# NG CHIN TAI, TRADING IN THE NAME AND STYLE OF LEAN SEH FISHERY & ANOR

**v.**

# ANANDA KUMAR KRISHNAN

Federal Court, Putrajaya
Ahmad Maarop PCA, Zaharah Ibrahim CJM, Aziah Ali, Alizatul Khair Osman Khairuddin, Rohana Yusuf FCJJ
[Civil Appeal No: 02(f)-97-09-2017(P)]
17 October 2019

***Contract:*** *Damages — Assessment — Commission contract — Distinction between claim for agreed sum and claim for damages — Whether action in substance a suit claiming for an agreed sum — Whether rules on remoteness of damage and mitigation of loss applicable to a commission contract for an agreed sum — Contracts Act 1950, s 74*

***Contract:*** *Nature of contract — Commission contract — Whether contract for commission a contract in perpetuity or a contract for a determinate duration — Whether such contract could be determined through giving of reasonable notice or through the happening of a subsequent event*

The 1st defendant's son, DW7 had approached the plaintiff in February 2004 to help the 1st defendant, trading as Lean Seh Fishery ("LSF"), secure a contract for the supply of seafood to Tesco Stores (M) Sdn Bhd ("TESCO"). DW7 verbally offered the plaintiff a 5% consultant fee should he succeed in securing a contract for the supply of seafood. By a Letter of Appointment dated 6 February 2005 ("the Contract") signed by DW7, the plaintiff was appointed as marketing consultant to negotiate with and promote LSF to TESCO for the purpose of securing a contract for the supply of fresh, frozen and processed seafood. Pursuant to the Contract, LSF agreed *inter alia*, to pay the plaintiff 5% of its total invoice value or billings to TESCO. The fee of 5% was to be paid to the plaintiff for the duration of the period that LSF or any of its associates or associate companies or related parties supplied seafood to TESCO. The plaintiff subsequently secured a contract for LSF and he also recruited and trained employees to ensure that its deliveries were made on time and invoices issued consistently. The plaintiff also convinced TESCO to continue its arrangements with the 1st defendant when TESCO complained about the 1st defendant's poor services. The 1st defendant continued to pay the plaintiff his 5% fee on a weekly basis until the end of November 2005. On 30 December 2005, the 1st defendant emailed TESCO terminating the Contract with the plaintiff. In February 2006, the plaintiff sued the 1st defendant to recover *inter*

*alia*, the outstanding and continuing payments of his 5% fee. A few months after the plaintiff's suit was filed the 2nd defendant was established with the 1st defendant, his wife and his two children as directors and shareholders. In September 2006, the 1st defendant stopped supplying seafood to TESCO and such supply was taken over by the 2nd defendant. The relationship between TESCO and the 2nd defendant was mutually terminated on 25 October 2015. The High Court found for the plaintiff and based on the evidence, awarded him a sum of RM19,266,746.16 as damages. The Court of Appeal affirmed the High Court's decision. The Federal Court granted the defendants leave to appeal on the following two questions: (i) whether a contract for payment of commission may last in perpetuity without being subject to an implied term as to termination upon reasonable notice; and (ii) whether in determining the quantum of damages payable for breach of contract for the payment of a commission in perpetuity, damages are to be assessed in accordance with the principles in *Hadley v. Baxendale; Transfield Shipping Inc v. Mercator Shipping Inc* and s 74 of the Contracts Act 1950.

**Held** (dismissing the appeal with costs):

**(1)** Pursuant to para 4 of the Contract, it was clear that it was not, on the facts of the case, a contract in perpetuity. Whilst the Contract did not contain a termination clause, it did not mean that it was a contract of indeterminate duration — which is a contract *prima facie* enforceable in perpetuity but which may in certain circumstances be unilaterally terminated upon reasonable notice. The duration of the Contract was implicit from para 4 itself. The Contract provided for a specific period in which it remained enforceable and ceased to be in force upon the happening of a subsequent event, namely the cessation of the supply of seafood to TESCO by the 1st defendant or its associate companies, including the 2nd defendant. The Supplier Trading Agreement between TESCO and the 1st defendant which set out the circumstances under which the Agreement for the supply of seafood could be terminated by TESCO, further lent credence to such proposition. (paras 44-48)

**(2)** The Contract, not being a contract "in perpetuity" could only be determined or come to an end upon the happening of a certain event, which in the instant case, was the cessation of the supply of seafood to TESCO by the 1st defendant or its associate companies. The Contract could not be terminated by reasonable notice. There was no purpose to answer the first question referred since it was premised on the presumption that the Contract was perpetual in nature. (paras 55-56)

**(3)** There is a distinction between a claim for an agreed sum and a claim for damages. In the instant case, although the plaintiff may have used the word "damages", reading his Statement of Claim in context revealed that the action was in substance a suit claiming an agreed sum, ie the 5% fee. It was not strictly a claim for "damages" in the ordinary sense of the word. The Contract was a

commission contract where there was a claim for an agreed sum. The rules on remoteness of damage and mitigation of loss as enunciated in *Hadley v. Baxendale*, *Transfield Shipping Inc v. Mercator Shipping Inc* and s 74 of the Contracts Act 1950 did not apply in a breach of commission contract where there is an agreed sum. (paras 64, 69, 70 & 74)

**(4)** Parties in commission contracts are bound by the agreed sum stated in the contract, which in the instant case, the defendant deemed as "multiplier or multiplicand basis". In the instant case, the agreed sum was 5% of the defendants' total sales to TESCO. Since the plaintiff's claim was not one for damages but a claim for an agreed sum, there was no necessity to answer the second question of law posed. (paras 75-77)

**Case(s) referred to:**

*Chew Teng Cheong & Anor v. Pang Choon Kong [1981] 1 MLRA 223 (refd)*

*Crawford Fitting Co v. Sydney Valve & Fittings Pty Ltd [1988] 14 NSWLR 438 (refd)*

*Decro-Wall International SA v. Practitioners in Marketing Ltd [1971] 1 WLR 361 (refd)*

*Dr Martens Australia Pty Ltd v. Raben Footwear Pty Ltd [2000] FCA 1122 (folld)*

*Golden Star Video & Music Cen-Tre & Anor v. Daily Video Sdn Bhd [1994] 1 MLRH 878 (refd)*

