MELAWANGI SDN BHD

v.

TIOW WENG THEONG

Federal Court, Putrajaya
Rohana Yusuf PCA, Azahar Mohamed CJM, Mohd Zawawi Salleh, Abang Iskandar Abang Hashim, Idrus Harun FCJJ
[Civil Appeal No: 02(f)-10-02-2019(B)]
26 February 2020

Tort: *Defamation — Libel — E-mail containing allegedly defamatory statement – Whether defamation successfully proven — Legal effect or consequence of including e-mail in Part A of Agreed Bundle of Documents — Whether plaintiff agreed to place e-mail there — Whether any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon*

Civil Procedure: *Documents — Agreed bundle — E-mail containing allegedly defamatory statement — Legal effect or consequence of including e-mail in Part A of Agreed Bundle of Documents — Whether plaintiff agreed to place e-mail there*

Civil Procedure: *Pleadings — Defamation — Whether any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon*

The appellant/plaintiff sued the respondent/defendant for defamation. The plaintiff's cause of action in defamation was premised on two documents, namely: (i) a letter dated 25 June 2008 entitled "Complaint on the conduct of AGM on 8 April 2008 and request for EGM"; and (ii) an e-mail dated 13 October 2008 entitled "Amcorp Amended Letters" ("e-mail"). In the High Court, the Judicial Commissioner ("JC") held that the plaintiff had successfully proven on the balance of probabilities the three ingredients of defamation, ie that the words were defamatory, the words referred to the plaintiff and the words were published to third parties. The JC found that the plaintiff's pleaded case was not limited and confined to only one allegedly defamatory statement in the e-mail. The JC considered that the further allegedly defamatory statements were not derived from other publications but from the same e-mail and that the defendant would not suffer any prejudice because he was fully aware of the whole contents of the e-mail and was not caught by surprise. Consequently, the JC held that the defendant was liable for defamation in respect of the e-mail and allowed the plaintiff's claim. On appeal, the Court of Appeal took a contrary view and set aside the order of the High Court. Principally, the decision of the Court of Appeal was premised on the issue of the legal effect or consequence of including the e-mail in Part A of the Agreed Bundle of Documents. The Court of Appeal held that the High Court erred in law and fact when holding that document in Part A (in the instant case the e-mail) required proof of the

truth of the contents of the document. The Court of Appeal also found that any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon. Hence, the present appeal by the plaintiff.

Held (allowing the appellant/plaintiff's appeal with costs):

(1) The more closely this court looked at the notes of proceedings the more apparent it became that the principal error of the Court of Appeal was its finding that the plaintiff agreed to place the e-mail in Part A. There was failure on the part of the Court of Appeal to appreciate and consider that the plaintiff disputed the placing of the e-mail in Part A. This failure led the Court of Appeal into error. The Court of Appeal should have directed its mind to the true stand taken by the plaintiff at trial in relation to the placing of the e-mail in Part A. The Court of Appeal failed to accord the stand of the plaintiff the importance it deserved. The judgment of the Court of Appeal was therefore based upon a wrong premise of facts. That being the case, the underlying basis for the Court of Appeal to justify its appellate intervention was, with respect, wholly untenable. (para 32)

(2) The Court of Appeal, on the facts, also failed to take into account para 13 of the amended statement of claim. It was very important to understand the context in which para 13 was pleaded. The pleading must be looked at as a whole. Admittedly, the manner and style of the plaintiff's pleading might render itself open to criticism. Still, reading it as a whole and in its proper perspective, by paras 12 to 15 of the amended statement of claim, the plaintiff had specifically pleaded and referred to all the allegations made by the defendant through the e-mail and as such, the plaintiff's pleaded case was not limited and confined to only one alleged defamatory statement in the e-mail. The defendant was not caught off guard on this issue and was evidently not prejudiced. This court was not persuaded that the exercise of the JC's discretion in allowing the plaintiff to adduce further defamatory statements at trial was erroneous. In light of this, the error made by the Court of Appeal required intervention. (paras 38, 39, 41 & 42)

