DR H K FONG BRAINBUILDER PTE LTD

v.

SG-MATHS SDN BHD & ORS

Court of Appeal, Putrajaya
Kamardin Hashim, Kamaludin Md Said, Lau Bee Lan JJCA
[Civil Appeal No: W-02(IPCV)(W)-367-02-2018]
13 August 2020

Contract: *Franchises — Franchisors — Registration of franchisors — Whether foreign franchisor obliged to register franchise — Whether non-registration of franchise by foreign franchisor would render franchise void and unenforceable — Whether franchisee obliged to register foreign franchise — Franchise Act 1998, ss 6, 6A*

Contract: *Void contract — Franchise — Franchise agreement not registered — Whether franchise void — Whether guarantee and power of attorney executed in furtherance and of the franchise agreement also void — Whether all three documents formed a single composite agreement*

Statutory Interpretation: *Construction of statutes — Aids to construction — Long title to statute — Parliamentary debates — Whether proper aids to construction of statutes*

Statutory Interpretation: *Construction of statutes — Purposive approach — Material provisions in Franchise Act 1998 — Whether purposive approach justified*

The appellant/plaintiff was a company incorporated in Singapore by one Dr FHK – a Singaporean – who had developed a method of teaching mathematics ("the Method"). Through a second Singapore incorporated company – DFB – Dr FHK executed a Master Licence Agreement dated 18 December 2013 ("the MLA 2013"), a Guarantee and Power of Attorney ("the three Documents") to allow the 1st respondent/defendant to *inter alia*, operate and manage a teaching business utilising the Method in Malaysia. The plaintiff claimed in the High Court that the 1st defendant had breached the provisions of the MLA 2013 and failed to comply with the MLA 2013 post-termination provisions. The plaintiff thus applied *inter alia*, for injunctive and other relief to restrain the defendants from disclosing the plaintiff's confidential information and business techniques and to return all material related to the business to the plaintiff. The defendants opposed the plaintiff's claims. The 1st to 3rd respondents/defendants counterclaimed for *inter alia*, a declaration that the MLA 2013 and Guarantee were invalid and for a refund of all moneys paid by the 1st defendant to the plaintiff. The High Court dismissed the plaintiff's claim and the 1st to 3rd defendants' counterclaim. The High Court held *inter alia*, that the MLA 2013 was a franchise under the Franchise Act 1998 ("FA 1998") and since the plaintiff had never registered the franchise under the FA 1998, it was illegal and

void under the Contracts Act 1950 ("CA 1950") and was unenforceable against the 1st to 3rd defendants. Further, since the MLA 2013 was illegal and void, the Personal Guarantee of the 1st to 3rd defendants given to the plaintiff and the Power of Attorney were also illegal, void and unenforceable. The plaintiff appealed against the dismissal of its claim and the 1st to 3rd defendants cross-appealed against the decision of the High Court refusing to order restitution of moneys paid by the 1st defendant.

Held (unanimously dismissing the appellant/plaintiff's appeal; and dismissing the defendants/respondents' cross-appeal):

(1) The judge was correct in adopting the purposive approach in the interpretation of the material provisions in the FA 1998. The judge's reliance on the purposive approach was justified by: (i) his finding that ss 6, 6A and 68 FA 1998 had been introduced by Act A 1442 with effect from 1 January 2013, and Part 1 of the Interpretation Acts 1948 and 1967 (by virtue of s 2(1)(a) and in particular s 17A) applied to interpret the FA 1998; and (ii) his reliance on *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd*. (paras 17-19)

(2) The Court of Appeal would not disagree that reference to the long title of a statute and Parliamentary debates could be aids to the construction of a statute. Neither could the Court of Appeal disagree with the principle of *expressio unius est exclusio alterius*. The court however was not able to accept the plaintiff's submission as to why legislature did not intend to compel foreign franchisors to be registered. The Court of Appeal would agree with the High Court's findings that the business was a franchise under s 4(a), (b), (c) and (e) FA 1998 and that the purposive construction was supported. (paras 21-22)

(3) On whether the "Buku Panduan" published by the Ministry of Domestic Trade and Consumer Affairs had the force of law, the Franchise (Forms And Fees) Regulations (PU(A) 422 of 1999) was the only Regulations made by the Minister pursuant to s 60 FA 1998. Thus, the plaintiff's submission that the Buku Panduan was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 FA 1998 was misconceived. The Buku Panduan had not been issued pursuant to any enabling provision under the FA 1998 for it to have the force of law. It was thus unnecessary to refer to the Buku Panduan. (paras 26, 28 & 29)

(4) The plaintiff's submissions on the validity of the MLA 2013 were untenable in light of the Court of Appeal's finding that s 6(1) FA1998 applied to a foreign franchisor. The judge did not err in relying on case law for the principle that registration of a franchise was imperative and non-registration of the same would render the franchise agreement void and unenforceable. Even if the 1st defendant failed to register the business under s 6A(1) FA1998, the plaintiff could have exercised the power granted by the 1st defendant to the plaintiff under the Power of Attorney, to register under s 6A(1) FA 1998. (para 38)

(5) The three Documents formed a single composite transaction and thus the illegality of the MLA 2013 would consequently taint the Guarantee and the Power of Attorney. The Guarantee and Power of Attorney would likewise be void in their entirety under s 24(a) or (b) CA 1950. In the instant case, the judge had correctly found the two breaches (the failures of the plaintiff and 1st defendant to register the franchise and business under the FA 1998) had rendered the MLA 2013 void in its entirety under s 24(a) and (b) CA 1950. (paras 43, 44, 45 & 47)

(6) The plaintiff had failed to prove a cause of action in unjust enrichment as the plaintiff did not plead in its Statement of Claim that the 1st to 3rd defendants had been unjustly enriched at the plaintiff's expense. (paras 49-50)

(7) Since the three Documents were void, s 66 CA 1950 ought to be considered for the determination of any remedy available to the plaintiff. In this regard, the High Court Judge had proffered reasons why he was unable to invoke s 66 CA 1950. (paras 62-63)

(8) In their Notice of Appeal, the defendants sought a refund of the moneys paid to the plaintiff as part of the relief claimed. However, the refund was part of the relief which the 1st to 3rd defendants sought in prayer 4 of their counterclaim. Since what the 1st to 3rd defendants sought to vary was a substantive finding of the court which relief was part of the counterclaim dismissed by the High Court, the defendants ought to have filed a Notice of Appeal against the dismissal of the counterclaim and not seeking to vary the decision of the High Court. (paras 66, 68 & 69)

(9) The Court of Appeal was not minded to allow the defendants to raise the dismissal of their counterclaim through the Notice of Cross-Appeal as to do so was tantamount to allowing them to seek relief through the backdoor and would result in deprivation of relevant praecipe to the Government. Further, the 4th to 6th respondents/defendants had no basis to raise the allegation in the Notice of Cross-Appeal as they were not privy or parties to the MLA 2013. (paras 69-70)

(10) There could also be no variation on the issue of cost since there was no basis to sustain the first ground and the second ground had been abandoned by the defendants. Also, since the issue of cost did not arise in the Notice of Appeal dated 15 February 2018 filed by the plaintiff, the defendants ought to have filed the appeal against the decision of the Judge for not granting cost to the defendants instead of seeking the same through the Notice of Cross-Appeal. If the defendants sought to only appeal against the decision of the Judge on cost, then they ought to have first obtained leave of the court pursuant to s 68(1)(c) of the Courts of Judicature Act 1964 ('CJA'). Where no such leave was obtained, the appeal would fail *in limine*. (paras 71-72)

(11) In the instant case, there were no appealable errors committed by the Judge which warranted appellate intervention. (para 73)

Case(s) referred to:

Barisan Tenaga Perancang (M) Sdn Bhd v. Dr Mansur Hussain & Ors [2017] 2 MLRH 177 (refd)

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 MLRA 20 (refd)

David Hey v. New Kok Ann Realty Sdn Bhd [1984] 1 MLRA 726 (refd)

Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1) [2000] 1 MLRH 356 (refd)

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 MLRA 247 (refd)

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 1 MLRA 116 (folld)

Edwin Thomas v. F&N Beverages Marketing Sdn Bhd & Anor [2017] 2 MLRH 629 (distd)

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 MLRA 52(refd)

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 2 MLRA 1 (refd)

Hamath Kaur v. Inder Singh [1922] LR 50, IA 69 (refd)

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 6 MLRA 373 (distd)

Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850 (refd)

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1996] 2 MLRA 194 (refd)

Lai Soon Onn v. Chew Fei Meng & Other Appeals [2018] 6 MLRA 633 (refd)

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 1 MLRA 95 (refd)

Lim Seng Kiat & Anor v. Jee Hing Lim & Anor [2015] MLRHU 992 (refd)

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2018] MLRAU 484 (distd)

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 1 MLRA 274 (folld)

Malayan Banking Berhad v. Neway Development Sdn Bhd & Ors [2017] 5 MLRA 277; [2017] 2 SSLR 113 (folld)

