GOLDEN STAR & ORS

v.

LING PEEK HOE & ORS

Federal Court, Putrajaya
Abdul Rahman Sebli, Zabariah Mohd Yusof, Hasnah Mohammed Hashim FCJJ
[Civil Review No: 02(f)-24-04-2016(A)]
11 January 2021

Constitutional Law: *Courts — Federal Court — Inherent powers of court — Whether Federal Court had inherent powers to review its own decision — Circumstances when Federal Court might review its own decision — Rules of the Federal Court 1995, r 137*

Civil Procedure: *Contempt of court — Committal proceedings — Formal notice to show cause — Service of — Whether personal service of formal notice to show cause mandatory — Circumstances when failure to effect personal service of formal notice fatal — Rules of Court 2012, O52 r 2B*

Civil Procedure: *Contempt of court — Failure to comply with court order — Applications for review of decision and for stay filed in apparent attempt to evade compliance with High Court Order affirmed and reinstated by Federal Court Order — No application to stay Federal Court Order — Whether such behaviour showcased total disregard and disrespect of Federal Court Order — Whether such behaviour constituted clear contempt of the Federal Court's Order*

Civil Procedure: *Federal Court — Inherent powers of Court — Whether Federal Court had inherent powers to review its own decision — Circumstances when Federal Court might review its own decision — Rules of the Federal Court 1995, r 137*

Legal Profession: *Liability as officer of court — Whether advocate's main and primary duty as officer of the court to ensure the rules of court were observed and to respect court and its order — Whether rights of advocate and solicitors to appear and plead in courts protect them from contempt of court — Legal Profession Act 1976, s 35*

After a trial of a civil dispute between the parties, the High Court had declared the Sales and Purchase Agreements executed between the first applicant with the 2nd to 4th respondents and transfers of properties thereunder null and void. On 17 April 2013, the High Court further ordered the respondents to do all that was necessary to discharge the properties and to surrender the original titles thereto within 60 days from the date of the order ("the High Court Order"). The respondents appealed to the Court of Appeal which allowed the appeals and set aside the High Court Order. The applicants obtained leave to appeal to the Federal Court and on 20 June 2017, the Federal Court unanimously allowed the applicants' appeal, set aside the Court of Appeal's order and reinstated the

High Court Order. The respondents were ordered to discharge the charge over the 1st applicant's properties and to return the title deeds within 60 days of the Federal Court's Order. On 28 February 2018, the respondents motioned to review the Federal Court's Order ("the First Review"). On 18 May 2018, the High Court granted the applicants an *ex parte* order to cite the 2nd to 4th respondents for contempt. The respondents' counsel later withdrew the First Review and it was struck off on 24 September 2018. Thereafter the respondents appointed a new counsel – HK – who on 23 October 2018, filed a second review against the Federal Court's Order ("the Second Review"). HK also applied for a stay of proceedings, including a stay of the committal proceedings against the respondents in the High Court. HK further filed another review application against the Federal Court's Order ("the Third Review") and subsequently obtained a stay of execution in the High Court pending disposal of the Review Applications (the Second and Third Reviews"). The Federal Court struck off the Second and Third Reviews on 27 May 2019 and granted the applicants leave to commence committal proceedings against HK and the respondents. HK filed a notice of motion by way of encl 52(a) to set aside para 3 of the Federal Court's order dated 27 May 2019 and the applicants filed a notice of motion for committal proceedings through encl 38(a). The Federal Court heard both encls 52(a) and 38(a) together.

Held (unanimously dismissing encl 52(a); and finding the respondents and HK guilty of contempt):

(1) The Federal Court would unanimously dismiss encl 52(a). Whether failure to comply with the rule on personal service of the formal Notice to Show Cause required by O 52 r 2B of the Rules of Court 2012 was fatal or not would depend on: (i) the facts of the case; and (ii) whether such failure had prejudiced the proposed contemnor – HK in the instant case. On the facts of the instant case, the failure by the applicants to serve the notice personally on HK was neither fatal nor prejudicial to him. There was also no merit in the argument that the failure to cite the name of HK in the intitulement was fatal. With regard to the Order 52 statement, sufficient particulars of the alleged contempt by HK had in fact been stated in the statement itself. (para 40)

(2) Under r 137 of the Rules of the Federal Court 1995 ("RFC"), the Federal Court has inherent power to review its own decision but such power is exercised only in rare and exceptional circumstances. In order to succeed in a review application made pursuant to r 137 RFC it must be shown that not only did the case fall within the stringent criteria as set out in *Asean Security Mills* but the error must be so obvious that there was injustice to the party. (paras 42-43)

