IN THE FEDERAL COURT OF MALAYSIA AT PUTRAJAYA
(APPELLATE JURISDICTION)
CIVIL APPLICATION NO: 06(i)-06-07/2017(B)

BETWEEN

JRI RESOURCES SDN BHD (CO. NO: 271634-H)	**…**	**APPELLANT/ APPLICANT**

AND

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD (CO. NO: 672174-T)	**…**	**RESPONDENT**

AND

1) PRESIDENT OF ASSOCIATION OF ISLAMIC BANKING INSTITUTIONS MALAYSIA		
2) CENTRAL BANK OF MALAYSIA	**…**	**INTERVENERS**

IN THE COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: B-02(IM)(NCVC)-1674-09/2016

BETWEEN

JRI RESOURCES SDN BHD (CO. NO: 271634-H)	**…**	**APPELLANT/ APPLICANT**

AND

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD (CO. NO: 672174-T)	**…**	**RESPONDENT**

IN THE HIGH COURT OF MALAYA AT SHAH LAM
SUIT NO:22 NCVC-584-09/2013

BETWEEN

KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD … PLAINTIFF
(CO. NO: 672174-T)

AND

JRI RESOURCES SDN BHD
(CO. NO: 271634-H)
ISMAIL BIN KAMIN
ZULHIZZAN BIN ISHAK
NORAZAM BIN RAMLI … DEFENDANTS

CORAM:

RICHARD MALANJUM, CJ
AHMAD MAAROP, PCA
ZAHARAH IBRAHIM, CJM
DAVID WONG DAK WAH, CJSS
RAMLY HAJI ALI, FCJ
AZAHAR MOHAMED, FCJ
ALIZATUL KHAIR OSMAN KHAIRUDDIN, FCJ
MOHD. ZAWAWI SALLEH, FCJ
IDRUS HARUN, JCA

JUDGMENT OF THE COURT

Introduction

[1] This matter came before this Court by way of a constitutional reference by the High Court at Kuala Lumpur pursuant to section 84 of the Courts of Judicature Act 1964 ("Act 91") and Article 128(2) of the Federal Constitution ("FC").

[2] The constitutional questions reserved for determination by this Court are as follows:

> "(1) Whether Sections 56 and 57 of the Central Bank of Malaysia Act 2009 are in breach of the Federal Constitution and unconstitutional by reason of:-
>
> (a) Contravening Article 74 of the Federal Constitution read together with the Ninth Schedule of the Federal Constitution for the Shariah Advisory Council ("SAC") having been vested with the power to ascertain Islamic law;
>
> (b) Contravening Part IX of the Federal Constitution for the said sections having the effect of vesting judicial power in the SAC; or
>
> (c) Contravening Article 8 of the Federal Constitution for the said sections having the effect of denying a litigant substantive due process.

(2) If the above is answered in the negative:

(a) Whether the Court is nonetheless entitled to accept or consider the expert evidence in respect of any questions concerning a Shariah matter relating to Islamic finance business."

[3] The questions raised on behalf of the applicant are of great public importance, especially to Islamic banking and finance industry in Malaysia.

The Parties

[4] The applicant, JRI Resources Sdn Bhd, is a company incorporated in Malaysia with its address at No. 46-A, Jalan Ara Satu, Taman Rinting, 81750 Masai, Johor Darul Takzim, and was at all material times a customer of the respondent. The applicant is the 1st defendant in the proceedings before the High Court.

[5] The respondent is a financial institution incorporated in Malaysia and has its registered address at Level 26, Menara Prestige, No.1, Jalan Pinang, 50450 Kuala Lumpur and had granted various Islamic facilities, including an *Ijarah* facility, to the applicant. The respondent is the plaintiff in the proceedings before the High Court.

[6] The 1st intervener is the President of Persatuan Institusi Perbankan Islam Malaysia ("Association of Islamic Banking

Institutions Malaysia" ("AIBIM")), a body stated to have been established in 1996. It was formerly known as the Association of Interest Free Banking Institutions Malaysia with the objective, inter alia, of promoting the establishment of sound Islamic banking systems and practices and also of promoting and representing the interest of members and rendering where possible such advice or assistance as may be deemed necessary and expedient to members. One of the supports provided by AIBIM is through the establishment of a special taskforce committee known as AIBIM-ISRA Shariah Standard Formulation Task Force to assist Bank Negara Malaysia ("BNM") and International Shariah Research Academy for Islamic Finance (ISRA) in drafting the standards for Shariah contracts.

[7] The 2nd intervener, BNM, was established pursuant to section 3 of the Central Bank of Malaysia Act 1958 ("the 1958 Act"). The 1958 Act was repealed and replaced by the Central Bank of Malaysia Act 2009 ("the 2009 Act"). The principal object of BNM is "to promote monetary stability and financial stability to the sustainable growth of the Malaysia economy" (see section 5(1) of the 2009 Act). The primary functions of BNM include to regulate and supervise financial institutions which are subject to the laws enforced by BNM (see section 5(2) and (1) of the 2009 Act) and to promote a sound, progressive and inclusive financial system

(section 5(2)(f)). Section 5(4) further provides that BNM "shall have regard to the national interest" in carrying out its functions under the 2009 Act. The Islamic banking industry is included under the purview of BNM as section 27 of the 2009 Act recognises Islamic financial system as part of the Malaysian financial system besides the conventional financial system.

The Factual Background and Antecedent Proceedings

[8] The genesis of the dispute giving rise to this reference proceedings can be traced back to 4 Ijarah Muntahiah Bitamlik Facilities ("the Ijarah Facilities") and a Murabahah Tawarruq Contract Financing facility ("the MTQ Facility") entered between the applicant and the respondent sometime in 2008. The repayment of these facilities was guaranteed by Ismail Bin Kamin, Zulhizzan Bin Ishak and Norazam Bin Ramli ("the Guarantors"), the 2nd, 3rd and 4th defendants in the court below.

[9] The Ijarah Facilities concerned the leasing of shipping vessels by the respondent to the applicant. The vessels were purchased at the request of the applicant and the respondent funded the purchase and became the owner of the vessels. These vessels were then leased to the applicant.

[10] The respondent's claim is premised on the applicant's failure to make payment of the amount outstanding to the respondent under the facilities granted.

[11] On 2.9.2013, the respondent filed a civil action against the applicant and the Guarantors for the recovery of the amounts due under the facilities.

[12] In 2014, the respondent filed an application for summary judgment against the applicant and the Guarantors. On 3.10.2014, the High Court granted summary judgment against the applicant and the Guarantors for the outstanding amounts due amounting to RM118,261,126.26 as at 8.11.2013 together with compensation fees.

[13] The applicant then appealed to the Court of Appeal against the summary judgment.

[14] At the hearing before the Court of Appeal on 15.9.2015, the applicant submitted that its failure to derive income from the charter proceeds (from leasing of the vessels) was due to the failure of the respondent to carry out major maintenance works on the vessels. The applicant alleged that the carrying out of the major maintenance works on the vessels was the responsibility of the respondent, as owner of the vessels.

[15] The applicant further submitted that the High Court had erred in not seeking a ruling on a Shariah issue in relation to the Shariah compliance of clause 2.8 of the Ijarah Facilities Agreements. Clause 2.8 provided that:

> "Notwithstanding the above clause 2.7, the parties hereby agree that the **Customer shall undertake all of the Major Maintenance** as mentioned herein and the Customer will bear all the costs, charges and expenses in carrying out the same" (Emphasis ours).

[16] The Court of Appeal allowed the appeal on 16.9.2015 and directed that the following question be referred to the Shariah Advisory Council ("SAC"):

> "Whether clause 2.8 of all the Ijarah Agreements (4 in total) between the Plaintiff and its customer (the 1st Defendant) is Shariah compliant, in light of the Shariah Advisory Council resolutions made during its 29th meeting on 29.9.2002, the 36th meeting dated 26.6.2003 and the 104th meeting dated 26.8.2010."

[17] Both the applicant and the respondent actively participated in the process before the SAC. The applicant on or about 15.2.2016, submitted an expert opinion to the SAC and the respondent also submitted its expert opinion to the SAC. The opinions were in conflict. The applicant's expert, Dr. Azman Mohd Noor, disagreed with the inclusion of clause 2.8 in the Ijarah Facilities Agreements

as he was of the view that it did not comply with Islamic law. On the contrary, the respondent's expert, Dr. Azman Hasan, took the position that non-compliance was not material and therefore did not invalidate the Ijarah Facilities.

[18] On 30.6.2016, the SAC forwarded its ruling to the High Court on the Shariah principles that it had ascertained (see Shariah Advisory Council's Ruling dated 30.6.2016 pp. 299 to 301 of AR Vol.2). The English translation of the said ruling is set out below:

> "COURT'S REFERENCE TO BANK NEGARA MALAYSIA'S SHARIAH ADVISORY COUNCIL (CIVIL SUIT NO.33 NCVC-584-09/2013)
>
> KUWAIT FINANCE HOUSE (MALAYSIA) BERHAD VS JRI RESOURCES SDN BHD, ISMAIL BIN KAMIN, ZULHIZZAN BIN ISHAK & MUHAMAD NORAZAM BIN RAMLI
>
> **Introduction**
>
> In answering to the question posed by the court, the SAC took note that the SAC's duty is merely to analyse the Syariah's issues that are contained in each question posed and to state the Hukum Syarak ruling relating to the question. The SAC does not have jurisdiction to make a finding of facts or to apply the ruling to the facts of the case and to decide whether relating to an issue or for the case because this jurisdiction is vested with the court.

Referred Question

Whether clause 2.8 in all Ijarah Agreements (4 in total) between the Plaintiff and its customer (the 1st Defendant) is Shariah compliant, in the light of the Shariah Advisory Council resolution made during its 29th meeting on 25.9.2002, the 36th meeting dated 26.6.2003 and the 104th meeting dated 26.8.2010.

…

Answer

After referring to the decision of the SAC's earlier meeting, concerning the issue of the cost of maintenance of ijarah's asset, the SAC has decided that in principle, the maintenance cost relating to the ownership of ijarah's asset is the responsibility of the owner, meanwhile the cost relating to the usufruct of the rental is the responsibility of the lessee. Nevertheless, there are few arrangements that were allowed by the SAC which are –

i. The owner of the asset can delegate to the lessee to bear the maintenance cost of the asset and amount of that cost will be fully deducted in the transaction's sale and purchase of the asset at the end of the lease period; or

ii. The owner and the lessee may negotiate and agree to decide which party that will bear the maintenance cost of the asset.

