

TASARRUF FUDULI¹ AS A MECHANISM FOR RATIFICATION OF CONTRACT

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As the products of Islamic banking and finance become more advance, there is an attempt by the industry to innovate products and services using the feature of ratification under “*tasarruf fuduli*” (unauthorised disposition) as the underlying principle. However, its application may not comply with the intended rules on ratification of unauthorised contract under Shariah. Thus, this paper studies the concept of *tasarruf fuduli* and ratification of contract in Shariah and how it applies in modern context. It examines views of the four Islamic schools of thought with regard to *tasarruf fuduli* and the element of ratification therein. Based on the studies, the paper proposes a parameter for guidance on ratification of *tasarruf fuduli* which is regarded as a very remote situation and should be carried out with caution.

¹ The phrase “*tasarruf fuduli*” literally means unauthorised disposition. Technically, it refers to the disposition of a person for another without having the proper authority.

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I. Introduction

The theory of contracts in Islamic law has been thoroughly deliberated by the Muslim jurists in fiqh literature. An important aspect of the discussion is the status of a contract which may vary, including among others a valid contract, an invalid contract, a void contract or an incomplete contract. Each of this status has different legal implications on the respective contracts. With reference to deliberation of the jurists, the discussion on *tasarruf fuduli* has been identified to focus on the status of a contract that is entered into through an unauthorised disposition, whereby the contracting party does not have the ownership or authority on the subject matter of the contract to conclude and execute the contract. There is however another perspective that *tasarruf fuduli* deals with the condition (*shart*) related to the subject matter (*ma`qud `alaih*) of a sale contract, where the contracting party must have the ownership on the subject matter.

II. Concept of *Tasarruf Fuduli*

In fiqh, it is a requirement that a person who enters into a contract to have the legal right to do so. This right to enter into a contract stems from either him/her having (1) the legal capacity to perform such contract (*ahliyyah*); and (2) the power or authority (*wilayah*) to execute such contract. The purpose of entering into a contract could either be for the interest of oneself (naturally a person has the authority to execute for his own self) or he/she may execute it on behalf of others. If the transaction is concluded on behalf of others, then he/she must have the authority to execute the transaction which may derive from him being appointed as a *wakil* for a particular person (principal); or he/she transacts on behalf of those under his guardian.

A Shafi'i jurist, Al-Zarkashi cited² that there are six (6) categories of a person's disposition for others. First, disposition through legal authority such as a father for his son. Second, disposition as a pure substitute such as an agent acting on behalf of a principal. Third, disposition by a commission (agent) with authority such as an executer (*was'i*). The fourth disposition is of a different nature and it can be divided into two parts. Firstly, disposition for others that is a necessity to do so, such as to donate an asset of which its owner is not known. Secondly, disposition that is done without the necessity to do so, *ab initio* such as an extorter who seizes another person's asset and disposes it to get the price. The fifth category of disposition is disposition of assets with consent from the other person but the person goes against or beyond the specified consent or mandate. For example, a principal instructing his agent to sell an item for one hundred dollars but he sold it for much less. The sixth disposition, being the last category is disposition for others but using the person's own money.

² Al-Zarkashi, *Al-Manthur fi Al-Qawa'id*, vol. 1, p. 300

Based on the above categories, it is understood that the Shariah law requires a person who enters into a contract to have both the legal capacity and authority to do so. This research however, will focus more on disposition for others without legal authority or/and beyond the duty mandated upon him. If the transaction is entered into without authority, this is known as *tasarruf fuduli* (unauthorised disposition).

It is evidenced that the explanation by Al-Zarkashi is very much related to the view of Shafi'i jurists which we shall elaborate more in this research. This section will explore the concept of *tasarruf fuduli* from the fiqh perspective.