Case(s) referred to:

Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor [2017] 6 MLRA 281; [2017] 2 SSLR 433 (refd)

Noor Azman Azemi v. Zahida Mohamed Rafik [2019] 2 MLRA 259 (folld)

YB Menteri Sumber Manusia v. Association Of Bank Officers Peninsular Malaysia [1998] 1 MELR 30; [1998] 2 MLRA 376 (refd)

Legislation referred to:

Rules of Court 2012, O 34 r 2(c), (d), (e)

Counsel:

For the appellant: Dhanaraj Vasudevan (Devandra Balasingam with him); M/s Kamil Hashim Raj & Lim

For the respondent: Douglas Yee (Siew Choon Jern & Ong Chern Yii with him); M/s Douglas Yee

[For the Court of Appeal judgment, please refer to Tiow Weng Theong v. Melawangi Sdn Bhd [2018] 6 MLRA 52]

JUDGMENT

Azahar Mohamed CJM:

Introduction

[1] The appellant sued the respondent for defamation. The courts below came to different findings. The High Court after a full trial, allowed the appellant's claim. The Court of Appeal took a contrary view. The Court of Appeal set aside the order of the High Court. Aggrieved by the judgment of the Court of Appeal, the appellant applied for leave to appeal to the Federal Court. The appellant was granted leave to appeal on four questions of law. Hence, the present appeal before us, which in substance arose from the reversal by the Court of Appeal of the decision of the High Court. After hearing the parties, we adjourned the matter for our consideration. We now give our decision and the grounds for the same.

[2] We will describe the parties in this judgment as they appeared in the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

Background Facts

[3] The background facts are uncontroverted. We will only highlight in the following paragraphs the pertinent facts in so far as they are relevant to the issues that arise for our decision in this appeal.

[4] At all material times, the plaintiff is the developer of a piece of commercial property known as the Amcorp Trade Centre ("ATC"), which comprises the PJ Tower, Amcorp Tower, Melawangi Tower and Amcorp Mall in Petaling Jaya, Selangor.

[5] The defendant at the material time was a member of the Amcorp Trade Centre Owners and Tenant Association ("the Association"). His late wife purchased a unit in the Melawangi Tower.

[6] The plaintiff's cause of action in defamation is premised on two documents, namely:

(a) a letter dated 25 June 2008 entitled "Complaint on the conduct of AGM on 8 April 2008 and request for EGM" ("the letter"); and

(b) an e-mail dated 13 October 2008 entitled "Amcorp Amended Letters" ("the e-mail").

[7] The dispute between the parties arose this way. The plaintiff, pursuant to the statutory requirement under the Building and Common Property (Maintenance and Management) Act 2007 ("2007 Act"), carried out an Annual General Meeting ("AGM") on 8 April 2008 to elect office holders of the committee members of the Joint Management Body ("JMB").

[8] Apparently not every stakeholder was happy with the election results of the AGM. Not long after the AGM, the letter was published and distributed. At the same time, an official complaint was sent to the Majlis Bandaraya Petaling Jaya ("MBPJ") and the Commissioner of Buildings ("COB").

[9] A meeting was called by the COB pursuant to the aforesaid complaint and the COB, exercising his power under the 2007 Act, called for an Extraordinary General Meeting ("EGM") of the JMB on 19 October 2008.

[10] In the meantime, the plaintiff filed an application for judicial review in respect of the said decision to hold the EGM and on 16 October 2008, the Shah Alam High Court granted an injunction order for the postponement of the EGM until the decision on the application for judicial review is known.

[11] In view of the injunctive order, MBPJ cancelled the instruction to hold the EGM. It was during this period the e-mail was issued and distributed.