Accordingly, the SAC has decided that the negotiation to determine the party that will bear the maintenance

cost of the asset is allowed, as long as it has been agreed by the contracting parties."

[19] Following the ruling from the SAC, the High Court scheduled a hearing date in August/September 2016 for the trial to proceed on the respondent's claim against the applicant.

[20] However, before the trial could proceed, the applicant filed an application for a reference to the Federal Court pursuant to Article 128(2) of the FC and section 84 of the Courts of Judicature Act 1964 (Act 91) to determine if sections 56 and 57 of the 2009 Act under which the SAC gave its ruling was constitutionally valid. In short, the applicant declined to accept the ruling issued by the SAC.

[21] The High Court, on 22.8.2016, dismissed the applicant's application for a constitutional reference. The applicant then filed an appeal to the Court of Appeal against the said dismissal.

[22] On 15.5.2017, the Court of Appeal allowed the applicant's appeal and ordered the High Court to make the constitutional reference as sought by the applicant.

[23] Accordingly, on 20.10.2017, the High Court made the reference to the Federal Court. Hence, these reference proceedings before us.

[24] On 15.3.2018, this Court allowed AIBIM and BNM to intervene and participate in the reference proceedings.

[25] Before we proceed further, we wish to express our appreciation to all counsel concerned for their lucid, thorough and helpful submissions.

The Applicant's Submissions
Reference Question 1(a)

[26] At the outset of the hearing of these reference proceedings, learned counsel for the applicant informed the Court that he did not wish to pursue question 1(a). The applicant accepted that item 4(k) of List I (Federal List) in the Ninth Schedule to the FC vests legislative competence in Parliament to enact laws aimed at ascertaining Islamic law and other personal laws for purposes of federal law.

[27] In our considered view, learned counsel's concession on this issue was rightly made in law. Article 74 of the FC enjoins the Federal and State Legislatures in enacting legislation to observe the allocation of legislative power over the matters enumerated in the Ninth Schedule under the respective lists. Article 74 of the FC reads –

"**Subject matter of federal and State laws**

74.(1) Without prejudice to any power to make laws conferred on it by any other Article, **Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List** (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, **the Legislature of a State may make laws with respect to any of the matters enumerated in the State List** (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List)." (Emphasis added).

[28] In **Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals** [1997] 3 MLJ 23, (CA), Gopal Sri Ram JCA (as he then was) explained the scheme under Article 74:

"The Federal Constitution, in order to lend expression to the federal system of government which we practise, has apportioned legislative power between the States and the Federation. Each legislative arm of Government – the Legislative Assembly in the case of Sarawak and Parliament in the case of the Federation – is authorised by the Federal Constitution to make laws governing those subjects enumerated in the respective Lists appearing in the Ninth Schedule thereto. Constitutional lawyers term this as "the enumerated powers doctrine". It refers to the power of

a legislature, whether State or Federal, to make laws upon topics enumerated in a written constitution. Generally speaking, if a particular subject in respect of which a law is enacted is not one of those enumerated in the enabling constitutional provision, the enacted law is ultra vires and therefore void: *Mamat bin Daud & Ors. v. Government of Malaysia* [1988] 1 MLJ 119. Proceedings to have a law invalidated on this ground – that is to say, the lack of legislative jurisdiction – must be brought in accordance with the terms of art. 4(4) read with art. 128 of the Federal Constitution."

[29] Item 4(k) of List I (Federal List) in the Ninth Schedule permits Parliament to make laws for the ascertainment of Islamic law and other personal laws for the purpose of federal law. Item 4(k) reads:

"4. Civil and criminal law and procedure and the administration of justice including –

(k) ascertainment of Islamic law and other personal laws for purposes of federal law."

[30] Further, Parliament has the power to enact laws concerning finance (see Item 7 of List I (Federal List) in the Ninth Schedule to the FC). In **Latifah Mat Zin v Rosmawati Sharibun & Anor** [2007] 5 CLJ 253, it was held by this Court at page 274:

"Item 4(k) provides: "Ascertainment of Islamic Law and other personal laws for purposes of federal law" is a federal matter. A good example is in the area of

Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the federal list items 7 and 8 respectively. **The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliant or not falls within item 4(k) and is a federal matter. For this purpose, Parliament has established the Syariah Advisory Council – see s.16B of the Central Bank of Malaysia Act 1958 (Act 519)**". (Emphasis added).

[31] In **Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd** [2013] 3 MLJ 269, the Court of Appeal expressed its view at pages 275-276 in these words:

"**[20]** We take the view that the constitutionality of ss 56 and 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:

> 4. Civil and criminal law and procedure and the administration of justice, including —
>
> …
>
> (k) ascertainment of Islamic law and other personal laws for purposes of federal law

> **[21]** Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. **Thus, ss 56 and 57 are within Parliament's power to enact**." (Emphasis added).

[32] In our considered view, it is beyond doubt that the FC confers power on Parliament to enact a law in respect of the ascertainment of Islamic banking because financial matters are within item 7 of the Federal List and also because item 4(k) specifically permits Parliament to enact laws aimed at ascertaining Islamic and other personal laws for the purposes of federal law.

[33] That was, however, not the end of the matter. While learned counsel for the applicant conceded that by virtue of item 4(k) of List I (Federal List) in the Ninth to Schedule to the FC, it is within legislative competence of Parliament to enact a law in respect of the ascertainment of Islamic banking, he then in the same breath argued that sections 56 and 57 of the 2009 Act go beyond the scope of item 4(k) of the FC. The contention as made by learned counsel for the applicant in the Court of Appeal was as follows:

> "It is however submitted that sections 56 and 57, CBMA go beyond the scope of Item 4(k) and as such were enacted unconstitutionally in view of Parliament not having been competent to enact such laws;

> In this regard, a distinction is to be drawn between the ascertainment of Islamic law (as provided for under section 52(1)(a), CBMA) and the determination of a question concerning a Shariah matter (as provided for under section 56(1), CBMA)."

[34] Learned counsel sought to impress upon us that the law making power of Parliament is bound by the concept of constitutional limitation. Where a law is enacted for purposes not sanctioned by the Constitution, it must be held to be unconstitutional and void. The Constitution is **suprema lex**, the supreme law of the land (see Article 4 of the FC) and there is no organ of government above or beyond it. Every organ of the government, be it the executive, the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of the authority. If there is a transgression of the constitutional limitation, the law made by the legislature has to be declared ultra vires by the court.

[35] We find it convenient to deal with this issue together with question No.1(b) since both issues are clearly related and the arguments presented by learned counsel for the applicant are overlapping and intertwined.

Reference Question 1(b)

[36] The issue that forms the axis of the dispute between the parties in this reference proceedings is whether sections 56 and 57 of the 2009 Act are unconstitutional as they contravene Part IX of the FC (Article 121) on the judicial power, and that "the said sections have the effect of vesting judicial power in the SAC".

[37] In regard to question 1(b), learned counsel for the applicant in his submission has two strings to his bow. First, learned counsel argued that the doctrines of separation of powers and independence of the judiciary are basic features of the FC and are an integral part of its basic structure. It is an essential feature of the judiciary that it be seised with all the powers necessary to comprehensively determine any matters that come before the courts. This is an essential feature of the court and necessarily arises from the language of Article 121(1)-(1B) and (2) of the FC. In support of his submission, emphatic reliance was placed on the decision of the celebrated case of **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case** [2017] 3 MLJ 561 ("**Semenyih Jaya Case**") wherein this Court, inter alia, held that the judicial power resides solely in the judiciary and no other as is explicit in Article 121(1) of the FC. In the superior courts, only judges appointed under Article 121(1) of the FC, and no other, could exercise decision-making powers. The discharge

of judicial power by non-qualified persons (not being judges or judicial officers) or non-judicial personages renders the said exercise ultra vires Article 121(1) of the FC.

[38] Another string to his bow is that the power to adjudicate in civil and criminal matters is exclusively vested in the courts. For this purpose, judicial power is to be understood as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties. To that end, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Reliance was placed on the case of **Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals** [2018] 1 MLJ 545 wherein the Federal Court, inter alia, held that:

> "[51] The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party."

[39] The essence of learned counsel's submission is that it is impermissible for the legislature to abrogate or vest judicial functions, specially the functions traditionally vested in the High Court, and to confer or vest the same in another person or body, which is devoid of essentials of a superior court. In other words, the ascertainment of existing rights by judicial determination of issues of fact or law falls exclusively within judicial power and Parliament cannot confer the function on any other person or body but a court constituted under Article 121(1) of the FC. Judicial power requires a court to exercise its independent judgment in interpreting and expounding upon the law. Ascertainment of Islamic law for banking by the SAC would preclude a judge from exercising its independent judgment. It is emphatically the province and duty of the Court to say what the law is and no one, not even Parliament, can transfer this power from the judiciary to another body.

[40] Learned counsel for the applicant then invited our attention to the functions of SAC as stated in section 52 of the 2009 Act:-

> "**Functions of Shariah Advisory Council**
>
> 52.(1) 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.

(2) For the purposes of this Part, "ruling" means any ruling made by the Shariah Advisory Council for the ascertainment of Islamic law for the purposes of Islamic financial business."
(Emphasis added).

[41] Learned counsel posited that reading section 52 together with sections 56 and 57 of the 2009 Act, it is self-evident that the SAC has been given a role in legal proceedings relating to Islamic financial business. Learned counsel vehemently submitted that by virtue of sections 56 and 57 of the 2009 Act, the SAC's role goes beyond the function of ascertaining Islamic law on any question of Shariah that arises in dispute before a High Court.

[42] Whilst canvassing the above contention, learned counsel for the applicant pointed out that in the event a reference is made by a court or arbitrator concerning Shariah question(s), it would require

the SAC to determine the appropriate legal principles to be applied to the transaction concerned. This would necessarily involve a consideration of the nature of the transaction and the agreement(s) entered into for that purpose. Other facts might also be relevant, for instance, the method employed to bind the parties to the transaction for the purpose of the said transaction. The SAC then has to apply the appropriate legal principles to the material facts so as to enable a ruling to be issued on the question(s) referred.

[43] It was the contention of learned counsel that the steps described above are not merely an exercise directed at ascertainment of Islamic law, such as is contemplated by item 4(k), List I (Federal List) in the Ninth Schedule to the FC but in fact an exercise of a judicial function. Moreover, the ruling issued by the SAC is binding on the High Court.