(3) There were two orders relevant to the committal proceedings in the instant case: the High Court Order dated 17 April 2013 granting a mandatory injunction compelling the respondents to surrender the titles within 60 days from the date of the Order – the 60 days lapsing on 17 June 2013; and the Federal Court Order dated 20 June 2017 affirming the High Court Order

with a 60 days-period lapsing on 20 August 2017. The respondents' previous solicitors had advised the respondents to comply with the Federal Court Order despite the filing of a review against it. However, the respondents blatantly disregarded the Federal Court Order and proceeded to engage HK after the expiry of the prescribed 60 days. On the facts and evidence, there was a blatant and flagrant disobedience of the Order of the Federal Court. Despite having exhausted all avenues to appeal, the respondents were recalcitrant by insisting on litigating by filing the applications for review as well as for the stay. From the time the Federal Court Order was granted until the First Review application was filed, one year and two months had lapsed followed by the filing of the Second and Third Review applications. It was apparent that the respondents had unabashedly refused to comply with the High Court Order affirmed and reinstated by the Federal Court. The non-compliance of a court order, and in the instant case an injunction, was a serious matter. Such behaviour showcased total disregard and disrespect of the order granted by the Federal Court which amounted to clear contempt of the Federal Court's order. (paras 47, 48, 62 & 63)

(4) An allegation of contempt against an advocate and solicitor was a serious matter. HK was not a novice. He was an experienced advocate and solicitor with more than 20 years of litigation experience. When he was engaged, the 60-day compliance period as ordered by the Federal Court had expired. By accepting the brief, HK would have been aware at all material times of the Federal Court Order and the terms of the mandatory injunction. Nevertheless, HK filed the Second Review application followed by the Third Review application as well as the stay of the committal in the High Court. Although HK could do so on behalf of his clients, no application was filed to stay the Federal Court Order. As an advocate, HK's main and primary duty as officer of the court was to ensure the rules of court were observed, and to respect the court and the court's order. Section 35(1) of the Legal Profession Act 1976 did not protect lawyers from contempt. It merely dealt with the right to appear and plead in courts in Malaysia. (paras 64 - 65)

(5) HK's affidavits were devoid of any reason or explanation of whether he had advised his clients to comply with the Federal Court Order and the reason for non-compliance and, despite the advice given by him they had instructed him to proceed with filing the review applications and the stay application. In the instant case, contempt of court had been proved beyond reasonable doubt against the respondents and HK for intentional disobedience of the Federal Court. The conduct and behaviour of the respondents and HK were contumacious and disrespectful. (paras 66, 70 & 71)

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLRA 80 (refd)

Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 3 MLRA 1 (refd)

Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors [1995] 1 MLRA 311 (refd)

Hup Soon Omnibus Co Sdn Bhd & Anor v. Lim Chee @ Lam Kum Chee [2017] MLRAU 515 (refd)

MBf Holdings Berhad & Anor v. Houng Hai Kong & Ors. [1994] 2 MLRH 293 (refd)

Parashuram Detaram Shamdasani v. King-Emperor [1945] AC 264 (refd)

PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)[2019] 3 MLRA 429 (refd)

Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Anor [2020] 5 MLRA 186 (refd)

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 5 MLRA 191 (folld)

Tan Sri Dato' Dr Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 MLRA 717 (refd)

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 2 MLRA 211 (refd)

TO Thomas v. Asia Fishing Industry (Pte) Ltd [1976] 1 MLRA 239 (refd)

Wee Choo Keong v. MBF Holdings Bhd & Anor And Another Appeal [1993] 1 MLRA 260 (refd)

Legislation referred to:

Legal Profession Act 1976, s 35(1)

Rules of Court 2012, O 52 r 2B

Rules of the Federal Court 1995, r 137

Counsel:

For the applicants: Hong Chong Hang (Edmund Lim with him); M/s Hong Chew King & Co

For the respondents: Chieng Lee Karn; M/s Chieng and Lum and Associates

For Haniff Khatri: Mohamed Haniff Khatri Abdulla (Mohamad Reza Abu Hassan, Mohd Irzan Iswatt Mohd Noor & Mohamad Farhan Kamarudin with him); M/s Haniff Khatri

[For the Court of Appeal judgment, please refer to Golden Star & Ors v. Ling Peek Hoe & Anor And Other Appeals [2016] 1 MLRA 377]

JUDGMENT

Hasnah Mohammed Hashim FCJ:

Introduction

[1] There are two committal proceedings commenced, one initiated at the Ipoh High Court and the other, before this court. The parties will be referred to as in the committal proceeding before the Federal Court.

[2] Enclosure 38(a) is the committal proceeding before this court:

(1) Ding Toh Biew (No K/P: 710206-08-6281), Ding Toh Gien (No K/P: 680918-08-5573) dan Ding Toh Lei (No K/P: 631002-08-6225), Pemohon-Pemohon Ke-2, Ke-3 dan Ke-4 yang dinamakan di atas untuk tunjuk sebab mengapa mereka tidak harus dikomitkan ke penjara kerana menghina Perintah Mahkamah Persekutuan bertarikh 20 Jun 2017;

(2) Golden Star (No Pendaftaran Perniagaan: 5196380), Ding Toh Biew (No K/P: 710206-08-6281), Ding Toh Gien (No K/P: 680918-08-5573) dan Ding Toh Lei (No K/P: 631002-08-6225), pemohon pertama, Ke-2, Ke-3 dan Ke-4 yang dinamakan di atas untuk tunjuk sebab mengapa mereka tidak harus dikomitkan ke penjara kerana memalukan Hakim-Hakim Mahkamah Persekutuan yang mendengar dan memutuskan Perintah Mahkamah Persekutuan bertarikh 20 Jun 2017 dan melemahkan pentadbiran keadilan dan keyakinan awam terhadap badan Kehakiman;