[12] Subsequently, the plaintiff commenced in the High Court the current action under appeal against the defendant in relation to a series of defamatory statements made by the defendant through the letter and the e-mail. To complete the facts, the plaintiff, amongst others, claimed the following:

(i) An injunction to prevent the defendant from further publishing or distributing similar defamatory statements;

(ii) The defendant publish a complete and unconditional retraction of the defamatory statements in two main newspapers, one in English and another in Bahasa Malaysia, within the terms and conditions agreed upon by the plaintiff's solicitors on behalf of the plaintiff;

(iii) General damages amounting to RM5,000,000.00 from the defendant, arising from the publication of the defamatory statements.

Decision Of The High Court

[13] The first point to note is that in the High Court, the learned Judicial Commissioner ('JC') found the defendant did not defame the plaintiff in the letter because there was no evidence that the defendant issued the letter and he denied doing so. However, the defendant did not deny sending the e-mail. Accordingly, the learned JC held that on a balance of probabilities, the defendant was the person who had sent the said e-mail.

[14] The learned JC further held that the defendant defamed the plaintiff in the e-mail. The learned JC found that the defendant in his e-mail made several allegations of the mismanagement of fund on the part of the plaintiff. Thus, it was held that the e-mail was libellous in that it imputed an utter failure on part of the plaintiff in managing the account at the expense of the owners of the units in ATC.

[15] The learned JC held that the plaintiff had successfully proven on the balance of probabilities the three ingredients of defamation; that the words were defamatory, the words referred to the plaintiff and the words were published to third parties.

[16] The defendant's defences were justification and qualified privilege. In analysing the defendant's defences, the learned JC found that the defendant was neither an owner nor the tenant of ATC. The connection between the plaintiff and the defendant was that the defendant's late wife was at one time the registered owner of one of the units in ATC.

[17] In relation to the defence of qualified privilege, the learned JC held that it must be on the existing duty on the part of the defendant. There was no nexus between the plaintiff and the defendant for the defendant to rely on the defence of qualified privilege. The learned JC further held that being the husband of the owner certainly did not accord him with such duty. The duty, according to the learned JC, was on his late wife, if any.

[18] Furthermore, the learned JC held that the publication of the e-mail was actuated by malice on the part of the defendant. Therefore the defendant could not rely on either justification or qualified privilege for his defence.

[19] Consequently, the learned JC held that the defendant was liable for defamation in respect of the e-mail. The plaintiff's claim was allowed and it was ordered the damages to be assessed.

Decision Of The Court Of Appeal

[20] The defendant appealed to the Court of Appeal. As we have indicated earlier, the Court of Appeal found in favour of the defendant in relation to the e-mail.

[21] The Court of Appeal took the view that the learned JC erred in law and fact when making a finding on the balance of probabilities that the defendant had defamed the plaintiff in the e-mail.

[22] Principally, the decision of the Court of Appeal was premised on the issue of the legal effect or consequence of including the e-mail in Part A of the Agreed Bundle of Documents. The Court of Appeal held that the High Court erred in law and fact when holding that document in Part A (in the instant case the e-mail dated 13 October 2008) required proof of the truth of the contents of the document. The Court of Appeal held that the emplacement of the e-mail in Part A resulted in the defence of justification being made out. In the words of the Court of Appeal:

> "[76] For the reasons cited above, we conclude that the learned judge erred in holding that the documents in Part A required proof of the truth of the contents of the documents. As we have concluded that no such proof is necessary. It follows that the defence of justification is made out. In other words, the categorisation of the e-mail in Part A effectively means that the contents are not in dispute or are agreed. As the contents are agreed to by the plaintiff, it effectively accepts what is stated in the e-mail. Agreeing and accepting the contents of the e-mail means that the plaintiff accepts the truth of the same. This in turn can only lead to the legal consequence that justification is made out."

