

## Is Malaysian Islamic Home Financing Bay' Bithaman Al-Ajil ('BBA') Compatible with Islamic Law? A Critical Examination on The Issue of 'Beneficial Ownership'

Associate Professor Dr. Nuarrual Hilal Md Dahlan ACIS

Legal and Justice Research Centre, School of Law, College of Law, Government and International Studies,  
Universiti Utara Malaysia, Sintok, Kedah, Malaysia  
Email: nuarrualhilal@uum.edu.my; nuarrualhilal@gmail.com

Dr. Fauziah Mohd Noor

School of Law, College of Law, Government and International Studies,  
Universiti Utara Malaysia, Sintok, Kedah, Malaysia  
Email: mnfauziah@uum.edu.my; mnfauziah75@gmail.com

Dr. Mohd Sollehudin Shuib

Islamic Business School, College of Business,  
Universiti Utara Malaysia, Sintok, Kedah, Malaysia  
Email: sollehudin@uum.edu.my

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### Abstract

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

**Keywords:** Beneficial Ownership; Abandoned Housing Projects; Bay' Bithaman al-Ajil (BBA); Issues; Purchasers' Grievances; Proposal for Reform.

### 1. Introduction

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

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

Court of Malaya at Kuala Lumpur)).

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

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

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

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

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

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

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

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

## 2. Research Methodology

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

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

officers as a way to achieve triangulation and multiple evidences and thus can ensure reliability and validity of the research undertaken (Silverman, 2000; Yin, 1994; Yin, 2000).

### 3. The Governing Law of Islamic Banking and Finance in Malaysia

Islamic banking and finance in Malaysia is governed by the Islamic Financial Services Act 2013 (Act 759) (IFSA). The obligation to comply with *shariah* (Islamic Law) in all the activities of the institutions carrying out Islamic banking business is clearly spelt out in section 28 of IFSA (Duty of Institution to Ensure Compliance with *Shariah*). An institution carrying out Islamic banking business is under a responsibility to do certain acts once it found that the business that it carries out has contravened the *shariah* (section 28(3) IFSA).

*Shariah* Advisory Council ('SAC') is a council established by the Bank Negara Malaysia (Central Bank of Malaysia) pursuant to section 51 of the Central Bank of Malaysia Act 2009 (Act 701) (Establishment of *Shariah* Advisory Council) ('CBM'). The SAC shall be the authority for the ascertainment of Islamic Law for the purpose of Islamic financial business (section 51 CBM). It is a duty of the Bank Negara Malaysia and Islamic Financial Institutions to consult the SAC pursuant to sections 55(1) and 55(2) of CBM in respect of Islamic financial business and conducting its affairs. The purpose of consulting, referring and seeking advice from the SAC is to make sure that the Islamic financial business and its affairs are conducted in accordance with the requirements of *Shariah* (section 55(2) CBM). Apart for sections 51 and 55, sections 56(1), 57 and 58 of the CBM also prescribe that the rulings and advice of the SAC shall bind the IFIs, the Bank Negara Malaysia, the *Shariah* Committee, the court of law and the arbitrators on matters pertaining to Islamic financial matters.

Thus, the rulings and advice of the SAC shall bind the IFIs, the court of law, the arbitrator and the *Shariah* committee. In other words, the new provisions inserted in the CBM in relation to the SAC, serve as ouster clauses to oust any jurisdiction and power of the court of law, any other *Shariah* committee of the IFIs and any other persons to challenge the rulings and advice of the SAC in respect of Islamic financial business and affairs (Md. Dahlan & Aljunid, 2010; Md Dahlan & Aljunid, 2011).

Apart from complying with the *shariah* and the SAC, the IFIs carrying out Islamic financial business must follow the standards set out by the Bank Negara Malaysia and the SAC (section 29 IFSA).