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 5 MLRA 377 (refd)

Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan [2018] 2 SSLR 201 (distd)

Northman v. Barnet Council [1978] 1 WLR 221 (refd)

Ooi Soon Eng v. Ng Kee Lin [1979] 1 MLRA 321 (distd)

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 1 MLRA 137 (refd)

Pang Mun Chung & Anor v. Cheong Huey Charn [2019] 1 MLRA 486 (distd)

Patel v. Mirza [2017] 1 All ER 19 (refd)

Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission Of Malaysia) v. See Chee How & Anor [2015] 6 MLRA 353 (distd)

PP v. Yap Min Woie [1995] 2 MLRA 91 (refd)

Rimba Muda Timber Trading v. Lim Kuoh Wee [2006] 2 MLRA 25 (refd)

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 1 MLRA 332 (refd)

SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd [2010] 16 MLRH 537 (refd)

Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 4 MLRA 11 (distd)

Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor [2015] MLRHU 893 (refd)

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 2 MLRA 668 (refd)

Legislation referred to:

Contracts Act 1950, ss 24(a), (b), 66, 71

Courts of Judicature Act 1964, s 68(1)(c)

Franchise Act 1998, ss 4(a), (b), (c), (e), 6(1) , 6A, 6B, 7, 14(2), 41, 60

Industrial Relations Act 1967, s 28

Interpretation Acts 1948 and 1967, ss 2(1)(a), 17A

Labuan Financial Services Authority Act 1996, s 4A

National Land Code, s 340(2)

Pool Betting Act 1967, s 21

Rules of the Court of Appeal 1994, r 8(1), (3), First Schedule

Other(s) referred to:

Visu Sinnadurai, *Law of Contract*, 4th edn, p 267, para 4.56

Counsel:

For the appellant: Joy Appukuttan (Kelvynn Foo Wai Tzen with him); M/s KH Lim & Co

For the respondents: Kok Pok Chin (Ong Hong Keit, Marcus Chong with him); M/s PC Kok & Co

[For the High Court judgment, please refer to Dr H K Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors [2018] MLRHU 578]

JUDGMENT

Lau Bee Lan JCA:

Introduction

[1] This is an appeal by the appellant against the decision of the learned Judicial Commissioner ('Judge') made on 19 January 2018 dismissing the appellant's claim with no order as to costs and dismissing the Counterclaim of the 1st to 3rd respondents with no order as to costs.

[2] The 1st to 3rd respondents filed a cross-appeal dated 20 April 2018 against the said High Court's decision in relation to the High Court's refusal to order restitution of the monies paid by the 1st respondent to the appellant under the illegal MLA 2013.

[3] We shall for easy reference refer to the parties as they were in the court below.

Brief Facts

[4] The plaintiff, Dr H K Fong Brainbuilder Pte Ltd is a company incorporated in Singapore by Dr Fong Ho Keong ('Dr Fong'), a Singaporean citizen. Dr Fong claims to have developed 'Dr Fong's Method' of teaching mathematics to students in primary and secondary schools. The 2nd and 3rd defendants were Dr Fong's best friends for 55 years and interested in the business. Pursuant to that, the 1st defendant was established; the 2nd and 3rd defendants owned 85% of the 1st defendant while Dr Fong owned the remaining 15%.

[5] There is another company called Dr Fong BrainBuilder Pte Ltd ('DFB') which was owned by Dr Fong as well. DFB entered into a Master License Agreement with the 1st defendant on 26 February 2008 ('MLA 2008') which expired on 30 June 2012. On 18 December 2013, another MLA, ('MLA 2013'), a Guarantee and Power of Attorney were executed ('the 3 Documents'). The MLA 2013 allows the 1st defendant to, among others, operate and manage the 'BrainBuilder' business (a business to teach mathematics to students) ('BrainBuilder Business') in Malaysia.

[6] The 4th defendant is the 2nd defendant's daughter and former employee of the 1st defendant. The plaintiff alleged the 4th defendant had taken over a registered business called "Pusat Latihan Perkembangan Kaji Kreatif ('PLPKK') from the 2nd and 3rd defendants. The 2nd and 3rd defendants established the 5th and 6th defendants.

[7] The plaintiff claimed that: (i) 1st defendant had breached the MLA 2013 by awarding a sub-license to En Suhaimi bin Ramly to operate a franchise in Setapak; and (ii) PLPKK and the 5th and 6th defendants are competing businesses with the BrainBuilder Business and had used Dr Fong's Method which is the plaintiff's confidential information. The plaintiff then terminated the MLA 2013 on 8 October 2015. The 1st defendant did not comply with the post-termination provisions in the MLA 2013 to enable the plaintiff to take over the 1st defendant's BB centres, ie BrainBuilder Business centres operated by the 1st defendant to teach Mathematics using Dr Fong's Method.

[8] The plaintiff prayed, among others, (i) that the 2nd to 6th defendants be restrained from dealing with the 1st defendant's customers and from disclosing the plaintiff's confidential information and other business techniques; (ii) that the 2nd to 6th defendants be compelled to cease all business that are in competition with the plaintiff; (iii) for the return of all materials resembling

the BrainBuilder Business to the plaintiff; (iv) for an injunction to restrain the defendants from destroying, among others, the 1st defendant's business details; (v) that 1st to 3rd defendants provide a complete business account derived by the 1st defendant arising from the BrainBuilder Business; (vi) that the Receiver be appointed over the 1st, 4th, 5th and 6th defendants; (vii) that general, aggravated and exemplary damages be payable by the defendants jointly and severally; (viii) that the 1st, 2nd and 3rd defendants make restitution to the plaintiff for loss and damage; and (ix) costs and interest be payable to the plaintiff.

[9] The defendants asserted: that Dr Fong's Method is based on Singapore's Mathematics Syllabus ('Singapore Maths') owned by the Singapore Government and that Singapore Maths has been taught by many tuition and learning centres in Malaysia; they were misled by the plaintiff to believe that the plaintiff owned the Singapore Maths method; the termination was a disguise for the plaintiff's assistance to take over the 1st defendant without paying the agreed RM2.5 million to the 2nd and 3rd defendants; the 4th defendant resigned after the termination took place; PLPKK has no business; and the 5th and 6th defendants did not operate the Mathematics tuition centres.

[10] The 1st to 3rd defendants counterclaimed against the plaintiff for a declaration that the MLA 2013 and the Guarantee are invalid; refund of all moneys paid by the 1st defendant to the plaintiff and damages to be assessed.

[11] At the High Court, the plaintiff's claim and the 1st to 3rd defendants' counterclaim were dismissed with no order as to costs. The security for costs furnished by the plaintiff was refunded.

Decision Of The High Court

[12] Essentially the findings of the learned judge are:

(a) The learned Judge has found as a matter of fact: (i) the plaintiff's witnesses are reliable; (ii) the defendants' witnesses are unreliable; (iii) the 1st to 3rd defendants have breached the MLA 2013 (on the assumption that the 3 Documents are valid, ie this court reverses the High Court's decision that the 3 Documents are void).

(b) The MLA 2013 is a franchise under the Franchise Act 1998 ('FA 1998'). The plaintiff has breached s 6(1) FA 1998 and the 1st defendant has breached s 6A(1) FA 1998. Since the franchise was never registered by the plaintiff under the FA 1998, it is illegal and void under the Contracts Act 1950 ('CA 1950') and is unenforceable against the 1st to 3rd defendants.

(c) As the MLA 2013 is illegal and void the Personal Guarantee of 1st to 3rd defendants given by them to the plaintiff and the Power of Attorney by reason of the illegal MLA 2013 is also illegal, void and unenforceable.

(d) Section 66 and 71 CA 1950 cannot be applied and/or invoked.

(e) The plaintiff did not plead and tender evidence for the doctrine of unjust enrichment.

(f) On the assumption that the MLA 2013, the Guarantee and the Power of Attorney are valid, the 1st to 3rd defendants are held to be liable to the plaintiff for breaches of the MLA 2013 and the 2nd and 3rd defendants are held liable to the plaintiff under the Guarantee.

(g) The plaintiff failed to establish the cause of action of conspiracy to defraud and breach of confidence against the 2nd to 6th defendants.

Our Decision

I. Main Appeal

A. Interpretation Of The FA 1998

MLA 2013 Is A Franchise

[13] At the High Court the plaintiff argued that the MLA 2013 is not a franchise but a licence. However based on the Memorandum of Appeal, the plaintiff appeared to have accepted the MLA 2013 is a "franchise". Be that as it may, for completeness, we shall deal with the learned judge's finding on why the FA 1998 apply to the MLA 2013.