III. Definition of *Fuduli*

The word *fuduli* is attributed to the word *fudul* which is the plural of *fadl*.³ The word *fadl* literally means "increase" which gives a positive sense, but the word *fuduli* is mostly used in a negative connotation.⁴ The word *fuduli* literally stands for (المشتغل) ⁵ (بما لا يعنيه) which means a person who gets involved in something that is none of his concern. Though its literal meaning also includes "dressmaker",⁶ the first meaning is of our concern. The technical or juristic definition of *fuduli* carries its literal meaning in it. Accordingly, *fuduli* has been defined as "someone who is not an agent".⁷ *Fuduli* is defined by Ibn Nujaym in general terms as: "a person who is not an agent". A better definition is provided by the same author as: "*Fuduli* is a person transacts for the sake of others without Shariah permission."⁸ It has also been defined as "a person who disposes of others' matters without the mandate to do so, such as selling the property of others without his permission or without having the mandate to do so."⁹ Al-Zuhayli defines *fuduli* as a person "who disposes of something or concludes any of the contracts without him/her having the mandate to do so."¹⁰ In short, *fuduli* is someone "who disposes another person's right without any legal permission."¹¹

³ Al-Tharvi, Muhammad Ali, *Kashshaaf Mustalahat al-Funoon wa al-Uloom*, Maktabat Labnan Nashiroon, Beirut (1996), 1st Edition, v. 2, p. 1278; Al-Fayroz Abadi, Muhammad ibn Yaqaob, *Al-Qamoos al-Muheet*, Muassasah al-Risalah, Beirut, (2005) 8th Edition, p. 1043,

⁴ Al-Tharvi, Muhammad Ali, op. cit., pp. 1278

⁵ Al-Fayroz Abadi, Muhammad ibn Yaqaob, op. cit., pp. 1043; *ISRA Compendium for Islamic Financial Terms* (2013), p. 274, International Research Academy for Islamic Finance, Kuala Lumpur; Zaydan, Abdul Karim: *al-Madkhal li Dirasat al-Shariah al-Islamiyyah*, Dar Umar ibn al-Khattab Alexandria(2001), p. 348

⁶ Al-Fayroz Abadi, Muhammad ibn Yaqaob, op. cit., pp. 1043

⁷ Al-Tharvi, Muhammad Ali, op. cit., pp. 1278

⁸ Ibn Nujaym, Zayn al-Deen, *al-Bahr al-Raiq Sharh Kanz al-Daqaiq*, Shirkat A'la al-Deen, Beirut, undated, v. 6, p. 160

⁹ Zaydan, Abdul Karim, op. cit., pp. 348

¹⁰ Al-Zuhayli, Wahbah, *al-Fiqh al-Islami wa Adillatuhu*, Dar al-Fikr, Damascus (1989), 3rd Edition, v. 4, p. 373

¹¹ ISRA (2013), op. cit., pp. 274

IV. Legality of *Tasarruf Fuduli*

Muslim jurists are of different views with regards to the permissibility of *tasarruf fuduli* which in general can be summarised into two categories. The first view which is held by Malikis, Hanafis and Shafi`is (*qaul qadim*) regards *tasarruf fuduli* as permissible and the contract which is entered into by the *fuduli* (the unauthorised person) is suspended subject to approval by the principal or the person of whom the contract is intended for. The second opinion which is held by Shafi`is and Hanbalis is that any contract that is concluded by way of *tasarruf fuduli* is invalid or void.

The first opinion is argued based on a hadith where “Urwah reported that the Prophet (peace be upon him) gave him a dinar to buy a sheep. He bought two sheep, then he sold one of them for a dinar which brought him a sheep and a dinar. So the Prophet (peace be upon him) invoked a blessing on him in his business dealing, and he was such that if he bought dust he would make a profit from it”¹². This hadith describes that one of the companions ended up accomplishing the task and making a profit of one dinar at the same time, and the prophet (peace be upon him) acknowledged his act. The prophet’s consent showed that the practice is allowed. Furthermore, *tasarruf fuduli* is often executed for the interest of others and they may approve or disapprove it. Thus, *tasarruf fuduli* does not inflict harm to the intended person.¹³ The second opinion refers to a number of hadith which the prophet (peace be upon him) prohibits one from selling what he/she does not own. They argued that *tasarruf fuduli* falls under this category of transaction where the asset to be sold is not in possession and therefore cannot be delivered.