Similarly, all persons, including the IFIs, are duty bound to comply with the directions (written circulars, guidelines and notices) of the Bank Negara Malaysia on any *Shariah* matter relating to the Islamic financial business. These directions are made in accordance with the advice of the SAC. Any person who fails to comply with any of these directions, commit an offence and shall, on conviction, be liable to a fine not exceeding three million ringgit (Malaysian Ringgit (MYR): 3,000,000.00) (USD 750,000.00) (section 59(1)(2)(3) CBM).

In addition to the above, the IFIs must also comply with the advice of its internal *Shariah* Committee (section 30(1) IFSA). IFIs must also establish their own *Shariah* Committee to advise its business, affairs and activities in order to ensure that they comply with the *Shariah* (section 30(1) IFSA). The duties and functions that the *Shariah* Committee carries out must also be consistent with the standards prescribed by the Bank Negara Malaysia (section 32 IFSA).

The superiority and hegemony of the SAC over the court, the IFIs, the arbitrator and the *Shariah* Committee in relation to the Islamic financial business and affairs has been given judicial support and recognition by recent cases namely *Mayban Trustees Bhd v CIMB Bank Bhd and other appeals* [2012] 6 MLJ 354 (Court of Appeal at Putrajaya), *Mayban Trustees Bhd v CIMB Bank Bhd and other appeals* [2012] 2 MLJ 187; [2012] 6 MLJ 354 (Court of Appeal at Putrajaya), *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2012] 1 ShLR 23; [2011] 3 MLJ 26 (High Court of Malaya at Kuala Lumpur), *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 1 ShLR 1; [2012] 7 MLJ 597 (High Court of Malaya at Kuala Lumpur), *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2013] 3 MLJ 269 (Court of Appeal at Putrajaya), *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2009] 6 MLJ 416 (High Court of Malaya at Kuala Lumpur), *Kuwait Finance House (M) Bhd lwn Teknogaya Diversified Sdn Bhd dan lain-lain* [2012] 9 MLJ 433 (High Court of Malaya at Kuala Lumpur), *Mayban Trustees Bhd v CIMB Bank Bhd and other appeals* [2012] 6 MLJ 354 (Court of Appeal at Putrajaya), *CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor* [2012] 3 MLJ 869 (High Court of Malaya at Kuala Lumpur), *Bank Muamalat Malaysia Bhd lwn Kong Sun Enterprise Sdn Bhd dan lain-lain* [2012] 10 MLJ 665 (High Court of Malaya at Johor Bahru) and *Bank Islam Malaysia Bhd lwn Rhea Zadani Corp Sdn Bhd dan lain-lain* [2012] 10 MLJ 484 (High Court of Malaya at Kuala Lumpur).

### 4. Case Law

There are reported cases that have dealt with BBA in Malaysia. Among the cases are as follows:

- 1) *Bank Islam Malaysia Bhd v Azhar Osman & Other Cases* [2010] 5 CLJ 54 (High Court of Malaya at Kuala Lumpur)(issue involving the demand of the bank for full sale price);
- 2) *Bank Kerjasama Rakyat Malaysia Bhd v. Brampton Holdings Sdn Bhd* [2015] 4 CLJ 635 (High Court of Malaya at Kuala Lumpur)(Issues on the liability of the defendant debtor who failed to make repayment under the BBA facility to the bank financier);
- 3) *Malayan Banking Bhd v. Marilyn Ho Siok Lin* [2006] 3 CLJ 796 (High Court of Sabah & Sarawak, at Kuching)(Issue on the claim of the bank for full sale price from the customer debtor even though the BBA facility was terminated prematurely before the end of the repayment period);
- 4) *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] 5 CLJ 311 (High Court of Sabah and Sarawak at Kuching)(Issue on the claim of the bank for full sale price from the customer debtor even though the BBA facility was terminated prematurely before the end of the repayment period); and,
- 5) *Arab-Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) and Other Cases* [2009] 1 CLJ 419 (High Court of Malaya at Kuala Lumpur)(Issue on the rate of profit from BBA transaction may have contravened Islamic Law).