The Question Of Law On Appeal To The Federal Court

[23] On 14 January 2019, the plaintiff obtained leave of the Federal Court to file the present appeal against the decision of the Court of Appeal based on the following questions:

> (1) Whether documents that are included in Part A of an agreed bundle of documents pursuant to O 34 r 2(d) of the Rules of Court 2012, which are then admitted and marked as evidence during trial mean that the authenticity and the truth of the contents of the documents have been agreed and accepted and/or cannot be challenged?
>
> (2) Whether O 34 r 2(c) - (e) of the Rules of Court 2012 are applicable to all causes of action?
>
> (3) Whether the defendant in a defamation action should be allowed to raise the issue in (1) above when parties have agreed that the truth of the contents of the said documents is an issue to be tried in the full trial?
>
> (4) Whether the defendant in a defamation action would be demolishing his own pleaded defence of justification by raising the issue that the impugned defamatory document should be placed in Part B of the agreed bundle of documents?

Our Decision

[24] In the memorandum of appeal (see pp C1-C4, Jilid 1 Bahagian A) and the written submissions, the plaintiff attacked the judgment of the Court of Appeal on a number of grounds. However, what turned out to be of critical importance in the course of the arguments before us is the factual question whether the plaintiff in the first place had agreed that the e-mail be emplaced in Part A of the Agreed Bundle of Documents.

[25] It is material to point out at this juncture that the Court of Appeal anchored its judgment on the primary ground that the plaintiff had agreed to place the e-mail in Part A of the Agreed Bundle of Documents. As we shall see later, this has a far-reaching implication. As a consequence, it was marked in the course of evidence without reservation and admitted into evidence. This is made clear by the following excerpt of the judgment of the Court Appeal:

> "[24] This is the primary ground of the appeal. It relates to the adjectival position in law in relation to the classification of documents into separate categories, now usually described in practice as Parts A, B and C. Of particular concern here is the meaning to be ascribed to, and the legal consequences of placing documents in Part A.
>
> [25] In this context, it is not in dispute that the litigating parties agreed to place the e-mail in Part A of the Agreed Bundle of Documents. As a consequence, it was marked in the course of evidence without reservation and admitted into evidence.
>
> [26] As it was so marked, learned counsel for the defendant maintained that it amounted in effect to the plaintiff admitting or conceding that:
>
> (i) The e-mail existed and was not therefore fabricated;
>
> (ii) The e-mail had been authored by the maker stated in the e-mail; and
>
> (iii) The plaintiff admitted that the contents of the documents were true.
>
> [27] It is the last of the three propositions that gave rise to serious dispute in this and other appeals. By admitting that the contents of the documents were true, there would effectively be a concession that the very statements that the plaintiff had challenged as being defamatory were in fact true. This in turn would have the legal consequence that the defence of justification had been proven or conceded to by the plaintiff. The plaintiff would therefore have no further basis for its claim in defamation."

Crucially, at another place of its judgment, the Court of Appeal observed:

> "[28] It is important to point out that the option was given to the plaintiff (through its counsel) to retract or remove the relevant document from the category known as Part A and for it to be placed in Part B during the course of the trial. However the plaintiff refused this offer and insisted on the e-mail remaining in Part A."

[26] Evidently, the judgment of the Court of Appeal implied that the plaintiff agreed to place the e-mail in Part A and that it was the plaintiff who insisted the e-mail to remain in Part A. This part of the judgment of the Court of Appeal is not free from difficulty. It raises serious problems. So, was the Court of Appeal correct in concluding that the litigating parties agreed to place the e-mail in Part A of the Agreed Bundle of Documents?

[27] In the circumstances, one of the key questions for us to determine is whether the plaintiff had agreed to place the e-mail in Part A of the Agreed Bundle of Documents.

[28] The answer to this factual question must be approached on the basis of what was precisely agreed to by the litigating parties. All this came out during the proceedings before the learned JC and meticulously recorded in the notes of proceedings that formed part of the Appeal Records ("AR"). At the hearing before us, in responding to the questions posed by us, learned counsel for the plaintiff took us through the relevant parts of the notes of proceedings to support his contention that the plaintiff never agreed to place the e-mail in Part A and that in truth the plaintiff wanted to remove the e-mail from Part A and to move it to Part B of the Agreed Bundle of Documents. On the basis of the factual matrix in the present case, in our opinion, this line of argument has merit.