[44] Learned counsel further submitted that the ruling(s) of the SAC is to all intent and purposes an opinion. The courts have characterised the SAC for this purpose as a "statutory expert", citing observation made by the learned judge in **Mohd Alias bin Ibrahim v RHB Bank & Anor** [2011] 4 CLJ 654, at paragraph 109:

> "Hence, the ruling issued by the SAC is an expert opinion in respect of Islamic finance matters and it derives its binding legal effect from the Impugned

> Provisions enacted pursuant to the jurisdiction provided under the Federal Constitution."

[45] Learned counsel contended that this in itself is not controversial. This Court had declared in **Sulaiman Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, Intervener) and Other Applications** [2009] 6 MLJ 354 (FC), per Zaki Azmi PCA (as he then was) at paragraph 105:

> "This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field."

[46] According to learned counsel, the difficulty created by sections 56 and 57 of the 2009 Act is that these provisions, firstly, remove the discretion of the High Court as to the need for expert evidence on the subject, and secondly, make the "expert opinion" of the SAC binding. It is settled that it is for the trial court to determine whether to accept expert evidence and, in the face of conflicting opinions, to determine which opinion (if at all) is to be preferred. As Edgar Joseph J said in **Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd** [1995] 1 CLJ 15 at page 30:

> "It was submitted by counsel for the purchaser, and we agree, that this was not the correct approach for the Judge to have adopted. When, as here, there was a conflict of expert testimony, the correct approach for the judge to have adopted was not to cut the Gordian

> knot, as it were, by averaging out the two quantifications aforesaid, but by analysing the reasoning of the rival experts, and then concluding by accepting the version of one over the other."

[47] Thus, by compelling the High Court to refer question(s) of Shariah to the SAC and the ruling made is to be binding, these provisions effectively usurp judicial function and power of the court. It precludes the High Court from embarking on a line of enquiry essential to its constitutional role and function. Learned counsel further submitted that the ruling of the SAC should be considered merely as guiding principles upon a court but not binding as provided for by section 16B of the 1958 Act.

[48] Learned counsel concluded his submission by contending that indeed the SAC does exercise judicial power in so far as question(s) of Shariah is concerned. Therefore, sections 56 and 57 contravene Article 121(1) of the FC. These sections ought to be declared as unconstitutional and void.

[49] Both facets of the arguments advanced by learned counsel for the applicant had been seriously opposed by learned counsel for the respondent and interveners. We will refer to their submissions in the course of our deliberation.

Legislative History of the SAC

[50] Before we dwell on the legal issues raised by learned counsel for the applicant, perhaps it would be useful to narrate the legislative history and genesis of the SAC.

[51] It is necessary to find out what were the concerns of Parliament, based on the legislative history of the SAC, when it introduced the new sections 56 and 57 into the 2009 Act.

[52] The best way to understand a law is to know the reason for it. In **Utkal Contractors and Joinery Pvt. Ltd. and others v. State of Orissa and others** [1987] 3 SCC 279, Justice Chinnappa Reddy of the Indian Supreme Court, said:

> "9. … **A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation**. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids.
>
> The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the

wind, the interpreter may proceed ahead…" (Emphasis added).

[53] Again in **Reserve Bank of India v Peerless General Finance and Investment Co. Ltd. and others** [1987] 1 SCC 424, Justice Reddy said:

> "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. **A statute is best interpreted when the object and purpose of its enacted**. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. **If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context**. With these glasses the court must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place." (Emphasis added).

[54] To provide context, we first give an overview of the unique characteristics of Islamic banking. One of the unique characteristics of Islamic banking and finance is compliance with Shariah principles and rulings. Shariah compliance is what distinguishes an Islamic bank from a conventional bank as the former observes certain rules and prohibitions not observed by the latter. Failing to fulfil Shariah compliance requirements would generate a risk called "the Shariah non-compliance risk". This risk is unique to the Islamic banking and finance industry, and is particularly significant to it for the following reasons:

(a) it generally impacts the industry's reputation as well as the reputation of the financial institutions and thus, it may deteriorate reliance by depositors, investors, customers and stakeholders in the long term;

(b) contracts containing Shariah repugnant elements which had already been executed are liable to be deemed null and void, which would in turn render the profits derived thereof non-halal. As a result the tainted income arising from such transactions must be channelled to charity and cannot be kept by the bank; and

(c) it may involve some legal costs as potential suits may lead to payment of damages.

[55] Therefore, the existence of non-shariah compliant element would not only affect the confidence of the public in Islamic banking and finance industry, but it might also expose an Islamic bank to losses and fiduciary and reputational risks.

[56] Hence, Shariah compliance is the backbone of Islamic banking and finance industry and Shariah principles are the raison détre of all Islamic financial contracts. It gives legitimacy to the practices of Islamic banking and finance industry and thus validate the profits. It also boosts the confidence of all stakeholders that all the practices and activities of the bank are in compliance with the Shariah. Besides, section 28(i) of the Islamic Finance Services Act 2013 states that one of the duties of an Islamic financial institution is "to ensure that its aim and operation, business, affairs and activities are in compliance with Shariah".

[57] However, compliance with Shariah will be confidently achieved only by having a proper Shariah governance framework. This is because Shariah governance is meant to ensure compliance by Islamic banking and finance industry with the rules of Shariah.

[58] In Malaysia, the Shariah governance framework is based on the centralised model compared to a decentralised one being practiced in Gulf Cooperation Council (GCC) countries. The

centralised model is formed on the basis that the BNM itself has its own Shariah supervisory board called Shariah Advisory Council (SAC).

(See generally Rusni Hassan, Uzaimah Ibrahim, Nurdiana Irwani Abdullah, Akhtarzaite Abd Aziz & Mohd Fuad Sawari, "An Analysis of the Role and Competency of the Shariah Committees (SCs) of Islamic Banks and Financial Service Providers", Research Paper (No: 18/2010)).

[59] The SAC was established pursuant to section 124 of the (now repealed) Banking and Financial Institutions Act 1989 ("BAFIA") which was amended vide the **Banking and Financial Institutions (Amendment) Act 1996**. The amending Act had amended section 124 (7) to state as follows:

> "(7) For the purposes of this section –
>
> (a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank on the Syariah relating to Islamic banking business or Islamic financial business;"

[60] The Central Bank Act 1958 ("the 1958 Act") was then amended by the addition of section 16B which came into force on 1.1.2004.

[61] The old section 16B of the 1958 Act expressly stated that where in any proceedings relating to Islamic banking business and Islamic financial business which is based on Shariah principles before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator **may** refer such question to the SAC for its ruling. Any ruling made by the SAC pursuant to a reference by a court, shall be taken into consideration by the court and if the reference was made by an arbitrator, shall be binding on the arbitrator.

[62] Pursuant to the aforesaid provisions, it was not mandatory for the court to refer to the SAC any Islamic and/or Shariah principles. Although the Court has to consider the ruling(s), but the Court is not bound by such rulings(s). It binds two arbitrators though. However, following the growth of Islamic finance in Malaysia, there was a corresponding rise in disputes in relation to Islamic products in the civil courts.

[63] In the absence of any binding and definitive rulings of the SAC, the learned authors Adnan Trakic and Hanifah Haydar Ali Tajuddin, commented:

> "There are instances where different courts have decided differently on the same Islamic banking matters. The asymmetric approaches by the Malaysian judges in deciding Islamic banking and finance issues

have widened the uncertainty, and that could adversely affect the future development of Islamic banking and finance industry."

(See Adnan Trakic and Hanifah Haydar Ali Tajudin (eds), **Islamic Banking & Finance**: **Principles, Instruments & Operations** (p. 52) (the Malaysian Current Law Journal 2016.)

[64] In BNM's affidavit of 23.4.2018 filed in the present proceedings affirmed by En. Marzunisham Bin Omar, Assistant Governor of BNM, it has been clearly stated that there was a necessity for a single authority to ascertain Islamic law for the purpose of Islamic financial business. According to him, because of the rapid increase in the number of players in Islamic banking and finance in the country over the years, the rising complexities of Islamic finance products and the corresponding increase in disputes must be properly managed. An unsatisfactory feature of the resolution of the disputes before the civil courts previously, has been due to the reliance on various differing sources of Islamic principles.

[65] It is an acknowledged fact that diversity of opinion among so-called experts in Islamic legal principles had led to uncertainty in the Islamic banking industry that affected the stability of the Islamic financial system to the detriment of the economy.

[66] In **Affin Bank Bhd v Zulkifli bin Abdullah** [2006] 3 MLJ 67, **Malayan Banking Bhd v Marilyn Ho Siok Lin** [2006] 7 MLJ 249, **Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors (Koperasi Seri Kota Bukit Cheraka Bhd – Third Party)(and Other Cases)** [2008] 5 MLJ 631, the courts seemed to be reluctant to admit that the issues before the courts involved Shariah disputes and needed to be decided based on reference to the Islamic principles and the ruling of the SAC. The judges disregarded Shariah issues and had dealt with the legal matters purely based on the contractual disputes.

[67] In **Malayan Banking Bhd. v Ya'kup bin Oje** [2007] 6 MLJ 389, it was observed by the High Court at para 28 that it could on its own have recourse to the various sources of Islamic law to determine the appropriate Shariah principle to apply on the 'riba' issue. The Court perforce made reference to the judgment of the Supreme Court of Pakistan on the subject and reminded itself of the presence of various forms of legal stratagems called 'helah' to disguise the imposition of interest in Islamic facilities, and other like propositions.

[68] The approaches taken by the courts had also opened the way for Islamic banking cases to be decided based on the civil and common law. In this situation, the underlying transaction, which

strictly must comply with the Shariah principles lost its essence. Since Shariah compliance of all business activities is a pivotal requirement in Islamic banking and financial system, it is senseless for the parties to enter into a transaction which is not only governed by civil and common law but also decided even against the Shariah principles.

[69] In **Arab-Malaysian Finance Bhd. v Taman Ihsan Jaya Sdn Bhd** (**supra**), Abdul Wahab Patail J (as he then was) caused great concern, disquiet and uneasiness among Islamic banks and lawyers when he ruled that the bai' bithaman ajil ("BBA") contract in the cases before him was not a bona fide sale but a financing transaction. His Lordship found that the profit portion rendered the transaction contrary to the **Islamic Banking Act 1983** on the ground that it made the contract far more onerous than the conventional banking with riba. In reaching his decision, His Lordship held that the civil court was not a mere rubber stamp and that its function was to examine the application of the Islamic concepts and to ensure that the transactions did not involve any element not approved in Islam. The learned judge further stated that *'whether the court is a Syariah Court or not, that Allah is Omniscient must also be assumed where that court is required, in this case by law, to take cognizance of elements in the religion of Islam.'* In emphasizing that form could not override substance,

even the website of the Bank Negara Malaysia on BBA Financing was not spared his scalpel. The learned judge went so far as to hold the words 'not approved by the religion of Islam' in the **Islamic Banking Act 1983** meant that *'unless the financing facility is plainly stated to be offered as specific to a particular mazhab, then the fact it is offered generally to all Muslims means that it must not contain any element not approved by any of the recognised mazhabs'.*

[70] On appeal, the aforesaid decision of **Taman Ihsan** was reversed (See in **Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other** [2009] 6 MLJ 839 (CA) at 851, 853-855). In doing so, the Court of Appeal held that the BBA facility agreement was valid and enforceable.