[14] His Lordship took cognisance that the MLA 2013 does not use the word "franchise" but relied on *Barisan Tenaga Perancang (M) Sdn Bhd v. Dr Mansur Hussain & Ors* [2017] 2 MLRH 177 at para 39 (decision was affirmed by this court) in that the court is not bound by label or description given by parties to the MLA 2013. The learned Judge held that the MLA 2013 is a franchise under the FA 1998 and therefore the FA 1998 applies to MLA 2013 for the following reasons:

(1) "Franchise" under s 4 of the FA 1998 means a contract or an agreement, expressed or implied, whether oral or written, between two or more persons by which all the 4 cumulative conditions of a "franchise" stipulated in s 4(a), (b), (c) and (e) FA 1998 are fulfilled in the MLA 2013 ('4 Prerequisites'). They are:

"(a) **the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor**;

(b) **the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor,**

and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit the franchisee to use the intellectual property;

(c) **the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system; and**

(d) [Deleted by Franchise (Amendment) Act 2012 (**Act A 1442**)]

(e) **in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration**.

(f) [Deleted by Act A 1442]."

[Emphasis Added]

(2) the unrebutted oral evidence of the 2nd and 3rd defendants regarding the operation of the 1st defendant's BrainBuilder Business proves that such a business fulfils all the 4 Prerequisites;

(3) clauses 11.2, 11.9, 13.1 and 23.2 of the MLA2013 state that the 1st defendant shall comply with manuals. The plaintiff has provided the 1st defendant with a "Franchise Operations Manual" ('FONT') to operate the BrainBuilder Business;

(4) Dr Fong and the plaintiff (whose *alter ego* is Dr Fong) have actual knowledge of the fact that the MLA 2013 is a franchise agreement based on the following evidence:

(a) Dr Fong's email dated 11 April 2013 to the 2nd defendant referred to the 1st defendant as a Master Franchisee;

(b) Ms Anne Hooi Yoke Ling ('Ms Hooi') was the plaintiff's solicitor who drafted MLA 2008 and the three Documents. During cross-examination, Dr Fong admitted that he had been advised by Ms Hooi by way of an email dated 24 December 2013 to register the BrainBuilder Business as a franchise but he did not act on that advice. The learned Judge attached great weight to Miss Hooi's email which was sent to Dr Fong only sixs days after the execution of the 3 Documents on 18 December 2013;

(c) Dr Fong explained during re-examination that the 1st defendant had been given the "task" to register BrainBuilder Business as a franchise; and

(d) Counsel for the plaintiff cross-examined the 3rd defendant regarding Dr Fong requesting him to look into the issue of franchise way back in December 2013 and he disagreed with

the proposition that he was concerned that Bumiputera quota in the 1st defendant will be implemented.

Whether Section 6 FA 1998 Applies To The Plaintiff?

[15] Returning to the mainstream, we shall now touch on the primary grounds of appeal canvassed by the plaintiff. First, the plaintiff took issue with the purposive approach applied by the learned judge in ascribing a wide interpretation to the word "franchisor" in s 4 FA 1998 to include "foreign franchisor" and on the other hand applied the literal approach to construe s 6 FA 1998 to warrant the plaintiff to register. The plaintiff submits the function of the Court is not to add words into the statute but to give the words of the statute its ordinary and natural meaning citing *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 MLRA 52 and *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1996] 2 MLRA 194 (FC).

[16] With respect we find there is no merit in the plaintiff's aforesaid submission. For ease of comprehension the relevant parts of ss 6, 6A and 6B FA 1998 are reproduced below:

> **"Registration of franchisor**
>
> Section 6(1). **A franchisor shall register his franchise with the Registrar before he can operate a franchise business** or make an offer to sell the franchise to any person.
>
> (2) **Any franchisor who fails to comply with this section, unless exempted by the Minister under s 58, commits an offence and shall, on conviction, be liable:**
>
> (a) **If such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;**
>
> ...
>
> **Registration of franchisee of foreign franchisor**
>
> Section 6A(1). **Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval.**
>
> **Registration Of Franchisee**
>
> Section 6B. **A franchisee who has been granted a franchise from a local franchisor or local master franchisee shall register the franchise with the Registrar** by using the prescribed registration form within fourteen days from the date of signing of the agreement between the franchisor and franchisee."
>
> [Emphasis Added]

[17] We accept the principles governing the interpretation of a statute propounded in *Foo Loke Ying* (*supra*) and *Krishnadas Achutan Nair (supra)*. However in the context of the appeals before us, we are of the view that the learned judge was correct in adopting the purposive approach in the interpretation of the material provisions in the FA 1998 for the reasons which follow.

[18] His Lordship's purposive approach is justified by the fact of:

(a) his finding that "ss 6, 6A and 6B FA have been introduced by Act A1442 with effect from 1 January 2013, [P]art 1 of the Interpretation Acts 1948 and 1967 (IA), [by virtue of s 2(1)(a) IA and in particular s 17A of IA] applies to interpret FA"; and

(b) his reliance on *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 1 MLRA 137 that "In accordance with s 17A IA, this court gives a purposive interpretation of ss 6, 6A and 7 FA" which is "[as] intended by Parliament through Act A1442 [for] all franchises, local and foreign, to be registered with the Registrar (Purposive Construction)".

[19] Contrary to the plaintiff's submission that the learned judge's reliance on *Palm Oil Research (supra)* is misplaced since the case is premised on the interpretation of tax law, with respect we are of the view that the said case is of assistance for the principle that the Federal Court applied s 17A IA to give a purposive construction of *albeit* a tax statute. This is bolstered by the case of *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 1 MLRA 116, wherein the Federal Court held "This purposive approach has now been given statutory recognition by our Parliament enacting s 17A in the Interpretation Acts 1948 and 1967 (Act 388)... [and] [i]n view of the statutory recognition we can and should adopt a purposive approach in the interpretation of "Ruler" for the purposes of arts 181, 182 and 183 [of the Federal Constitution]" (per Haidar Mohd Noor FCJ (as he then was)).

[20] Learned counsel for the plaintiff argues that s 6 FA 1998 does not apply to the plaintiff, a foreign franchisor for the following reasons:

(a) The FA 1998 should be viewed as a whole wherein it makes specific reference to "foreign franchisor" in s 6 FA 1998.

(b) The word "foreign" does not appear in the word "franchisor" in s 6 FA 1998.

(c) Section 4 FA 1998 and the "Buku Panduan" published in the Official Portal of the Ministry of Domestic Trade and Consumer Affairs defines "franchisor" as to include a master franchisee and

not a foreign franchisor. We shall address the issue of whether the "Buku Panduan" has the force of law hereafter.

(d) It is a principle of interpretation of statute that where the legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be the legislature's intention to disparate inclusion or exclusion, citing the case of this court in *Lai Soon Onn v. Chew Fei Meng & Other Appeals* [2018] 6 MLRA 633.

(e) Premised on the Parliamentary Debates, the FA 1998 was amended by Act A1442 that included s 6A where the words "foreign franchisor" were introduced. However there were no amendments to s 4 FA 1998 on the definition of "franchisor" or to s 6 FA 1998 to add the words "foreign franchisor". Hence the legislature did not intend to compel foreign franchisors to be registered.

(f) The long title to the FA 1998 relied on by the learned Judge to mean the Act is to provide registration must be the registration of local franchisor, local master franchisee and local franchisee.

(g) The principle of *expressio unius est exclusio alterius* applies wherein the express mention of "foreign franchisor" in s 6 FA 1998 and its exclusion from s 6 FA 1998 implies the legislature's deliberate intention of omission in the latter section citing *Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1)* [2000] 1 MLRH 356 (HC).

[21] We do not disagree with the fact that reference to the long title of a statute as the learned judge did in following *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 MLRA 20 when the Federal Court "referred to the preamble to the Pengurusan Danaharta Nasional Berhad Act 1998 to ascertain the object of that statute" and Parliamentary Debates can be an aid to the construction of a statute as acknowledged by the learned judge premised on *Danaharta Urus (supra)*. Neither do we disagree with the principle of *expressio unius est exclusio alterius*. However with respect we are unable to accept the submission of the plaintiff in deducing why the legislature did not intend to compel foreign franchisors to be registered.

[22] We agree with the findings of the learned judge that the BrainBuilder Business "is a "franchise" under s 4(a), (b), (c) and (e) FA". Further the Purposive Construction alluded in para 19(b) above is supported by:

(a) the long title of FA 1998 which states "to provide for the registration is of ... franchises";

(b) Parliamentary Debates with respect to the passing of Act A1442 on 17 July 2012 wherein the learned Judge stated the objectives

of the requirement to register franchises on the part of franchisors and franchisees are as follows:

> "(i) to enable the Registrar to supervise the development of the franchise industry in this country;
>
> (ii) to protect franchisees from being defrauded;
>
> (iii) to encourage entrepreneurs to participate in the franchise industry; and
>
> (iv) to attract foreign investors to invest in our Malaysian franchise industry."