[29] We therefore need to turn our attention to the notes of proceedings and look more closely and carefully scrutinise what actually transpired during the course of the High Court proceedings. To this end, we have read the AR in its entirety. In this regard, the relevant pages which have a strong bearing on the matter can be seen at pp 170-178 Jilid 2(2) Bahagian B of the AR. These relate to notes of proceedings at the start of the trial before the plaintiff called its witness. The relevant parts are set out below:

> "DNR (counsel for the plaintiff): ... we are now proposing the document in Part A to be moved to Part B. They are objecting. So I humbly request My Lord's ruling on that as to whether we may be permitted to move it to Part B because it has not start. The trial hasn't started. The witnesses are here. The maker of the document is also here. So if we are allowed to do that, My Lord, then I will humbly request for that to move to Part B.
>
> YA: Precisely what document?
>
> DNR: My Lord, the document at pp 78 to 79 in Ikatan Dokumen Bersama Bundle B. Page 78, My Lord.
>
> YA: An e-mail, right?
>
> DNR: Yes, My Lord."

[30] It must be noted that the e-mail referred to by the learned JC is the same e-mail that is the subject matter of the present appeal. Subsequently, after

hearing submissions from both sides, at p 177, the High Court made the following order:

> "YA: Pages 78 and 79 of Part A are maintained. But parties are allowed to cross-examine."

[31] In which ever way one were to look at it, it is not accurate to say that the litigating parties agreed to place the e-mail in Part A of the Agreed Bundle of Documents. More significant still, and most problematically, in our opinion, the observation of the Court of Appeal that the plaintiff "insisted on the e-mail remaining in Part A" is a mistaken reading of the true stand taken by the plaintiff through his counsel. The key point here is that, as we have seen earlier, the plaintiff all along wanted to remove the e-mail from the category known as Part A and for it to be placed in Part B. This is irrefutable.

[32] The more closely we looked at the notes of proceedings the more apparent it became that a principal error of the Court of Appeal was its finding that the plaintiff agreed to place the e-mail in Part A. There was failure on the part of the Court of Appeal to appreciate and consider that the plaintiff disputed the placing of the e-mail in Part A. This failure led the Court of Appeal into error. The Court of Appeal should have directed its mind to the true stand taken by the plaintiff at trial in relation to the placing of the e-mail in Part A. The Court of Appeal failed to accord the stand of the plaintiff the importance it deserved. The judgment of the Court of Appeal was therefore based upon a wrong premise of facts. That being the case, the underlying basis for the Court of Appeal to justify its appellate intervention was, with respect, wholly untenable. This is in itself sufficient to warrant appellate intervention on our part and dispose of the present appeal.

[33] However, as submitted by learned counsel for the plaintiff, the judgment of the Court of Appeal also dealt with the issue of adducing further allegedly defamatory statements at trial that were not pleaded in the amended statement of claim. Learned counsel in his submission argued that on the facts of the present case, the Court of Appeal had erred in law and fact in coming to the conclusion that the plaintiff could not lead evidence on allegedly defamatory statements at trial which had not been specifically pleaded.

[34] In resisting the submissions, learned counsel for the defendant made this point. He pointed out that none of the questions for which leave was granted relate to or deal with this issue. As such, this issue should not be raised in the present appeal.

[35] We have given our utmost considerations of the submissions of learned counsel for the defendant. In the circumstances of the present case, we do not agree. Like all general rules there are exceptions. As we have said in the recent case of *Noor Azman Azemi v. Zahida Mohamed Rafik* [2019] 2 MLRA 259 as a matter of broad general principle, a party is not precluded from raising a new issue in an appeal because this court has the power and therefore the

discretion to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *YB Menteri Sumber Manusia v. Association Of Bank Officers Peninsular Malaysia* [1998] 1 MELR 30; [1998] 2 MLRA 376 and *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2017] 6 MLRA 281; [2017] 2 SSLR 433). We must add here that the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to achieve the ends of justice. It has to be performed with care after giving serious considerations to the interests of all parties concerned.