(3) Mohamed Haniff Bin Khatri Abdulla, seorang peguambela dan peguamcara yang mengamal di bawah nama dan gaya Tetuan Haniff Kathri, peguam mewakili pemohon-pemohon yang dinamakan di atas untuk tunjuk sebab mengapa beliau tidak harus dikomitkan ke penjara kerana membantu dan bersuhabat dengan pemohon-pemohon untuk mengekalkan pelanggaran dan ketidakpatuhan Perintah Mahkamah Persekutuan bertarikh 20 Jun 2017, memalukan Hakim-Hakim Mahkamah Persekutuan yang mendengar dan memutuskan Perintah Mahkamah Persekutuan bertarikh 20 Jun 2017 dan melemahkan pentadbiran keadilan dan keyakinan awam terhadap Badan Kehakiman; dan

(4) Kos permohonan dibayar oleh pemohon-pemohon yang dinamakan di atas dan Mohamed Haniff Bin Khatri Abdulla kepada Ling Peek Hoe dan Ling Boon Huat/Responden-Responden.

[3] Enclosure 52(a) is the notice of motion filed by Mohamed Haniff Bin Khatri Abdulla ("HK") to set aside para 3 of the Federal Court Order dated 27 May 2019:

(1) Bahawa berdasarkan Kaedah 137, Kaedah-Kaedah Mahkamah Persekutuan 1995 dan/atau bidang kuasa sedia ada Mahkamah, perenggan (3) Perintah *Ex-Parte* Mahkamah Persekutuan bertarikh 27 Mei 2019 yang memberikan kebenaran kepada responden-redsponden yang dinamakan di atas untuk memohon supaya Mohamed Haniff Bin Khatri Abdulla seorang peguambela dan peguamcara yang mengamal di bawah nama dan gaya Tetuan Haniff Khatri, peguam mewakili pemohon-pemohon yang dinamakan di atas, untuk tunjuk sebab mengapa beliau tidak hasur dikomitkan ke penjara kerana membantu dan bersubahat dengan pemohon-pemohon untuk megekalkan perlanggaran dan ketidakpatuhan Perintah Mahkamah Persekutuan bertarikh 20 Jun 2017, memalukan Hakim-Hakim Mahkamah Persekutuan yang mendengar dan memutuskan perintah Mahkamah Persekutuan bertarikh 20 Jun 2017 dan melemahkan pentadbiran keadilan dan keyakinan awam terhadap Badan Kehakiman, adalah diketepikan;

(2) Bahawa berdasarkan Kaedah 137, Kaedah-Kaedah Mahkamah Persekutuan 1995 dan/atau bidang kuasa sedia ada Mahkamah, prosiding pengkomitan melalui Notis Usul bertarikh 29 Mei 2019 terhadap Pemohon-Pemohon dan Mohamed Haniff bin Khatri Abdulla di Mahkamah Persekutuan, termasuk namun tidak terhad kepada pemfailan Afidavit Jawapan oleh Mohamed Haniff bin Khatri Abdulla terhadap prosiding pengkomitan tersebut, adalah digantung sehingga pelupusan permohonan Mohamed Haniff bin Khatri Abdulla di perenggan (1) di atas;

(3) Kos bagi permohonan ini hendaklah dibayar oleh responden-responden yang dinamakan di atas kepada Mohamed Haniff Bin Khatri Abdulla dengan serta-merta.

[4] Ling Peek Hoe and Ling Boon Huat are the 1st and 2nd applicants ("the applicants") in this committal proceeding. The 2nd applicant is the son of the 1st applicant. Golden Star, Ding Toh Biew, Ding Toh Gien and Ding Toh Lei are the 1st, 2nd, 3rd, and 4th respondents ("the respondents"). Mohamed Hanif Bin Khatri Abdulla ("HK"), an advocate and solicitor practising under the name and style of Messrs Haniff Khatri was cited by the applicants for aiding and abetting the respondents' non-compliance of the court order. The leave to commence committal proceedings was granted by this court on 27 May 2019.

The Facts

[5] The 1st applicant is the registered owner of a shophouse described as No 59, Taman Ilmu Setiawan, Setiawan, Perak ("No 59 shophouse") and two pieces of agricultural land located at Kg Selamat ("Kg Selamat Properties"). These properties will collectively be referred to as "the Properties". Ding Siew Ching ("DSC") is an advocate and solicitor practising in Messrs Ding & Co in Setiawan, Perak. The 1st respondent is a licensed moneylending company while the 2nd, 3rd and 4th respondents are partners of the 1st respondent. DSC, the 2nd, 3rd and 4th respondents are siblings.

[6] The facts that led to the dispute between the parties began in 1995 when the 1st applicant obtained a loan facility of RM590,000.00 from Hong Leong Bank Bhd ("HLBB"). The properties and his house at No 27, Jalan Raja Omar ("Jalan Raja Omar Property") were charged as securities for the loan.