(c) the wide definition of "franchisor" in s 4 FA to mean a person who grants a franchise to a franchisee and includes a master franchisee with regard to his relationship with a subfranchisee, unless stated otherwise in this Act; and

(d) the learned judge took cognisance of the fact that to concede to the submission of the plaintiff that s 6(1) FA applies only to local "franchisors" will result in two scenarios:

> "(a) this **will create an absurdity** wherein local franchisors have to register their franchises with the Registrar under s 6(1) FA but foreign franchisors are exempted from such a requirement. Under s 58 FA, only the "Minister" (defined in s 4 FA as the Minister for the time being charged with the responsibility for matters relating to franchises) may exempt a franchisor, local and foreign, from the requirement of registration under s 6(1) FA; and
>
> (b) this **will create an injustice** to franchisees of foreign franchises [as compared to franchisees of local franchises which are required to be registered under s 6(1) FA]. This is because if a foreign franchisor is not required to register the foreign franchise with the Registrar under s 6(1) FA, the foreign franchisor may wriggle out from compliance with mandatory provisions legislated by Parliament in FA for the protection of franchisees of foreign franchises."

[Emphasis Added]

[23] In our judgment the Purposive Construction taken by the learned Judge is in accordance with the position adopted by the Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah (supra)* when it referred to *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850 at p 899 wherein Lord Diplock quoted a passage in *Northman v. Barnet Council* [1978] 1 WLR 221 where Lord Denning MR said at p 228, as follows:

> "In all cases now in the interpretation of statutes, we adopt such a construction as will 'promote the general legislature purpose' underlying the provision. It is

no longer necessary for judges to wring their hands and say: There is nothing we can do about it'. **Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind**."

[Emphasis Added]

[24] It is apposite for us to refer to the statements of the learned judge at subparagraphs (3) and (4) of para 40 at p 36 of his Grounds of Judgment ('Grounds') which read:

"(3) **additionally or alternatively, a literal interpretation** of s 6(1) FA together with the wide definition of "franchisor" in s 4 FA, requires a foreign franchisor to register the franchise with the Registrar (**Literal Interpretation**);

(4) **based on the Purposive Construction and Literal Interpretation,** the Plaintiff is required to register the BrainBuilder Business franchise with the Registrar under s 6(1) FA ..."

[Emphasis Added]

[25] Whilst we agree with the purposive approach taken by the learned judge, with respect we do not agree with the learned judge's aforesaid statements as emphasised because having opted to adopt the purposive approach, then "[I]t is a matter for the purposive approach to replace the literal [method of construction]." as opined by the Federal Court] in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah (supra)* when it referred to *Kammins Ballrooms*.

[26] On the issue of whether the "Buku Panduan" has the force of law, the plaintiff submits:

(a) The learned Judge when interpreting the FA 1998 ought to have taken into consideration that the "Buku Panduan" has the force of law. The cases of *Edwin Thomas v. F&N Beverages Marketing Sdn Bhd & Anor* [2017] 2 MLRH 629 at paras 79 and 80 and *Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan* [2018] 2 SSLR 201 [34], [35], [36] & [37] were cited.

(b) The "Buku Panduan" which serves as a guideline for the registration of franchise business was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 FA 1998.

(c) Relying on the case of *David Hey v. New Kok Ann Realty Sdn Bhd* [1984] 1 MLRA 726 for the proposition that the Federal Court had taken judicial notice of the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-Overs", the plaintiff urges this court to take judicial notice that the Buku Panduan "by the Minister provides a proper explanation of the definition of the word "franchisor"" [in s 6 FA 1998]."

[27] We observe that there is a common denominator in both cases highlighted to us by the plaintiff, ie there is an enabling provision allowing the issuance of the "guidelines" in question. In *Edwin Thomas (supra)*, the High Court held Practice Note No 1 of 1987, a set of guidelines that have the force of law because it was issued under s 28 of the Industrial Relations Act 1967. On the other hand, in *F&N Beverages Marketing (supra)*, the Guidelines for Carrying on Offshore Leasing Business in Labuan 2003 was held by the High Court to be made by the Lembaga Perkhidmatan Kewangan Labuan (respondent) pursuant to the power conferred on it under s 4A of the Labuan Financial Services Authority Act 1996.

[28] Based on our research, the Franchise (Forms And Fees) Regulations (PU(A) 422 of 1999) is the only Regulations made by the Minister pursuant to s 60 of the FA 1998. The other two Regulations are:

(i) Franchise (Qualifications Of A Franchise Broker) Regulations 1999 (PU(A) 423 of 1999) made by the Minister pursuant to s 14(2) of the FA 1998; and

(ii) Franchise (Compounding of Offences) Regulations 1999 (PU(A) 424 of 1999) made by the Minister pursuant to s 41 of the FA 1998.

In light of the above, with respect we make this observation that the submission on behalf of the plaintiff that the Buku Panduan was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 FA 1998 is misconceived.

[29] The question of taking any judicial notice does not arise because in light of the existence of the three aforementioned Regulations, it is clear that the Buku Panduan has not been issued pursuant to any enabling provision under the FA 1998 for it to have the force of law. We therefore find it unnecessary to refer to the Buku Panduan.

B. Validity Of The MLA 2013

[30] For reasons discussed earlier the learned judge held "[T]he plaintiff is required to register the BrainBuilder Business franchise with the Registrar under s 6(1) FA 1998. The plaintiff's failure of non-registration amounts to a contravention of s 6(1) FA 1998 (Plaintiff's Breach). It is not disputed by the 1st to 3rd defendants that 1st defendant's failure to register the BrainBuilder Business franchise with the Registrar under s 6A(1) FA 1998 has breached s 6A(1) FA 1998 (1st Defendant's Breach)".

[31] The learned judge then held the effect of the Plaintiff's Breach and 1st Defendant's Breach (Two Breaches) depends on whether ss 6(1) and s 6A(1) FA 1998 are intended by Parliament to be mandatory or directory provisions. The learned judge further held that our legislature has intended ss 6(1) and s 6A(1) FA 1998 to be mandatory provisions for the following reasons:

(a) Based on four High Court's decisions that have held franchise agreements are void and unenforceable due to failure to register the franchise in question namely, (i) *SP Multitech Intelligent Homes Sdn Bhd v. 1 Home Sdn Bhd* [2010] 16 MLRH 537, at 539; (ii) *Munafsya Sdn Bhd lwn. Proquaz Sdn Bhd* [2012] MLRHU 861, at para 72; (iii) *Lim Seng Kiat & Anor v. Jee Hing Lim & Anor* [2015] MLRHU 992, at para 16; and (iv) *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor* [2015] MLRHU 893, at paras 9-16;

(b) Use of the word "shall" in ss 6(1) and 6A(1) FA 1998 clearly shows Parliament's intention for these provisions to have mandatory effect and reliance was placed on the judgment of Mohd Dzaiddin FCJ (as he then was) in *Public Prosecutor v. Yap Min Woie* [1995] 2 MLRA 91;

(c) Parliamentary Debates clearly shows the legislature's intention for ss 6(1) and 6A(1) FA 1998 to be mandatory provisions.

[32] The learned judge recognised that the court has a discretion to invoke the doctrine of severance to "save" the lawful part of a contract by severing the illegal provisions under cl 48.1 MLA 2013. However His Lordship was of the opinion he could not apply the doctrine of severance because:

(i) an invocation of the doctrine of severance will undermine ss 6(1) and 6A(1) FA 1998 which are intended by Parliament to be mandatory provisions; and

(ii) the Two Breaches held by him do not concern a particular term of the MLA 2013 which is illegal and can be severed from other lawful provisions of the MLA 2013 but rather concern the lack of registration of the 1st defendant's BrainBuilder Business and taints the entire MLA 2013.

[33] The learned judge held in view of the Two Breaches, the MLA 2013 is void in its entirety under s 24 CA 1950 ie, the MLA 2013 is forbidden by ss 6(1) and 6A(1) FA 1998 and/or under s 24 CA 1950, ie the MLA 2013 is of such a nature that, if permitted, would defeat ss 6(1) and 6A(1) FA 1998. The learned Judge relied on *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 5 MLRA 377 where the Federal Court held that when a party has alleged a contract is illegal, the court has a duty to consider the validity of the contract based on s 24 CA 1950 (per Jeffrey Tan FCJ at paras 70 & 71).

[34] The learned judge held the decision to invalidate the entire MLA 2013 based on s 24(a) and/or s 24 CA 1950 is not unjust to the plaintiff because Dr Fong and the plaintiff (Dr Fong is the plaintiff's *alter ego*) have been legally advised by the plaintiff's solicitors (Miss Hooi) vide Miss Hooi's email dated 24 December 2014 to register the 1st defendant's BrainBuilder Business

franchise under the FA 1998 but it was ignored based on the misconceived idea that shares in the 1st defendant may have to be given to Bumiputeras (see subparagraph 2(d) of para 15 above).

[35] On the issue of validlity, essentially the learned plaintiff's counsel argues that:

(a) Section 6 FA 1998 only penalises the master franchisee, the 1st defendant.

Where there is express provision to render a franchise agreement null and void, it must be construed that the mere presence of a penal provision in s 6 FA 1998 cannot be equated to imply that the MLA 2013 is illegal, null or even void.

(b) the MLA 2013 in fact complies with s 6 FA 1998. This is done through the presence of cl 15.1(f) of the MLA 2013 that obliges the 1st and 3rd defendants to *inter alia* register the BrainBuilder Business.