[36] In our judgment, after taking into consideration all the circumstances of the case, in order to achieve the ends of justice, it is essential that we deal with the issue of adducing further allegedly defamatory statements at trial raised by the counsel for the plaintiff.

[37] In its statement of claim, the plaintiff specifically pleaded "The developer presented an account that showed an unusually huge loss of RM10.8 million which was considered unreasonable by the COB ...". During the trial, the plaintiffs sole witness averred in the witness statement that four other statements in the e-mail are defamatory of the plaintiff. The learned JC held that the plaintiff's pleaded case is not limited and confined to only one allegedly defamatory statement in the said e-mail. The learned JC considered that the further allegedly defamatory statements were not derived from other publications but from the same e-mail and that the defendant would not suffer any prejudice because he is fully aware of the whole contents of the e-mail and was not caught by surprise. One could see the force of the learned JC's reasoning. The Court of Appeal, however, thought otherwise. According to the Court of Appeal any other defamatory statements other than that specifically pleaded ought not to be considered or adjudicated upon.

[38] Here we get to the key point. In our judgment, the Court of Appeal failed to take into account para 13 of the amended statement of claim at p 109 of Jilid 2(1) Bahagian B of AR that states:

> "13. The plaintiff pleads that all the allegations made by the defendant through the said E-mail are merely allegations made without evidence and negative prejudice whereby they were only made to poison the minds of the unit owners and voters for the purpose of gaining their support."

[39] It is very important to understand the context in which para 13 is pleaded. The pleading must be looked at as a whole. Admittedly, the manner and style of the plaintiff's pleading may render itself open to criticism. Still, reading it as a whole and in its proper perspective, in our judgment, by paras 12 to 15 of the amended statement of claim, the plaintiff has specifically pleaded and referred to all the allegations made by the defendant through the e-mail and as such the plaintiff's pleaded case is not limited and confined to only one alleged defamatory statement in the e-mail.

[40] What's more, during cross-examination of the defendant at trial, the issue of "additional alleged defamatory statements", was raised and the relevant part of which is set out below:

"DNR: Now, My Lord, I would like to take him to para 13 of the Statement of Claim.

YA: Paragraph?

DM: 13, My lord. Much obliged. Please read para 13 at p 14 to this Honourable Court.

TIOW: Page 14. The Plaintiff pleads that all the allegation made by Defendant through the said e-mail are merely allegation made without evidence and negative prejudice whereby they were only made to poison the minds of the unit owners and voters for the purpose of gaining their supports.

DNR: Ok. Mr Tiow. Do you confirm that the plaintiff pleads that all the allegations made by you through the said e-mail are mere allegations? Those words are there, right Mr Tiow?

TIOW: Yes

DNR: Ok. Thank you.

DGY: I'm sorry, My Lord, I didn't record that. My Lord read out what the question. All the allegations in the e-mail are mere allegations, is it?

DNR: Yes

DGY: Thank you. My Lord.

DNR: So, I put it to you, the plaintiff has stated that everything that you have said in your e-mail as per para 13 of the Statement of Claim is done by you maliciously, recklessly and thus, it is defamatory, because you don't have anything in this Court to substantiate any of these allegations made by you. Agree, disagree?

TIOW: Disagree

YA: This e-mail at p 78

YA: ...has been pleaded, right?

DNR: Yes.

YA: So, the question of not been pleaded doesn't arise."

[41] It can be seen from the above that in point of fact it could not be said the defendant was caught off guard on this issue. The defendant was evidently not prejudiced. We are not persuaded that the exercise of the learned JC's discretion in allowing the plaintiff to adduce further defamatory statements at trial was erroneous.

[42] In light of the above, the error made by the Court of Appeal required us to intervene.