## 5. The Case Study

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

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

### 5.1 Analysis

In the transaction above, the purchaser bought the said property from the developer vide an agreement of sale and purchase. Later the purchaser applied to BIMB for financing the balance purchase price. This was done through BBA. There are three documents involved:

- 1) Sale & Purchase Agreement between the vendor developer and the purchaser dated 9 September 2002 ('S&P');
- 2) PSA dated 1 November 2002 ('PSA');
- 3) PPA dated 1 November 2002 ('PPA'); and,
- 4) Deed of Assignment dated 1 November 2002 ('DoA') as a security document where the property has not yet received final title which gives a right to the lender creditor chargee to sell the property if the borrower debtor defaults on the home finance repayment.

Through these legal documents the purchaser is called the beneficial owner of the property. Beneficial owner is a legal term where specific property rights ("use and title") in equity belong to a person even though legal title of the property belongs to another person (Black's Law Dictionary, 2001). This often relates where the legal title owner has implied trustee duties to the beneficial owner. In practical sense, in respect of the sale and purchase of property in Malaysia is concerned, beneficial owner refers to the purchaser who paid the deposit (normally 10%) of the purchase price to the vendor, without having paid the total purchase price and that the title to the property is not yet transferred into the name of the purchaser pending full payment of the purchase price.

In other words, referring to the above case study, the purchaser through the purchase of the said property vide sale & purchase agreement (S&P) dated 9 September 2002, from the developer, the property of which was still pending completion, becomes the beneficial owner of the said property as the said property has not yet fully bought, the purchase price is still not fully paid and title has not yet registered into the name of the purchaser. His position as the beneficial owner still subsists even when the purchaser entered into the BBA contract vide PPA. This can be seen in the preamble of the PPA dated 1 November 2002 of the case study above. Through PPA also, pursuant to clause 5 (passing of beneficial ownership and/or rights), the beneficial owner of the said property was shifted to BIMB. Later through PSA and Deed of Assignment (DoA) dated 1 November 2002, pursuant to clause 4 (Passing of Beneficial Ownership and/or rights) and clause 1, respectively, the beneficial owner was re-shifted back to the purchaser through the mechanism of *Bay' al-Inah*. Through PSA also and by the fact that the purchaser is again becoming the beneficial owner, the said property is charged to BIMB through the Deed of Assignment (DoA).

The issue is this: What is the Islamic law view on beneficial ownership?

Under Islamic law, a contract is called *al-'aqdu*. *al-'aqdu* is defined as 'the obligation which is the result of an offer given by a party and the acceptance given by the other party, in a way where its legal effect is expressed on the thing contracted upon' (Ibn 'Abidin, 1966).

According to Mejelle, pursuant to article 103, *aqdu* is defined as 'the two parties taking upon themselves and undertaking to do something. It is composed of the combination of an offer (*ijab*) and acceptance (*qabul*)'.

According to Qamus al-Wasit, *al-'aqdu* means 'an agreement between two parties with a purpose that the respective parties have to execute their obligations as agreed'.

There are many Quranic verses and Hadith of Prophet Muhammad (PBUH) mentioning on contract. For instances are the followings:

- 1) Surah al-Maidah 5:1: "O ye who believe! fulfil (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." (Ali, 1989).
- 2) Surah al-Baqarah 2:282: "O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord Allah, and not diminish aught of what he owes. If they party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is jester in the sight of Allah, More suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear Allah. For it is Good that teaches you. And Allah is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him Fear his Lord conceal not evidence; for whoever conceals it, - his heart is tainted with sin. And Allah knoweth all that ye do" (Ali, 1989).
- 3) Hadith of the Prophet Muhammad (PBUH): "Muslims are bound by their condition" (al-Bukhari, 1934).

Under Islamic law there is no specific topic discussing on 'beneficial ownership'. What is clear is that 'beneficial ownership' denotes not an absolute ownership. The issue is, whether Islam allows beneficial ownership in contract?

First of all, in Islamic law there is a caution by a Hadith of not to involve in non or incomplete ownership and non-possession-ship of subject matter.

