Islamic Finance Litigation in Malaysia: An Introduction

Seminar on An Introduction to Islamic Finance.

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Litigation, being the dispute resolution process through the courts of law, is the most popular method for resolving domestic Islamic banking and financial disputes.

Based on a survey conducted by Assoc. Prof. Dr. Hakimah Yaacob on 10 Islamic banks and 12 takaful operators, it was discovered that there was a credit policy in many of these Islamic financial institutions (IFIs) not to include the alternative dispute resolution clauses in their contract and opt for litigation.
JURISDICTION OF COURT IN ADJUDICATING
ISLAMIC FINANCIAL DISPUTES

This issue was for the first time brought up in an unreported case of Bank Islam Malaysia Bhd v. Adnan Bin Omar (Civil Suit No: S3-22-101-91) whereby a preliminary objection was raised by Adnan (the defendant) challenging the jurisdiction of civil court in hearing this Islamic finance case.

The judge in the said case (NH Chan J), in dismissing the preliminary objection, ruled that the civil courts shall have the jurisdiction to hear Islamic banking disputes and Islamic commercial cases considering Islamic banking matters fall under the List I of Ninth Schedule of the Federal Constitution.
In Mohd Alias Ibrahim v. RHB Bank Berhad & Anor [2011] 4 CLJ 654, Mohd Zawawi Salleh J re-affirmed the position as follows:

“[62] In Malaysia, Islamic law falls under the jurisdiction of the Syariah Courts which derive its power under a State law enacted pursuant to art. 74(2) of the Federal Constitution following para. 1, List II, Ninth Schedule to the Constitution (State List).

[63] However, in cases involving banking transactions based on Islamic principles, it is the civil courts that will have jurisdiction to hear these matters.

[64] The reason is that the law relating to finance, trade, commerce and industry falls within the ambit of the Federal List in List I, Ninth Schedule to the Federal Constitution.”
WHY NOT THE SHARIAH COURT?

According to Tun Abdul Hamid Mohamad (the former Chief Justice), the Shariah court is not considered as competent forum to adjudicate Islamic banking and finance cases due to some reasons inter alia as follows:

1. The disputes over Islamic banking transactions do not involve Islamic law per se but also application of statutes under civil law such as National Land Code, Companies Act, Contracts Act 1950 and etc.

2. The power of enforcement and remedies available to Shariah courts are very limited. The Shariah courts cannot grant remedies of injunction, specific performance or declaration. Some modes of execution such as garnishee proceedings, bankruptcy and winding up are not available at Shariah court.

3. Islamic banking customers are not confined to Muslims but include non-Muslims and corporations.

4. Shari’ah courts are State courts independent of each other and with their own appellate courts. The doctrine of stare decisis is not applied in Shari’ah courts.
On 6th February 2003, the Chief Judge of Malaya has issued a **Practice Direction No. 1 of 2003** whereby a Muamalat Court was set up under the Commercial Division of the Kuala Lumpur High Court to hear Islamic banking cases. This Muamalat Court consists of one High Court judge, one deputy registrar and one senior assistant registrar.

Subsequently, the said Practice Direction was replaced by **Practice Direction No. 4 of 2013 and supplemented by Practice Direction Nos. 6 & 7 of 2013**.

Pursuant to this administrative step taken by the judiciary, all Islamic banking and finance cases filed at the Muamalat Court at Kuala Lumpur High Court are given special registration code namely Code 22M (previously Code 22A) for civil suits based on writ action and Code 22MF (previously Code 24A) for foreclosure matter and action based on originating summons.
LAWS GOVERNING THE ISLAMIC FINANCE LITIGATION PROCEEDINGS

Laws governing the judicial framework
- Federal Constitution
- Courts of Judicature Act
- Subordinate Courts Act

Laws regulating the Islamic financial industry
- Central Bank of Malaysia Act 2009
- Islamic Financial Services Act 2013
- Development Financial Institution Act 2002 (DFIA) and others.

Laws governing the transaction between IFI and consumers
- Contracts Act 1950
- National Land Code 1965
- Companies Act 2016
- Civil Law Act 1950 and others.