Conclusion

[43] In consequence and in view of all the above and in the circumstances of this case, we find it unnecessary to answer the posed questions of law. We would prefer to leave the resolution of the questions to a case where the questions must necessarily be determined.

[44] The result is that we allow the appeal with costs by setting aside the orders of the Court of Appeal. We hereby restore the order of the High Court.

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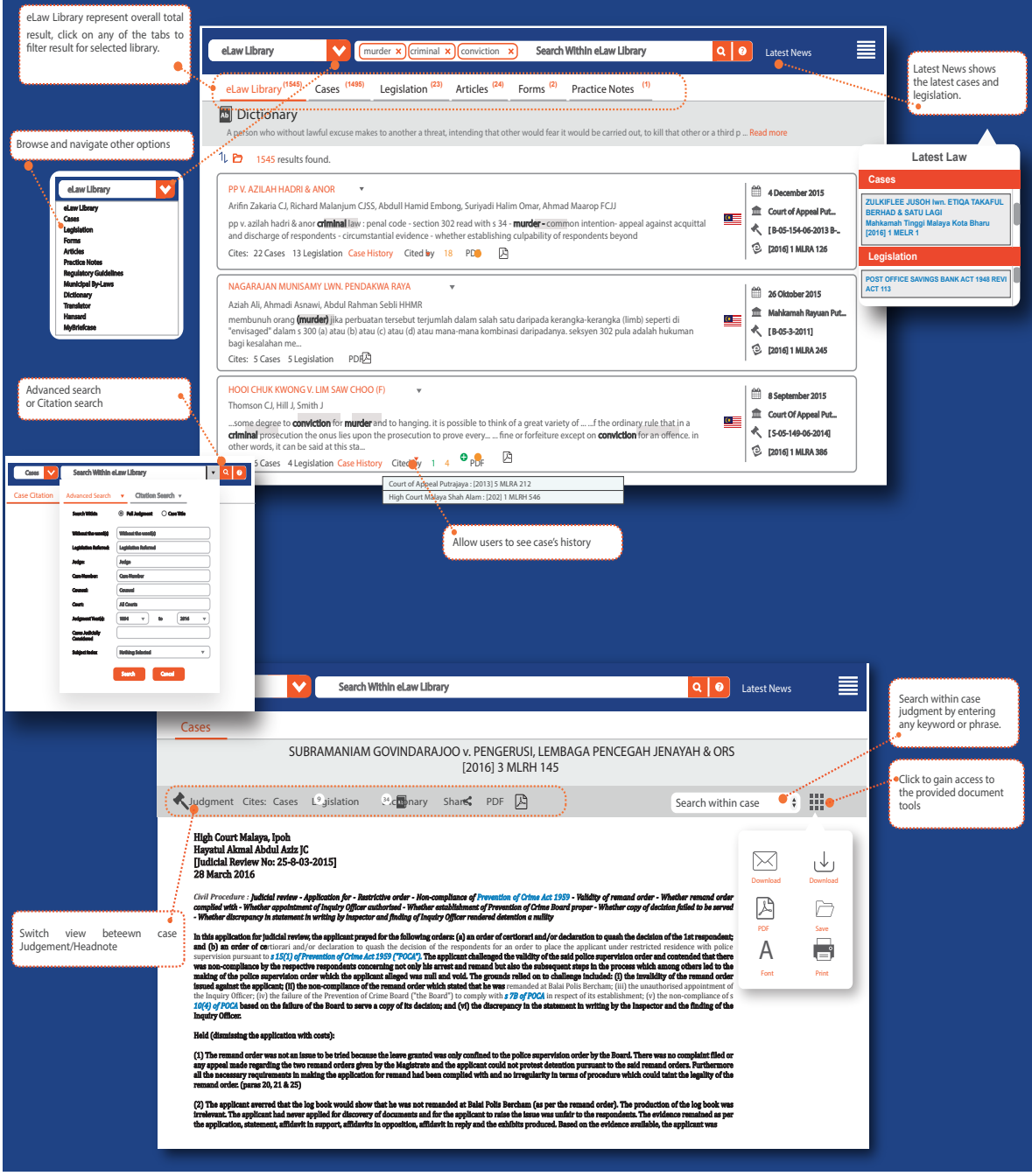