[36] In essence the abovesaid arguments are similar to the plaintiff's contentions at the High Court in para 36 of the Grounds:

> "(3) s 6(2) FA provides for penal consequences if there is a breach of s 6(1) FA by a local franchisor. There is however no criminal sanction for a contravention of s 6A(1) FA by the franchisee of a foreign franchise. Accordingly, Parliament does not intend to invalidate MLA (2013) for the 1st Defendant's failure to register the BrainBuilder Business franchise with the Registrar under s 6A(1) FA (1st defendant's Failure)."

[37] The plaintiff further argues that the learned judge erred in placing too much reliance on the single correspondence between the plaintiff and its solicitor's email dated 24 December 2013 that the plaintiff could have used the Power of Attorney to register under s 6A FA 1998 when he failed to consider sufficiently the evidence of Dr Fong's email dated 26 December 2013, what Dr Fong communicated to the 2nd and 3rd defendants at a meeting on 8 July 2014, 1st to 3rd defendants were provided with the Franchise Manual, Dr Fong's explanation of his email from his solicitor that the task was on the 1st to 3rd defendants to register (para 6.19 of the Plaintiff's Main Submission).

[38] With respect, we are of the view that the submission of the plaintiff in paras 36 to 38 above is untenable in light of our finding that s 6(1) FA 1998 applies to a foreign franchisor. Contrary to the plaintiff's submission that the cases of *SP Multitech*, *Munafsya Sdn Bhd*, *Lim Seng Kiat* and *Tea Delights (supra)* have no application as they are concerned with the relationship between a local franchisor and/or master franchisee, we are of the view that the learned Judge did not err in placing reliance on these cases for the principle that registration of franchise is imperative and non-registration of the same will render the franchise agreement void and unenforceable. Taking it at the highest, even if it

was the 1st defendant's failure not to register the BrainBuilder Business under s 6A(1) FA 1998, we agree with the learned judge's finding that the plaintiff could have exercised the power granted by the 1st defendant to the plaintiff under the Power of Attorney to apply to the Registrar (as the 1st defendant's lawful attorney) to register under s 6A(1) FA 1998.

[39] Further, since it is our finding that s 6(1) FA 1998 applies to a foreign franchisor, we will now turn to the submission of the plaintiff that the court should be slow in striking down commercial contracts. In support of this proposition, the plaintiff refers to *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 1 MLRA 274. This was also the contention of the plaintiff at the High Court (refer para 36 of the Grounds). We accept the dicta of the Federal Court as highlighted to us by the plaintiff, ie –

> "It is a familiar proposition that courts should be slow to find illegality and strike down commercial transactions. (See, eg *St John Shipping Corporation v. Joseph Rank Ltd* [1956] 3 All ER 683, 690, 691; *Central Securities (Holdings) Bhd v. Haron Bin Mohamed Zaid* [1978] 1 MLRA 307)."

– which we observe is repeated. However in the very passage which the plaintiff quoted in submission lies a very material principle of law stated by the Federal Court which we find the plaintiff overlooks and which we stress as follows:

> "It is true that s 3 of the Civil Law Act 1956, directs our courts to apply the Common Law of England in force at the date of its coming into effect; that is 7 April 1956, **only in so far as the circumstances permit and save where no provision has been made by statute law**."
>
> [Emphasis Added]

[40] In *Merong Mahawangsa (supra)*, the question upon which leave was granted to appeal against the order of the Court of Appeal from a High Court's decision was whether an agreement to provide services to influence the decision of a public decision maker to award a contract was a contract opposed to public policy as defined under s 24 CA 1950 and therefore void. In allowing the appeal, the Federal Court, among others, at 387 [16] opined:

> "[16] Section 24 of the Act stipulates five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by a law; (b) it is of such a nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or, (e) the court regards it as immoral, or opposed to public policy. "In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void ... **The provisions of s 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b) and (e) of s 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law;** para (b) deals with what could defeat the object of any law; and para (e) deals with public policy" (*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd &*

> *Anor* [1990] 1 MLRA 348 per Hashim Yeop Sani CJ (Malaya), delivering the judgment of the court), **which statements "continue to be good law"** (*Fusing Construction Sdn Bhd v. Eon Finance Bhd & Ors And Another Appeal* [2000] 1 MLRA 330 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court."
>
> [Emphasis Added]

We observe that in respect of *Lori Malaysia (supra)*, the Federal Court at [20] stated:

> "[20] Even so, in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd*, this court counselled that courts should be slow to strike down commercial contracts on the ground of illegality, contrary to the view expressed in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anon*."

The foregoing statement was preceded by what the Federal Court stated:

> "**It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by** the common law or **statute, no court will lend its assistance to give effect**" (*Cope v. Rowlands* [1836] 2 M&W 149, 157 per Parke B, which was quoted with approval in *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 4 MLRA 11 per Ramly Ali FCJ, delivering the judgment of the court). "Under s 2(g) of the Contracts Act, an unlawful agreement is not enforceable" (*Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 1 MLRA 274, per Edgar Joseph Jr FCJ, delivering the judgment of the court)."
>
> [Emphasis Added]

Thereafter the Federal Court at [71] held, among others, "[W]henever the illegality of a contract is raised or become apparent, it is the duty of the court to take it up, by reference to s 24 of the Act". This legal principle was correctly adopted by the learned judge at para 34 above. Hence we find there is no error on the learned judge's part in respect of his findings in paras 34 and 35 above.

[41] Under the head of argument on illegality, learned counsel for the plaintiff submits that even if s 6 FA 1998 did apply to the plaintiff, the section does not render the MLA 2013 illegal for non-registration. To this end counsel urges the court to consider the recent developments on illegal contracts in the judgment of the Supreme Court of the United Kingdom in *Patel v. Mirza* [2017] 1 All ER 19, *Pang Mun Chung & Anor v. Cheong Huey Charn* [2019] 1 MLRA 486 and *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2018] MLRAU 484. We shall revisit these cases later.

C. Guarantee Provides For Indemnity

[42] Learned counsel for the plaintiff submits that the learned judge erred when he held that the 2nd and 3rd defendants' Guarantee and the Power of Attorney are illegal and void under s 24(a) and/(b) CA 1950 arising from the illegality of the MLA 2013 as there was an indemnity from the 2nd and 3rd

defendants to the plaintiff pursuant to cl 2 of the Guarantee and the indemnity is collateral to the MLA 2013 and cannot be vitiated by any illegality that may strike down the MLA 2013. In support thereof, the plaintiff cites:

(i) *Law of Contract*, 4th edn where the learned author, Dato' Seri Visu Sinnadurai makes the following observation at para 4.56 p 267:

> "[4.56] Other principles relating to collateral contracts: consideration, illegality and breach. The following principles of law stated in *Chitty on Contracts, General Principles*, (30th Edn) at paragraph 12-006, should be noted:
>
> Consideration for the collateral contract is normally provided by entering into the main contract, but a collateral contract may also be actionable even if the main contract is unenforceable, eg illegality. Breach of the collateral contact will give rise to an action for damages for its breach, but not as a general rule to a right to treat the main contract as repudiated."; and

(ii) *Rimba Muda Timber Trading v. Lim Kuoh Wee* [2006] 2 MLRA 25 where "the Federal Court found favour with the argument that although the sub-contract was held to be Illegal the respondent's claim is founded on the collateral rights acquired under the contract."

[43] With respect we are not persuaded by the above submission of the plaintiff. We are more inclined to agree with the approach taken by the learned judge for the reasons which follow. The learned Judge held the 3 Documents, ie the MLA 2013, the Guarantee and the Power of Attorney form a single composite transaction premised on the following reasons:

"(1) the 3 Documents concern the same BrainBuilder Business;

(2) the 3 Documents are prepared by the same solicitor, Ms Hooi;

(3) clause 5.3 MLA (2013) provides that "all persons with ownership interest" in MLA (2013) "must" execute the Guarantee in the form provided in Appendix 3 to MLA (2013) (Appendix 3). The Guarantee is exactly in the form of Appendix 3;

(4) clauses 1 to 4 of the Guarantee solely concern the obligations of the 1st Defendant under MLA (2013);

(5) clause 34 MLA (2013) states that to "secure the performance" of the 1st defendant of the obligations under MLA (2013), the 1st defendant irrevocably appoints, among others, the plaintiff as the 1st defendant's attorney. Hence, the execution of the PA. Clause 1 PA provides that the 1st defendant has irrevocably appointed, among others, the plaintiff as the 1st Defendant's attorney; and

(6) the three Documents were executed on the same day (18 December 2013) and their execution was witnessed by Ms Hooi."