Laws regulating the litigation process
- Rules of Court 2012
- Rules of Court of Appeal 1994
- Rules of Federal Court 1995
- Limitation Act 1953
- Specific Relief Act 1950
- Evidence Act
- Bankruptcy Act and Bankruptcy Rules
- Winding Up Rules and others.
In *Bank Kerjasama Rakyat Malaysia Bhd v. EMCEE Corporation Sdn Bhd [2003] 1 CLJ 625*, the Court of Appeal has held that:

“As was mentioned at the beginning of this judgment, the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.”

In *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22*, the Court of Appeal has stated that the same contract law shall apply to Islamic financial cases. Raus Sharif JCA stated:

“... the law applicable to BBA contracts is no different from the law applicable to a loan given under the conventional banking. The law is the law of contract and the same principle should be applied in deciding these cases.”
What is the difference between Islamic finance litigation and the existing civil litigation?

Islamic Finance Litigation

Application of civil legislation + Application of Shariah law = Islamic Finance Litigation

Civil Litigation

Application of civil legislation + Adjudication by civil court = Civil Litigation
Islamic finance litigation is a special area of practice which demands the lawyers / litigators and judicial officers to be well versed with the following:

1. Shariah principles applied in Islamic banking & finance
2. Regulatory framework governing Islamic financial industry
3. Procedural / Adjectival law
4. Application of civil legislations & potential conflict of laws

Tun Ariffin Zakaria (former Chief Justice) was of the view that the biggest challenge for the civil courts in the exercise of its judicial function is the application of relevant laws to Islamic finance transaction.

MAIN ISSUES IN ISLAMIC FINANCE LITIGATION

1. Disputes as to breach, enforcement, termination, rectification, validity & interpretation of the contract.


3. Legislative conflicts. Islamic finance transaction / practice fails to comply certain statutory requirements or common law.

4. Issues relating to oppression, excessive claim, prohibited business conduct and consumer protection.

5. Shariah non-compliance and defence of illegality.
COMMENCEMENT OF CIVIL ACTION (ACTION IN PERSONAM) FOR DEBT RECOVERY

1. Identify Parties (Plaintiff / Defendant)
2. Verify Cause of Action (nature of Shariah contract)
3. Determine Court's Jurisdiction (monetary / territory & etc)
4. Check limitation period (6 years / 12 years - secured)

- Execution of Judgment
- Judgement granted
- Writ Action
- Originating Summons

Upon perusing the security documents:
• Describe the Plaintiff (IFIs, DFIs, non-IFI)– vesting order/change of name (if any)
• Describe the Defendant(Customer/Guarantor/Individual/Company)
• State the nature of financing and the Shariah principle applied
• State the security documents involved and the salient terms / features
• State the existence and status of security (charge, assignment and etc)
• Plead the breach of contract / event of default / issuance of LOD/LOR

From the statement of account / instruction provided:
• State the amount of facility approved by Plaintiff;
• State the amount disbursed to Customer or 3rd Party (Vendor/Developer)
• State the amount and rate of Ta’widh, late payment charges to be imposed
• Plead clearly the amount of claim in prayer for relief

Rules of Pleading
• Formal requirements (divided into para, numbered consecutively) - O. 18 r.6
• Facts not evidence to be pleaded – O. 18 r.7
• Points of law may be pleaded – O.18 r. 11 (e.g. compliance with BNM guideline)
• Particulars of pleading – O.18 r.12 (formulate a complete cause of action)
• Specify the relief or remedy which Plaintiff claims – O.18 r.15
In FLH ICT Services Sdn Bhd & Anor v. Malaysian Debt Venture Bhd [2016] 1 CLJ 243, the Court of Appeal dismissed a claim allegedly based on bai’ al-inah transaction since the underlying asset was absent.

“In our view the essence of bai al-inah transaction or contract in the matter before us as entered into by the parties herein must necessarily be grounded upon the basic premise that it must involve the sale and buy back transactions of an asset of a seller. The existence of the asset in the transactions is an imperative without which such contract is not a bai al-inah contract, but something else outside the Syariah system.