[7] Sometime in mid-1996, the 1st applicant approached the 1st respondent's office for a loan through the 2nd respondent. For the purpose of the loan, the 1st applicant was asked to furnish the original copy of the titles of the properties and was informed that the 1st respondent had the right to keep the original titles until the 1st applicant fully paid the loans.

[8] For the purpose of the loan the 1st applicant signed certain documents and paid the sum of RM150.00 as legal fees. It was represented to the 1st applicant by the 2nd respondent that the documents that he had signed as well as the

legal fees paid were for the loan procured from the 1st respondent. A cheque of RM5,000.00 was issued by the 2nd respondent to the 1st applicant with the agreed interest on the loan of 4% per month. The 1st applicant further took a few more loans from the 1st respondent totalling RM500,000.00.

[9] Unfortunately, the 1st applicant was in arrears of the HLBB loan payment. To resolve the outstanding sum due to HLBB, the 1st applicant sold the Jalan Raja Omar Property sometime at the end of 1996. HLBB received RM330,000.00 as part payment of the 1st applicant's loan with HLBB.

[10] The respondents settled the 1st applicant's HLBB loan and discharged the charges on the Properties.

[11] In 2003, the 1st applicant discovered that the Properties had been transferred to the 2nd, 3rd and 4th respondents by virtue of sale and purchase agreements ("SPAs"). All the loans and transfers documentation were handled by DSC.

[12] In the same year, the 1st applicant took a loan from another bank to repurchase No 59 shophouse for RM330,000.00 where the 1st applicant and his family lived. The No 59 shophouse was then transferred to the 2nd applicant. As in the previous transaction, all the documentations relating to the transfer were handled by DSC.

The High Court

[13] On 18 August 2006, the applicants filed a suit in the Ipoh High Court against DSC and the respondents seeking a declaration that the SPAs and the transfers of the Properties were null and void. The essence of the applicants' claim was based on misrepresentation, fraud or conspiracy to defraud.

[14] In respect of DSC, the applicants alleged that as an advocate and solicitor, she failed to exercise all reasonable professional care, skill and diligence and had breached the terms of her retainer with the applicants, in particular:

(a) Failed to properly advise the applicants on the purported SPAs for the Properties from the 1st applicant to the 2nd, 3rd and 4th respondents; and

(b) Failed to advise the applicants that the purported transactions and redemption of the No 59 shophouse was in contravention of the Moneylenders Act 1951 ('the MLA 1951').

[15] The respondents also filed a suit in the Ipoh High Court against the applicants seeking an injunction and damages for trespass. Both suits by order of the High Court were consolidated on 24 February 2010.

[16] On 28 November 2012 after a full trial, the High Court declared that the SPAs entered between the 1st applicant with the 2nd, 3rd and 4th respondents

and the transfers of the properties were null and void. The High Court ordered the respondents to pay the applicants general, special, punitive and exemplary damages. The respondents' claim was dismissed with costs.

[17] Subsequently on 17 April 2013, the High Court further ordered the respondents to do all that is necessary to discharge the lands and thereafter surrender the original issue document of titles to the 1st applicant within 60 days from the date of the order ("the High Court Order").

[18] Aggrieved by the decision of the High Court the respondents appealed to the Court of Appeal.

The Court Of Appeal (COA)

[19] The COA found that the learned JC erred in applying the wrong standard of proof in holding that the applicants had proven their case against the respondents for fraudulent misrepresentation and fraud in respect of the three properties. The learned JC ought to have used the beyond reasonable doubt test. The applicants failed to prove fraudulent misrepresentation and fraud beyond reasonable doubt.

[20] The COA allowed the three appeals by the respondents with costs and set aside the High Court Order.

The Federal Court

[21] Dissatisfied with the decision made by Court of Appeal, on 10 April 2015 the applicants filed a motion for leave to appeal.

[22] On 28 March 2016, the Federal Court allowed the leave to appeal and the following questions of law:

> Question 1
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> Whether in light of the recent Federal Court of Malaysia's decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 5 MLRA 191, the Court of Appeal was right in adopting beyond reasonable doubt as the standard of proof for civil claim?
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> Question 2
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> Whether irresistible conclusion is not the same with beyond reasonable doubt?

[23] On 20 June 2017 the appeal was heard in the Federal Court. In respect of Question 1, the Federal Court held that the court could not subscribe to the argument that, "future cases" meant only cases that were yet to be filed with the courts. The law as declared by the Federal Court in *Sinnaiyah (supra)* and made subject to the doctrine of prospective overruling, applied to all pending cases and all those cases that were still under appeals within the court system. For

that reason, it was wrong of the COA to have adopted the "beyond reasonable doubt" as the standard of proof in the instant case.

[24] In respect of Question 2, the Federal Court was of the view that the "irresistible conclusion test" was the same as "the beyond reasonable doubt test".

[25] The Federal Court unanimously allowed the applicants' appeal, set aside the COA order and reinstated the High Court Order requiring the 2nd to 4th respondents to cause the charge created by them on the 1st applicant's properties to be discharged and to return the original title deeds to the 1st applicant within 60 days of the FC Order.