[44] In *Malayan Banking Berhad v. Neway Development Sdn Bhd & Ors* [2017] 5 MLRA 277; [2017] 2 SSLR 113 on the findings of the courts below, the Federal Court (per Richard Malanjum CJ (Sabah and Sarawak) (as he then was) stated (at [12]):

> "[12] The primary reason given by the High Court in dismissing the claim was that the term loan was for an illegal purpose in that it was given for the purchase of the native land in contravention of ss 17(1) and 64(1) of the SLO [Sabah Land Ordinance]. It was held that 17(1) of the SLO clearly prohibits any dealing between a native and a non-native in respect of a native land. As such, it was ruled that since the transaction was tainted with illegality the whole sale and purchase agreement was void by virtue of s 24(a) and (b) of the Contracts Act 1950. In turn, all the other instruments connected with the sale and purchase agreement such as the deed of assignment and the letters of guarantee were also tainted with illegality."

Having found the leave question (at [2]) to be academic, the Federal Court (at [22]) in essence held where a contract is void under any paragraph in s 24 CA 1950, any other contract, instrument or document which is related to the void instrument may be tainted with illegality and may also be rendered void.

[45] We are of the view that the finding of the learned judge that the 3 Documents "form a single composite transaction" falls within the purview of the ratio of the Federal Court in *Malayan Banking (supra)* that "… any subsequent and documentation that linked to or arose out of the purchase would have been tainted with such illegality". Thus we agree with the learned judge's finding that the illegality of the MLA 2013 will consequently taint the Guarantee and the Power of Attorney. Further, by parity of reasoning, we also agreed the Guarantee and the Power of Attorney will likewise be void in their entirety under s 24(a) and/or s 24 CA 1950.

D. Unjust Enrichment

[46] Since we rule that the 3 Documents are void, we do not find it is necessary to deal with the appeal brought by the plaintiff against the learned judge's findings on conspiracy to defraud it and breach of confidence. This is because both these causes of action in tort will only arise on the assumption that the 3 Documents are valid. The learned Judge took cognisance of the same and stated "In the event that the Court of Appeal reverses the above decision that the 3 Documents are void, "will proceed to decide whether the 1st to 3rd Defendants have breached the MLA 2013 and Guarantee." (para 55 of the Grounds).

[47] It is apposite at this juncture to refer to the learned judge's Grounds at para 35:

> "35. Learned counsel for the plaintiff and defendants have cited an impressive array of cases on illegal contracts. I am of the view that whether a contract or transaction has breached a provision of law, depends on the construction of

that provision. As such, cases on illegality depend on the interpretation of the particular law which has been contravened."

It is in this context that learned counsel for the plaintiff submits that the learned Judge erred when he failed to consider sufficiently the principles laid down in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 1 MLRA 332, namely, "... one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question, and NOT whether the statute prohibits the contract or the making of the contract in question by the parties ...". In this regard, whilst we acknowledge that "This difference is real, though very subtle (per Peh Swee Chin FCJ (as he then was)), a common thread runs through the decisions of Lamin Mohd Yunus PCA (as he then was), Peh Swee Chin FCJ and Zakaria Yatim FCJ (as he then was) "that the said agreement is a contract or amounts inevitably to a contract to do an act forbidden or prohibited by s 21 under the said statute [Pool Betting Act 1967]" and "This is contrary to s 24(a) of Contracts Act and the agreement is therefore illegal and void". Such a contract is unenforceable. Similarly on the facts of this appeal, the learned judge has correctly found the Two Breaches render the MLA 2013 void in its entirety under s 24(a) and/or s 24(b) CA 1950 alluded in paras 31 and 34 above.

[48] Returning to the mainstream, we shall now turn to the plaintiff's appeal on unjust enrichment. As to whether the plaintiff can rely on the doctrine of unjust enrichment, the learned judge appropriately relied on *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 MLRA 247 at paras 110, 117 and 118 where the Federal Court held the Court may grant restitution to a plaintiff when the following 4 cumulative conditions of a cause of action in unjust enrichment have been proven by the plaintiff:

"(1) the defendant had been enriched;

(2) the defendant's enrichment has been gained at the plaintiff's expense;

(3) the defendant's retention of the benefit is unjust; and

(4) the defendant has no defence to extinguish or reduce the defendant's liability to make restitution."

[49] According to the learned judge, the plaintiff has failed to prove a cause of action in unjust enrichment as the plaintiff did not plead in the Statement of Claim that the 1st to 3rd defendants have been unjustly enriched at the plaintiff's expense. From the pleadings point, whilst it is true that the plea for unjust enrichment is found in the Plaintiff's Reply to the 1st to 3rd defendants' Defence as submitted by the plaintiff, however we agree with the learned Judge that the plaintiff did not plead in the Statement of Claim regarding any advantage received by the 1st defendant under a void MLA 2013 as the plaintiff has taken the position that the MLA 2013 is valid and has not breached FA 1998. Further a perusal of the plaintiff's list of issues to be tried shows that the learned Judge was correct in stating that the cause of action in unjust

enrichment is not listed as an issue to be tried. Hence there is no error on the learned judge's part in terms of pleadings.

[50] From the evidential perspective, the learned judge has considered the evidence before him and correctly concluded that the plaintiff has failed to prove that the 1st to 3rd defendants have been enriched at the expense of the plaintiff and the retention of the benefit is unjust and evidence has been adduced that the 1st defendant has paid the plaintiff pursuant to the MLA 2013 (para 54 of the Grounds). We find the learned judge did not err as the purported evidence premised on the plaintiff's reliance of the findings of the learned Judge at para 9.3.1, 9.3.2, 9.3.3 and 9.3.4 is misplaced as these are findings of the learned Judge on the assumption the 3 Documents are valid (para 55 of the Grounds onwards). It is our finding that the 3 Documents are void and hence, contrary to the plaintiff's submission, these findings of the learned Judge do not apply.

[51] We will now consider the applicability of *Patel v. Mirza, Pang Mun Chung* and *Liputan Simfoni (supra)*. In *Patel v. Mirza*, Mr Patel paid Mr Mirza £620,000.00 pursuant to a contract under which Mr Mirza was to use the money to trade in RBS (Bank) shares with the benefit of insider information which Mr Mirza is to procure. The anticipated insider information however was not forthcoming and the contract lapsed. No such insider information was provided and the trade/bet failed to take place. Mr Mirza refused to refund the £620,000.00 back to Mr Patel. So, Mr Patel sued Mr Mirza for the refund of the money actually paid by Mr Patel to Mr Mirza. Mr Patel succeeded in his claim for restitution of the monies actually given. The members of the UK Supreme Court differed in their reasoning: Lord Toulson with whom Lady Hale, Lord Kerr, Lord Wilson, Lord Hodge and Lord Neuberger agree whilst Lord Mance agreed with Lord Clarke and Lord Sumption.

[52] At p 191 e-f, the UK Supreme Court stated:

> "The principal issue was whether a party to a contract to carry out an illegal activity was precluded from recovering money paid under the contract from the other party under the law of unjust enrichment."

[53] Following *Patel v. Mirza* whether unjust enrichment can apply to an illegal contract is subject to three considerations, namely:

> "(a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;
>
> (b) to consider any other relevant public policy on which the denial of the claim may have an impact; and
>
> (c) to consider whether denial of the claim would be a proportionate response to the illegality."

These principles can be gleaned from the judgment of the UK Supreme Court at paras 120 and 121 as follows:

> "[120] **The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system** (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). **In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts**. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.
>
> [121] A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal."
>
> [Emphasis Added]

[54] In *Pang Mun Chung*, the appeal is primarily concerned with the application of the defence of illegality and public policy in relation to an action brought to enforce a trust. The Court of Appeal referred to *Patel v. Mirza* at 681 [67] and at 685 [83] opined:

> "[83] In the present case, we take the view that the public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence. In this connection, we are reminded of the oft-quoted passage in *St John Shipping Corp v. Joseph Rank Ltd* [1957] 1 QB 267 of Devlin J as follows (at p 288):
>
> > Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other."

[55] Applying the "proportionality test" to the facts of this case, learned counsel for the plaintiff submits the following:

> "6.35.1 By allowing the Plaintiff's claim, it would not undermine the purpose of the prohibiting rule since Parliament has considered the consequence of contravening s 6(1) FA 1998. (s 6(2) FA 1998).

6.35.2 [P]arliament did not intend to render the MLA 2013 illegal for breach of s 6(1) FA 1998.

6.35.3 The nature and gravity are procedural, as opposed to contracts where the object and/or purpose is unlawful. (*Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 1 MLRA 213.

6.35.4 The conduct of the parties here is clear. The 1st to 3rd Defendants did nothing to procure the registrations despite the obligation to do so under the MLA 2013 and repeated reminders made by the Plaintiff at meetings.

6.35.5 On the issue of centrality and remoteness of the illegality to the contract, s 6 FA 1998 obliges the franchisor to register before he can operate a franchise business but it does not prevent parties from executing the MLA 2013.

6.35.6 The consequences of denying the claim would mean that the Defendants will benefit from its own breach, at the expense of the plaintiff."

[56] With respect we are of the considered opinion that there is no merit in the plaintiff's above said submission. First, we agree with the learned judge's findings in respect of the Two Breaches (Plaintiff's Breach and the 1st defendant's Breach) in paras 31 and 34 above.