[71] The Court of Appeal further held that Islamic financing facilities do not have to satisfy all four Mazhabs to be considered acceptable in the religion of Islam. On this, the Court of Appeal held at page 853:

> "With utmost respect, the learned judge had misinterpreted the meaning of 'do not involve any element which is not approved by the religion of Islam'. First, under s.2 of the Islamic Banking Act 1983, 'Islamic banking business' does not mean banking business whose aims and operations are approved by

all the four mazhabs. Secondly, we do not think the religion of Islam is confined to the four mazhabs alone as the sources of Islamic law are not limited to the opinions of the four imams and the schools of jurisprudence named after them. As we all know, Islamic law is derived from the primary sources i.e. the Holy Quran and the Hadith and secondary sources. There are other secondary sources of Islamic law in addition to the jurisprudence of the four mazhabs."

[72] The Court of Appeal stressed the fact that civil court judges should not decide whether a matter is in accordance with the religion of Islam or not. The Court of Appeal held:

> "[32] **In this respect, it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise**. As rightly pointed out by Suriyadi J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulama' take years to comprehend'. **Thus, whether the bank business is in accordance with the religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence**." (Emphasis added).

[73] It could be said that the new sections 56 and 57 of the 2009 Act had solved this issue by making it compulsory for the civil court

judges to refer the matter to the SAC or to refer to the SAC's ruling.

[74] Section 56 of the 2009 Act provides:

> "(1) 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.
>
> (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat." (Emphasis added).

[75] "Islamic financial business" is defined in section 2 of the 2009 Act to mean:

> "any financial business in ringgit or other currency which is subject to the laws enforced by the Bank and consistent with the Shariah."

[76] Section 57 of the 2009 Act further provides:

> "Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part **shall be binding** on the Islamic financial institutions under

section 55 and court or arbitrator making a reference under section 56." (Emphasis added).

[77] The 2009 Act has enhanced the role and functions of the SAC. The SAC is now the sole authority for the ascertainment of Islamic law for the purpose of Islamic financial business. Although every Islamic financial institution is responsible to form their own Shariah Committee at their institutional level, they are required to observe the advice from the SAC pertaining to Islamic financial businesses. Similarly, when a ruling given by the Shariah committee members constituted in Malaysia by an Islamic financial institution differs from the ruling given by the SAC, the ruling of the SAC shall prevail. This further clears the ambiguity and creates no opportunity for such conflicting ruling/advice to be rendered at all by Shariah Committees.

[78] The 2009 Act further affirms the legal status of Shariah pronouncements issued by the SAC as binding upon both the courts as well as arbitrators. The court or an arbitrator is required to refer to the SAC for deliberation on any Shariah issue as well as take into account its existing Shariah rulings. Undeniably, legal certainty is upheld by the 2009 Act through legal recognition of the SAC as the reference point for courts and arbitrators on any Shariah matter in relation to Islamic finance business. This is

crucial to promote consistent implementation of Shariah contractual principles in Islamic financial transactions.

(See generally Tun Abdul Hamid Mohamed and Dr. Adnan Trakic, "The Shariah Advisory Council's Role in Resolving Islamic Banking Disputes in Malaysia: A Mode to Follow?" (International Shariah Research Academy for Islamic Finance (ISRA) Research Paper (No.47, 2012)).

[79] In the course of their arguments, learned counsel for the respondent and the interveners attached considerable weight to the need for certainty around the Shariah law applicable to Islamic banking and finance. According to them, uncertainty of Shariah interpretation would be disruptive for the Islamic market to function well. Hence, section 51 of the 2009 Act provides for the establishment of the SAC to serve the particular need for an authoritative view on Shariah matters in Islamic finance.

[80] We agree with the submissions. In this aspect, it is relevant to reproduce the passage in the judgment of Rohana Yusuf J (now FCJ) in **Tan Sri Abdul Khalid Ibrahim v Bank Islam Bhd & Another Case** [2010] 4 CLJ 388 at paragraph [18]:

> "[18] To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial

transaction. Taking cognisance that there will always be differences in views and opinions on the Syariah, particularly in the area of muamalat, there will inevitably be varied opinions on the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of muamalat. Such permissive nature is evidenced in the definition of Islamic Banking Business in s. 2 of the Islamic Banking Act 1983 itself. Islamic Banking Business is defined to mean, banking business whose aims and operations do not involve any element which is prohibited by the Religion of Islam. It is amply clear that this definition is premised on the doctrine of "what is not prohibited will be allowed". It must be in contemplation of the differences in these views and opinions in the area of muamalat that the legislature deems it fit and necessary to designate the SAC to ascertain the acceptable Syariah position. In fact, it is well accepted that a legitimate and responsible Government under the doctrine of siasah as-Syariah is allowed to choose, which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from Quran and Islamic Injunction, for the benefits of the public or the ummah. The designation of the SAC is indeed in line with that principle in Islam."

Analysis and Findings Whether sections 56 and 57 of the 2009 Act go beyond the scope of item 4(k) of List 1, Federal List of the Federal Constitution

[81] Learned counsel for the 2nd interveners' argument in answer to the submission advanced by learned counsel for the applicant on this issue was simple, clear and, in our judgment, irrefutable.

First, he argued that the “ruling” that is made binding by section 57 is the “ruling” as defined in section 56(2) which is not for a “determination” of dispute between the parties but for the “ascertainment” of the applicable Islamic law “for the purposes of the Islamic financial business”. Secondly, he asserted that the legislature deliberately, in consonant with item 4(k) of the Federal List in the Ninth Schedule to the FC, employed the words “to ascertain” and not “to determine”.

[82] He then referred us to **Strouds Judicial Dictionary** (9th edn. 2016) where the word “ascertain” is defined to mean to “make known” or “made certain”. In **In ReWait** [1927] 1 Ch. 606, Atkin LJ defined the word “ascertained” as meaning “identified in accordance with the agreement”. In contrast, the word “determination” or “to determine” connotes the end of a process. In **R v. Young** (Trevor) [2004] 1 WLR 1587, May LJ on behalf of the English Court of Appeal observed with regard to the word “determination” and “determining” appearing in a statutory provision, as follows:

> “We consider on reflection that the words “determining” and “determination” connote the end of the process, that which the court eventually decides”.

[83] In **R v Coates** [2004] 1 WLR 3043, the English Court of Appeal observed that a case is "determined" when the decision is announced and, until then, even if an agreement among the judges is apparent, the case is not determined.

[84] We agree with the submission of learned counsel for the 2nd intervener that the ruling under section 57 of the 2009 Act does not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. It does not "determine" the liability of the borrower under the Islamic facility. The determination of a borrower's liability under any banking facility is decided by the presiding judge and not the SAC.

[85] With respect, we are of the view that learned counsel for the applicant overlooked the two points that are central to the impugned provisions as explained above. We are also of the view that it would be a fundamental error to ignore the definition given to particular words by the statute itself, as learned counsel for the applicant seeks to do, or to substitute one word for another. In short, an "ascertainment" exercise which results in a "ruling" must not be confused with an act of "determination" which results in a final decision.

[86] This issue has been settled by the decision of the High Court in **Mohd Alias Bin Ibrahim v RHB Bank Bhd** [2011] 3 MLJ 26, wherein the learned judge noted as follows:

> "It is the court's considered view that there are differences between these two words. …
>
> Act 701 is a federal law and its contents are consistent to the words employed in the Federal Constitution. In this sense, it can be seen that the SAC is not in a position to issue a new hukm syara' **but to find out which one of the available hukm is the best applicable in Malaysia for the purpose of ascertaining the relevant Islamic laws concerning the question posed to them**. …
>
> **At the end of the matter, the application and final decision of the matter remains with the court**. The court still has to decide the ultimate issues which have been pleaded by the parties. After all, the issue whether the facility is Shariah compliant or not is only one of the issues to be decided by the court." (Emphasis added).

[87] The above decision was fully endorsed and affirmed by the Court of Appeal in **Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd** [2013] 3 MLJ 269. Low Hop Bing JCA, in delivering the judgment of the Court of Appeal held:

"… Next, the statutory duty and function of the SAC is to ascertain Islamic financial matters or business only. **It does not hear evidence nor decide case**.

Sections 56 and 57 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 before e.g. any court, 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 judicial function is within the domain of the court i.e. to decide on the issues which the parties have pleaded." (Emphasis added).

[88] The words we have emphasised in the two cases above are imperative.

[89] For the foregoing reasons, we would answer question No: 1(a) in the negative.

Reference Question No:1(b)
The First Contention

[90] To recapitulate, learned counsel for the applicant submitted that it is impermissible for the legislature to divest the core judicial functions traditionally vested with the High Court and to confer or vest the same in the SAC which lacks the basic characteristics of a superior court, like the High Court. Therefore, sections 56 and 57 of 2009 Act impugned the doctrine of separation of powers.

The Second Contention

[91] The gist of the second contention is that by virtue of sections 56 and 57 of the 2009 Act, the SAC has been vested with judicial functions and has been given a role in legal proceedings relating to Islamic finance business. By virtue of section 57 of 2009 Act, the High Court would be bound by the ruling. The High Court as such does not play any role in the ascertaining of the Islamic law or its application to the facts before it to the extent that falls within the scope of the SAC's functions.

[92] For the reasons given below, we are unable to agree with the submissions of learned counsel for the applicant.

Doctrine of Separation of Powers

[93] The doctrine of separation of powers had been treated by scores of writers and discussed by many judicial decisions in Malaysia and various Commonwealth jurisdictions. We do not need and do not propose to add to the jurisprudence. For the purpose of this judgment, suffice if we highlight the salient features of the doctrine of separation of powers.

[94] The separation of powers doctrine is not expressly provided in the FC. Yet, the doctrine is recognised as an integral element of our constitutional design (see **Semenyih Jaya Case** (**supra**)). The basic contour of the separation of powers is easily stated. It

recognises the functional independence of the three branches of government – the legislature, judiciary and executive. The difference between the three branches of the government undoubtedly is that the legislature makes the law, the executive executes and enforces the law and the judiciary interprets the law.