... Hence it begs the question what actually was being transacted on 31 July 2009 between the seller and the purchaser in the MFA, ASA and APA. There are uncertainties in the underlying feature of the said bai al-inah contract/financing i.e., the existence of the asset in the transactions.”
In *Pripih Permata Sdn Bhd v. Bank Muamalat Malaysia Berhad [2015] 6 CLJ 135*, the Malacca High Court declared the Property Purchase Agreement (PPA) and Property Sale Agreement (PSA) as null and void because the subject matter (*mahal al-’aqd*) does not actually exist at the time of the conclusion of contract. This case involves financing facility for under construction property. Hence, it was decided by the Judge under Order 14A ROC 2012 that there was element of major uncertainty (*gharar al-fahish*) in the financing transaction. However, it appears that no reference was made to SAC by the Court.

**Public Bank Bhd v. Mohd Isa Mohd Nafidah [2013] 1 CLJ 274**

“Malaysian scholars have permitted the sale of an asset under construction using BBA and/or Bai Al-Inah, because it is perceived as the sale of rights on the house under construction, not the sale of the physical house under construction. Rights are acknowledged as property in Islam according to majority of scholars, and hence the customers can sell the independent financial rights. If the non-existent subject matter is certain in its existence and is capable of delivery in the future, it does not tantamount to gharar al-fahish. Shariah recognises beneficial ownership over a property or an asset.”
**Para 7.4 of the BNM/RH/GL 012-5 Guideline on Ibra’ (Rebate) for Sale-Based Financing**

IFIs are required to ensure that the customers are duly informed on the applicability of ibra’ in the redemption statement or other documents issued by IFIs to the customers for the purpose of recovery (such as letter/notice of demand) and in the Statement of Claim prepared for litigation cases. At minimum, IFIs are expected to disclose the following:

(i) **Commitment** to provide ibra’ in the Statement of Claim, redemption statement and other documents such as letters or notices of demand for the purpose of recovery; and

(ii) The **formula** or the manner of ibra’ computation and the relevant conditions relating to the granting of ibra’ in the redemption statement and other documents such as letters or notices of demand.

**Ibra’** means surrendering one’s right to a claim on debt either partially or fully. Initially, the grant of Ibra’ is purely at the discretion of the Islamic bank. However, the SAC in its 101st meeting held on 20th May 2010 resolved that Islamic banking institutions are obliged to grant ibra’ to customers for early settlement of financing based on buy and sell contracts (such as bai’ bithaman ajil or murabahah).
Late Payment Charges (LPC) may be imposed for all Islamic financial products and services. LPC comprises 2 elements namely,
- Ta'widh (compensation);
- Gharamah (penalty).

In the case of Bank Kerjasama Rakyat Malaysia Bhd v. Flavour Right Sdn Bhd & Ors [2013] 1 CLJ 810, the defendants argued that the plaintiff bank's entire claim was tainted with illegality and unenforceable under section 24 of Contracts Act 1950 because the plaintiff has imposed and levied interest/riba which was prohibited by Shariah principles.

However, the court rejected the defendant's contention and held that late payment charge imposed by bank does not amount to riba as it is called Ta'widh which has been sanctioned by the Shariah Advisory Council of Bank Negara Malaysia's Guideline (BNM/RH/GL 01202) item 8.

Ta'widh is compensation for damage done to another, in terms of Islamic financial institutions (IFI), Ta'widh refers to a claim for compensation arising from actual loss suffered by the financier due to the delay in the payment of financing or debt agreement by the customer (BNM, Resolutions of Shariah Advisory Council of Bank Negara" (Kuala Lumpur: BNM.2010, p.129).

It should be differentiated from gharamah which refers to penalty charges imposed for delayed payment in financing or debt agreements where actual loss need not be proved. For gharamah the IFI cannot keep the proceeds but must channel it to approved charities.
The actual loss to be compensated from any default payment, from the date of payment **until the maturity date** shall not be more than **1% per annum**.

The actual loss to be compensated from default payment which **exceeded the maturity date** shall not be more than the prevailing daily overnight **Islamic Interbank Money Market rate (IIMM)** on the outstanding balance (subject to ibra’ if applicable) of the Islamic financial Products.