*Hadley v. Baxendale [1854] 9 Exch 341 (refd)*

*Howe v. Motor Insurers' Bureau [2017] EWCA Civ 932 (refd)*

*Jervis v. Harris [1996] (Ch.19) (refd)*

*Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2001] 4 MLRH 755 (refd)*

*Martin-Baker Aircraft Co Ltd v. Canadian Flight Equipment Ltd; Martin-Baker Aircraft Co Ltd v. Murison [1955] 2 QB 556 (refd)*

*Merbok Hilir Berhad v. Sheikh Khaled Jassem Mohammad And Other Appeals [2014] 1 MLRA 62 (refd)*

*Rapatax (1987) Inc v. Cantax Corp 145 D.L.R. (4th) 419 (refd)*

*Tong Lee Hua v. Yong Kah Chin [1978] 1 MLRA 628 (folld)*

*Transfield Shipping Inc v. Mercator Shipping Inc [2009] AC 61 (refd)*

*Winter Garden Theatre v. Millennium Productions Ltd [1948] AC 173 (refd)*

**Legislation referred to:**

Contracts Act 1950, s 74

Courts of Judicature Act 1964, s 78(1)

Trade Practices Act [Aus], s 52

**Other(s) referred to:**

*Cases and Materials on Contract Law in Australia*, 4th edn, para 22.3

*Chitty on Contracts*, 28th edn, paras 23-046, 23-053, 27-008, 32-134

*Halsbury's Laws of England*, 4th edn, para 531

**Counsel:**

*For the appellants: Gopal Sri Ram, (Ram Karpal Singh, Yohendra Nadarajan, Damien Chan, Khairul Anwar & Harshaan Zamani with him); M/s Yohendra Nadarajan*

*For the respondent: Gurdial Singh Nijar (Ambiga Sreenevasan & Lim Wei Jiet with him); M/s Sreenevasan*

**JUDGMENT**

**Alizatul Khair Osman Khairuddin FCJ:**

**Introduction**

**[1]** This appeal arose from the decision of the High Court (subsequently affirmed by the Court of Appeal) which had allowed the respondent's claim against the appellants for the sum of RM19,266,746.16 together with interest.

**[2]** For convenience, the respondent will be referred to as the plaintiff while the appellants will be referred to as the (1st and 2nd) defendants respectively in this judgment.

**[3]** We heard parties' respective submissions, reserved judgment, and upon due consideration deliver this judgment.

**[4]** This judgment is prepared and delivered pursuant to s 78(1) of the Courts of Judicature Act 1964, as both Justice Zaharah Ibrahim, CJM and Justice Aziah Ali, FCJ have since retired. This judgment is therefore the judgment of the remaining members of the panel.

**The Leave Questions**

**[5]** This court, on 17 August 2017 granted the defendants leave to appeal on the following Leave Questions:

> Leave Question (i)
>
> Whether a contract for payment of commission may last in perpetuity without being subject to an implied term as to termination upon reasonable notice?
>
> Leave Question (ii)
>
> Whether in determining the quantum of damages payable for breach of contract for the payment of a commission in perpetuity is to be assessed in accordance with the decisions in *Hadley v. Baxendale* [1854] 9 Exch 341; [1843-60] All ER Rep 461 and *Transfield Shipping Inc v. Mercator Shipping Inc* [2009] AC 61 and upon an application of s 74 of the Contracts Act 1950 or whether it should be determined upon a multiplier and multiplicand basis?

**The Background Facts**

**[6]** The plaintiff, an individual, initiated this suit to enforce a brokerage contract against the defendants for services rendered in securing the contract for the 1st defendant for the supply of seafood to Tesco Stores (M) Sdn Bhd ('Tesco'). The 1st defendant, also an individual, trades in the name and style of Lean Seh Fishery. The 2nd defendant is a company which was effectively set up by the 1st defendant. We will elaborate further on the formation of the 2nd defendant later in the judgment. This will explain why the 2nd defendant was to made a party to this suit.

**[7]** The facts are essentially these. Sometime in February 2004, one Ng Tee Keat (DW7), the 1st defendant's son, approached the plaintiff to seek his help in securing a contract for the supply of seafood to Tesco for the 1st defendant. In consideration, Ng Tee Keat verbally offered the plaintiff a 5% consultant fee should he succeed in securing the contract.

**[8]** In December 2004, it came to the plaintiff's knowledge that Tesco was looking for a new seafood supplier. The plaintiff managed to arrange a meeting between Ng Tee Keat and the Manager of Tesco's Fresh & Frozen Food Department, one Simon Ng. The latter requested the plaintiff to supply certain information about the 1st defendant's background which the plaintiff duly supplied on 31 January 2005.

**[9]** After several exchanges of correspondence and meetings, Ng Tee Keat signed a letter of appointment dated 6 February 2005, ("the Contract") appointing the plaintiff as a marketing consultant to negotiate with and promote Lean Seh Fishery to Tesco for the purpose of securing a contract for the supply of fresh, frozen and processed seafood to Tesco. As the plaintiff's case is premised on the Contract, we reproduce below the terms and conditions of the Contract in its entirety:

> "RE: FEE OF MARKETING CONSULTANT
>
> We Messrs Lean Seh Fishery, agree to appoint Mr ANANDA KUMAR S/O KRISHNAN (I.C. No. 651005-08-6309) as our Marketing Consultant to negotiate with and to promote Lean Seh Fishery to TESCO STORES (M) SDN BHD, for the purpose of securing a contract for the supply of, Fresh, Frozen and Processed Seafood to the latter.
>
> **We agree to pay a fee of 5% (five percent) of total Invoice value of any and/ or all billings made to Tesco Stores (M) Sdn Bhd to Mr Ananda Kumar a/l Krishnan.**
>
> The Fee of 5% (five percent) of total Invoice to be paid to Mr Ananda Kumar a/l Krishnan, is for his effort in Promoting Lean Seh Fishery and Securing the Contract for the Supply of Fresh, Frozen and Processed Seafood to Tesco Stores (M) Sdn Bhd.
>
> This fee of 5% (five percent) shall be paid to Mr Ananda Kumar a/l Krishnan for the duration of the period that Lean Seh Fishery or any of its Associates

and/or Associate Companies and/or related Parties supplies Seafood to Tesco Stores (M) Sdn Bhd.