V. Unauthorised Sale and Purchase

Although *tasarruf fuduli* may generally occur in any type of transactions, based on the views of classical jurists, it appears that the discussion of jurists on this topic revolves around the context of *tasarruf fuduli* in a sale and purchase contract. Therefore, this section shall focus on the practice of *tasarruf fuduli* in the context of sale and purchase. The following will further elaborate the views of classical jurists with regard to unauthorised sale and purchase (*bai` wa shira’ fuduli*). Specific views on unauthorised purchase (*shira’ fuduli*) will also be elaborated as there are various opinions based on the different context and scenarios of the purchase.

¹² Al-Bukhari, *Sahih Bukhari*, hadith no. 3370

¹³ Al-Zuhaili, Wahbah, *al-Fiqh al-Islami wa Adillatuhu*, p. 167; Zaydan, Abdul Karim: op. cit., p. 348

VI. The *Shariah* Rulings on Unauthorised Sale and Purchase

In general, there are two categories of the jurists' opinion on unauthorised sale and purchase:

First: The contract - which is entered by the *fuduli* (unauthorised person) - is construed as valid but in suspense, which means its legal effect depends on ratification or non-ratification by the party in which the sale and purchase is intended for.

Second: The sale and purchase contract is invalid.

VII. Unauthorised Sale (*Ba' Fuduli*)

It is worth noting that in the jurists' discussions, the first view which considers that *ba' fuduli* is valid but suspended until ratification is made is held by Hanafi, Maliki and Shafi'i (*qaul qadim*) jurists. On the other hand, Hanbalis and Shafi'is are of the view that *ba' fuduli* is not valid.

Ibn Al-Humam explained that whoever sells an asset belonging to another person without his permission, the owner may choose to either give consent or to terminate the sale transaction.¹⁴ This view is also shared by jurists of Maliki and Hanbali. Al-Dasuqi mentioned that a *ba' fuduli* will be effective by virtue of the owner giving consent to the sale. Thus, the *fuduli* seller will be deemed as an agent of the owner and he/she is only entitled to claim the price from the *fuduli* seller.¹⁵

According to the jurists of Shafi'i and a number of Hanbali jurists, the contract becomes invalid as the *fuduli* does not enter into the contract as an owner, or as someone who is authorised by the owner. However, there is a minority view among Hanbalis that regards the contract as valid since it is correctable at the time of execution.¹⁶

VIII. Unauthorised Purchase (*Shira' Fuduli*)

As in the above-mentioned opinions on *ba' fuduli*, the jurists' specific views on *shira' fuduli* may also be divided into two main views; of which the first view deems the purchase to be valid but suspended, pending ratification by the intended purchaser. Among the proponents of this view are jurists of Hanafi, Maliki and

¹⁴ Ibn Humam, *Fath Al-Qadir*, vol. 15, p. 386

¹⁵ Al-Dasuqi, *Hashiyah Al-Dasuqi 'ala Sharh al-Kabir*, vol. 10, p. 481

¹⁶ Ibn Muflih, *Al-Mubdi*, vol. 4, p. 16

Shafi'i (*qaul qadim*). According to this view, the sale contract which is entered into by the unauthorised person will be recognised if the party of which the contract is intended for, approves it. Otherwise, the contract is enforced on the *fuduli*. The second view provided by jurists of Hanbali and Shafi'i is that the unauthorised purchase contract is invalid. However, there are some thorough discussions on *shira' fuduli* involving different scenarios and context in which we find that some jurists opted for more detailed interpretation. We shall look into each of these scenarios.

a) Unauthorised purchase with principal's money and disclosure of the principal

The case of *tasarruf fuduli* may occur when a person who is entrusted with another person's money uses the money to purchase an asset for the owner without his consent or authorisation. The unauthorised person (*fuduli*) however discloses to the third party seller that the purchase is done on behalf of the owner. In this scenario, the first group of jurists is of the view that the purchase is suspended (*mawquf*) subject to ratification by the owner. The second group of jurists is of the view that such a scenario renders the purchase to be void. It is mentioned in *Mawahib Al-Jalil*¹⁷ the opinion of Ibnu Al-Majishun Al-Maliki which says that if a person swears to the third party seller that he/she purchases the asset for another person with his money and the owner does not approve it, the purchase becomes invalid and he/she may claim his/her money from the *fuduli* or the third party seller. However Shafi'i's (*qaul qadim*)¹⁸ mentioned that in this case, the purchase is either invalid or is enforced against the *fuduli*.