The IIMM rate; defined as the daily weighted average for overnight rate of the Mudharabah interbank investment at the Islamic Interbank Money Market, has been agreed by the Shariah Advisory Council to be the reference rate for actual loss, post maturity. The IIMM rate can be sourced from the IIMM website [http://iimm.bnm.gov.my/index.php](http://iimm.bnm.gov.my/index.php).
Late payment charge on judgment debts arising from financial transactions in accordance with Shariah

(1) Every judgment debt arising from financial transactions in accordance with Shariah shall carry a late payment charge calculated from the date of judgment until the judgment debt is fully satisfied at the rate provided under Order 42, rule 12 and subject to the following conditions:

(a) the judgment creditor shall only be entitled to ta’widh as a result of late payment;
(b) the amount of late payment charge shall not exceed the outstanding principal amount; and
(c) if the amount of ta’widh is less than the amount of late payment charge, the balance shall be channelled to any charitable organizations as determined by the Shariah Advisory Council.

(2) For the purpose of this rule-

(a) "Shariah Advisory Council" means the Shariah Advisory Council established under the Central Bank of Malaysia Act 2009 [Act 701] and the Capital Markets and Services Act 2007 [Act 671]; and

(b) "ta’widh" means compensation for actual loss and shall be calculated at the rate determined by the Shariah Advisory Council."
In the eyes of Shariah, a guarantee may be given by a third party to an Islamic financial institution as a form of security to enhance the position of the customer. The guarantee arrangement is known as Kafalah in Shariah.

In the event of default of payment by customer, the IFI may initiate concurrent legal action against the customer and the guarantor.

The guarantor will be held liable under the contract of guarantee or Kafalah. Civil suit may be filed regardless whether the guarantor is a social guarantor or not.

Bank Muamalat Malaysia Berhad v. Suhaili Abdul Rahman & Anor [2014] 10 CLJ 179

“As a party who had executed the said guarantee, the second defendant was bound by the terms of the said guarantee although the second defendant had not read the contents of the contract. Unless the second defendant could establish that the said guarantee was executed by way of fraud, misrepresentation and undue influence, the second defendant must honour the said guarantee and pay the overdue amount as agreed under the said instrument.

Therefore, the second defendant’s contention that he did not sign the said guarantee and that he was not aware of the terms of the said guarantee were baseless.”
In the case of *Bank Kerjasama Rakyat Malaysia Bhd v. Sea Oil Mill (1979) Sdn Bhd & Anor [2010] 1 CLJ 793*, the Federal Court held that:

In the case of *Ginlon (M) Sdn Bhd v. MBf Finance Bhd [2004] 2 CLJ 169*, Abdul Aziz Mohammad JCA (as he then was) opined regarding s. 81 of the Contracts Act 1950 as follows:

... that is a contract of guarantee. The remedy of the person to whom the guarantee is given is therefore to sue the surety on his undertaking in the contract of guarantee, if the third person defaults.

Since the 1st respondent’s appeal was struck out it meant that the O. 14 summary judgment given by the High Court against the 1st respondent, still remains. It follows that the 2nd respondent’s liability as the guarantor for the 1st respondent also remains, by virtue of s. 81 of the Contracts Act 1950. The suit by the appellant against the 2nd respondent as the guarantor is therefore valid, following the decision of the Court of Appeal in the case of *Ginlon (M) Sdn. Bhd. v. MBf Finance Bhd.*, supra.

When there is a Judgment obtained against Customer (Principal Debtor), the liability of the Guarantor shall remain under s.81 Contracts Act.
In the case of Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281 at 288, the Supreme Court decided that the courts should always set their face against illegality in any contract.

It is very well settled that the courts can take judicial notice of such illegality at any stage of the proceedings and refuse to enforce the contract irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.

In Islamic finance litigation, it is quite common to see defence of illegality and Shariah non-compliance being raised by counsel acting for the consumer / defendant to defeat the claim by Islamic financial institution.
There are several schools of law / mazhabs interpreting the Shariah laws. Which one prevails in Islamic financial transaction?

Is there any Act of Parliament codifying the substantive Shariah laws and principles for Islamic banking and financial transaction?
The Shariah Advisory Council shall have the following functions:

(a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part;

(b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank;

(c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and

(d) such other functions as may be determined by the Bank.
Section 56 CBMA 2009

Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall-

(a) take into consideration any published rulings of the Shariah Advisory Council; or

(b) refer such question to the Shariah Advisory Council for its ruling.
Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd [2013] 4 CLJ 794 – Court of Appeal

Sections 56 and 57 of the CBMA 2009 contain clear and unambiguous provisions to the effect that whenever there is any Shariah question arising in any proceedings relating to the Islamic financial business, it is mandatory to invoke s. 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic law on financial matters or business.