For example al-Tirmizi reported that a man questioned the Prophet Muhammad (PBUH) that a man came to see

him and he wanted to buy from him some goods. He had no such goods. He went to the market and purchased the goods and then sold them to the man. The Prophet Muhammad (PBUH) responded to the question by answering "do not sell what you do not have" (al-Tirmizi, 1937). The report indicates, in Islam, it is not allowed for a person to sell an object which he does not own or possess.

Imam al-Bukhari also reported a hassan hadith which prohibits of selling the foodstuff which was previously bought without taking into possession (al-Bukhari, 1934).

To Ahmad Hidayat Buang, the above mentioned contract is prohibited because the seller cannot guarantee that he is able to deliver the object of the sale physically and legally. In physical term he cannot guarantee the object will be available in future and in legal term he is not yet the lawful owner of the object (Buang, 2000).

Be that as it may, it is submitted that, Islam provides certain elements of contract. In the event that any of these elements is absent, then the contract can be void. The elements are as follows:

- a. The subject-matter must exist;
- b. The subject-matter can be delivered;
- c. The subject-matter can be ascertained; and,
- d. Suitability of the subject-matter.

### 5.1.1 The Subject-Matter Must Exist

Islamic law emphasizes that the subject matter of a contract must exist at the conclusion of the contract. Thus, if the subject-matter is absence, the contract is void. Due to the absence of the subject-matter, the contract becomes a *gharar* contract (fraudulent/perilous contract), which is a void contract. The authority that requires the existence of the subject matter and prohibition of *gharar* contract is as follows:

Al-Quran:

1) Chapter IV (Surah An-Nisa'), Verse 29: "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!". (Ali, 1989).

Through the above Quranic verse, Islam prohibits all categories of wealth acquisition or profit through unlawful ways which it terms *batil*. Unlawful way includes *gharar* contract (Buang, 2000).

Hadith:

2) "Muslims are brothers. It is not permissible for a Muslim to sell a thing which contains faulty elements/flaws/defects (*aib*) to his fellow brother (Muslim) except if he discloses it" (al-Shawkani, 1357H).

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.' (Imam Muslim, n.d)

4) The Prophet Muhammad (PBUH) said: "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" (al-Shawkani, 1357H).

5) Yahya related to me from Malik from Abu'r-Rijal Muhammad ibn Abd ar-Rahman ibn Haritha from his mother, Amra binti Abd ar-Rahman that the Prophet (PBUH), forbade selling fruit until it was clear of blight. Malik said: 'Selling fruit before it has begun to ripen is an uncertain transaction (*gharar*).' (Imam Malik, 2016).

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 (Tradition), whereby the Prophet Muhammad (SAW) prohibited a person from selling an animal foetus yet to be born while it is still in the mother's womb, when the mother was not part of the sale (al-Zayla'i, 1393H). 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 of the udder being perhaps void of milk, and instead, only containing air (al-Kasani, 1328H). In one hadith, the Prophet Muhammad (PBUH) prohibited the act of stopping the milk of udder of the

female goat for a certain duration for the purpose of enticing the public to purchase the female goat on the pretext of it containing a lot of milk (al-Shawkani, 1357H). Prophet Muhammad (PBUH) too prohibited the sale of things which one does not own (Abu Dawud, 2009).

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 purchaser immediately harvests them. The position is the same in respect of the sale of fruits and agricultural products, which yield successively one after another during one harvest as in the case of water melons and egg-plants. In this particular case, Muslim jurists in general have agreed to allow the sale of fruits which have already appeared but will disallow the sale of fruits which are yet to appear (Al-Kasani, 1328H). This contract falls under the category -- 'the subject matter exists in essence, then comes into existence thereafter' (Nawawi, 1999; Al-Sarkhasi, 1384H; Ibn Juzay, 1974; Ibn Qudamah, n.d).