b) Unauthorised purchase with principal's money without disclosure of the principal

This scenario is similar to the previous scenario with the only difference that the owner of the money is not disclosed to the third party seller. In other words, the *fuduli* purchases the asset without mentioning the purchase is done on behalf of others. In this arrangement, if we look from the seller's perspective, he/she is dealing with the *fuduli* as the purchaser. For this particular scenario, the jurists within the first group hold different views. The Hanafis opined that in this case the purchase is enforced against the *fuduli*. In this regard, Ibn Al-Humam of Hanafis mentioned that if the purchase is not attributed to the owner, and the *fuduli* has not been appointed as agent (to the owner) and furthermore the *fuduli* has full legal capacity to execute the purchase, then the purchase shall be enforced against him¹⁹. Whilst according to the Maliki school, the purchase shall be suspended pending approval by the owner. If the approval is not given, the purchase shall be enforced against the *fuduli*. However, since the real owner is not disclosed to the third party seller, the owner shall only be entitled to claim his money from the *fuduli*. For the second group of jurists, they viewed the purchase as invalid. Shafi'i's (*qaul qadim*) also hold the same view as mentioned in paragraph (a) above.

¹⁷ Al-Hattab, *Mawahib al-Jalil*, vol. 4, p. 272

¹⁸ Al-Rafi'i, *Al-'Aziz Sharh Al-Wajiz*, vol. 4, p. 31

¹⁹ Ibn al-Humam, *Fath al-Qadir*, p.15, vol. 394

c) Unauthorised purchase under liability (*fi zimmah*)

Shafi'i jurists mentioned that if the purchase is under the principal's liability but the principal is not disclosed to the third party seller, then the purchase is affected on the *fuduli*. Whilst in *qaul qadim*, the purchase is subject to ratification by the principal. Otherwise, the purchase will be affected against the *fuduli*. However, if the purchase is under the *fuduli's* liability but with disclosure of the principal, then the legal effect will be the same as in the context of the *fuduli* purchasing using the principal's money and with disclosure of the principal (as mentioned in item (a) above). If the *fuduli's* liability is not expressed, then the contract becomes void. In *qaul qadim* of Imam Shafi'i, the contract shall be subject to ratification. Ironically, this scenario is also mentioned in the opinion of the Hanbali jurists.²⁰ As we are aware, in general *tasarruf fuduli* is considered as void according to Hanbalis. However, they mentioned that in this particular scenario, if the purchase is made under the *fuduli's* liability and he did not attribute it to another person, then the purchase is valid and may be enforced through ratification. If it is not ratified, then it will be enforced against the *fuduli*. According to them, the reason for this type of transaction to be validated and not be deemed void is that the *fuduli* transacted under his liability (may also include his own money) and not with another person's money/asset.

d) Unauthorised purchase with *fuduli's* money

This scenario is a bit different compared to all the above scenarios because the *fuduli* disposes his money in a purchase done for others. This particular scenario is discussed by Shafi'i jurists. In this context, the *fuduli* purchases an asset from a third party using his own money but the purchase is intended for another person. According to Shafi'i jurists, it depends on whether the *fuduli* discloses the intended purchaser or not. If the intended purchaser is not disclosed, the purchase is enforced against the *fuduli*. If the purchaser is disclosed or the purchase is attributed to the intended purchaser, the purchase is suspended pending approval by the intended purchaser. If there is no approval from the purchaser, the purchase is enforced on the *fuduli* and in another view, the purchase is void.²¹

IX. *Tasarruf Fuduli* and the Views of Contemporary Scholars

Abdul Karim Zaidan argues that the opinion of Hanafi and Maliki scholars on *tasarruf fuduli* is preferable due to two reasons. Firstly, all contracts and dispositions have been legalised for the benefit of the people. It is most probably that the *fuduli* acted in the interest of the party for whom he is performing a disposition for, though without his initial permission. This person who is unaware of the *fuduli's* disposition can later approve it if he views it to be in his best interest and, alternatively, he can nullify it if he finds it to be against his interest. Hence, the disposition of the *fuduli* does not carry or inflict harm upon the unaware party.