The fact that the court is bound by the ruling of the SAC under s. 57 does not detract from the judicial functions and duties of the court in providing a resolution to the dispute which the parties had submitted to the jurisdiction of the court. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the court, and so could not be said to usurp the judicial functions of the court. Hence, ss. 56 and 57 are valid and constitutional.
SHARI`AH STANDARDS / GUIDELINES ISSUED BY BANK NEGARA MALAYSIA

Section 29(1) IFSA 2013
Section 33E(1) DFIA 2002

BNM may, in accordance with the advice or ruling of the Shariah Advisory Council, specify standards-
(a) on Shariah matters in respect of the carrying on of business, affair or activity by an institution which requires the ascertainment of Islamic law by the Shariah Advisory Council; and
(b) to give effect to the advice or rulings of the Shariah Advisory Council.

In Diana Chee Vun Hsai v. Citibank Bhd [2009] 6 CLJ 774 at para [14] and [20], it was held that:

“The Guidelines Has Force of Law

[14] The Bank Negara Credit Card Guidelines BNM/RH/GL 1014-1, as stated earlier was issued under the enabling provision of s. 70 of the Payments Systems Act 2003. I am of the opinion that the said guidelines are piece of subsidiary legislation. "Subsidiary legislation" is defined under s. 3 of the Interpretation Acts 1948 and 1967 as;

Any proclamation by law, rule, regulation, order, notification, by law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect.

[20] Applying the law to the facts of the case, I conclude that the Respondent has contravened the law and public policy as enunciated in the Payment Systems Act 2003, which is to be read together with the Bank Negara Credit Card Guidelines. Wherefore, I have no hesitation to allow and grant order in terms of the application in this originating summons as per encl. 11."
In the case of **Bank Kerjasama Rakyat Malaysia Bhd v. Brampton Holdings Sdn Bhd [2015] 4 CLJ 635**, it was held that:

“... a court could not simply decide that an Islamic financing facility was not Shariah compliant. The court should be guided by the advice and ruling of the Shariah Advisory Council on Islamic Finance (‘SAC’). Accordingly, the defendant could not merely allege that the Islamic Financing Facility was illegal and unenforceable. **The defendant should have obtained advice or ruling from the SAC as to whether the Islamic Financing Facility herein had complied with Shariah or otherwise**”

In **Bank Kerjasama Rakyat Malaysia Berhad v. Koperasi Belia Nasional Berhad [2016] 1 LNS 995**, the High Court stated:

“However, on the factual matrix of this case, **there is nothing in the Statements of Defence filed by the Defendant to plead and/or to declare that the agreements entered between the parties are null and void as these agreements are in breach of the SAC Circular and/or resolutions.** As this is not a pleaded issue, the Defendant cannot simply raise the same either in the affidavit or in their submission.

Again as can be seen from Statement of Defence dated 22.1.2016, in particular paragraph 14, **these issues on the specific non compliance with the SAC Circular and/or resolutions have not been specifically pleaded…”**
In dealing with issue of illegality or Shari‘ah non-compliance, the Malaysian courts generally have taken two approaches namely the non-interventionist approach and interventionist approach.

In the non-interventionist approach, the court will not interfere with the Shari‘ah issues but only to give effect to the terms of contract between parties. This approach is similar to the position taken by the English court in *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and Others* [2004] EWCA Civ 19. See:

- *Maybank Islamic Bhd v M-IO Builders Sdn Bhd & Anor* [2017] 2 MLJ 69 - COA
- *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals*, [2009] 6 CLJ 22 - COA

However, for interventionist approach, the court will recognise the Shari‘ah issues and if necessary, deal with the aspects of liability and quantum of claim. In some cases, the Court is prepared to declare the Islamic financial transaction as invalid. See:

- *Maybank Islamic Berhad v. M-10 Builders Sdn Bhd* [2015] 4 CLJ 526. (reversed by COA)
Unlike other modes of execution of judgment, the bankruptcy proceeding is regarded as a quasi-penal proceeding whereby strict adherence to the bankruptcy rules is required.