[95] The above statement, whilst accurate and straightforward, is deceptively simple because separation of powers of government has never existed in pure form except in political theory. In reality, there is an overlap and blending of functions, resulting in complementary activity by the different branches that makes absolute separation of powers impossible.

[96] In Malaysia, the executive and legislature are closely entwined. The Prime Minister and a majority of his ministers are Members of Parliament and sit in the Dewan Rakyat (House of the Representatives) and Dewan Negara (Senate). The executive is, therefore, present at the heart of Parliament.

[97] In the case of **National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development** 2016 1 SACR 308 (SCA), the Constitutional Court of South Africa observed at paragraph [13]:

> "[13] In seeking to answer the question under consideration, it must be recalled that –

(a) there is no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.

(b) because of the different systems of checks and balances that exist in countries such as the United States of America, France, the Netherlands and Germany, for example, the relationship between the different branches of government and the power or influence that one branch of government has over the others differs from one country to another.

(c) the separation of powers doctrine is not fixed or rigid constitutional doctrine but it is given expression in many different forms and made subject to checks and balances of many kinds;

(d) our Constitution does not provide for a total separation of powers among the Legislature, the Executive and the Judiciary; and

(e) although judicial officers may, from time to time, carry out administrative tasks "[t]here may be circumstances in which the performance of administrative functions by judicial officers infringers the doctrine of separation of powers"."

[98] In the case of **Botswana Railways' Organization v Setsogo**, 1996 BLR, 763, the Court commented on the doctrine of separation of powers in the context of the Constitution of Botswana in the following terms:

> "But the Constitution did not establish that theory in this country in its rigid form. None of the various arms of government: the Executive, the Legislature and the Judiciary comes to life or lives in a hermetically sealed enclave".

[99] It is, therefore, clear that the doctrine of separation of powers is not rigid, fixed or static but continues to evolve. The traditional notion that there are separate and distinct roles for the executive, legislative, and judicial branches of government which should remain inviolate has changed over time to reflect their growing interrelationship to facilitate the efficient operation of government.

[100] In Malaysia today there are several statutory adjudicatory bodies that have decision-making powers in disputes between parties like the Special Commissioners of Income Tax or the Labour Tribunals under the Employment Act 1955, the Industrial Court established under section 21 of the Industrial Relations Act 1967, the Customs Appeal Tribunal (CAT) established under the Customs Act 1967 or the Competition Appeal Tribunal established

under section 44 of the Competition Act 2010. They are adorned with similar trappings as a court but are not strictly "courts" within the meaning of Article 121 of the FC.

[101] In **Shell Co. of Australia v Federal Commissioner of Taxation** [1931] AC 275, cited by learned counsel for the 2nd intervener in his argument, a similar point was considered by the Privy Council on the issue whether the Board of Review of Taxation in Australia was a body exercising judicial power of the state. The Privy Council observed thus:

> "The authorities are clear to show that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power."

[102] The Privy Council further focused on certain characteristic features of a court: a tribunal will not become a court merely because it gives a final decision, examines witnesses on oath, contending party is heard, decisions affecting rights of subjects are rendered by it, or decision is appealable to ordinary courts. Even whilst acting judicially, a tribunal may retain its characteristics as an administrative body as distinguished from a court. Applying the aforesaid tests, the Privy Council ruled that the board of review established under the Income Tax Act 1922-25 of Australia was not a court but only an administrative tribunal empowered by law to

review decisions of the Commissioner of Income Tax who was not a judicial authority. The Privy Council goes on to say "an administrative tribunal may act judicially but still remain an administrative tribunal as distinguished from a court, strictly so called. Mere externals do not make a direction … by an ad hoc tribunal an exercise by a court of judicial power" (at p.508) (see also **Associated Cement Co. Ltd v P.N. Sharma AIR** 1965 SC 19595; **Durga Shankar Mehta v Raghuraj Singh** AIR 1954 SC 520, **Kihoto Hollohon v Sri Zachillhu** AIR 1950 SC188, **Virindar Kumar Satyawadi v The State of Punjab AIR** 1956 SC 153; **State of Gujarat Revenue Tribunal Bar Association** [2012] 10 SCC 353).

Judicial Power

[103] The phrase "judicial power" is difficult to define. In **Danson R v Davison** [1956] 90 CLR 353, Dixon CT and Mc Tiernan J observed "many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive". Rather than attempt to define phrase "judicial power", it is more appropriate to examine its characteristics or attributes.

[104] A perusal of the Australian decisions in **Huddart**, **Parker & Co Proprietary Ltd v Moorehead** [1909] 8 CLR 330; **Rola Co**

(Australia) Pty Ltd v The Commonwealth [1944] 69 CLR 185, **Reg v Davison** [1954] 90 CLR 353, **Palmer v Ayres (in their capabilities as liquidators of Queensland)** [2017] HCA 5, cited by learned counsel for the respondent in her argument reveal common, though not exclusive, characteristics of judicial power:

(i) exercising adjudicative functions;

(ii) finality in resolving the whole dispute; and

(iii) enforceability of its own decision.

[105] In the case of **The Bharat Bank Ltd. v Employees**, AIR 1950 SC 188, the Indian Supreme Court considered whether an Industrial Tribunal was a court. It said that one cannot go by mere nomenclature. One has to examine the functions of a Tribunal and how it proceeds to discharge those functions. It held that an Industrial Tribunal had all the trappings of a court and performed functions which cannot but be regarded as judicial. The court referred to the Rules by which proceedings before the Tribunal were regulated. The Court dwelt on the fact that the powers vested in it are similar to those exercised by civil courts under the Code of Civil Procedure when trying a suit. It had the power of ordering discovery, inspection etc. and forcing the attendance of witnesses, compelling production of documents and so on. It gave its decision on the basis of evidence and in accordance with law.

Applying the test laid down in the case of **Cooper v Wilson**, [1937] 2 K.B. 309 at p.340, the Court said that **"a true judicial decision presupposes an existence of dispute between two or more parties and the involves four requisite – (1) the presentation of their case by the parties; (2) ascertainment of facts by means of evidence adduced by the parties often with the assistance of argument; (3) if the dispute relates to a question of law, submission of legal arguments by the parties, and (4) by decision which disposes of the whole mater by findings on fact and application of law to facts so found. Judged by the same tests, a Labour Court would undoubtedly be a court in the true sense of the term**. The question, however, is whether such a court and the presiding officer of such a court can be said to hold a post in the judicial service of the State as defined in Article 36 of the Constitution." (Emphasis added).

[106] Learned counsel for the 1st intervener submitted that similar definition has been adopted in Malaysia in case of **Public Prosecutor v Dato Yap Peng** [1987] CLJ (Rep) 289. It was further expounded in **Semenyih Jaya Case**. This Court highlighted in the latter case that the exercise of judicial power carries two features. The first feature is that judicial power is exercised in accordance with the judicial process of the judicature

which is also illustrated by Gaudron J in **Wilson v Minister for Aboriginal Affairs** [1996] 189 CLR 1 at 562 when he said:

> "For the moment, it is sufficient to note that the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on two things. **It depends on the courts acting in accordance with the judicial process**. More precisely, it depends on their acting openly, **impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are**. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process.
>
> So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, judicial power is not simply a power to settle justiciable controversies, but a power **which must be and must be seen to be exercised in accordance with the judicial process**." (Emphasis added).

[107] The second feature of judicial power as explained by Her Ladyship Zainun Ali FCJ is vested only in persons appointed to hold judicial office. Therefore, a non-judicial personage has no

right to exercise judicial power. As observed by Lord Diplock in **Hinds v The Queen [1976] AC 195**:

> "What, however is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to **continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature**, even though this is not expressly stated in the Constitution." (Emphasis added).

[108] We have no reservations in accepting the proposition of law expounded in the **Semenyih Jaya Case**. In our considered opinion, the SAC does not have any characteristics of judicial power as laid down in the **Semenyih Jaya Case**. The ruling made by the SAC is solely confined to the Shariah issue. The presiding judge who made reference to the SAC will then exercise his judicial power and decide the case based on the evidence submitted before the Court. Since there is no judicial power vested in the SAC, the SAC does not usurp the judicial power of the Court.

[109] We accept the contention advanced by learned counsel for the 1st intervener that section 56(1) of the 2009 Act gives option to the Court or arbitrator whether to take into consideration the

published ruling of the SAC or refer the Shariah issue to the SAC for ruling. The word “or” in that section signifies that such option is provided to the court or arbitrator. The phrase “take into consideration” in that section implies that only the court or arbitrator has the exclusive judicial power to decide on the case by applying the ruling of the SAC to the facts of the case before them.

[110] Learned counsel for the applicant submitted, citing the Australian case of **Mellifont v Attorney General for State of Queensland** [1991] 173 CLR 289, that in order to determine whether a power concerned was judicial power; it was important to consider whether the exercise of such power is “an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings”.

[111] With respect, the submission is without substance for the simple reason that the High Court of Australia in **Mellifont** had recognised that it is the combination of attributes that make an exercise of judicial power. It should also be noted that **Mellifont** is a criminal case and any matter relating to criminal liability vests exclusively with court. Likewise, the case of **R (on the application of Anderson) v Secretary of State for the Home Department** [2002] UKHL 46 referred to by learned counsel for the applicant, concerns a dispute in a criminal case, where the Court recognised

that jurisdiction over disputes in criminal matters lie only with the Court.

[112] The Australian High Court itself recognises in the judgment that it is the combination of the attributes that makes it the exercise of judicial power and not any single one or other of them. At p.106 of the law report the following observation is made:

> "Leaving aside these incidental powers with an administrative ingredient, an essential characteristic of judicial power is that its exercise affect the legal rights, status or obligations of persons who are subject to the jurisdiction of the court or body in which the power is reposed. That characteristic is not sufficient by itself to stamp a power as judicial but it is an indispensable characteristic of all powers which are judicial."

[113] We agree with the submission of learned counsel for the respondent that the exercise of judicial power does not exist merely because there is an adjudication of an issue. The reasoning in the following cases support our conclusion:

(a) In the High Court of Australia's decision of **The Queen v The Trade Practices Tribunal and Others; (Ex Parte) Tasmanian Breweries Proprietary Limited**, [1970] ALR 449, the issue was whether the Trade Practices Tribunal, in determining whether a trade agreement can

be examined and adjudicated upon as being an agreement against public policy, is exercising judicial power. The majority judges decided:

(i) an adjudication or determination by the Tribunal was not an exercise of judicial power (see pages 371, 375, 376, 378); and

(ii) following from such adjudication, the exercise of a judicial power would involve the application of the law to the facts as determined and an order made to resolve the controversy/dispute (pages 374-375, 394-395, 409, 411).