As regards the subject-matter which did 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 *gharar* (Nawawi, 1999; Al-Sarkhasi, 1384H; Ibn Juzay, 1974; Ibn Qudamah, n.d). A transaction containing the element of *gharar* is prohibited based on the verses of the Quran above and the hadith of the Prophet Muhammad (PBUH), for instance Ibn Umar to have said that the Prophet (PBUH) prohibits sales involving *gharar* elements (al-Bayhaqi, 1971). Majority of the jurists are also unanimously of the opinion that the contract which its subject matter generally could not be surrendered to the parties at the conclusion of the contract or at the promised date, is a *gharar* contract and thus it is void, not binding and having no legal effect (al-Zuhayli, 1988).

*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 (Abdul Rahman, 2016). It is also forbidden by the Shariah because this element typically causes enmity, dispute, hardship, injustice and losses to the parties.

Hence, referring to the issue of 'beneficial ownership' in the above case study, it is clear that, the subject matter, i.e the completed house does not exist at the time the contract was entered into and when the contract was concluded. There seems no possibility, based on the case study, that the subject-matter can be possibly existed at the conclusion of the contract and even to date. This is because the vendor developer terminated the construction of the house and abandoned it and there is no plan for rehabilitation altogether to ensure the construction completed, to the detriment of the purchaser. It follows that, the 'beneficial ownership' that the purchaser owned during the subsistence of the agreement of sale with the vendor developer and the subsistence of PPA with BIMB was a defective ownership and cannot be existed to date. Thus, it is opined, the agreements (agreement of sale and PPA) are void contracts, unless there is a clear term in the BBA agreements that provide protection to the aggrieved parties in the event abandonment occurred.

### 5.1.2 The Subject-Matter Can Be Delivered

Islamic law requires that the subject-matter can be delivered, irregardless whether there exist beneficial ownership or legal ownership. What is important, the subject-matter can be delivered to the rightful parties to the contract. Even though the ownership is beneficial, not being absolute, in nature, yet if the parties can ensure the delivery of the subject matter including the ownership, the contract is recognized under Islamic Law and is valid. This is the opinion of the majority of the jurists (al-Zuhayli, 1988).

### 5.1.3 The Subject-Matter Can Be Ascertained

It is necessary according to Islamic Law that the subject matter can be ascertained so as to prevent disputes, hardships and losses to the parties. According to the Hanafi and Hanbali Schools, knowledge and ascertainment of the subject matter can be made by pointing out the place where the subject-matter is placed, even if it is hidden (al-Kasani, 1982; Ibn Qudamah, n.d). However, according to the Maliki School, there is no valid contract unless parties can see the subject matter visually, except it is impracticable, then in this situation the subject matter must be ascertained by description (al-Hattab, 1992). On the other hand, Shafie School opined that the knowledge of the subject matter can only be attained only by visual sight of the subject matter, whether or not the subject matter is actually present at the meeting of the parties (al-Sharbini, 1370H).

Following the above elaboration, the subject matter of the case study is the pending completion house. Thus, at

the time of the contract, it cannot be seen. Neither can it be seen after the conclusion of the contract. There is no term in the sale agreement, PPA, PSA and DoA (the BBA agreements) that require the responsible parties to ensure that the house can be rehabilitated and be brought into existence and/or payment of compensation to the aggrieved parties. What is available are the descriptions of the property (subject matter) which are provided in the sale agreement between the vendor/developer and the purchaser, in the PSA, PPA and DoA. For example, the descriptions of the houses are on information regarding the material construction, measurement, land description, duration of construction and right to defect liability period. As the house (subject-matter) does not exist i.e. abandoned, and it cannot be seen visually and further there is no term that requires the responsible party to rehabilitate the abandoned house, these facts have rendered the subject matter unascertainable and thus, it is submitted, the contract is void.