Prior to filing the bankruptcy action, a Judgment Creditor (JC) should take note *inter alia* of the following:

- Final Judgment has been obtained and not stayed;
- Bankruptcy threshold: RM30,000 (new amendment RM50,000);
- Whether Judgment Debtor is a Social Guarantor;
- If the Judgment is more than 6 years, application for leave must first be obtained:

The Federal Court in the landmark case of *Dr Shamsul Bahar Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 CLJ 561* has held that a JC who commences bankruptcy proceedings after more than six years had lapsed from the date of judgment must obtain the prior leave of the court pursuant to Order 46 rule 2 of the Rules of Court 2012. *This requirement also applies to Islamic finance judgment.*

However, the restriction on post judgment interest under *section 6(3) Limitation Act 1953* is not applicable to late payment charges or *ta'widh.*
Section 3(1)(i) of the Bankruptcy Act 1967 is the commonly invoked provision to prove an act of bankruptcy when a debtor fails to satisfy the demand made in a bankruptcy notice. This sub-section provides:

“A debtor commits an Act of bankruptcy in each of the following cases:

…

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:"

ENFORCEMENT OF ISLAMIC FINANCE JUDGMENT BY WAY OF BANKRUPTCY ACTION
In Ong Lian Oeu v. Kuwait Finance House (Malaysia) Bhd [2013] 10 CLJ 526, the judgment debtor applied to set aside the bankruptcy on the ground, *inter alia*, that the amount claimed in the bankruptcy notice was only quantified up to 30 April 2012 and not up to the date of issue of the bankruptcy notice i.e. on 11 June 2012, which was contrary to s. 3(1)(i) of the Bankruptcy Act 1967. In resolving this issue, the High Court has held:

[8] In my considered view the phrase "with interest quantified up to the date of issue of bankruptcy notice" under s. 3(1)(i) of the Bankruptcy Act 1967 ("the Act") does not apply to the present case on the ground that the judgment creditor is not claiming for interest. In other words, the judgment creditor is not obliged to quantify the 'gantirugi bayaran lewat' (late payment compensation) up to the date of issue of the bankruptcy notice as the said provision is only applicable in respect of interest and not "gantirugi bayaran lewat" and there is nothing in language of s. 3(1)(i) to suggest that the said provision is wide enough to encapsulate the late payment compensation. ...

[13] I am in full agreement with the submission of the judgment creditor’s counsel that in view of foregoing and to avoid any ambiguity on the amount that the judgment debtor has to pay, for the purpose of the bankruptcy notice, the judgment creditor is deemed to have waived its claim for late payment compensation calculated at the judgment creditor’s R-Rate from 1 May 2012 to 11 June 2012.”
On the similar issue, Mohd Amin Firdaus JC in the case of Tan Thean Chooi v. Kuwait Finance House (Malaysia) Bhd & Another Case [2013] 7 CLJ 404 held that:

“The Bankruptcy Act 1967 does not contain any provision whatsoever in relation to Islamic banking, especially a judgment sum based on Murabahah Tawarruq facility. Thus, there was a lacuna in the Act. It is for the Legislature to look into the lacuna and not this court. In consequence of this lacuna, 'interest' ins. 3(1)(i) of the Act ought not to be interpreted to include late payment compensation in relation to Islamic banking facilities. In the circumstances, the JC was not obliged to quantify the late payment compensation up to the date of issue of the bankruptcy notice. Therefore, the bankruptcy sums which were only quantified up to 30 April 2012 and not up to the date of issue of the bankruptcy notice on 8 June 2012 was valid.”
In Bank Kerjasama Rakyat Malaysia Bhd v. EMCEE Corporation Sdn Bhd [2003] 1 CLJ 625, the Court of Appeal has stated that:

“The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.”

In another case of Arab-Malaysian Merchant Bank Berhad v. Silver Concept Sdn Bhd [2006] 8 CLJ 9, it was held that:

“The burden is on the defence to show that "cause to the contrary", and invariably discharged by filing the relevant affidavits. Needless to say, if the defendant can successfully establish that there exists fatal-procedural defects, deceit, bribery, un-Islamic practices in the like of usury, amongst others, having tainted the transaction then the originating summons must fail.”
In the case of *Majlis Amanah Rakyat v. Bass Bin Lai [2009] 2 CLJ 433*, Hamid Sultan J held:

"The proper procedure in law to challenge the legality of a contract, is by filing an originating process and seeking relief as set out in the Specific Relief Act 1950. That does not mean that the court has no power or jurisdiction to consider such issues if properly raised and argued in a foreclosure proceeding, as was done in Taman Ihsan's case.