[57] Next it is pertinent to note that the Court of Appeal in *Pang Mun Chung* held-

"[28] Dealing now with the issue of illegality, **we observe, at the outset, that the law in this regard can be segregated broadly into contracts that are illegal under statute (statutory illegality) or contracts which are illegal at common law. There is no suggestion in the present case of any statutory illegality**. We need only concern ourselves with illegality at common law which must be grounded upon established heads of public policy as the case law suggests. This principle is also embodied in s 24(e) of the Contracts Act which provides that any agreement of which the consideration or object is immoral or opposed to public policy is void."

[Emphasis Added]

(Per Harmindar Singh Dhaliwal JCA at [28])

On this score the case of *Pang Mun Chung* can be distinguished as the said case concerns with illegality at common law premised on established heads of public policy and s 24(e) CA 1950 whilst the appeal before us concerns with contracts that are illegal under statute (statutory illegality) as alluded in para 34 above.

[58] In *Liputan Simfoni*, among others, the facts are the respondent (plaintiff) was the registered proprietor of a piece of land. An imposter company claiming to be the plaintiff applied to the 3rd defendant, Pendaftar Tanah and Galian, Wilayah Persekutuan Kuala Lumpur for a replacement issue document of title

alleging that it had lost the original document of title to the land. The 3rd defendant issued a replacement document of title and the imposter company entered a sale and purchase agreement ("1st SPA") to sell the land to the 2nd defendant. Upon completion of the sale, the 2nd defendant was registered as the owner of the land. The 2nd defendant entered into a sale and purchase agreement with the appellant (1st defendant), Liputan Simfoni for the sale of the land ('2nd SPA'). The plaintiff commenced a suit against all three defendants seeking, among others, declarations that the transfers of the land to the 1st and 2nd defendants were *void ab initio* and orders that the subject land be restored to the plaintiff and the 3rd defendant to rectify the entries in the document of title of the subject land. The High Court allowed the plaintiff's claim, holding, among others, that the transfer of the land from the 2nd defendant to the 1st defendant was obtained by a void instrument which in turn rendered the title of the 1st defendant defeasible pursuant to s 340(2) of the NLC and the land was restored to the plaintiff. The Court of Appeal affirmed the High Court decision. Leave to appeal was allowed to the 1st defendant, among others, on the question of law "(v) whether a finding that a sale and purchase agreement is *void ab initio* pursuant to s 24(b) CA 1950 renders the Form 14A under the NLC void, despite the Form 14A being a valid instrument duly registered in favour of the subsequent *bona fide* purchaser with the Land Office".

[59] Having considered, among others, *Patel v. Mirza* at 220 [123] and 221 [124] (which passage was highlighted to us by counsel for plaintiff), Hasan Lah FCJ (as he then was) (delivering judgment of the Federal Court at [125] and [126] held:

> "[125] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. **The compliance with the Stamp Act 1949 and the Real Property Gains Tax Act 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land**. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the Government by civil proceeding as a debt to the Government. **The object of the two Acts is to raise revenue**. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd.* The 1st defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.
>
> [126] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction."
>
> [Emphasis Added]

[60] In our considered opinion, the case of *Liputan Simfoni* can be distinguished. Unlike the findings of the Federal Court as emboldened above, in this appeal, for the given reasons it is a prerequisite for all franchisors and franchisees (local and foreign) to register their franchises with the Registrar under ss 6(1), 6A(1) and 6 FA 1998, otherwise the entire MLA 2013 is void under ss 24(a) and/or 24 CA 1950 as held by the learned judge (paras 74(4) and 75 of the Grounds).

[61] Save for *Pang Mun Chung* and *Liputan Simfoni* which were not ventilated before the High Court, the learned judge was not oblivious of the development of case law, among others, *Patel v. Mirza* (at para 51 of the Grounds) but expressed that "[he was] not able to apply the cases cited (including *Patel v. Mirza*) because we have our own s 66 CA. Furthermore as a matter of *stare decisis*, [he was] bound by the Federal Court's judgment in *Tan Chee Hoe & Sons*.". We agree with the approach taken by the learned Judge for the reasons which follow.

[62] Since we agree with the learned Judge that the 3 Documents are void, in terms of whether any remedy is available to the plaintiff, one of the provisions to consider is s 66 CA 1950. We find the learned Judge appropriately refer to *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 4 MLRA 11 as the Federal Court, among others, at paras 37-38 (per Ramly Ali FCJ) (as he then was) stated:

> "[37] The effect of a void contract or agreement is provided for under s 66 [CA]
>
> ...
>
> [38]... The Privy Council in *Hamath Kaur v. Inder Singh* [1922] LR 50, IA 69 in considering a claim based on s 65 of the Indian Contracts Act 1872 [CA (India)] (which is identical to our s 66 [CA]) ruled:
>
> > an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

[63] The learned judge proffered reasons why he was unable to invoke s 66 CA 1950 as follows:

> "48. I am unable to invoke s 66 CA in this case because the 1st defendant has made payments under the MLA (2013) to Dr Fong and the plaintiff regarding the 1st defendant's right to operate BrainBuilder Business. As such, the 1st defendant has not received any advantage under the MLA (2013) to be restored to the plaintiff under s 66 CA. Moreover, the plaintiff has taken the position in this case that MLA (2013) is valid and has not breached FA. Hence, the plaintiff did not plead in the SOC and adduce any evidence regarding any advantage received by the 1st defendant under a void MLA (2013).

49. The material facts in *Tan Chee Hoe & Sons* can be easily distinguished from this case because the purchaser in a sale of shares contract in Tan Chee Hoe & Sons has received a deposit of 10% of the sale price from the vendor (an advantage under the contract) and this deposit is rightfully ordered by the Court of Appeal (affirmed by the Federal Court) to be restored to the vendor under s 66 CA. In this case, no deposit has been paid by any party under the MLA (2013)."

II. Cross-Appeal

[64] Through its Notice of Cross-Appeal dated 20 April 2018, the defendants seek to vary part of the decision of the learned judge on three grounds:

(a) the defendants seek to allege that the learned judge ought to have refunded to the 1st defendant monies that were paid to the plaintiff ('First Ground');

(b) the defendants seek to raise the issue that the 1st to 3rd defendants were not *in pari delicto* to the alleged illegality of the MLA 2013 ('Second Ground'); and

(c) the defendants allege that the learned judge ought to order cost against the plaintiff pursuant to Grounds 1 and 2.

[65] On the First Ground, learned counsel for the defendants in oral submission merely argue that since the High Court ruled the MLA2013 (franchise) was illegal, the High Court ought to refund RM1,078,781.00 to the 1st to 3rd defendants that was paid to the plaintiff. The following dicta of the Federal Court in *Tan Chee Hoe & Sons* at 32 [59] was drawn to our attention:

"(c) being a void contract, by virtue of s 66 of the Contracts Act 1950, the court of law may order restoration of whatever consideration or advantage paid or given under that contract."

[66] With respect in our judgment the defendants' submission has no merit whatsoever. We are of the view that the said refund is part of the relief which the 1st to 3rd defendants seek in prayer 4 of their counterclaim, ie "Satu Perintah bahawa plaintif hendaklah dalam masa tujuh hari dari tarikh Perintah atau Penghakiman ini memulangkan semua wang yang telah dibayar oleh Defendan kepada Plaintif atau wakil Plaintif (Fong Ho Kheong)".

[67] Rules 8(1) read with (3) and Form 2 in the First Schedule of the Rules of the Court of Appeal 1994 allows the filing of Notice of Cross-Appeal to only vary the decision. In *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 6 MLRA 373 at [15], the Federal Court opined:

"[15] In construing r 8 and Form 2 of the RCA 1994, the Court of Appeal had rightly considered the critical words used, namely "should be varied ... specifying the grounds thereof" and "to be varied to the extent". Following this, the Court of Appeal had rightly held that the word "vary" by itself should

> be given its ordinary and natural meaning as stated in The Concise Oxford Dictionary to mean "change, make different, modify".
>
> [16] We also agree with the Court of Appeal's finding that it had considered theclear provisions under r 5 of the RCA 1994, and holding that r 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing ... Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal."

[68] In *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission Of Malaysia) v. See Chee How & Anor* [2015] 6 MLRA 353 at [77], the Court of Appeal, among others, stated:

> "... a cross-appeal is only meant for variation of 'the decision' appealed against and not for variation, reversal or setting aside of any other decision of the High Court unrelated to the appeal filed by the appellant."

[69] Since what the 1st to 3rd defendants seek to vary is a substantive finding of the court which relief is part of the counterclaim dismissed by the High Court, the defendants ought to have filed a Notice of Appeal against the dismissal of the counterclaim and not seek to vary the decision of the High Court.

[70] In addition, we are not minded to allow the defendants to raise the dismissal of their counterclaim through the Notice of Cross-Appeal as to do so is tantamount to allowing them to seek relief through the backdoor and results in deprivation of relevant praecipe to the Government. An added reason is that the 4th to 6th defendants have no basis to raise this allegation in the Notice of Cross-Appeal as they are not privy or parties to the MLA 2013.

