242216 - Selling at the original price, and making maintenance and insurance the responsibility of the customer, in a diminishing-share partnership

the question

With the diminishing share partnership in the U.K. islamic banks they sell each share on a monthly basis so that the capital is repaid.
I read http://islamqa.info/en/150113 and one of the UK islamic banks was asked and they replied that each time you buy a share the price will be the one bought at and not the current market value. If I am happy to pay at this rate is it permissible.
Also they say that to keep the rental rates competitive they wont take burden of maintenance nor insurance responsibility.
If i am happy pay all cost of maintenance is it permissible?

Summary of answer

In conclusion, it is not permissible to enter into the
contract mentioned, because it involves two prohibited matters:
1.
the promise to
buy the share of the financial institution at its nominal value
2.
making
maintenance and insurance the responsibility of the customer.
These two conditions undermine the partnership contract, so
they end up being a trick aimed at earning riba through this financing,
because the customer has to pay the financial institution more than he will
take from it, under the heading of partnership and renting.
And Allah knows best.

Detailed answer

A diminishing-share partnership is an agreement between two partners to create a company owned by both of them, to undertake a project or buy real estate or start a manufacturing enterprise, and so on, on the basis that the partnership will end when the share of one partner (who is financing the venture) has gradually shifted to the other on the basis of separate, consecutive transactions.

Majallat Majma‘ al-Fiqh al-Islami, issue no. 13 (2/513), from a paper by Dr Nazeeh Hammaad.

We have previously explained the guidelines on dealing with this kind of partnership, in the answer to question no. 150113.

From these guidelines we may note the following:

Firstly:

There should be three contracts, with no connection or overlap between them, and there should be no stipulation that one be agreed upon in order to complete another, and each contract is subject to the rulings that are decreed by sharee‘ah. These contracts are as follows:

1. The financial institution and the customer should buy the property, each according to his share, so that they both pay towards compulsory insurance, maintenance, taxes, fees for transfer of ownership, and so on, each commensurate with his share in the property, and they are both to bear the risks of any damage to the property, according to their shares.

2. The property may be rented out to the customer – as is most likely to be the case – or to someone else.

3. The customer may buy the share of the financial institution gradually, on the basis of a prior promise. The Fiqh Council regards it as permissible to make the promise binding on one of the two parties only, and the other party has the choice: if he wishes he may go

ahead and if he wishes he may refuse. It is not permissible for the promise to be binding on both parties, because that comes under the heading of selling, and it is not permissible to commit to a transaction to be carried out in the future, just as it is not permissible to stipulate buying (or selling) in the partnership contract.

It is obligatory to draw up a deal when buying every single share, even if the deal is only verbal.

Secondly:

It is not permissible to promise to buy shares at their value at the beginning of the project, because this is a guarantee of the partner's capital, which is prohibited according to sharee'ah. Rather the sale of each share should be at the market price, or as agreed at the time of purchase. Thus both parties will share any loss if the price of the property drops, and they will share any gain if the price rises.

Ibn Qudaamah said, explaining invalid conditions in partnerships:

If it is stipulated that the one who takes wealth to invest it (in a partnership) must guarantee the capital, or must take a share of the loss, or that when he sells the item he is more entitled to the price, or the one who takes the money to invest it makes any such stipulation upon the owner of the capital, all of these are invalid conditions. We have mentioned and explained many of them elsewhere. End quote (5/186)

It says in al-Ma'aayeer ash-Shar'iyyah (p. 199):

It is permissible for one of the parties to a partnership to make a binding promise to buy things that the partnership owns during the lifetime of the partnership, or when dissolving it, at market value, or whatever is agreed upon at the time of purchase. It is not permissible to promise to buy it for the nominal value. End quote.

It also says (p. 215):

The reason why it is not permissible to give a binding promise on the part of any of the parties to the partnership to buy things that the partnership owns for the nominal value is that this is like a guarantee of capital, which is prohibited according to sharee‘ah.

The reason why it is permissible to give a promise to buy it at the market value is that this is not a guarantee between the partners. End quote.

In a statement of the Islamic Fiqh Council it says:

Neither of the two parties should promise to buy the share of the other for the same value as the share had at the time of setting up the partnership, because that comes under the heading of one partner guaranteeing the share of the other. Rather the value of the share should be decided based on the market value at the time of selling, or whatever is agreed upon at the time of selling. End quote.

Thirdly:

It is not permissible to make the costs of maintenance and insurance the responsibility of the customer, because this is contrary to the concept of partnership that is based on sharing gains and losses. In a statement of the Fiqh Council it says:

There should be no stipulation that one party should bear the costs of insurance or maintenance, or any other expenses. Rather that should be carried by the partnership, commensurate with the share of each partner.

It is not permissible to impose that on the customer on the basis that he is a tenant who is renting the property, because it is not permissible to stipulate that the tenant be responsible for maintenance, because that leads to making the rent he is paying ambiguous, and this makes the rental contract invalid.

In al-Mawsoo‘ah al-Fiqhiyyah (1/286) it says:

It is not permissible to stipulate that the renter should be responsible for maintenance, because that leads to making the rent he is paying ambiguous, and the rental contract is

rendered invalid by this condition, according to the consensus of all madhhabs. End quote.