The Review Applications And Committal Proceedings

[26] Dissatisfied with the Federal Court's decision, on 28 February 2018 the respondents filed a motion to review the Federal Court Order vide Federal Court Civil Application No: 02(f)-24-04-2016(A) ('the First Review').

[27] At the same time on 16 April 2018 the applicants filed a committal proceeding against the 2nd, 3rd and 4th respondents in the Ipoh High Court for non-compliance of the FC Order.

[28] The Ipoh High Court allowed the *Ex-Parte* Order dated 18 May 2018 for the applicants to cite the 2nd, 3rd and 4th respondents for contempt.

[29] During the hearing of the First Review before the Federal Court on 15 August 2018, the respondents' counsel applied for an adjournment which was not allowed by the Federal Court. The respondents' counsel then decided to withdraw the First Review and accordingly it was struck off by the Federal Court.

[30] After the First Review was struck off by the Federal Court on 24 September 2018, HK was appointed by the respondents to represent them. It is contended by the respondents that they were unaware of the withdrawal of the First Review by their counsel and that it was made without their instructions.

[31] On 23 October 2018 HK filed another review application against the Federal Court Order that is, Civil Review No: 08(R)-8-10-2018(W) ('the Second Review'). This was followed by an application for stay of proceeding (inclusive but not limited to committal proceeding against the respondents) filed on 25 October 2018 in the Ipoh High Court pending disposal of the Second Review.

[32] On 8 November 2018 HK filed another review application against the Federal Court Order vide Civil Review No: 08(RS)-15-11-2018(W) ('the Third Review').

[33] On 6 December 2018 HK obtained a stay of execution at the Ipoh High Court pending disposal of the review applications.

[34] Both the Second and Third Reviews were struck off on 27 May 2019. The Federal Court granted leave to the applicants to commence committal proceeding against HK and the respondents on following grounds:

(i) Failed, ignored and refused to obey the Federal Court Order;

(ii) Openly denied the "kesahihan dan penguatkuasaan" (validity and enforceability) of the Federal Court Order;

(iii) Falsely and without any basis accused the Federal Court "berat sebelah" (bias) on the Federal Court Order; and

(iv) Ignored the authority and bypass the hierarchy of the Federal Court by applying for a stay of proceeding in the High Court pending disposal of the Second and Third Reviews in the Federal Court.

[35] HK filed a notice of motion on 29 May 2019 to set aside para 3 of the Federal Court Order dated 27 May 2019. The applicants on the other hand filed a notice of motion for committal proceedings (Encl 38(a)). Due to conflict of interest HK discharged himself from representing the respondents. This court heard both encls 52(a) and 38(a) together.

The Arguments

[36] Before us learned counsel for the applicants argued that the respondents not only failed but blatantly ignored and refused to obey the Federal Court Order within the prescribed 60 days as expressly stated in the said order. Learned counsel submitted that the respondents were aware of the mandatory injunction and the Federal Court Order which had affirmed the High Court Order. The respondents through an affidavit filed to oppose the committal proceedings denied the validity and enforceability of the order of the Federal Court. It was further argued that the respondents' allegation of bias is without any merit and basis. Such allegation casts aspersion on the integrity and impartiality of the Federal Court Judges who had heard the appeal.

[37] It was further submitted by learned counsel for the applicants that by applying for a stay of proceedings in the Ipoh High Court pending disposal of the Second and Third Reviews in the Federal Court, the respondents had bypassed the hierarchy of the courts. The respondents did not apply for a stay at the Federal Court but had instead filed the stay application at the Ipoh High Court. HK was cited as a contemnor as he acted as counsel for the respondents and had, according to the applicants, orchestrated, aided and abetted the respondents to disobey the Federal Court Order.

[38] In response, learned counsel for the respondents submitted that they had just followed the advice of HK because they are laymen and thus do not possess

any knowledge of the law and the rules of court. Therefore, they had no other option but to rely on the professional advice given by HK as their lawyer.

[39] HK on the other hand, argued that the applicants failed to prove beyond reasonable doubt that he is in contempt as the matter complained of by the applicants does not amount to interfering with the due administration of justice but was made in good faith in exercising the respondents' legal rights. He had acted in accordance with the respondents' instructions and the applicants failed to prove that it was HK who had advised the respondents to disobey the Federal Court Order. In support of his submission, learned counsel argued that as an advocate and solicitor, he is protected by the provision of the LPA, that is, to act without fear or favour. Furthermore, it is against public policy for advocates and solicitors to be held liable for contempt in the course of exercising their duty as the filing of the Second and Third Review applications and the stay proceedings are within the ambit of the law and do not tantamount to acts of contempt.

