RHC can be satisfied as follows:

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- |     |   |   |  |
|-----|---|---|--|
| (a) | the amount of advance                     | → | the Bank's Buying Price                                      |
| (b) | the amount of repayments                  |   |  |
| (c) | the amount of instalments in arrears:     | → | at the date of issue of OS;<br>at the date of the affidavit. |
| (d) | the amount remaining due under the charge | → | to be arrived at by following<br>step (1) to (5) above.      |
| (e) | the daily profit <sup>v</sup>             | → | monthly profit divided by 30                                 |

<sup>i</sup> [2006] 7 CLJ 321

<sup>ii</sup> [2006] 1 CLJ 438; [2006] 3 MLJ 67. This case was featured in both our Law Update Issue 2/2005 under the heading 'Recovery of Islamic Loan' and Law Update Issue 1/2006 under the Epilogue section.

<sup>iii</sup> Arrived at by dividing the monthly profit of RM173.68 with 30 days.

<sup>iv</sup> We were given to understand that currently a number of cases involving Islamic financing are pending before the same judge who had heard arguments from various counsel on the issues arising from *Zulkifli Abdullah's* case and other cases involving Islamic financing and will in due course deliver a judgment that will, hopefully, provide a definitive guide on the claims involving Islamic banking product.

<sup>v</sup> O.83 r 3(7) talks about a day's interest which is actually not applicable for Islamic financing since interest is prohibited under Syariah law. However, the decision in *Suhaimi Md Hashim's* case appeared to have included such relief but in the form of 'a day's profit'.

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## PUBLIC UTILITIES

### TNB'S POWER TO CUT POWER

The conflicting decisions of the High Court with regard to the extent of power exercisable by utilities provider, Tenaga Nasional Berhad (TNB), when it finds evidence that points to tampering of power supply wires or meter at the premises of the user, was resolved by the Court of Appeal in the very recent decision in *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Berhad*.

Prior to this decision, the High Court in *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Berhad*<sup>i</sup> held that TNB had no power to disconnect power supply upon giving 24 hours notice even if an employee of TNB found evidence which in his opinion proved that an offence had been committed under s 37(1), (3) or (14) of the Electricity Supply Act 1990 (Act). The court held that such power as conferred by s 38(1) of the Act was only exercisable only after the user had been proved by evidence in the court of law to have committed an offence under s 37(1), (3) or (14) of the Act. In the learned judge's opinion, the words "proves" appearing in s 38(1) of the Act envisaged proof before a court of law and not before an employee of TNB.

On the other hand, both judges in *Leong Hup Poultry Sdn Bhd v Tenaga Nasional Berhad*<sup>ii</sup> and *Tan Yeong Kim v Tenaga Nasional Berhad*<sup>iv</sup> held views conflicting to the decision in *Dai-Ichi Electronics (M) Sdn Bhd*. They were of the view that s 38(1) of the Act did not require proof of commission of an offence before the court of law before TNB could exercise its

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power to cut the power supply. The words in s 38(1) must be given its ordinary and literal meaning so that an employee of TNB once finding upon any premises *evidence which is in his opinion proves* that an offence has been committed under 37(1), (3) or (14) of the Act is empowered to disconnect the power supply upon giving not less than 24 hours' notice.

The Court of Appeal in *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Berhad* disagreed with the interpretation given to s 38(1) of the Act in *Dai-Ichi Electronics (M) Sdn Bhd's* case. They preferred the interpretation and views expressed in the latter two cases. Following this decision, TNB is empowered to disconnect power upon giving 24 hours' notice under s 38(1) of the Act without having to wait for the outcome of the court proceedings in relation to the offences alleged to have been committed by the user concerned in tampering with any meter or dishonestly consumes energy or such other instances under ss 37(1), (3) and (14) of the Act.

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<sup>i</sup> Court of Appeal Civil Appeal No: J-02-892-2005.

<sup>ii</sup> [1996] 4 MLJ 506

<sup>iii</sup> Mahkamah Tinggi Muar Guaman Sibil No:22-11-1999

<sup>iv</sup> [2008] 8 CLJ 629

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## CONTACT US

For further information, explanation or analysis of the subject matter covered in this issue or to provide feedback, please contact us at:

TAY & HELEN WONG  
LAW PRACTICE  
Suite 703 Block F Phileo Damansara I  
No. 9 Jalan 16/11  
46350 Petaling Jaya  
Selangor Darul Ehsan  
Malaysia  
Tel (603) 79601863 Fax (603) 79601873  
email: [lawpractice@thw.com.my](mailto:lawpractice@thw.com.my)

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