We agree to remit the above mentioned fee to Mr Ananda Kumar a/l Krishnan within Five (5) working days from the date, that Lean Seh Fishery receives payment from Tesco Stores Sdn Bhd.

For and On Behalf of
LEAN SEH FISHERY SDN BHD

Signed and Stamped
NG TEE KEAT"

[Emphasis Added]

**[10]** The plaintiff subsequently secured a contract for Lean Seh Fishery to supply seafood to Tesco.

**[11]** Pursuant to the Contract, the plaintiff also recruited and trained employees to ensure that the 1st defendant's deliveries were made on time and invoices were issued consistently. The plaintiff also managed to convince Tesco to continue its arrangement with the 1st defendant. This was after the plaintiff received a complaint from Tesco about the 1st defendant's poor services.

**[12]** As the facts would have it, the 1st defendant continued to pay the plaintiff the 5% fee on a weekly basis until the end of November 2005. Then on 30 December 2005, the 1st defendant sent out an email to Tesco ('Email') purporting to terminate the Contract. The email reads as follows:

"Date: 30/12/2005

We are informed you that Mr ANANDA KUMAR KRISHNAN. I/C no. 651005-08-6309 is no longer in LEAN SEH FISHERY. Effective dated **30th Dec 2005**.

As a result, Mr ANANDA KUMAR KRISHNAN has no right to act on our behalf to have any deal with Tesco.

Thank you.

Yours truly,

Ng Tee Keat"

[Emphasis Added]

**[13]** The plaintiff then instituted a suit against the 1st defendant sometime in February 2006 for, *inter alia* payment of the 5% fee as per the Contract in the sum of RM293,935.53 as at 13 February 2006 and any continuing amount thereafter.

**[14]** A few months after the suit was filed, the 2nd defendant was set up, initially under the name of Segi Lambang Sdn Bhd later renamed LS Fishery Sdn Bhd, its present name.

**[15]** At around the same time, one Lean Seh Fishery Sdn Bhd was formed with the 1st defendant and his wife, together with Ng Tee Keat as shareholders. The 1st defendant and his wife were the Directors. The 2nd defendant's shareholders and directors were at all material times the 1st defendant's children Ng Tee Huat and Ng Ai Tiang.

**[16]** In this regard, both the High Court and the Court of Appeal found this was a proper case to lift the corporate veil of the 2nd defendant. The Court of Appeal agreed with the High Court's finding that the 2nd defendant was set up with the intention of defrauding the plaintiff. In other words, the 2nd defendant was formed specifically to take over the supply of seafood to Tesco from the 1st defendant in order to circumvent the Contract. The 2nd defendant did not have any seafood supply and obtained all its seafood supply from Lean Seh Fishery Sdn Bhd.

**[17]** The finding of the Court of Appeal and the High Court on this issue is not a subject matter of this appeal.

**[18]** Around September 2006, the 1st defendant stopped supplying seafood to Tesco and this was taken over by the 2nd defendant. The relationship between Tesco and the 2nd defendant was mutually terminated on 25 October 2015.

**The Decision Of The High Court**

**[19]** The High Court did not make a specific finding that the Contract is a contract in perpetuity. What the learned judge found was that the Contract cannot be unilaterally terminated. To quote the learned judge:

> "[95] As I have decided that the said contract dated 6 February 2005 is valid and enforceable, it cannot be terminated unilaterally by the 1st defendant by sending an e-mail to TESCO informing that the plaintiff was no longer acting on the 1st defendant's behalf. The plaintiff in this case had performed his obligation under the said contract and it is for the 1st defendant to honour the agreement and comply with the terms of the said contract. **Therefore, I am of the considered view that the said contract is still in existence and not terminated.**"
>
> [Emphasis Added]

**[20]** On damages, the High Court re-stated a basic feature of contract law ie that its purpose is to place the parties in the position as if the Contract had been performed. It then went on to calculate 5% of the profits of the 2nd defendant from Week 48 of 2005 to December 2013 based on the evidence presented before it and awarded the plaintiff the sum of RM19,266,746.16. (See the High Court's Grounds of Judgment at p 127 of the Core Bundle (CB) Jld. 2-Judgments).

## The Decision Of The Court Of Appeal

**[21]** The Court of Appeal too did not express the view that the Contract is one in perpetuity. Instead the converse can be inferred from the court's judgment as seen below:

> "32. As for issues 3 and 4 relating to the perpetual nature of the contract between the respondent and the 1st appellant, we agree with learned counsel for the respondent that the contract had been terminated on 25 October 2015 when Tesco and the 2nd defendant had mutually terminated their relationship. **The respondent's entitlement was simply 5% of the total sale to Tesco by the 1st appellant. If there were no more relationship between the 1st appellant and Tesco, there was no more entitlement by the respondent.** That we said was the long and short of the contents of the letter dated 6 February 2005."
>
> [Emphasis Added]

**[22]** As for damages, the Court of Appeal upheld the High Court's finding when it found as follows:

> "33. As for the amount awarded by the learned judge, firstly as pointed out by counsel for the respondent there was no appeal as to the quantum of the award by the trial court. Secondly we thought that was perfectly correct as the evidence of PW2 being the financial controller of Tesco and in our view an independent witness was not challenged seriously and for good reason."

## Parties' Submission

**[23]** In respect of Leave Question (i), the gist of the defendants' argument is that the Contract is in essence a contract in perpetuity as it is silent as to its duration and made no provision for termination. Further, the learned judge in his judgment seemed to imply that the Contract is one in perpetuity when, in holding that the Contract cannot be unilaterally terminated, His Lordship found that "…the said contract is still in existence and not terminated." (See para 19 (*ante*)).

**[24]** However, relying on the authorities stated below, learned counsel submitted that commercial prudence dictates that contracts of this nature should be determinable rather than that it be allowed to run in perpetuity.

Parties must have intended that the Contract be terminable on notice. The cases relied on are:

(a) *Crawford Fitting Co v. Sydney Valve & Fittings Pty Ltd* [1988] 14 NSWLR 438 at pp 443-444;

(b) *Martin-Baker Aircraft Co Ltd v. Canadian Flight Equipment Ltd; Martin-Baker Aircraft Co Ltd v. Murison* [1955] 2 QB 556 at p 581;

(c) *Decro-Wall International SA v. Practitioners in Marketing Ltd* [1971] 1 WLR 361 at p 376; and

(d) *Merbok Hilir Berhad v. Sheikh Khaled Jassem Mohammad And Other Appeals* [2014] 1 MLRA 62.