Analysis And Decision

Enclosure 52(a)

[40] Enclosure 52(a) is unanimously dismissed by this court. Our reasons are as follows. Firstly, on the issue of personal service, under O 52 r 2B of the Rules of Court 2012, the question whether the failure to comply with the rule is fatal or not depends on the facts of the case and whether it has prejudiced the proposed contemnor in this case, HK. This court in *Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Anor* [2020] 5 MLRA 186 held that non-compliance with the requirement of notice pursuant to O 52 r 2B is not fatal or prejudicial. On the facts of the case before us, we are of the view that the failure by the applicants to serve the notice personally on HK is neither fatal nor prejudicial to him. On the issue in relation to intitulement, we do not find any merit in the argument that the failure to cite the name of HK in the intitulement is fatal. With regard to the O 52 statement, we find that sufficient particulars of the alleged contempt by HK have in fact been stated in the statement itself.

Review Applications

[41] The issue before us is the contempt by the respondents and their former lawyer, HK. However, we feel that is necessary to discuss the review application which is the basis of the complaints by the applicants in this committal proceedings. Rule 137 of the Rules of the Federal Court 1995 (RFC) provides:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[42] Under r 137 RFC the Federal Court has the inherent power to review its own decision but this is exercised only in rare and exceptional circumstances.

Abdul Hamid CJ in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLRA 80 in his usual eloquent manner explained the invocation of the rule:

> "In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many time warned against such attempts."

[43] In order to succeed in a review application made pursuant to r 137 RFC it must be shown that not only does the case fall within the stringent criteria as set out in *Asean Security Mills (supra)* but the error must be so obvious that there was injustice to the party. Zaki Tun Azmi CJ succinctly explained in his judgment in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 3 MLRA 1:

> "Before the application can succeed, he must be able to show on the face of the record that there was injustice. That error must be obvious on the face of the record. It should be able to be seen just by reading the record that there was an error which obviously was an injustice. In *Asean Security Papermills* case, I have listed out the circumstances where discretion under r 137 can be exercised. If one were to go through all these cases, injustice could be clearly seen even before going into the merits of each case. It cannot apply where a decision of this court is only questioned, whether in law or on the facts of the case. This principle is well spelt out in the case cited below.
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> [13] In *Chan Yock Cher v. Chan Teong Peng* [2005] 2 MLRA 25, Abdul Hamid Mohamad FCJ (as he then was) said this:
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> > ... It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court that is not a ground that warrants us to review the decision. Similarly, regarding the interpretation

> and application of some provisions of the Companies Act 1965, even if we disagree with the earlier panel (again we do not say whether we agree or disagree) that does not warrant us to set aside the judgment and the *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 3 MLRA 1 order of the earlier panel of this court and re-hear and review the appeal. Otherwise, as has been said, there would be no end to a proceeding."

[44] In the instant case before us, this court had unanimously allowed the applicants' appeal, set aside the Court of Appeal Order and reinstated the High Court Order. The respondents then filed an application to review the Federal Court's decision. The First Review was struck off by this court on 15 August 2018 when the respondents' counsel decided to withdraw application. This was then followed by the Second and Third Review applications.

[45] The effect of the striking out of the First Review would necessarily mean that the decision of the High Court had been reinstated as ordered by this court. In other words, the respondents must comply with the order granted by the High Court in favour of the applicants. Due to the non-compliance of the Federal Court Order the applicants filed a committal proceeding against the respondents. However, the respondents filed an application to stay the execution of the Order pending the review applications.

[46] HK filed the Second Review but the application was technically flawed as it was filed under the wrong administrative code. Subsequently, another review application was filed, the Third Review. The applicants on the other hand, filed an application to strike out both the Second and Third Review applications and on 27 May 2019 both applications were struck off without liberty to file afresh by this court.

The Committal Proceeding

[47] There are two Orders pertaining to this case. The High Court Order dated 17 April 2013 granted a mandatory injunction compelling the respondents to surrender the titles within 60 days from the date of the Order. The 60 days to comply lapsed on 17 June 2013. The FC Order dated 20 June 2017 affirmed the High Court Order granting the mandatory injunction. The 60 days to comply lapsed on 20 August 2017.

[48] The respondents' previous solicitors, Messrs Yunus Ali & Kam had advised them to comply with the FC Order despite the filing of a review against it. Learned counsel for the respondents argued that being laymen they had followed the advice of their lawyer. However, the respondents blatantly disregarded the Federal Court Order and proceeded to engage HK after the expiry of the prescribed 60 days. It is contended by learned counsel for the applicants that the respondents did the following:

(i) Affirmed an affidavit denying the validity and enforceability of the Federal Court Order; and

(ii) Relied on the said affidavit to oppose the committal proceeding against them for non-compliance of the mandatory injunction in the High Court.

[49] HK was then engaged by the respondents after the 60 days lapsed on 24 September 2018. Despite the lapse of the 60 days the applications for review of the Federal Court Order were filed. The application to stay the committal proceeding at the High Court was filed by the respondents. When the application for leave to commence committal proceeding was granted by the Federal Court, the respondents decided to dissociate themselves from HK for the advice given. *Ex abudandi cautela*, they filed a complaint with the Bar as well as a Statutory Declaration to show that they were serious about HK giving "incompetent and/or wrong advice" to them (see: para 6.3 Affidavit Ding Toh Lei affirmed on 15 August 2019).