²⁰ Al-'Uthaimin, *al-Sharh al-Mumti` 'ala Zad al-Mustaqni`*, vol. 8, p. 130

²¹ Al-Rafi'i, *Al-'Aziz Sharh Al-Wajiz*, vol. 4, p. 31

Therefore, it does not make sense to view the disposition of the *fuduli* as void. Secondly, the texts regarding the permissibility and validity of dispositions are generic in nature without the disposition of *fuduli* being exempted from them.²²

Regarding the need of permitting *tasarruf fuduli*, Zuhayli argues that the selling of another person's property without his permission is frequently found in practical day to day life. Examples of such disposition include, one spouse selling the property of the other spouse, individuals selling the property of the government, or the sale of the property of the person who has gone missing.²³

Al-Qaradaghi²⁴ expresses that the opinion of the Hanafi school regarding *tasarruf fuduli* is preferable. He also adds that the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) has also adopted this opinion in its respective standards.

X. *Tasarruf Fuduli* in Modern Islamic Finance

Al-Qaradaghi maintains that some Islamic banks have resorted to the application of *tasarruf fuduli* in certain situations. These situations include:

1. A trader purchases what he needs from an outside party but then finds himself unable to fulfil his obligations. Consequently, he approaches an Islamic bank seeking financing. However, it is not permissible for the Islamic bank to provide financing in this situation on the basis of *tasarruf fuduli* because the contract is already valid and effective against the trader, therefore it cannot be valid for another party (the Islamic bank in this case) afterwards.
2. There might be other situations in which the bank views that the client actually intended to purchase something in the name of the bank in the form of, for instance, invoices and bill of lading. In this situation, it is possible for the bank to transact on the basis of a *fuduli* contract, whereby the bank ratifies the purchase made by the client and then sells the object to the customer on the basis of *murabahah*.
3. Other situations may also occur in cases whereby the bank opens a letter of credit for the client and fixes a ceiling for the client's import and export. However, prior to agreeing on the execution of *murabahah*, the client purchases merchandise with the intention of buying for the bank. In this case it is also permissible for the bank to complete the transaction by giving consent on the transaction and then sells it to the client on the basis of *murabahah*.

²² Zaydan, `Abdul Karim, *Madkhal ila al-fiqh al-Islami*, p. 349

²³ Al-Zuhayli, Wahbah, *al-Fiqh al-Islami wa Adillatuhu*, Dar al-Fikr, Damascus (1989), 3rd Edition, v. 4, p. 373

²⁴ Al-Qaradaghi, Muhiuddin, *al-Fadhalah wa Tatbeeqatuha*, (2009), available online at: http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=536:2009-07-13-11-20-19&catid=84:2009-07-13-09-55-10&Itemid=13

However, the writer further argues that such transactions on the basis of *tasarruf fuduli* should be restricted to very exceptional cases and each case should be individually presented to the Shariah Board for approval.²⁵

XI. Standard and Fatwas Related to *Tasarruf Fuduli*

a) AAOIFI Shariah Standard No. 23

The Shariah Standard No. 23 issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) primarily deals with the contract of *wakalah* and its different aspects. In addition, the last part of the standard discusses the dispositions of an unauthorised agent. This standard has defined *fuduli* in the following words:

“8/1 An uncommissioned agent (Fodooli) is a person who discharges (even though in the absence of any need or urgency) the affairs of others without being an agent or having a right to do so by virtue of Shari’a. The deal becomes subject to the rulings on the Fodooli, even when the acts of a real owner makes him appear an agent.”²⁶

“8/2 The approval or denial of a contract concluded by an uncommissioned agent is subject to the discretion of the owner. Approval of such contract by the owner should also precede revocation of the contract by either of the two parties; otherwise, a new contract has to be initiated. If the owner of the property does not approve the act of the uncommissioned agent, the act becomes binding to the latter, if he did not declare at the time of signing the contract that he had no authority.

8/3 The rulings on the uncommissioned agent are applicable to all financial contracts like sale, purchase, rent and hiring contracts, donations by way of gift, and investment agency contracts.