**[25]** Counsel also cited *Chitty on Contracts* (28th edn) at paras 23-046 and 23-053.

**[26]** Based on the aforesaid authorities, learned counsel submitted that the Contract between the plaintiff and the 1st defendant may be terminated upon reasonable notice. The learned judge therefore erred in law in holding that the Contract cannot be unilaterally terminated.

**[27]** In this regard, it was learned counsel's submission that the plaintiff had given reasonable notice via a telephone call made by Ng Tee Keat, which fact was corroborated by an email dated 30 December 2005 wherein the 1st defendant confirmed with Tesco that the plaintiff was no longer authorised to act on their behalf.

**[28]** As for Leave Question (ii), following from the defendant's submission that the Contract is one in perpetuity, then according to learned counsel, any assessment of damages can only be dealt with based on the determination of the notice, ie whether the period of notice was unreasonable. This the High Court failed to take into consideration when awarding damages to the plaintiff. In support, learned counsel relied on the Canadian case of *Rapatax (1987) Inc v. Cantax Corp* 145 D.L.R. (4th) 419 at p 427.

**[29]** Counsel further argued that both the Court of Appeal and High Court failed to consider mitigation and remoteness in awarding the plaintiff the sum of RM19,266,746.16 (the said sum) as damages. These are settled principles under s 74 of the Contracts Act 1950 and as decided in the classic case of *Hadley v. Baxendale* [1854] 9 Exch 341. This failure has, in the defendant's view, resulted in a miscarriage of justice.

**[30]** The plaintiff on the other hand, contended that the defendant's presumption that the Contract is a perpetual and/or an indeterminate contract is flawed. Learned counsel referred to para 4 of the Contract which states as follows:

> "This fee of 5% (five percent) shall be paid to Mr Ananda Kumar a/l Krishnan **for the duration of the period that Lean Seh Fishery or any of its Associates and/or Associate Companies and/or related Parties supplies seafood to Tesco Stores (M) Sdn Bhd**."
>
> [As Emphasised]

**[31]** The Contract is therefore terminable by either party upon the occurrence of a subsequent event i.e. when Tesco no longer engages the 1st defendant (trading under Lean Seh Fishery) or any of its Associate Companies (including the 2nd defendant) for supply of seafood.

**[32]** The Supplier Trading Agreement dated 1 March 2008 between Tesco and the 2nd defendant which *inter alia* states:

> "(i) Clause 6.3:
>
> "Notwithstanding anything to the contrary, TESCO shall have the right to terminate this Agreement without assigning any reason, by serving thirty (30) days written notice to the Supplier (2nd Defendant)"
>
> (ii) Clause 18:
>
> "Termination of Contracts
>
> 19.1 TESCO shall be entitled forthwith to terminate any Contract made thereunder by written notice to the Supplier if:
>
> (a) the Supplier commits any breach of any of these Conditions or of any other provisions of any contract; or
>
> (b) the Supplier commits any act of bankruptcy or has a receiver or administrative receiver appointed of the whole or any part of its assets or if an order is made or resolution passed for the winding up of the whole or any part of its assets…"

reaffirms the aforesaid position.

**[33]** Citing, *inter alia*, *Chitty on Contracts* (28th edn) (*supra*), and *Halsbury's Laws of England* (4th edn) at para 531, learned counsel submitted that contracts of this nature which expressly provide for the circumstances upon which it would terminate (as in the present case) are not terminable by giving reasonable notice.

**[34]** The plaintiff also relied substantially on the Australian case of *Dr Martens Australia Pty Ltd v. Raben Footwear Pty Ltd* [2000] FCA 1122 where the Federal Court of Australia dismissed the cases relied on by the defendants such as *Winter Garden Theatre v. Millennium Productions Ltd* [1948] AC 173, and *Martin-Baker Aircraft Co Ltd (supra)* and held that they were inapplicable to a contract which is determinable upon the occurrence of a specified circumstance. Both these cases were referred to by the Alberta Court of Appeal in *Rapatax (supra)* when dealing with contracts of indeterminate duration.

**[35]** With regard to the Leave Question (ii), it is the contention of the plaintiff that the defendants herein are seeking the court to determine which of the proposed two methods for determining quantum in respect of a breach of contract where there is an agreed commission fee, is applicable:

(a) whether the rule on remoteness and mitigation of damage as applied in *Hadley v. Baxendale (supra)* and *Transfield Shipping Inc v. Mercator Shipping Inc* [2009] AC 61 (Transfield Shipping) and upon an application of s 74 of the Contracts Act 1950 applies; or

(b) whether it should proceed on a simple method of multiplying the percentage of commission fee with the total sales over a certain period.

**[36]** The plaintiff submitted that the said question of law is based on the erroneous assumption that the plaintiff's claim is a claim for damages for breach of contract 'in the ordinary sense', when in fact it is a claim for an "agreed sum".

**[37]** Learned counsel drew the court's attention to the following passage in *Chitty on Contracts* (28th edn) at para 27-008 where the learned authors explained the distinction between claims for payment of an agreed sum and claims for damages.

> "There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return of the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such debit. (It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay such a debt at the due date).
>
> The relevance of this distinction is that rules on damages do not apply to a claim for a debt, e.g the claimant who claims payment of a debt need not prove anything more than his performance or the occurrence of the event or condition; there is no need for him to prove any actual loss suffered by him as a result of the defendant's failure to pay the whole concept of remoteness of damages is therefore irrelevant; the law on penalties does not apply to the agreed sum; the claimant's duty to mitigate his loss does not generally apply; and the claimant will usually be able to seek summary judgment."

**[38]** The defendants, it was contended failed to appreciate this crucial distinction as evident from the proposed question.

**[39]** A similar view was expressed by the learned authors in *Cases and Materials on Contract Law in Australia* (4th edn) at para 22.3 where it spelled out the distinction between the two types of claims.

**[40]** The UK Court of Appeal's decision of *Jervis v. Harris* [1996] (Ch.19) and more recently the UK Court of Appeal decision of *Howe v. Motor Insurers' Bureau* [2017] EWCA Civ 932 lend further support to, as counsel puts it, "this trite common law principle".