However in a foreclosure proceeding, the court is focused on whether to allow the application for foreclosure as prayed or restrict the sum claimed at its discretion according to the justice of the case. (See Ya'kup's case). The court per se will not make declaratory order when there is no counterclaim for declaratory relief to set aside, annul or declare the contract null and void etc., in the legal sense save for the purpose of providing the appropriate relief and remedy in a given circumstance, as was done in an articulate manner by the learned judge in the case of Taman Ihsan.
FACTS OF THE CASE:

By a letter of offer dated 31 July 2003 (‘first LO’), the appellant granted several Islamic banking facilities to the first respondent, which included a murabahah overdraft facility (‘MOD facility’) for RM3m. The second respondent was the guarantor. The facilities were provided based on murabahah financing principle.

The parties executed a master facility agreement, asset purchase agreement (‘APA’) and asset sale agreement (‘ASA’). Under the APA and ASA, the appellant purchased the ‘rights, title, interest and benefit of the customer as derived from Project 1 and Project 2’ and sold the same to the first respondent. The facilities were secured by legal charges over several landed assets and guarantee by the second respondent.

By a letter of offer dated 8 December 2004 (‘second LO’). The restructuring of the MOD facility was executed vide a new facility agreement, a new APA and ASA. The subject of sale under this APA and ASA were ‘collectively the 4 parcels of lands’ which formed the same landed assets under the earlier facility. The appellant bank contended that the second LO superseded the first LO. The first respondent however insisted that the terms under the first LO be reinstated.
DECISION OF THE HIGH COURT: [2015] 4 CLJ 526 HC

The Revised OD Facility dated 23\textsuperscript{rd} December 2004 had breached the Murabahah Concept of Financing due to the following:

1. The Asset in respect the ASA and APA of this MOD Facility was the same asset in respect of the ASA and APA of 1\textsuperscript{st} MOD Facility.

2. This asset was already owned by the 1\textsuperscript{st} defendant. The transaction lacked the features that it must be an asset already in existence and owned by the seller.

3. The purchase and resale of the assets to the 1\textsuperscript{st} defendant to reschedule the financing involved the same asset as the Master Facility Agreement dated 15\textsuperscript{th} December 2003 read together with the 1\textsuperscript{st} LO.
DECISION OF THE COURT OF APPEAL:

• The guidelines and the Shariah parameters were dated 2009 and the guidelines issued by Bank Negara Malaysia only took effect on 1 April 2014, whereas the MOD facility was granted in 2003. Both the documents even if applicable did not apply retrospectively to the transactions between appellant and respondent.

• The nature of transaction of the MOD facility was a bai’ al inah agreement as defined, by the resolution and hence the application of the guidelines stated by the learned judge was misplaced. The guidelines is specific for murabahah contracts and murabahah purchase order arrangement and not addressing the bai’ al inah contract.

• Under the bai’ al inah transaction the same assets can be sold and purchased pursuant to an Islamic Banking facility multiple times without affecting Syariah. The judge erred by saying that the transaction of the MOD facility was null and void premised on the sale and purchase of the same asset.
DECISION OF THE COURT OF APPEAL:

• The assets involved under the first LO and the second LO were different. The underlying assets for the first LO were ‘the rights, title, interest and benefit of the customer as derived from Project 1 and Project 2’; whereas the underlying assets for the second LO were the four parcels of lands over which the first respondent had created first and second party legal charge in favour of the appellant.

• The apex courts’ decision and/or its policy which can be gleaned from case laws is to ensure that the Shariah facilities are declared by the court as valid when it has gone through licensed banks and/or financiers where the Bank Negara (Central Bank) strictly monitors the Islamic finance facility and its terms with the assistance of Shariah Advisory Council. However, courts are generally sympathetic when the customer complains the quantum of claim is excessive and/or breach of contract and/or the discretion of the banks to charge damages and/or rebate has not been properly exercised.

• It will be nearly impossible for the consumers to oppose liability and/or quantum when the bank initiates an action to recover the facility amount as per the contractual terms.