8/4 When the owner of the asset approves the act of the uncommissioned agent, the contract becomes effective, and subject to all rulings on agency. The approval shall be retroactively effective based on the date of such an act”²⁷ (p. 419-420)

²⁵ Al-Qaradaghi, Muhiuddin, op. cit.,

²⁶ Accounting and Auditing Organization for Islamic Financial Institution (AAOIFI) *Shariah Standard No. (23): Agency and the Act of An Uncommissioned Agent*. p. 419-420

²⁷ AAOIFI, op. cit., pp. 420

b) Kuwait Finance House Fatwa Committee

The Fatwa Committee of KFH has also deliberated on a scenario of *tasarruf fuduli* which was brought upon them. The text of the fatwa no. 882 is as follows:

Question:

A person sold KFH a house mortgaged to a certain entity. KFH agreed with this person to pay the price in two parts; the first part to be paid to the mortgage lender (Kuwait Savings and Credit Bank) in order to dissolve the mortgage, and the second part to be paid to the seller (the house owner) after the transfer of the house ownership to KFH. After the contract of sale was registered with the broker, KFH sold the house to another person who had promised to purchase it from KFH. However, the seller (the original owner) after receiving the first part of the price, paid it to the mortgage lender and upon dissolving the mortgage, sold the house to another party. Hence, KFH has taken legal actions against the seller. The seller is currently offering reconciliation whereby KFH terminates the contract of sale registered with the broker and the seller pays back the first part of the price (the part paid to dissolve the mortgage). Prior to this incident, the practice that has been followed in the event of purchasing real estate that is mortgaged to another bank is to stipulate in the contract of sale that the buyer (KFH) pays an advance payment equivalent to the debt owed to the mortgage lender. As a security, KFH requests the seller to issue a cheque in favour of KFH having the same amount as the advance payment. In the aforementioned incident, KFH requested the seller to issue a cheque in favour of KFH having the value of the debt owed to Kuwait Savings and Credit Bank. When the seller violated the contract and sold the house to another party, KFH submitted this cheque to the public prosecutor; the seller was prevented from travelling and was brought to trial in absentia for issuing cheque on insufficient funds.

Issuing a cheque as a security was the only method practised in the event of purchasing real estate that is mortgaged to another bank. However, this method has been cancelled, and in coordination with Kuwait Savings and Credit Bank, a more secure method is being followed. Is it allowed for KFH to ask for compensation for terminating the contract of sale? Is it also allowed for KFH to ask for compensation for the profit on selling the house that has been lost due to terminating the contract of sale between KFH and the purchase undertaker? Is it also allowed for KFH to ask for compensation for reserving the first part of the price throughout the period starting from the date of purchase to the date of payment to KFH?

View of the Committee:

The Fatwa Committee believes that KFH reserves the right to validate or to invalidate the sale because the previous owner sold a house not owned by him (*bay' al fuduli*). In case KFH validates the sale, subsequent permission is then considered like a preceding agency. In this case, it is allowed for KFH to collect any profit earned because it is the owner of the house, but KFH is not allowed to ask for any compensation.

From the response, it can be said that the Committee adopted the view which allows *tasarruf fuduli* to be ratified by the owner.

c) Al Baraka Fatwa

Al Baraka Fatwa Committee was consulted on the disposition of a customer who purchased an asset by way of *tasarruf fuduli*. The text of fatwa as follows:

Question:

Is it permissible for a customer to buy for others through a *fuduli* transaction? Please provide fatwa on this matter.

Answer:

In light of the report submitted by the supervisor of the operation that the financee who requested for murabahah financing has put forward the idea of buying a vehicle by way of musharakah between him and Al Baraka. In this context, after agreeing with al Baraka, the customer (financee) approached to sign an agreement with the vehicle manufacturer with payment of 10% of the price. He then proceeded to request al Baraka to enter into the contract by paying the remaining portion of the price (90%). In view of the above, the client's action is of two capacity; one is his purchase of 10% for himself; two is his purchase for Al Baraka of the 90% on the basis of *tasarruf fuduli*. This kind of transaction/disposal is dependent on the person of which the transaction is intended for. If he consents to it, the purchase is effective. Thus, it is the right of the company to agree to the disposal of the client or to reject it. If the company approves it, it effectively owns 90% of the vehicle and thus become established partners over the vehicle.