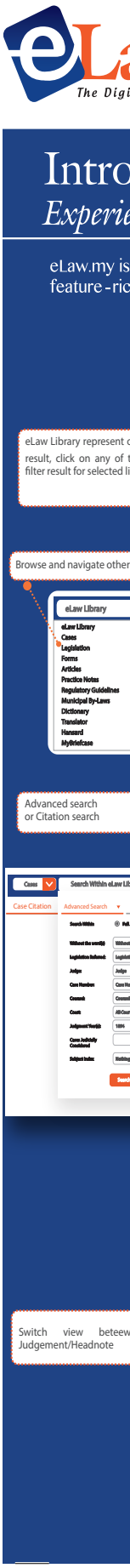
[71] In relation to the Third Ground, it is our view there can be no variation on the issue of cost since we find there is no basis to sustain the 1st Ground and the 2nd Ground has been abandoned by the defendants. Further, we are of the view that since the issue of cost does not arise in the Notice of Appeal dated 15 February 2018 filed by the plaintiff, the defendants ought to have filed the appeal against the decision of the learned judge for not granting cost to the defendants instead of seeking the same through the Notice of Cross-Appeal.

[72] Further thereto, if the defendants seek to only appeal against the decision of the learned judge on cost, then they ought to have first obtain leave of the Court pursuant to s 68(1)(c) of the Courts of Judicature Act 1964 ('CJA'). The Federal Court in *Ooi Soon Eng v. Ng Kee Lin* [1979] 1 MLRA 321 held where no such leave was obtained under s 68(1)(c) CJA, the appeal fails *in limine*.

Conclusion

[73] We have carefully considered the Written and Oral Submissions of the respective counsel and have perused the Records of Appeal before us. For all the foregoing reasons we are of the view there are no appealable errors

committed by the learned Judge which warrant appellate intervention. (See Federal Court case in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 2 MLRA 1 [14] which endorsed the view of the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 1 MLRA 95, Dream Property at 473 [89] and *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 2 MLRA 668 at [40] as to when appellate intervention is warranted). In the circumstances we unanimously dismiss both the appeal and the cross-appeal. We order the plaintiff to pay global costs in the sum of RM10,000.00 to each respondent subject to payment of allocatur.



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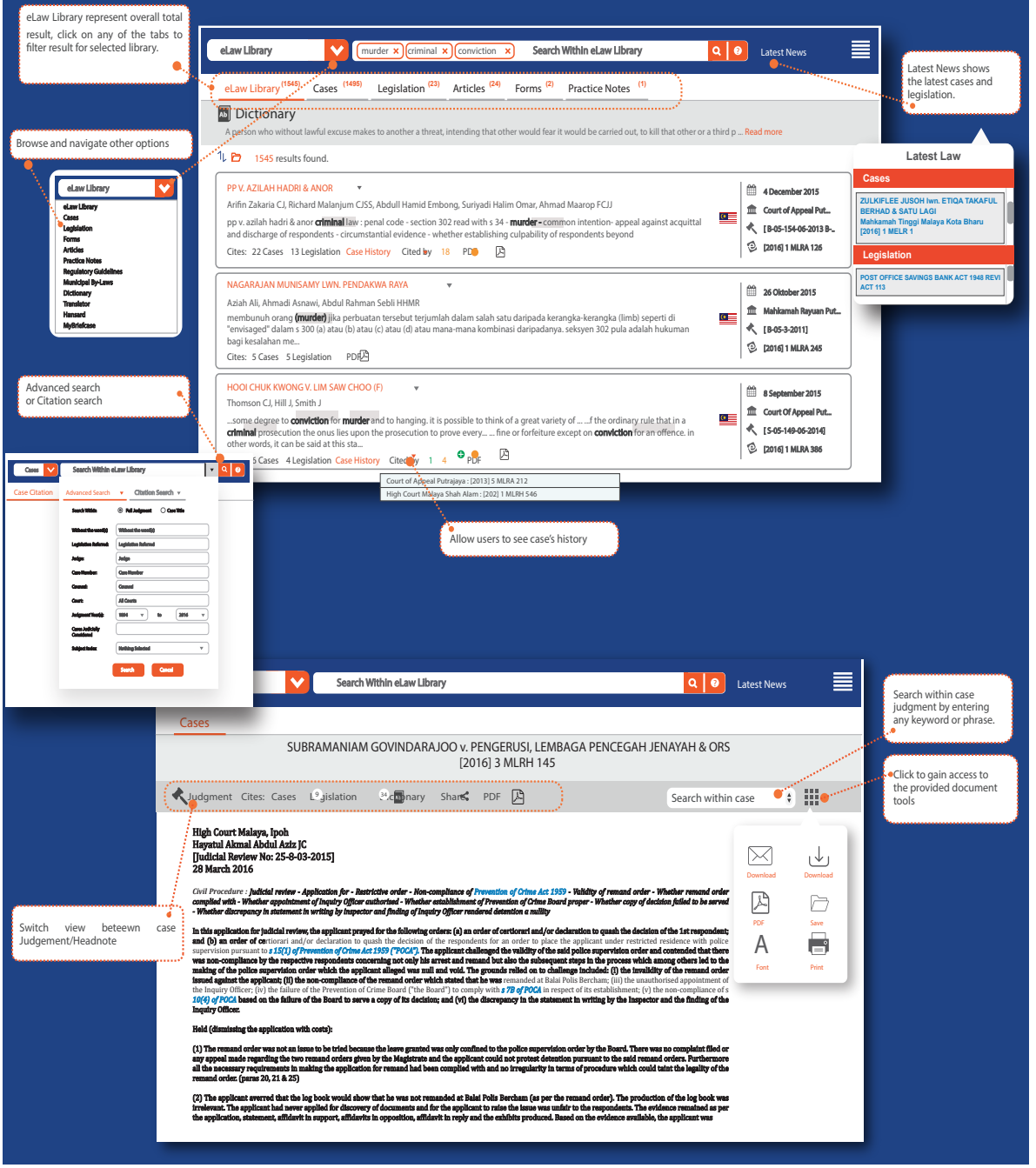

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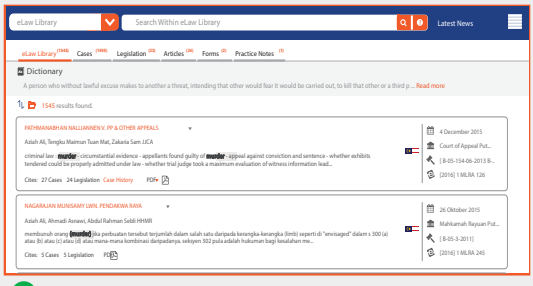

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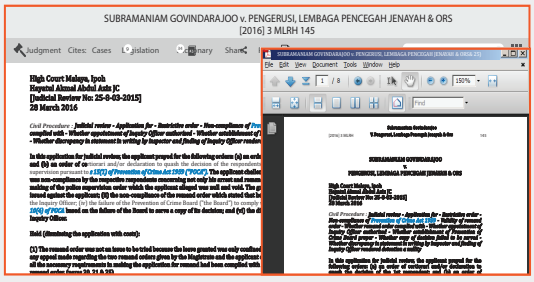

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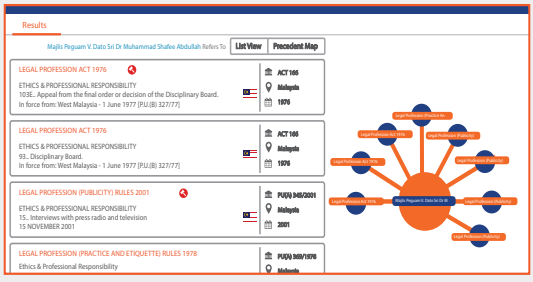

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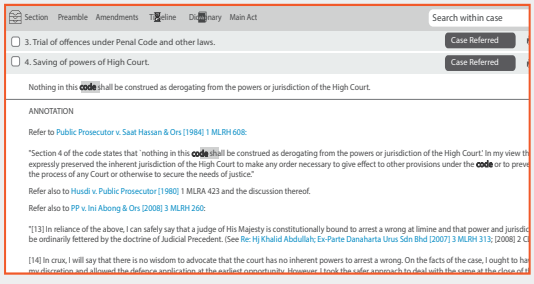

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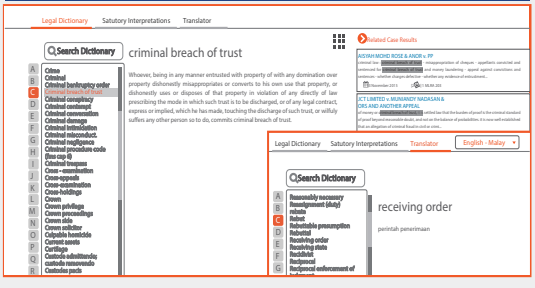

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