**[41]** In this regard, it was the plaintiff's contention that commission contracts such as the present one before us are contracts where there are "claims for an agreed sum". Thus according to *Chitty on Contracts* (28th edn), it is the duty of the principal to pay his agent any commission or other remuneration agreed upon and where there is an express term as to the payment of remuneration, the right to payment and amount will depend on that term. (See paras 32-132).

**[42]** Thus in light of the critical distinction between "claims for an agreed sum" and "claims for damages" as expounded by Chitty and the cases cited, it was the plaintiff's submission that the rules on remoteness and mitigation of damages set out in *Hadley v. Baxendale*, Transfield Shipping and s 74 of the Contracts Act do not apply in a breach of a commission contract where there is an agreed sum stipulated.

**Our Decision**

**Leave Question (i)**

**[43]** We have considered both counsel's submissions on this issue and we find merit in the plaintiff's argument that, contrary to the defendants' contention, the Contract is not, on the facts of the case, one in perpetuity.

**[44]** This is clear from para 4 of the Contract which we reproduce below for convenience and by way of re-emphasis:

> "This fee of 5% (five percent) shall be paid to Mr Nanda Kumar a/l Krishnan for the duration of the period that Lean Seh Fishery or any of its Associates and/or Associate Companies and/or related Parties Supplies Seafood to Tesco Stores (M) Sdn Bhd."

**[45]** Whilst the Contract does not contain a termination clause as such this does not mean that it is a contract of indeterminate duration which, according to the Alberta Court of Appeal in *Rapatax (supra)*, one that is *prima facie* enforceable in perpetuity, but which in certain circumstances may be unilaterally terminated upon reasonable notice.

**[46]** Rather it is our view that the duration of the Contract is implicit in para 4 itself which stipulates that the plaintiff shall be paid a fee of 5% tax for the duration of the period that the 1st defendant or any of its associate companies supplies seafood to Tesco.

**[47]** In short, the Contract provides for a specific period in which it remains enforceable and ceases to be in force upon the happening of a subsequent event, ie in this case, the cessation of the supply of seafood to Tesco by the 1st defendant and/or its Associate Companies (including the 2nd defendant).

**[48]** As submitted by learned counsel for the plaintiff the Supplier Trading Agreement (between Tesco and the 1st defendant) which sets out the circumstances under which the Agreement (for the supply of the seafood) may be terminated by Tesco (see cls 6.3 and 18), lends credence to this proposition.

**[49]** In *Chitty on Contracts* (28th edn), the learned authors recognised that parties themselves may expressly provide in their contract that either or one of them may have the option to terminate the contract, which option is exercisable upon:

(a) a breach of contract by the other party; or

(b) upon the occurrence or non-occurrence of a specified event other than a breach.

According to the learned authors:

> "**The parties may expressly provide that the contract shall *ipso facto* determine upon the happening of a certain event** …"
>
> [Emphasis Added]

(See paras 23-046 and 23-053, "Provision for Discharge in the Contract Itself").

**[50]** A similar view was expressed by the learned author of *Halsbury's Laws of England* (4th edn):

> "It is usual for parties to a contract to stipulate expressly or impliedly that the contract shall be determinable in certain circumstances, such as notice at the option of either party, or non-performance or breach of a term of the contract, or **on the happening of a particular event**."
>
> [Emphasis Added]

**[51]** In his article "Open Terms Relating to Time in Contracts for the Sale of Goods" in the McGill Law Journal, the learned author Michael Howard suggested that contracts which expressly provide for termination upon the happening of certain events cannot be terminated in some other way such as by giving reasonable notice. To quote the learned author:

> "It is suggested that such an agreement cannot be terminated by a reasonable notice because the contract shows that the parties have directed their minds to the question and that, on this basis, the court should not allow either party to terminate by reasonable notice. An express provision would also exclude the interpretation that the contract is to continue for an indefinite period and can only be terminated by breach by the other party as in *J Kitchen & Sons Pty Ltd v. Stewart's Cash and Carry Stores*."

**[52]** The learned author examined the case of *Prints for Pleasure v. Oswald-Sealy (Overseas) Ltd* a case "concerned with conferring exclusive marketing rights on certain conditions". There the court refused to imply a term for termination upon reasonable notice where the parties, although not making provision for the duration of their contract, expressly provide for the circumstances upon which it would terminate. The court held that in respect of such an agreement, the right to bring the contract to an end is conferred upon one party alone since a failure on his part to place the minimum of orders would terminate the contract. The court further held that this contract could not be terminated by reasonable notice.

**[53]** We refer next to the Australian case of *Dr Martens Australia Ltd (supra)* which as learned counsel for the plaintiff puts it, is exactly on point with the present case.

**[54]** The brief facts of this case as elicited from the judgment of the court are these. The proprietors of the trademarks and the owner of the copyright in the Dr Martens Air Wair logo (the appellants) alleged that the respondents have infringed their respective rights in respect of those marks and copyright. The applicants also contend that by using the trademarks and logo, and other advertising material, the respondents have contravened s 52 of the Trade Practices Act and have passed off their footwear as and for the footwear of the applicants or one of them. The respondents deny all allegation of wrongdoing on their part. One basis upon which they defend the claims is that by the agreement that is recorded in the 29 June transmission, the applicants undertook not to bring any action in respect of the respondents' use of the trademarks and logo.

The agreement in question reads as follows:

> "The applicants in Federal Court Proceeding No: VG443 of 1994 will not take any action against Raben Footwear Pty Ltd or Ron or Garry Lewy for the use by them of the Applicants logo and trade marks as depicted in the Exhibits attached to the Affidavit of Gary Lewy affirmed 28/6/95. This will not apply should Raben Footwear Pty Ltd or Ron or Garry Lewy cease to purchase for retail sale or deal with in any way footwear manufactured by the applicants or authorised representatives of the applicants ('Authorised Footwear'). However, the applicants confirm that they will not take any action against Raben Footwear Pty Ltd or Ron or Garry Lewy regarding the said use of the trade marks and logos for any period whilst Raben Footwear Pty Ltd or Ron or Garry Lewy are or were dealing with Authorised Footwear."

Three questions were posed to the court in relation to the aforesaid agreement. The relevant question for our purpose is the third question, which is:

> (3) Is the agreement terminable on reasonable notice?