(b) This was also the view of the majority judges of the High Court of Australia in **The Federal Commissioner of Taxation v Munro** and **British Imperial Oil Co. Ltd v Federal Commissioner of Taxation** [1926] 38 CLR 153, where the High Court held that judicial power must include jurisdiction to enforce a decision. (See pages 176, 200 and 201).

(c) The Australian High Court in **Rola Company (Australia Pty Ltd** (**supra**) had to consider whether a Women's Employment Board, in having powers to decide on

disputes concerning women's classes of work and pay, was exercising judicial power. The Court held that so long as a body merely makes ascertainment of facts and allows for the next step to be left to the courts, the exercise of such power would be non-judicial. The Australian High Court, at page 212, had expressly stated that the ascertainment of facts alone is not indicative of the exercise of judicial power as there was no determination of the legal rights and obligations of parties.

(d) The Court went on to state:

> "But, nevertheless, administrative authorities have been created for the purpose of ascertaining facts, supplementing the courts, and entrusted with power to make at least initial determinations in matters within, and not outside, ordinary judicial power. … **Consequently, it is not an exclusive attribute of judicial power that all determinations of fact in matters affecting public or private rights shall be made by some court in which judicial power has been vested. No-one doubts that the ascertainment or determination of facts is part of the judicial process, but that function does not belong exclusively to the judicial power**. The true function of judicial power is, as already indicated, to investigate, declare and **enforce rights** and

> obligations on present or past facts, by whatever authority such facts are ascertained or determined, and under laws supposed already to exist." (Emphasis ours).

Binding Effect of the SAC's Ruling(s)

[114] Much argument was advanced by learned counsel for the applicant about the binding effect of the SAC's ruling. It was submitted that it precludes the court from deciding the law applicable in the case before it and therefore the SAC usurps the courts power to interpret and apply the law in the case before the court.

[115] With respect, we disagree with the submission. In **Rola Company (Australia) Pty Ltd (supra)**, cited by learned counsel for the respondent and all the interveners, Regulations made under the National Security Act empowered a board to determine whether females might be employed on certain classes of work, and to decide, inter alia, matters related to their hours and conditions of employment and rates of pay. The board's decision is binding on specific employers, employees and industrial organisation and had the effect of an award or an order by Arbitration Court.

[116] The High Court of Australia held that the mere fact a decision is binding did not mean that there is an exercise of judicial power. The Court said:

> "In the same way it should, in my opinion, be held that the provision in reg. 5c that a determination made by a Committee shall be binding on certain persons **does not, by reason of the use of the word "binding," involve an exercise of the judicial power of the Commonwealth**. (Emphasis ours).

[117] In this connection, we think it is appropriate for the Court to make a comparison to the mandatory sentencing regime under various penal laws where the court is required to impose a specific term of imprisonment. One of the arguments advanced in challenging the constitutional validity of the mandatory sentencing regime is that it strips a court of the discretion which it ordinarily has in deciding what punishment or penalty is appropriate in the light of the offence and the particular circumstances in which it was committed. Sentencing is pre-eminently the prerogative of the courts. Therefore, mandatory sentencing constitutes invasion of the domain of the judiciary by the legislature. A criminal trial before an ordinary court requires, among others, an independent court which is empowered in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the

interest of society before imposition of sentence. This principle is firmly entrenched in law

[118] An interesting South African case in this context is **S v Dodo 2001 SACR 594 (CC)**. Buzani Dodo was found guilty of raping and murdering an elderly woman. Section 51(1) of the Criminal Law Amendment Act, 105 of 1997 makes it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under section 51(3)(a), the court is satisfied that "substantial and compelling circumstances" exist which justify the imposition of a lesser sentence. The Eastern Cape High Court declared the section in question to be constitutionally invalid, because it was inconsistent with section 35(3)(c) of the South Africa Constitution, which guarantees to every accused person "a public trial before an ordinary court" and was also inconsistent with the separation of powers required by the Constitution. The High Court's reasons for coming to the conclusion that the provisions of section 51(1) of the Act "undermine the doctrine of separation of powers and the independence of the judiciary" and are inconsistent therewith are summarised in para 61 of the judgment as follows:

> "A sentence of imprisonment for life, irrespective of the policies and procedures to which such sentence may be subjected by the Department of Correctional

> Services, must be regarded by the Court imposing it as having the potential consequence, at the very least, that the accused so sentenced will indeed be incarcerated until his death. It is an extreme sentence. It is the most severe sentence which may lawfully be imposed on an accused such as the one now before Court. It is a sentence which, in the ordinary course, requires a meticulous weighing of all relevant factors before a decision to impose it can be justified. […W]hatever the boundaries of separation of powers are eventually determined to be, the imposition of the most severe penalty open to the High Court must fall within the exclusive prerogative and discretion of the Court. It falls within the heartland of the judicial power, and is not to be usurped by the Legislature."

[119] Dealing with the provision of the Constitution, the High Court observed, that "[s]entencing is pre-eminently the prerogative of the courts", that the section of the Act in question "constitutes an invasion of the domain of the Judiciary not by the Executive, but by the Legislature" and that a criminal trial before an ordinary court requires, among other things, "an independent court which is empowered … in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the interests of society before the imposition of sentence.". The Court concluded that this:

> "… is not a trial before an ordinary court … [but] … a trial before a court in which, at the imposition of the prescribed sentence, the robes are the robes of the judge, but the voice is the voice of the Legislature."

[120] The Constitutional Court of South Africa reversed the High Court's decision, saying that there is no absolute separation of powers between judicial functions, on the one hand, and the legislature and executive on the other. The executive and legislative branches of a state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law abiding persons are protected, if needs be, through the criminal laws from persons who are bent on breaking the law. The executive and legislative branches must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect the society.

[121] More importantly, the Constitutional Court held, that the regime, inter alia, of prescribing minimum sentence under section 51(1) of the Criminal Law Amendment, Act, 105 of 1997, is not inconsistent with the separation of power principle under the Constitution.

[122] A similar point was considered by the Privy Council in **Ong Ah Chuan v Public Prosecutor**, [1981] AC 648. The issue

concerns section 15 of a Singapore statute which provides for penalties for trafficking, importing and exporting drugs that were graduate according to the quantity of the drug involved. Heroin attracted the death penalty where the quantity involved was 15 grammes or more. The defendant argued that the mandatory death sentence was unconstitutional. One of the arguments put forward was that the mandatory death penalty that excludes from the judicial function all considerations peculiar to the defendant in imposing sentence was wrong. In other words, standardisation of the sentencing process which left little room for judicial discretion to take account of variations in culpability within single offence categories results in a function which ceases to be judicial.

[123] The Privy Council rejected the argument. Lord Diplock pointed out at page 672 that there is nothing unusual in a capital sentence being mandatory, noting that at common law 'all capital sentences were mandatory'. His Lordship went on to say at page 673 that, if the argument were valid, it would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – a consequence which his Lordship was plainly not prepared to accept.

[124] Lord Diplock's decision was followed in Malaysia in **Public Prosecutor v Lau Kee Hoo** [1983] 1 MLJ 157. In this case, the Federal Court considered the following question:

> "Whether or not the mandatory death sentence provided under section 57(1) of the Internal Security Act, 1960 is *ultra vires* and violates articles 5(1), 8(1) and 121(1) of the Federal Constitution."

The Federal Court then held, as follows:

> "Held:(1) it is clear from article 5(1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the death penalty so that it is not necessarily unconstitutional;
>
> …
>
> (4) Capital punishment is not unconstitutional per se. In their judicial capacities, judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made;
>
> (5) All criminal law involves the classification of individuals for the purposes of punishment. Equality before the law and equal protection of the law require that like should be compared with like. What our Article 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. Everybody charged under section

57(1) of the Internal Security Act, 1960, is liable to the same punishment and therefore, it is not discriminatory;

(6) It is the function of the legislature not the judiciary to decide the appropriate punishment for persons charged under the Internal Security Act and the Arms Act. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law there is no inconsistency with article 8(1) of the Constitution. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment for equal moral blameworthiness;

(7) There is nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may to some extent be diminished if it is not."

[125] In the Australian case of **Palling v Corfield** [1970] 123 CLR 52, the brief facts are these: Under section 49(a) of the **National Service Act** 1951 (Cth), a person who was convicted of the offence of failing to respond to a national service notice was liable to a fine ranging from $40 to $200 and, at the request of the prosecutor, an additional mandatory sentence of seven days imprisonment if the defendant continued to refuse to comply with the requirements of national service. The High Court was

unanimous in rejecting an argument that the mandatory imposition of the additional penalty was a contravention of the separation of powers. The Court held that the subsection did not confer part of the judicial power of the Commonwealth on the prosecution or constitute an interference with judicial functions or attempt to delegate legislative power to the prosecution. Legislative power by way of prescribing penalty was likened to the legislative power in determining the elements of the offence.

Barwick CJ (at 58) stated:

> "It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a

> discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament."

[126] The Chief Justice concluded his remarks on this point by stating, "It is not ... a breach of the Constitution not to confide any discretion to the court as to the penalty imposed." The Chief Justice also rejected an argument that it was the prosecutor who effectively imposed the sentence.

[127] Another similar situation is the case of mandatory order. In **State (O'Rourke) v Kelly** [1983] I.R 38, the Irish Supreme Court examined section 62(3) of the Housing Act 1966, on the basis that it was an unconstitutional invasion of the judicial power. Section 62 established that a housing authority, Dublin Corporation in this case, may recover an abode provided by it, with subsection (3) continuing to state that that " … the justice shall, in such case he is satisfied that the demand mentioned in the said subsection (1) has been duly made, issue the warrant." Thus, it was argued that the judge had been deprived of his discretion over the matter and accordingly was an intrusion by the legislature into the affairs of

the Judiciary. The Supreme Court rejected this contention as they believed it was clear that section 62(3) "did not attempt to convert the District Court judge into a mere rubber stamp". O'Higgins C.J. delivered the judgment of the court:

> "It will be seen that it is only when the provisions of sub-s. 1 of s. 62 have been complied with and the demand duly made to the satisfaction of the District Justice that he must issue the warrant. In other words, it is only following the establishment of specified matters that the sub-section operates. This is no different to many of the statutory provisions which, on proof of certain matters, make it mandatory on a court to make a specified order. Such legislative provisions are within the competence of the Oireachtas."