In the case of the two partners agreeing to sell the car, they may share the profit, according to the respective equity after retrieving the amount of capital of each partner. Similarly, losses shall also be proportionate to the contributed capital. A partner may also sell off his share to the other partner by way of *murabahah*, or normal sale; or he may rent his portion through *ijarah muntahiyah bittamlik*. The selling of the portion may be of a one lump sum basis or partial disposal (*musharakah mutanaqisah*). However, this principle should only be applied in the narrowest scope and shall not constitute as a general principle given that it is based on the intention of the person which is hidden in nature and difficult to be ascertained.

XII. Analysis and Proposed Parameter

The rulings on *tasarruf fuduli* can be traced back to two different opinions and approaches among jurists which is either the transaction is suspended and subject to ratification; or the transaction is deemed invalid or void. The difference arises due to their different ways of viewing the *tasarruf fuduli*. The first group views that *tasarruf fuduli* may be permitted if ratified; and they also perceive it from the perspective of *maslahah* for the owner and also in the spirit of mutual assistance. Furthermore, the unauthorised transaction may be of benefit to the owner thus he may approve it.

Another group views that under the *tasarruf fuduli*, a *fuduli* person enters into a transaction without having ownership of the asset, thus the *tasarruf fuduli* is considered as a violation of rights which is why the contract is deemed void. It also refers to the hadith which underlines the principle that one shall not sell what one does not own as he cannot guarantee delivery of the goods to the purchaser.

Although the first group also views that ownership of subject matter of contract is an important requirement for a contract, they only view it as a requirement for the contract to become effective or binding and it does not affect the validity of the contract. Therefore, we can see that the difference in ruling arises from the different views with regard to the status of a contract that is executed without authority or authorisation.

The author wishes to highlight that this research, among others intends to examine certain product proposals by Islamic Financial Institutions (IFIs) in Malaysia which attempted to apply *tasarruf fuduli* as its feature. An example of such product involves a scenario of a customer who intended to obtain a house financing and has signed a sale and purchase agreement with a developer prior to applying *murabahah* financing with the IFI. As such, when the customer engages the IFI for financing, it is proposed that in order for the ownership of the IFI on the property to take effect prior to selling it to the customer on *murabahah*, the earlier sale and purchase agreed between the customer and developer would be regarded as a purchase by the customer on behalf of the IFI, through the application of *tasarruf fuduli* so that consequently the IFI may ratify the purchase by approving it. Hence, this research is important in terms of examining such product proposal and determining whether the requirements of *tasarruf fuduli* are fulfilled.

When the above scenario is evaluated in the context of the view of Hanbalis with regard to the purchase of a *fuduli* under his liability, it appears that there is a similarity between both cases. However, one of the significant features in the Hanbali context is that at the time of purchase, the *fuduli* purchaser has identified the real purchaser and intended the purchase to be for him. Whilst in the current context, the customer may have not yet identified the purchase is to be on behalf of a particular bank. Thus, one of the important considerations in the view of Hanbalis is the element of intention and without it, such transaction does not qualify to be categorised as *tasarruf fuduli* and hence, is not subject to ratification.

After deliberate discussion on *tassaruf fuduli* in previous sections, the author proposes the following as parameters and guidance in dealing with case of *tasarruf fuduli*:

1. *Tasarruf fuduli (unauthorised transaction) is defined as a transaction entered into on behalf of another;*
 - (a) *by a wakil beyond the mandate given, or*
 - (b) *by a person without having been appointed as a wakil.*

A person who performs such an act is referred to as an unauthorised agent (fuduli).
2. *In the event the unauthorised agent purchases an asset using another person's money, the contract is enforceable subject to ratification of the owner*
3. *Pursuant to item 2, in the event that the transaction is not ratified by the owner, the contract shall be enforceable against the unauthorised agent.*
4. *In the event that the unauthorised agent purchases an asset using his own money for another person:*
 - (a) *where the unauthorised agent does not disclose that the purchase is made on behalf of another, the contract shall be enforceable against the unauthorised agent; and*
 - (b) *where the unauthorised agent discloses that the purchase is made on behalf of another person, the contract is enforceable subject to the person's ratification, otherwise it is enforceable against the unauthorised agent.*
5. *In the event the unauthorised agent sells another person's asset, the contract is enforceable subject to ratification of the owner.*
6. *Pursuant to item 5, in the event that the transaction is not ratified by the owner, the contract shall become invalid.*