His Honour Finkelstein J's answer to this question is instructive as seen below:

> "The third question is whether the agreement is terminable on reasonable notice. There is a line of authority that where a contract for an indefinite period does not confer on the parties a power to determine that contract, such a power should be inferred if the contract is of a commercial character: *Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd* [1948] AC 173 at 203; *Martin-Baker Aircraft Co Ltd v. Canadian Flight Equipment Ltd* [1955] 2 QB 556 at 578; *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co* [1978] 1 WLR 1387 at 1395-1397…
>
> … Accordingly, I will approach the applicants' argument on the basis that ordinarily, having regard to the nature of a commercial agreement, the parties must have intended that such an agreement be terminable on reasonable notice. This accords with the view of McHugh JA (as His Honour then was) in *Crawford Fitting Co v. Sydney Valve & Fittings Pty Ltd* [1988] 14 NSWL 438 at 444.
>
> What assistance this provides the applicant in this case is not clear. In the first place, the agreement here under consideration is not for an indefinite

period. **The agreement comes to an end in the circumstance specified, namely when the respondents cease to purchase for retail sale or deal with "Authorised Footwear".** The date this will occur is not certain. But **an agreement whose duration is uncertain is not an agreement for an indefinite period as contemplated by the cases**. So, the authorities on which the applicants place reliance do not support the position for which they contend …"

[Emphasis Added]

**[55]** Based on the aforesaid authorities and taking into consideration the terms of the Contract, in particular para 4 thereof, it is clear to us that the Contract is in fact not a contract "in perpetuity" as contended by the defendants but one which is determinable upon the occurrence of a certain event. In other words, it is a contract for a definite duration, the duration of which is determined or comes to an end upon the happening of a specific event, which in this case is the cessation of the supply of seafood to Tesco by the 1st defendant and/ or its Associate Company. As established by these authorities such a contract is not terminable by reasonable notice. In this regard we wish to state, as an aside and for completeness, that it was the finding of the learned High Court Judge that, contrary to the defendant's assertion, the Contract was terminated without reasonable notice. His Lordship indicated as much when he held that the Contract could not be "terminated unilaterally by the 1st defendant by sending an e-mail to TESCO informing that the plaintiff was no longer acting to the 1st defendant behalf". To compound the matter further the termination was to take effect on the day the email was sent.

**[56]** In the light of our finding as such, we see no purpose in answering Question No 1 as the question is premised on the presumption that the Contract is perpetual in nature.

**Question of Law (ii)**

**[57]** This question deals with the issue of damages, ie how it should be assessed in the context of this case. The plaintiff argued that this is not a claim for damages in the "ordinary sense". He takes the position that the 5% commission as calculated by the High Court Judge principally amounts to a claim for an "agreed sum". As such, it is his argument that he be allowed to claim that amount without having to overcome the rules of remoteness and mitigation of loss.

**[58]** The defendants take the diametrically opposing view. They argue that the courts below relied on *Hadley v. Baxendale* [1854] 6 Exch 341, but erroneously did not require the plaintiffs to abide by the rules of having to prove mitigation of loss and remoteness of damage.

**[59]** In our view the answer to the above issue is addressed by the learned authors of *Chitty on Contracts*, (28th edn), at [27-008] which we referred to earlier in our judgment. (See para 37 *ante*).

As this concerns an important principle of law, we think it is only proper that we reproduce again the passage concerned:

> "**There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract.** A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return of the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such debt. (It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay such a debt at the due date).
>
> **The relevance of this distinction is that rules on damages do not apply to a claim for a debt e.g. the claimant who claims payment of a debt need not prove anything more than his performance or the occurrence of the event or condition**; there is no need for him to prove any actual loss suffered by him as a result of the defendant's failure to pay the whole concept of remoteness of damages is therefore irrelevant; the law on penalties does not apply to the agreed sum; the claimant's duty to mitigate his loss does not generally apply; and the claimant will usually be able to seek summary judgment."
>
> [Emphasis Added]

**[60]** The plaintiff referred to, amongst others, the following authorities in support of the above proposition:

(i) *Jervis v. Harris (supra)*; and

(ii) *Howe v. Motor Insurers' Bureau (supra)*.

**[61]** In *Jervis v. Harris*, the UK Court of Appeal citing the above passage in *Chitty on Contracts* proclaimed that:

> "… **a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition**; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt."
>
> [Emphasis Added]

**[62]** The court went on to hold that:

> "**The plaintiff who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; the rules as to remoteness of damage and mitigation of loss are irrelevant**; and unless the event on which the payment is due is a breach of some other contractual obligation owed by the one party to the other the law on penalties does not apply to the agreed sum."
>
> [Emphasis Added]

**[63]** In the recent case of *Howe Motor Insurers' Bureau (supra)*, the UK Court of Appeal was confronted with the same issue, ie whether Mr Howe's claim was a claim for damages or a claim for a civil debt. Lewison LJ reiterated the common law principle governing this issue holding that:

> "At common law there is a clear distinction between a claim that sounds in debt and a claim that sounds in damages. A debt is a definite sum of money payable by one person to another usually in return for the performance of a specified obligation by the payee or on the occurrence of some specified event or condition. A claimant who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss; and the rules about remoteness of damage and mitigation of loss are irrelevant. Damages, on the other hand, consist of a sum fixed by law in consequence of an antecedent breach of obligation or duty."

**[64]** As illustrated by the following cases:

(a) *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2001] 4 MLRH 755 (per Nik Hashim J (as he then was); and

(b) *Golden Star Video & Music Cen-Tre & Anor v. Daily Video Sdn Bhd* [1994] 1 MLRH 878 (per Ian Chin J),

Our courts appear to have accepted the distinction between a claim for an agreed sum and a claim for damages as pronounced in *Chitty on Contracts (supra)*.

**[65]** It is clear from the aforesaid authorities therefore that in a claim for an agreed sum:

(a) The claimant only needs to prove performance on his part as stipulated in the contract;

(b) the claimant does not need to prove any actual loss suffered as a result of the defendant's failure to pay the whole agreed sum;

(c) The rules on damages do not apply;

(d) The concept of remoteness of damages is not applicable; and

(e) The concept of mitigation of losses is not applicable.

**[66]** The defendants contended that the plaintiff is at this juncture changing their claim from a claim for damages to a claim for a debt. For this purpose, we need only refer to the plaintiff's claim as pleaded.