[128] It would seem to this Court, by parity of reasoning that Parliament is competent to vest the function of the ascertainment Islamic law in respect of Islamic banking in the SAC and such ascertainment is binding on the court. It was likened to the legislative power in prescribing the minimum sentence to be imposed by the court on a convicted person(s). The function of the SAC is merely to ascertain the Islamic law for Islamic banking, and upon such ascertainment, it is for the court to apply the ascertained Islamic law for banking to the facts of the case. The ascertainment of Islamic Law for banking does not settle the

dispute between the parties before the Court. The SAC did not determine or pronounce authoritative decision as to the rights and/or liabilities of the parties before court. It did not convert the High Court into a mere rubber stamp.

[129] The process of ascertaining Islamic law for Islamic banking was described by the learned judge in **Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd** [2012] 7 MLJ 597 as follows (at para 23):

> "Looking at the purpose of s 56 of the Act 707, it is clear that SAC is required to ascertain the applicable Islamic law to the above Shariah issues. **Upon ascertainment of the Islamic law, the court would then apply it to the facts of the present case**. This approach is in consonance with the decision in **Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor** [2009] 6 MLJ 839, where Raus Sharif JCA (as he then was) stated:
>
> > In this respect, it is our view that judges in civil courts should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise …"

[130] Earlier, in **Mohd Alias Bin Ibrahim v RHB Bank Bhd,** (**supra**), the same judge had carefully delineated the function discharged by the SAC as opposed to the function of the civil court. The critical feature that decides that the SAC does not

perform a judicial function it that it does not give a final decision in the dispute between the parties. The learned judge observed as follows (at para 102):

> "The SAC cannot be said to perform a judicial or quasi-judicial function. The process of ascertainment by the SAC has no attributes of a judicial decision. The necessary attribute of the judicial decision is that it can give a final judgment between two parties which carries legal sanction by its own force. It appears to the court that before a person or persons or a body or bodies can be said to exercise judicial powers, he or it must be held that they derive their powers from the state and are exercising the judicial power of the state. An attempt was made to define the words 'judicial' and 'quasi-judicial' in the case of **Cooper v Wilson and others** [1937] 2 KB 309. The relevant quotation reads –
>
> > "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation (not necessarily orally) of their case by the parties to the dispute; … (4) **a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law**." (Emphasis added)

[131] It is axiomatic that the SAC does not finally dispose of the dispute between the parties. It does not engage in the judicial process of determining the rights of the parties. This is made clear in the Manual issued by Bank Negara called the **Manual for References to Shariah Advisory Council by the Civil Court and Arbitrator** (see copy exhibited as 'MZKN-2' of the BNM's Affidavit dated 23 April 2018). In Part B, Para.7 of the Manual it is clearly stated as follows:

> "[In] answering the questions referred by the court or arbitrator, the Shariah Advisory Council is aware that its role is merely to ascertain the "hukum Syarak" (Islamic law) in relation to the issues where reference is made. The Shariah Advisory Council does not have any jurisdiction to make any finding of facts or to apply a particular "hukum" (principle) to the facts of the case or to make a decision. Whether in relation to an issue or for the case since such jurisdiction is vested with the court and arbitrator."

[132] It is relevant to note that in the present case in giving its ruling under section 57, the SAC had scrupulously adhered to this principle. In the opening paragraph of the ruling (see p.300 of AR Vol.2), the SAC stated as follows:

> "In answering to the question posed by the Court, the SAC took note that the SAC's duty is merely to analyse the Syariah's issues that are contained in

> each question posed and to sate the Hukum Syarak ruling relating to the question. The SAC does not have jurisdiction to make a finding of facts or to apply the ruling to the facts of the case and to decide whether relating to an issue or for the case because this jurisdiction is vested with the Court."

[133] It is clear acknowledgement by the SAC that it does not have the jurisdiction to enter into the dispute between the parties by itself "applying the ruling to the facts of the case" and coming to a final decision on the dispute. Further, we agree with the submission of learned counsel for the respondent that the duty to ascertain of Islamic law is conferred on the legislature and the SAC is the legislature's machinery to assist in resolving disputes in Islamic banking. It does not exercise judicial power at all.

[134] In **The Queen v. Trade Practices Tribunal; Ex parte Tasmanian Breweris Pty. Ltd**. [1970] 123 CLR 361, cited by learned counsel for the respondent in her argument, it was observed as follows (see page p377):

> "Thus the work of the Tribunal is work which would be appropriate for the legislature itself to do if it had the time to consider individual cases. It would be obviously impracticable for the Parliament to apply its own ideas as to what is contrary to the public interest, either by passing a special Act for every individual case or by laying down a definition which in every

> case would be sure to produce a result satisfactory to it. There is probably no practicable alternative to setting up an authority which with some but incomplete guidance from the legislature will apply its own notions concerning the public interest. This course the Trade Practices Act adopts, contenting itself with prescribing the qualifications for membership of the Tribunal, giving a limited measure of guidance, and then relying upon the Executive's choice of members to ensure, so far as assurance is possible, that the notions applied will be such as the Parliament would approve. … None of the powers of the Tribunal, then, involves any adjudication upon a claim of right."

[135] Similar observations were made in **The Federal Commissioner of Taxation v Munro** and **British Imperial Oil Co. Ltd v Federal Commissioner of Taxation (supra)**, where it was held at pages 178-179:

> "Other matters may be subject to no *a priori* exclusive delimitation, but **may be capable of assignment by Parliament in its discretion to more than one branch of government**. **Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trademarks would be instances of this class**. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances. **Deny that proposition, and you seriously affect the**

> **recognized working of representative government. Admit it, and the provision now under consideration is fully sustained**.
> (Emphasis ours).

[136] It is clear, therefore, that it is open to the legislature to establish the SAC as part of regulatory statute and to vest it with power to ascertain Islamic law for the purpose of banking. This point has been very ably considered by my learned brother Justice Azahar Mohamed, FCJ in his supporting judgment.

[137] Learned counsel for the respondent further submitted that disputes in Islamic financial and banking matters are within the jurisdiction of the civil courts, notwithstanding that Shariah law are involved. This is due to the fact that Islamic banking and financial disputes do not and cannot fall within the jurisdiction of Shariah Courts as finance and financial institutions are matters within the List I (Federal List) and outside of the List II (State List). Furthermore, financial institutions (and some of their customers) do not profess the religion of Islam.

[138] According to learned counsel for the respondent, we have a scenario where matters lie within the jurisdiction of civil courts, but the civil courts are not equipped to make findings on Islamic law.

[139] With the greatest respect and deference to the learned judges of the civil courts, we are of the humble opinion that the civil courts are not sufficiently equipped to make findings on Islamic law. The same sentiments were expressed in the following cases:

a) In **Bank Islam Malaysia v Lim Kok Hoe & Anor and other appeals** [2009] 6 MLJ 839, the Court of Appeal held at pp. 853-854:

> "In this respect, **it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the religion of Islam or otherwise**. As rightly pointed out by Suriyadi J (as he then was) in **Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd** [2005] 5 MLJ 210 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulama' take years to comprehend'. Thus, **whether the bank business is in accordance with the religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence**."
> (Emphasis added).

b) In **Tan Sri Abdul Khalid bin Ibrahim (supra)** the High Court held at pp. 614-615:

> "Before I conclude, perhaps it would be useful for me to add a few words as to why civil courts may not be sufficiently equipped to deal with the issue whether a transaction under Islamic banking is in accordance to the religion of Islam or otherwise. **Civil courts are not conversant with the rubrics of Fiqh Al-Muamalat which is a highly complex yet under-developed area of Islamic jurisprudence. In applying Islamic law to determine the parties right under a contract, a civil judge had to conduct an extensive inquiry into Islamic law and make an independent determination of Shariah principles**." (Emphasis added).

[140] In order to appreciate whether a civil judge is competent to decide on Shariah issues relating to Islamic banking and finance, perhaps an understanding of the sources of Shariah is very important.

[141] In this connection, we may advert to an article entitled: "A Study on the Shariah decision making Processes adopted by the Shariah Committee in Malaysian Islamic Financial Institutions", co-authored by Mohamad Asmadi Abdullah, Rusni Hasssan, Muhammad Naim Omar, Mohammed Deen Mohd Napiah, Ahmad Azam Othman, Mohammed Ariffin and Adnan Yusuf, **(**Australian Journal of Basic and Applied Sciences, 8(13) August 2014, pp. 670-675). The relevant passages in this regard, being of

considerable significance to our analysis, are extracted in full as hereunder:

> **"**Shariah or Islamic law has been defined as the sum total of Islamic teaching and system, which was revealed to Prophet Muhammad s.a.w recorded in the Qur'an as well as deducible from the Prophet's divinely guided lifestyle called the sunnah (Akram, 2008). The Qur'an and the sunnah contain rules and regulations revealed by Allah s.w.t and these two are known as the primary sources of Islamic Law. Al-Quran, Sunnah and Ijma' are transmitted proofs and their authority and binding force are independent of any rational justification (Kamali, 2004). *Qiyas* is another primary source but it is a rational proof because its validity is founded on an established hukm of the Qur'an, Sunnah or *Ijma'* (Akram, 2006). The commonality of the illah in *qiyas* is matter of opinion and *ijtihad* (Kamali, 2004). The authority of these four sources is based on the Qur'anic verse which addresses the command to the Muslims to refer to these sources to find solutions for disputes or issues. Allah SWT says: "O you who believe! Obey Allah SWT and obey the Prophet (Muhammad), and those charged with authority among you. And if you differ over anything among yourselves, refer it to Allah SWT (Al-Quran) and the Prophet (Al-Sunnah)." (*Surah al-Nisa'*: 59). It is also based on the Allah SWT also says: "And whatever the Prophet has given you – take it; and what He has forbidden you (from doing) – refrain from it." (*Surah al-Hasyr*: 7)(IBFIM, Internet).