XIII. Conclusion

The paper has presented various opinions with regard to *tasarruf fuduli* in the context of sale and purchase transactions. It is noted that the views of the jurists are divided in defining the character or nature of an unauthorised transaction. In one view, the transaction is recognised as valid, but suspended which means it is not enforced immediately. It is valid as it fulfils the conditions of a valid contract but it is not yet enforceable as it lacks the conditions of an enforceable contract. However, it will be enforced once it is ratified by the owner. In the second view, the transaction is regarded as invalid at the initial as it does not fulfil the condition of the subject matter of contract which is it must be owned by the party who enters into transaction.

It is noted in the proposed parameter that for an unauthorised purchase to be able to be subjected to ratification, it is important for the *fuduli* purchaser to disclose to the seller at the time of contract that the purchase is intended for another party and not for himself. Even if we attempt to base it on one of the views of the Hanbalis, at the very least there must be an element of intention by the purchaser at the time of purchase. This effectively excludes the application of contract ratification as proposed by the IFI.

It is worth highlighting, that the second view which does not recognise *tasarruf fuduli* holds that *tasarruf fuduli* is only acceptable in a critical and urgent situation that requires interference in other's property. Therefore, given this nature of *tasarruf fuduli* that inclines towards an exception to the general principle, it may not be suitable to become underlying principle to an Islamic banking product. *Tasarruf fuduli* should be perceived as mechanism for ratifying contract with limited application in Islamic banking industry.

References

- Accounting and Auditing Organization for Islamic Financial Institution (AAOIFI), Agency and the Act of An Uncommissioned Agent, Shariah Standard No. (23)(Bahrain): p. 419-420.
- Al-`Uthaimin. "al-Sharh al-Mumti` `ala Zad al-Mustaqni`." vol. 8, p. 130.
- Al-Bukhari. "Sahih Bukhari." hadith no. 3370.
- Al-Dasuqi. "Hashiyah Al-Dasuqi `ala Sharh al-Kabir." vol. 10, p. 481.
- Al-Fayroz Abadi, Muhammad ibn Yaqoob. "Al-Qamoos al-Muheet." Muassasah al-Risalah, Beirut, (2005) 8th Edition, p. 1043.
- Al-Hattab. "Mawahib al-Jalil." vol. 4, p. 272.
- al-Qaradaghi, Muhiuddin. "al-Fadhalah wa Tatbeeqatuha." (2009), available online at: http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=536:2009-07-13-11-20-19&catid=84:2009-07-13-09-55-10&Itemid=13
- Al-Rafi`i. "al-`Aziz Sharh Al-Wajiz." vol. 4, p. 31.
- _____. "al-`Aziz Sharh al-Wajiz." vol. 4, p. 31.
- Al-Tharvi, Muhammad Ali. "Kashshaf Mustalahat al-Funoon wa al-Ulum." Maktabat Labnan Nashiroon, Beirut (1996), 1st Edition, v. 2, p. 1278.
- Al-Zarkashi. "Al-Manthur fi Al-Qawa`id." vol. 1, p. 300.
- Al-Zuhayli, Wahbah. "al-Fiqh al-Islami wa Adillatuhu." Dar al-Fikr, Damascus (1989), 3rd Edition, v. 4, p. 373.
- Ibn al-Humam. "Fath al-Qadir." p.15, vol. 394.
- _____. "Fath Al-Qadir." vol. 15, p. 386.
- Ibn Muflih. "Al-Mubdi`." vol. 4, p. 16.
- Ibn Nujaym, Zayn al-Deen. "al-Bahr al-Raiq Sharh Kanz al-Daqaiq." Shirkat A'la al-Deen, Beirut, undated, v. 6, p. 160.
- ISRA Compendium for Islamic Financial Terms (2013), p. 274, International Research Academy for Islamic Finance, Kuala Lumpur.
- Zaydan, `Abdul Karim. "Madkhal ila al-fiqh al-Islami." p. 349.
- Zaydan, Abdul Karim. "al-Madkhal li Dirasat al-Shariah al-Islamiyyah." Dar Umar ibn al-Khattab Alexandria 2001, p. 348.