**[67]** Prayer (d) in the amended of Statement of Claim reads:

> "Suatu perintah bahawa defendan-defendan membayar plaintif sebanyak RM293,935.53 setakat 13 Februari 2006 dan berterusan sebagai **ganti rugi** atau jumlah yang akan ditentukan oleh Mahkamah sebagai **ganti rugi**."
>
> [Emphasis Added]

**[68]** For clarity, we reproduce paras 8 to 10 of the Statement of Claim so that prayer (d) may be understood in context:

> "8. Selepas bulan November 2005, plaintif telah berulangkali meminta defendan pertama membayar mengikut perjanjian surat bertarikh 6 February 2005 tetapi defendan pertama dalam kemungkiran kontrak telah gagal cuai dan/atau enggan berbuat demikian.
>
> 9. Defendan pertama **telah gagal membuat bayaran-bayaran kepada plaintif** sepertimana yang telah dijanjikan melalui surat bertarikh 6 February 2005.
>
> 10. Tuntutan plaintif terhadap defendan pertama adalah untuk jumlah sebanyak RM293,935.53 setakat 13 February 2006 **yang merupakan bayaran fee yang tertunggak di mana defendan pertama masih belum membuat bayaran** …"
>
> [Emphasis Added]

**[69]** While the plaintiff may have used the word "damages", reading the Statement of Claim in context, the action is in substance a suit claiming an agreed sum, ie the 5% fee. It is not strictly a claim for "damages" in the ordinary sense of the word.

**[70]** In this regard, it is settled law that commission contracts, such as the Contract in the present case are contracts where there are "claims for an agreed sum". (See *Chitty on Contracts* (28th edn) (at para 32-134)).

**[71]** As the learned authors (*supra*) pointed out in the above excerpt of their book, the remuneration of the agent typically takes the form of a commission, being a percentage of the value of the transaction the agent is to bring about for the principal.

**[72]** The agent however does not become entitled to his commission until the event, upon which his entitlement arises, has occurred. Thus where the agent is engaged to bring a third party to enter into a contract with his principal the event will occur when the principal and the third party enter into the contract in respect of which the agent was engaged to bring about.

**[73]** The High Court here made a finding (see para 94 of the Grounds of Judgement, CB Jld.2-Judgments) (upheld by the Court of Appeal) that the plaintiff was the "effective cause" of the transaction between the 1st defendant and Tesco. The plaintiff had on the facts, dutifully and successfully carried out his obligations under the Contract.

**[74]** We therefore agree with the plaintiff's submission that, based on the distinction between "claims for an agreed sum" and "claims for damages" (see paras 63 and 65 *ante*), the rules on remoteness of damage and mitigation of loss as enunciated in *Hadley v. Baxendale*, *Transfield Shipping* and s 74 of the Contracts Act 1950, do not apply in a breach of commission contract where there is an agreed sum stipulated.

**[75]** Parties, in such contracts, are bound by the agreed sum stated in the Contract, which the defendant here deemed as the "multiplier or multiplicand basis", in this case, it is 5% of the defendant's total sales to Tesco from week 48 of 2005 to December 2013.

**[76]** Support for this proposition is found in the Federal Court case of *Tong Lee Hua v. Yong Kah Chin* [1978] 1 MLRA 628 (upheld by the Privy Council) where Chang Min Tat FJ in his customary forthright style explained why parties in such contracts must be held to their bargain:

> "The claim of the respondent against the appellant was, if a little breath is blown to clear the smoke that legal arguments surrounded it with, nothing more or less than a claim for brokerage from the purchaser and is founded, in this case, not on practice or an implied promise but on an express promise from the respondent as purchaser.
>
> …
>
> **This note is a clear and unqualified undertaking to pay brokerage in the event of the appellant successfully obtaining the property in question and though the commission of 6 ½% of the purchase price is considerably more than the customary purchaser's commission** of, as we understand it, 2% and on a sale price of $1,462,500 it came to a substantial $95,062.50, that was the bargain made by the appellant with the respondent and in the absence of any circumstance releasing him from his bargain, the appellant must ordinarily be held to it, on a successful sale to the appellant or his nominee."
>
> [Emphasis Added]

(See also the judgment of Raja Azlan Shah CJ (Malaya) (as His Highness then was) in *Chew Teng Cheong & Anor v. Pang Choon Kong* [1981] 1 MLRA 223).

**[77]** In the light of our findings that the plaintiff's claim is not one for damages but a claim for an agreed sum, we find there is no necessity for us to answer the 2nd question of law.

**Conclusion**

**[78]** For the reasons aforementioned, we are constrained to dismiss the appeal with costs. The decision of the Court of Appeal is affirmed.

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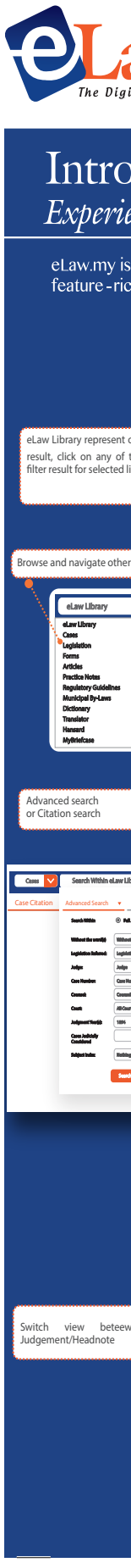