[50] HK in his affidavit justified his reasons for filing the applications:

(i) He was acting on the instructions of his clients and therefore protected under the LPA;

(ii) The applications for Reviews No 2 and No 3 were filed on the instructions of his clients; and

(iii) The application for stay of execution in the High Court was filed on the instructions of his clients.

[51] HK further argued in response that the filing of the committal proceedings in this court had in fact ousted the alleged contemnors' right of appeal as the alleged act of contempt was at the High Court not at the Federal Court. The failure by the applicants to initiate the committal proceeding against HK at the High Court and Court of Appeal stage shows that the applicants were in doubt as to whether there was any act of contempt committed by HK. As such, the applicants are estopped from proceeding with committal proceeding against HK as they themselves were in doubt as to whether they have a *prima facie* case of contempt against HK.

[52] The respondents had merely exercised their legal right in filing the appeals against the High Court's decision and reviews against the Federal Court's decision. HK further submitted that there is no *prima facie* act of contempt or the charge had not been proved beyond reasonable doubt because the matter complained of does not amount to and/or calculated as interfering with the due administration of justice but was made in good faith in the exercise of the respondents' legal rights.

[53] It was further argued that the filing of the Second and Third Review applications before Federal Court and the stay proceeding application before the High Court were *bona fide* and under instruction of the respondents and not to defeat the administration of justice.

[54] In the review applications, the respondents raised bias as a ground to challenge the Federal Court Order. Learned counsel for the applicants argued that this cast aspersion on the integrity and dignity of the Federal Court Judges who had heard the appeal. Learned counsel for the applicants in his submission cited the case of *Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors* [1995] 1 MLRA 311 where Gopal Sri Ram, judge of the Court of Appeal (as he then was) said that allegation of bias is a serious allegation that may lead to erosion of public confidence in the judiciary:

> "Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt."

[55] In response to the submission of learned counsel for the applicants, HK argued that he was merely acting on instructions and is protected from contempt by virtue of s 35(1) of the LPA which reads:

> "(1) Any advocate and solicitor shall, subject to this Act and any other written law, have the exclusive right to appear and plead in all courts of Justice in Malaysia according to the law in force in those courts; and as between themselves shall have the same rights and privileges without differentiation."

[56] Learned counsel, HK further submitted that by virtue of the provision of s 35(1) LPA advocates and solicitors are protected from contempt proceeding in order to be able to act without fear or favour. The said provision states that, subject to the provisions of the LPA and any other written law, advocates and solicitors shall have the exclusive right to appear and plead in all courts in Malaysia according to the applicable law and shall have the same rights and privileges.

[57] The principles of law pertaining to contempt of court were explained through the judgment of Abdul Hamid Omar LP in the Supreme Court decision of *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 1 MLRA 260,

> "Obedience to court order
>
> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences."

[58] Arifin Zakaria CJ in *Tan Sri Dato' Dr Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 MLRA 717 said:

> "[26] Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general

conduct for interfering with the due administration or the course of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v. Newspaper Publishing Plc (supra)*:

> Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order; and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to all contempts per Lord Diplock in *Attorney-General v. Leveller Magazine Ltd* [1979] AC 440 at 449.

[27] This reclassification was adopted by the Court of Appeal in *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 1 MLRA 602.

[28] Hence, the law of contempt is wide enough to cover not only those who are bound by the court order, but other parties who assist the disobedience to the court order. It was reported in *Attorney-General v. Times Newspapers Ltd* [1991] 2 All ER 398 that a person, who knowingly impeded or interfered with the administration of justice in an action between two other parties, was guilty of contempt of court notwithstanding that he was neither named in any order of the court nor had assisted a person against whom an order was made."

[59] The Federal Court in *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 3 MLRA 429 held:

> "[41] The courts of justice are the bulwark of a nation. Alexander Hamilton famously recognised, in the doctrine of the separation of powers, that the Legislature controls money, the executive controls force and the Judiciary controls nothing. It is on public confidence that the Judiciary depends, for the general acceptance of its judicial decisions, by both citizens and the Government. The public conforms to the decisions of the Judiciary, because they respect the concept of judicial power and the judges who exercise such power.
>
> [42] Therefore, the trust and confidence of the people in the judicial system to deliver impartial justice comprises the very foundation of the Judiciary.
>
> [43] The concept of contempt of court is essential to protect public confidence in the Judiciary and the administration of justice. The rationale behind the concept has been stated in the English *locus classicus* on this subject, namely the *Attorney General v. Times Newspaper Ltd* [1973] 3 All ER 54 by Lord Morris and followed by Steve Shim CJ (Sabah and Sarawak) in the case of *Zainur Zakaria v. PP* [2001] 1 MLRA 341:
>
> ... For a better perspective of this concept, I can do no better than refer to the illuminating speeches made by a strong panel of Law Lords in *Attorney General v. Times Newspaper Ltd* [1973] 3 All ER 54 (universally known as "the thalidomide case"). Therein, Lord Morris has said as follows:
>
> ... the phrase 'contempt of court' is one which is compendious to include not only disobedience to orders of a court but also certain types of behaviour

> or varieties of publications in reference to proceedings before courts of law which overstep the bounds which liberty permits. In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of the courts of law is to preserve freedom within the law for all well-disposed members of the community, it is manifest that the courts must never impose any limitations on free speech or free discussion or free criticism beyond those which are absolutely necessary. When therefore a court has to consider the propriety of some conduct or speech or writing decision will often depend on whether one aspect of the public interest definitely outweighs another aspect of the public interest. Certain aspects of the public interest will be relevant in deciding or assessing whether there has been contempt of court. But this does not mean that if some conduct ought to be stigmatised as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court.
>
> These are words of unparalleled wisdom which should be engraved in tablets of stone."

