

## **KLBC YLC MOOT COURT COMPETITION 2019 – MOOT PROBLEM**

1. On 10 April 2019, the Federal Court, in a narrow 5-4 decision in *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Berhad*, made the following rulings: (1) findings on Islamic finance by Bank Negara's Shariah Advisory Council (SAC) is binding on civil courts; and (2) the ascertainment of Islamic law by the SAC does not amount to a judicial decision.
2. In light of the split decision in *JRI Resources*, Parliament amended Section 51 of the Central Bank of Malaysia Act 2009 (“CBA”). Section 51 now reads as follows:

*“(1) The Bank may establish a Shariah Advisory Council on Islamic Finance which shall be the authority for the determination of Islamic law for the purposes of Islamic financial business.*

*(2) The Shariah Advisory Council may determine its own procedures.”*

In the Parliament Hansard, Dato’ Rahman Permata Yusof, the Finance Minister who tabled the bill to amend the said Section 51 of CBA, was reported to have said:

*“Melalui rang undang-undang ini, ianya adalah hasrat Kerajaan untuk menjadikannya jelas bahawa sebarang perkara yang menyentuh undang-undang Islam adalah semata-mata untuk Majlis Penasihat Syariah tentukan. Dengan izin, Tuan Speaker, “solely for the Shariah Advisory Council to determine”.*

3. Bank Almalia is a licensed Islamic bank incorporated under the laws of Malaysia. Mahligai Investment Sdn Bhd, the investment arm of Mahligai Berhad, holds 51% of the shares of Bank Almalia. The rest of the shares of Bank Almalia are held by private individuals and several Malaysian government-linked companies. Bank Almalia has been operating in Malaysia since 1999.

4. In 2003, Mahligai Berhad entered into a joint venture with the Bruneian government's sovereign wealth fund, Brunei Investment Authority, to establish an Islamic bank in Indonesia named Bank Garuda. Under the joint venture agreement, Mahligai Berhad owns 70% of the shares of Bank Garuda, whereas Brunei Investment Authority owns the other 30%.
5. On 2 May 2019, Bank Almalia commenced a claim against Mustaeir Properties Sdn. Bhd. ("**Mustaeir**") in the Kuala Lumpur High Court.
6. The claim is in respect of a Murabahah Contract Financing facility between Bank Almalia and Mustaeir on 21 March 2015 ("**Murabahah Contract**"). The Murabahah Contract involves Bank Almalia's purchase of buildings from a third party and Bank Almalia's subsequent sale of the same buildings to Mustaeir with a profit rate of 5%. The Murabahah Contract would be for a term of 10 years, with Mustaeir making monthly instalment payments to Bank Almalia via cash.
7. Mustaeir defaulted in its monthly payments to Bank Almalia. Mustaeir contends that the Murabahah Contract violates Shariah principles. The first ground is that the sale price would not be consistent throughout the 10-year term; there is a clause which provides for a downward revision of the profit rate from 5% to 3% at the 5<sup>th</sup> year juncture if Mustaeir made prior monthly payments to Bank Almalia on time. The second ground is that the buildings specified in the Murabahah Contract underwent major renovations from early March 2015 to May 2015.
8. The Kuala Lumpur High Court, pursuant to Section 56 of CBA, referred the question of the validity of the Murabahah Contract to the SAC.
9. The SAC is a 10-member body comprised of corporate leaders, civil servants, academicians, a former Court of Appeal judge and other experts who have experience in the Islamic finance field. It is headed

by Dato' Seri Fathul Mustaqim, the former executive chairman of the Malaysian Securities Commission. One of the members of the SAC is Associate Professor Dr. Zaini Bujang, an academician from Universiti Kewangan Islam Malaysia.

10. Parties were only allowed to put in written expert opinions on the question to the SAC. No oral hearing was given. The SAC released its ruling which is a one-liner:

*"The Murabahah Contract dated 21 March 2015 between Bank Almalia and Mustaeir Properties Sdn. Bhd. does not violate any Shariah principles"*

11. During the trial of the matter, Mustaeir tried to adduce further expert opinions to argue that the SAC ruling was incorrect. The Learned High Court Judge took issue on the basis that the High Court was bound by the SAC ruling.

12. In the midst of the trial, it was also made known to Mustaeir that Associate Professor Dr. Zaini Bujang was previously the independent non-executive director of Bank Garuda for a period 3 years between 2014-2016. He resigned in 2016. Associate Professor Dr. Zaini Bujang has also written and published extensively on Islamic finance. Further, column in a 2018 column at The New Reserve Times, a local Malaysian newspaper, titled "Compliance of Murahabah Contracts with Shariah Principles: A Contemporary Analysis", he wrote as follows:

*"My humble view is that the validity of Murabahah Contracts vis-à-vis Shariah principles should not be affected by the mere fact that there is fluctuation of the sale price throughout the term of the said contracts."*

13. The High Court allowed Mustaeir's application for the following questions of law to be referred to the Federal Court (pursuant to Section 84 of the Courts of Judicature Act 1964 and Article 128(2) of the Federal Constitution):

- (1) Whether Parliament is empowered under Article 74(1) of the Federal Constitution read together with item 4(k), Federal List, 9<sup>th</sup> Schedule to amend section 51(1) of the CBA to enable the SAC to determine Islamic law?
  - (2) Whether section 57 of the CBA contravenes Part XI of the Federal Constitution for having the effect of vesting judicial power in the SAC?
  - (3) Whether sections 56 and 57, CBA contravene Article 8 of the Federal Constitution for the said sections having the effect of denying a litigant substantive due process?
  - (4) Whether the composition of the Shariah Advisory Council in the circumstances of this case contravenes the principles of natural justice (in particular the *nemo judex in causa sua* principle) embedded in Article 5 and 8 of the Federal Constitution?
14. Counsel for both Mustaeir (Applicant) and Bank Almalia (Respondent) are invited to file their submissions in respect of the 4 questions of law abovementioned.