The development of the Shariah also relies on other sources which are termed as the secondary sources. These sources are formulated by the scholars based on their deep understanding of the primary sources. These sources are needed because there are a lot of new cases which did not occur during the time of the Prophet s.a.w. and hence, new *ijtihad* is necessary in order to find the ruling. These sources are like *qiyas*, *maslahah*, *istihsan*, *istishab*, *saddzari'ah*, '*urf*, *maqasidshar'iyyah*, *siyasahshar'iyyah* and many more. The basis for these secondary sources is a *hadith* of the Prophet s.a.w when he appointed Muaz as a judge in Yemen. The Prophet s.a.w asked Muaz that what he would do to solve disputes while in Yemen. The Prophet s.a.w said: "How will you judge when the occasion of deciding a case arises?" He replied; I shall judge in accordance with Allah's Book. The Prophet PBUH then asked him, "What will you do if you do not find guidance in Allah's Book? He replied: I will act in accordance with the Sunnah of the Prophet s.a.w The Prophet PBUH asked him again, "What will you do if you do not find guidance in the Sunnah of the Prophet s.a.w? He replied: I shall do my best to form an opinion and spare no pains. The Prophet s.a.w then patted him on the breast and said: "Praise be to Allah s.w.t who helped the Messenger of Allah s.w.t to find a thing which pleases the Prophet s.a.w. (Nyazee, 2002).

Ijtihad means striving to the utmost to discover the law from the texts through all possible means of valid interpretation (Nyazee, 2002). Its validity is derived

from divine revelation and hence is always in harmony with the Qur'an and the Sunnah (Kamali, 1991). The scholar who performs *ijtihad* must possess the appropriate qualification such as the knowledge of the sources of the Shariah, knowledge of Arabic and familiarity with the prevailing customs of society, upright character, as well as the ability to formulate independent opinion and judgment (Kamali, 2006). As far as the modern transaction is concerned, the *ijtihad* is significant in order to extend the ruling to new cases that are not covered clearly by the Qur'an and the Sunnah. Therefore the function of the *mujtahid* to derive the new ruling for the new case from the general principles available in the Qur'an and the Sunnah. The *mujtahid* is therefore must open their minds to the current development and realities and to interpret the whole text in its totality by looking at the objectives of the Shariah in order to materialise its ultimate objectives in any particular issue. (Islamic Capital Market, 2009)."

(See also Fathullah Al Haq Muhamad Asni & Jasni Sulong, "The Model of Instinbat by the Shariah Advisory Council of Central Bank Malaysia". (International Journal of Academic Research in Business and Social Science, Vol. 8, No. 1 January 2018).

[142] We agree with the contention of learned counsel for the 1st intervener that the SAC has been harmonising the proliferation of Shariah opinions in the industry since its inception. It has already

accustomed to the practical considerations at hand and the need for certainty in the industry on Islamic banking principles. Therefore, the binding nature of the ruling of the SAC is justified as section 56 of the 2009 Act was enacted on the reason of conserving and protecting the public interest.

[143] It is pertinent to note that the rulings of the SAC are made given through the exercise of collective *ijtihad*. The SAC comprises prominent scholars and Islamic finance experts, who are qualified individuals with vast experience and knowledge in various fields, especially in finance and Islamic law, to ensure robust and comprehensive deliberation before the issuance of the rulings.

[144] The appointment of the members of the SAC is provided for in section 53 of the 2009 Act. Section 53(1) states that the Yang di-Pertuan Agong, may on the advice of the minister after consultation with the Bank, appoint from among persons who are qualified in Shariah or who have knowledge or experience in the Shariah and in banking, finance, law or such other related disciplines as members of the SAC. Judges of Civil and Shariah Courts can also be appointed as members of the SAC. However, if a judge is to be appointed as an SAC member, the appointment must be done in accordance with section 53(2) which says that:

> "If a judge of the High Court, the Court of Appeal or the Federal Court, or a judge of the Shariah Appeal Court of any State or Federal Territory, is to be appointed under subsection (1), such appointment shall not be made except – (a) in the case of a judge of the High Court, the Court of Appeal or the Federal Court, after consultation by the Bank with the Chief Justice; and (b) in the case of a judge of the Shariah Appeal Court of any State or Federal Territory, after consultation by the Bank with the Chief Shariah Judge of the respective State or Federal Territory, as the case may be."

Semenyih Jaya Case

[145] We now turn to the **Semenyih Jaya Case**. In the course of his argument, learned counsel for the applicant emphatically relied on the decision of **Semenyih Jaya Case** in support of his contention that that the Impugned Provisions are unconstitutional and liable to be struck off. We agree with the submissions of the learned counsel for the respondent and the interveners that **Semenyih Jaya Case** does not support the position being advanced by the applicant that the conferment of the power to ascertain the Islamic law for Islamic banking on the SAC is an incursion into the judicial power of the Federation. The factual matrix in **Semenyih Jaya Case** is poles apart from the factual matrix of the case under our consideration. In **Semenyih Jaya Case**, the impugned section 40D of the Land Acquisition Act 1960

provided for the final decision on compensation for compulsory acquisition to be determined not by the judge but by the two assessors sitting with him in the High Court.

[146] In short, the offending part of section 40D was that it empowers the assessors, and not the judge to determine conclusively, and therefore finally, the very issue before the High Court, namely, the amount of compensation to be awarded to the landowner.

[147] The test is whether there has been a 'take-over of the judicial power of the court' by non-judicial personages. Zainun Ali FCJ explained why section 40D was an encroachment of the judicial power at para 95):-

> "(I)n our view, Section 40D of the Act has a wider reach. The implications of the language of s 40D(1) and (2) of the Act is that the assessors in effect take over the judicial power of the court enshrined under art 121(1) of the Federal Constitution in deciding on a reasonable amount of compensation in land reference matters. The judicial power to award compensation has been whittled away from the High Court Judge to the assessors in breach of art 121 of the Federal Constitution."

[148] It is clear, therefore, the test is whether the very matter placed before the court of law as the dispute between the parties

for final decision has been usurped by persons other than judges. In a land reference case under the Land Acquisition Act 1960, the dispute is over the amount of compensation. Section 40D permits the assessors to decide finally on this very issue. The Federal Court observed further at para 51-52:

> "It would appear that he (the judge) sits by the side-line and dutifully anoints the assessors' decision. Section 40D of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it. This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub."

[149] Unlike the assessors in the Land Reference Proceedings, the SAC in ascertaining the Islamic law for Islamic banking, does not conclusively and finally determine the right between the parties. The contest between parties remain with the adjudicating judge.

Reference Question 1(c)

[150] This reference question was not vigorously pursued by learned counsel for the applicant. Be that as it may, for the sake of completeness, we will discuss the issues raised by the applicant. The nub of the learned counsel for the applicant's submission on this issue is that the impugned provisions deprived a litigant

substantive process. The short answer is this. Article 8 of the FC deals with equality before the law and equal protection of the law and that equality means that people who are in the like circumstances should be treated equally. Numerous cases in the apex court confirm that Article 8 does not apply to all persons in any circumstances but rather it applies to person under like circumstances.

[151] In order to determine whether a law is discriminatory under Article 8, "the validity of a law relating to equals can therefore only be properly tested if it applies alike to all persons in the same group". (See **Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd** [2004] 2 MLJ 257).

[152] In the case of a reference made pursuant to section 56(1)(b) of the 2009 Act, parties involved are allowed to provide their own Shariah expert's views on the Shariah question(s). In fact, in these present applications, the applicant provided to SAC its own Shariah expert's view on the issue.

Reference Question 2(a)
Expert Evidence

[153] Learned counsel for the applicant finally contended that if the impugned provisions are constitutional, the party should be entitled to lead expert evidence and for the court to consider expert

evidence on question concerning Islamic law for Islamic financial business.

[154] We are not persuaded with the submission. The civil courts are not in a position to appreciate and determine the divergences of opinions among the experts and to decide based on Shariah principles. The proposition has been expounded in **Mohd Alias (supra)** where the learned judge observed that:

> "122. There is neither rhyme nor reason for the court to reject the function of the SAC in ascertaining which Islamic law to be applied by the civil courts in deciding a matter. Should this function be ignored, it would open the floodgate for lawyers and cause a tsunami of applications to call any expert at their own interest and benefit, not only from Malaysia but also other countries in the world who might not be familiar to our legal system, administration of Islamic law and local conditions just to challenge the Islamic banking transaction in this country."

[155] The same sentiment has been repeated by the learned judge in the case of **Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Bhd** [2012] 7 MLJ 597:

> **"[55]** In my considered opinion, it is advisable and practical that the question as to whether Islamic banking business is in accordance with the religion of

> Islam or otherwise be decided by eminent jurists properly qualified in Islamic jurisprudence and not by judges of the civil courts. This is to avoid embarrassment to Islamic banking cases as a result of incoherent and anomalous legal judgments. The applicable law to Islamic banking has to be known with certainty. Otherwise, lawyers, bankers and their customers are left to wonder which is in fact the correct law.
>
> **[56]** Even if expert evidence is allowed to be given in court to explain or clarify any point of law relating to Islamic banking, civil judges would be in a difficult situation to decide because the divergence of opinions among Islamic jurists and scholars to which the opposing experts might have and which they will urge the court to adopt may be so complex to enable civil judges to make an independent determination of Shariah principles."

[156] Further, if the parties are allowed to lead expert evidence, it would fall upon the civil courts to ascertain what the applicable Islamic law for the Islamic banking is, and to proceed to apply the ascertained law to the facts of the case. In ascertaining the law, competing parties to the dispute will submit before the courts their own views of what is the law. In such circumstances, the practical questions need to be addressed are –

(a) To what source would a judge refer to;

(b) which mazhab should he or she adopt if there are differing opinions among the experts; and

(c) would civil law or Shariah law be the applicable law.

[157] In our considered opinion, the use of expert evidence would not be helpful to a civil court judge as ultimately, the civil court judge would still have to make a decision and he or she would end up having to choose which expert opinion to rely on, and this could be further complicated if each expert based his or her opinion on different schools of jurisprudence.

[158] We are of the firm opinion that it is for a body of eminent jurists, properly qualified in Islamic jurisprudence and/or Islamic finance, to be the ones dealing with questions of validity of a contract under Islamic law and in Malaysia that special body would be the SAC.

[159] My learned brothers Ahmad Maarop, PCA, Ramly Ali, FCJ Azahar Mohamed FCJ and my learned sister Alizatul Khair Osman Khairuddin FCJ have read this majority judgment in draft and have expressed their agreement with it.

Conclusion

[160] For the foregoing reasons, the Impugned Provisions are not in breach of the FC and unconstitutional on either basis advanced

by learned counsel for the applicant. We answer the questions referred to us for our determination as follows:

No.1

(a) In the negative

(b) In the negative

(c) In the negative.

No.2 (alternative question)

In the negative.

[161] We order that this case be remitted to the High Court for further directions.

Dated: 10th April 2019

sgd.

(MOHD ZAWAWI SALLEH)
Federal Court Judge
Malaysia

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