This is in line with the opinion of the Hanafi School who maintained that the subject matter should be determined in a manner which can dispel serious ignorance, thus, the terms of the contract should define the genus, species quality and quantity. In addition to this, to the Hanafi School, immaterial lacking of knowledge does not invalidate the contract, because the party has the right of 'option on inspection' (al-Kasani, 1982). Similarly, this is also the opinion of the Maliki School, except that the Maliki School is of the opinion that contract by description is lawful and it is not necessary to allow 'option on inspection', different from the Hanafi School's view (al-Hattab, 1992). The Hanbali School is also of a similar view, where they opined that the subject-matter may be determined by description in a way which defines its exact identification. Prior inspection of the subject-matter is sufficient to conclude a contract, provided that it is not a kind which normally changes between the inspection date and the date when the contract is concluded. In other words, the descriptions of the subject-matter must tally with the actual features of the subject-matter upon delivery (Ibn Qudamah, n.d.; Ibn Qayyim, 1950).

Hence, referring to the case study above, the subject matter being the incomplete and abandoned house even though it has been fully described in the sale agreement (S&P), PPA, PSA and DoA (the BBA agreement), it is still failed to be delivered to the purchaser by the developer and/or the Islamic bank. It follows that, by the failure to deliver the subject matter (duly completed house), the vendor (BIMB) and the developer have breached the descriptions (S&P, PPA, PSA and DoA). The aggrieved purchaser is also entitled to right of option on inspection (Khiyar), following the Hanafi and the Hanbali Schools, and if warranted, he can void the contract.

#### 5.1.4 Suitability Of The Subject-Matter

The subject matter must be suitable in commercial value and fit for transaction purpose. This is the opinion of Ibn Abidin, al-Sharbi, al-Dardir and al-Kasani (Ibn Abidin, 1966; al-Sharbi, 1370H.; al-Dardir, 1972; al-Kasani, 1982).

Thus, as the subject matter in the case study was abandoned, cannot be delivered and cannot be occupied by the purchaser, the subject matter, it is submitted is not suitable for commercial value and unfit for transaction and use. Thus, the contract, it is opined, is void.

## 6. Conclusion and Recommendations

It is submitted that the beneficial ownership in house transaction as illustrated in the above case study and discussion does not guarantee, protect and preserve the interests and rights of the stakeholders for instance the aggrieved purchasers in abandoned housing projects. The authors are fully aware that if this practice of 'beneficial interest' is a common practice of the day and it is necessary to the modern development of the people on the basis of *maslahah ammah* and *maslahah mursalah* (general consideration of public interest) and *istihsan* (equitable consideration). Thus, its application is allowed. Nonetheless, it must be used in circumspection, in order not to cause any injustice, enmity, unfairness and unwarranted losses to the contracting parties. Its application must ensure that the elements that are prohibited under Islamic law are fully avoided for instance on the issue of *gharar*. Thus, the BBA documentation and agreement, being the PSA, PPA and DoA must be provided with additional terms that can provide adequate protection to the rights and interests of the purchasers. In the opinion of the authors, the current BBA terms involving beneficial ownership, it is submitted, are inadequate that can lead to *gharar* and evidently, has failed to fulfill the elements of contract as discussed above. Additional terms should be considered such as terms providing liability and responsibility of the bank and/or housing developer/vendor to rehabilitate or compensate the aggrieved parties in the event of abandonment, insofar as it is expedient and equitable. Alternatively, there should be a special mechanism that can ensure all relevant stakeholders are shielded from losses and grievances consequential to housing abandonment, for instance the vendor/Islamic bank and/or housing developer should possess housing development insurance to cover the situation where housing project is abandoned and provide specific terms, either in the S&P and BBA



documentation/agreement, on the liability and responsibility to rehabilitate abandoned housing projects and compensate the aggrieved parties. Further, it is suggested that BBA which uses the concept of *Bay' al-Inah* and *Murabahah* should only be made applicable to completed housing projects not pending completed housing projects. Finally, it is also suggested that the system of "full build and sell" (sell the houses only when the construction of the houses is duly completed) should be practised by housing developers in Malaysia to avoid the problems of abandoned housing projects and their consequential losses altogether.

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