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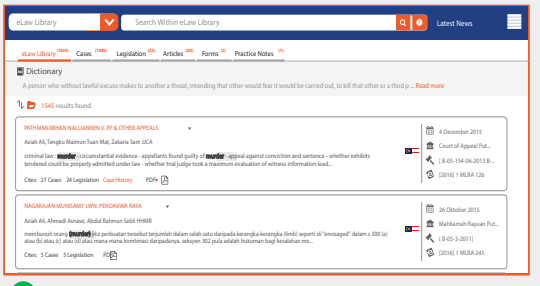

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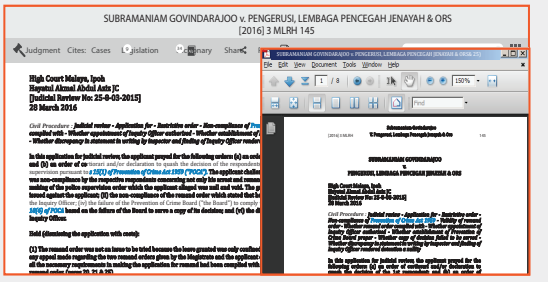

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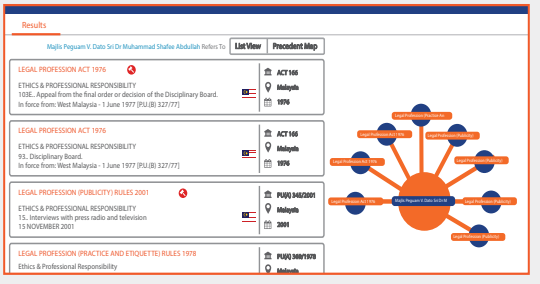

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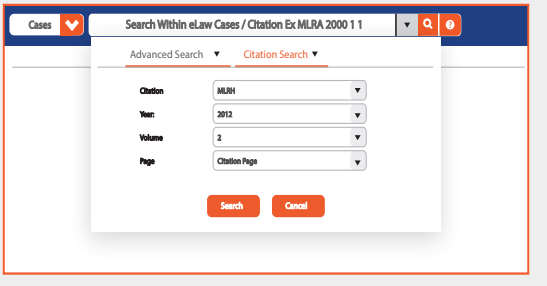

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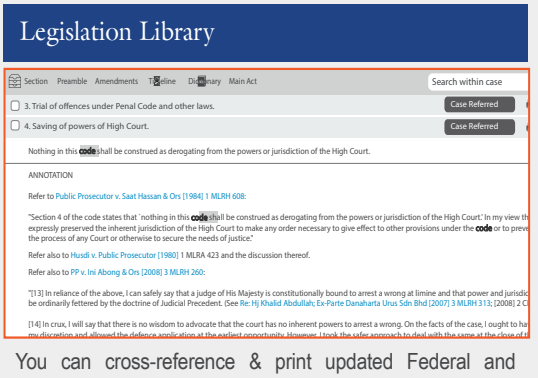

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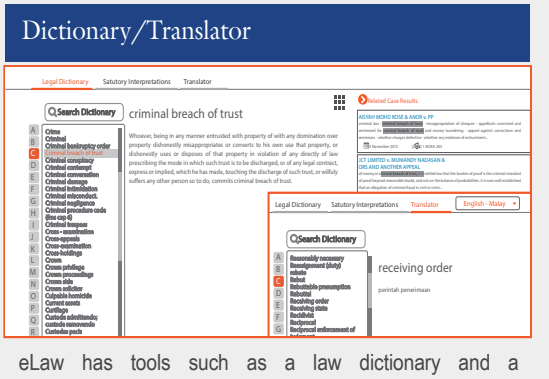

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