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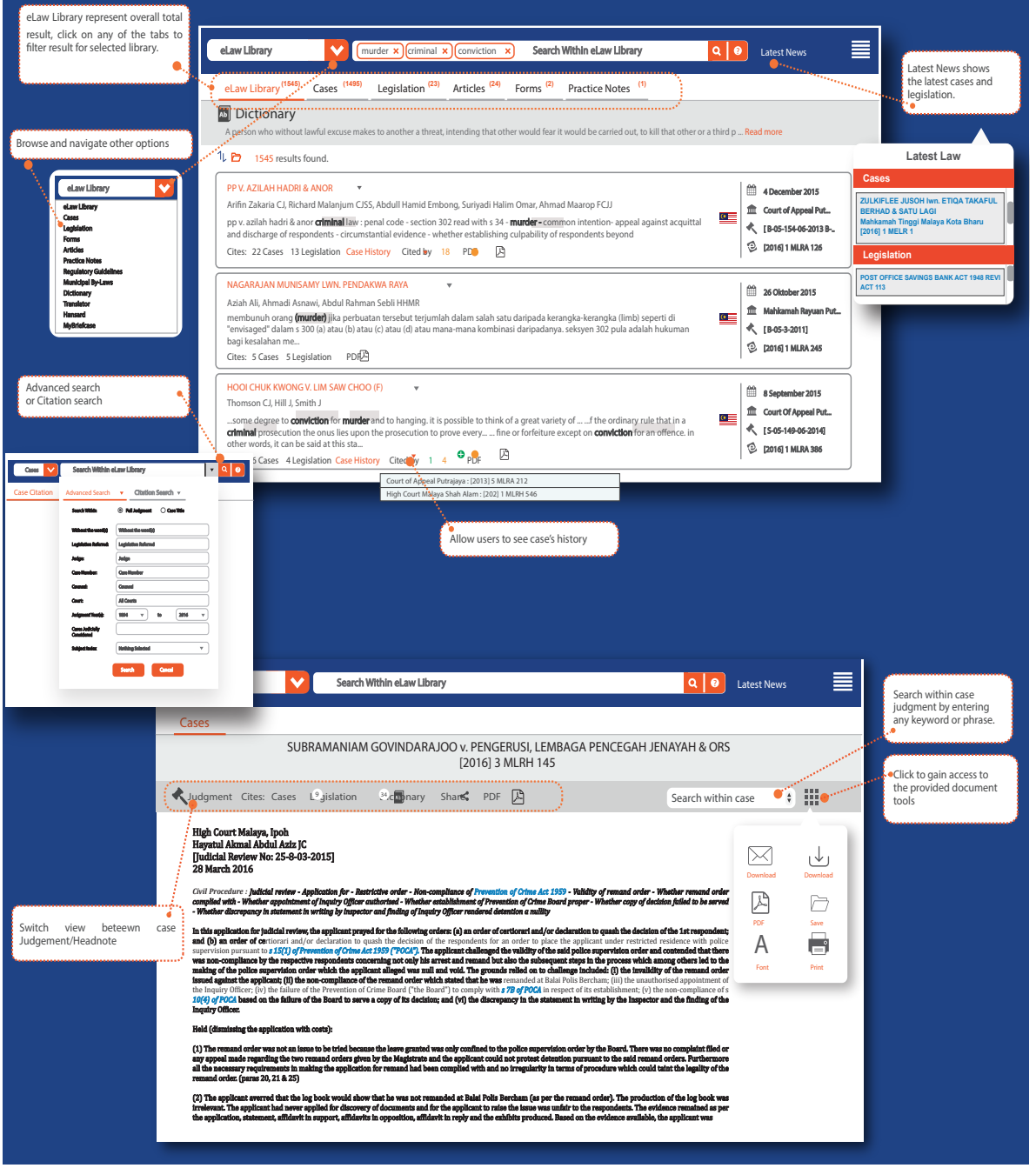

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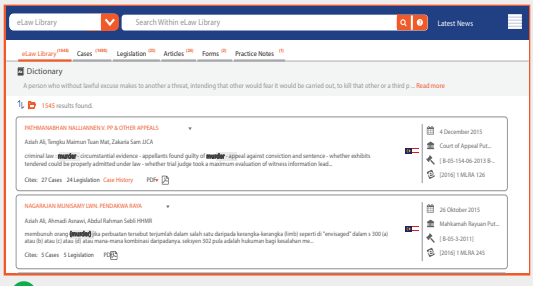

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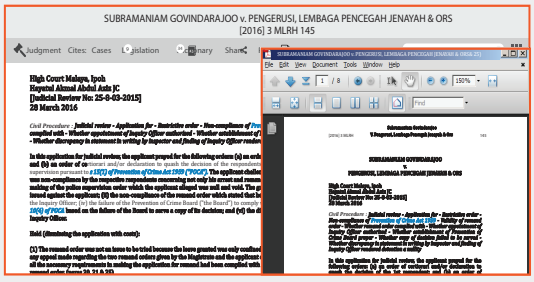

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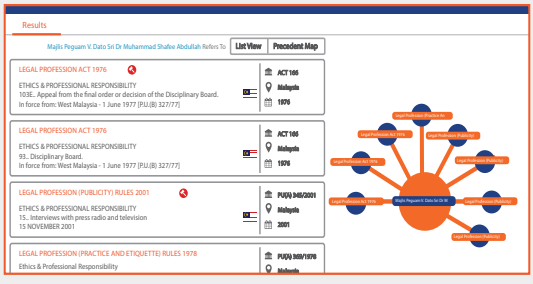

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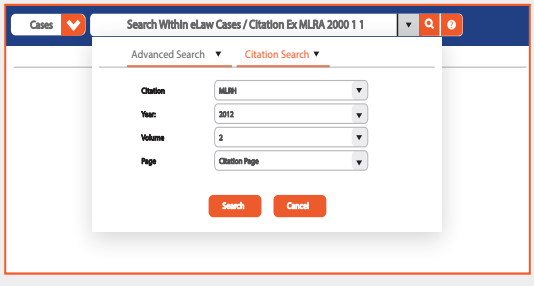

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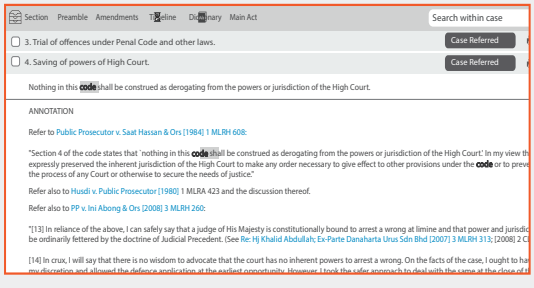

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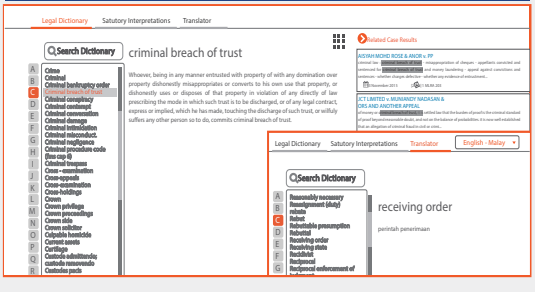

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