[60] HK's argument that the applicants' application for contempt is motivated by vengeance to retaliate against the respondents' applications for review is baseless. HK had at all material times acted on the instructions of the respondents when he filed the review applications and the stay.

[61] In *TO Thomas v. Asia Fishing Industry (Pte) Ltd* [1976] 1 MLRA 239, it was held by this Court that "An order even irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by proper application it is discharged". Lee Hun Hoe (Borneo) CJ in *TO Thomas (supra)* explicitly emphasised that contempt of court arises when there is wilful disobedience of an injunction,

> "When an injunction has been made against a person appellant cannot aid and abet that person to flout it for that will be in contempt. That person can appear in court and contest the injunction by asking the court to vacate it. Contempt of court arises on the wilful disobedience of the injunction whether it is made with or without jurisdiction. The question whether "the court order" has been suspended or modified is a matter for the court to decide when its properly before the court. This is not a matter for appellant to arbitrarily so construe. Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it. See *Attorney General v. Colney Hatch Lunatic Asylum* [1869] 4 Ch app 146. "The court order" has never been discharged.

> There is no question of the undertaking suspending "the court order". An order even irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by proper application it is discharged. This view is supported by authority. In dealing with the contention that the original order had been erroneously granted in *Fennings v. Humphrey* [1841] 4 Beav 1; 49 ER 237. Lord Langdale MR said:
>
> > It is clear, that a party who is served with an order may be guilty of contempt for disobedience, in a case in which the order ought not to have been made. He is not to determine for himself, but ought to come to the court for relief, if advised that the order is invalid". Nothing is more incumbent upon the courts than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against the courts."

[62] The Court of Appeal in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [1998] 2 MLRA 211, observed that a party could not ignore or refuse to comply with a court order on the ground of nullity. In another case *Hup Soon Omnibus Co Sdn Bhd & Anor v. Lim Chee @ Lam Kum Chee* [2017] MLRAU 515 the Court of Appeal emphasised the importance of a court order that it must be obeyed as ordered unless set aside or varied and not just a mere technicality that can be ignored. Before us, on the facts and evidence we find that there was a blatant and flagrant disobedience of the order of the Federal Court.

[63] Despite having exhausted all the avenues to appeal their case, the respondents were recalcitrant by insisting on litigating by filing the applications for review as well as for the stay. From the time the Federal Court Order was granted until the First Review application was filed, one year and two months had lapsed followed by the filing of the Second and Third Review applications. It is apparent to us that the respondents have unabashedly refused to comply with the High Court Order affirmed and reinstated by this court. The non-compliance of a court order, and in this case an injunction, is a serious matter. Such behaviour to our mind, showcased total disregard and disrespect of the order granted by the Federal Court which is tantamount to clear contempt of this court's order.

[64] With regard to HK, we are mindful that an allegation of contempt against an advocate and solicitor is a serious matter. HK is not a novice but an experienced advocate and solicitor with more than 20 years of litigation experience under his belt. When he was engaged, the 60 days to comply as ordered by this court had expired. By accepting the brief HK would have been aware at all material times of the Federal Court Order and the terms of the mandatory injunction. Nevertheless, HK filed the Second Review application followed by the Third Review application as well as the stay of the committal in the High Court. HK's justification for filing the applications for review and stay is just this, that under the law, on behalf of his client he can file the review applications as well as the stay application. We agree that he can do so. However, the circumstances and the facts of this case are not that simple

or straightforward. There is a specific order to comply with the Federal Court Order which had lapsed when the application to stay the committal was filed in the High Court as well as the Second and Third Review applications were pending in the Federal Court. No application was filed to stay the Federal Court Order.

[65] As an advocate, HK's main and primary duty as officer of the court is to ensure the rules of court are observed, and to respect the court and the court's order. Section 35(1) LPA does not protect lawyers from contempt. It merely deals with the right to appear and plead in courts in Malaysia.

[66] HK's affidavits are devoid of any reason or explanation of whether he had advised his clients to comply with the Federal Court Order and the reason for non-compliance and, despite the advice given by him they had instructed him to proceed with filing the review applications and the stay application.

[67] Anuar Zainal Abidin J (as he then was) in *MBf Holdings Berhad & Anor v. Houng Hai Kong & Ors.* [1994] 2 MLRH 293 emphasised the duties and responsibilities of an advocate and solicitor:

> "As a member of the Bar he is also an officer of the court. He has an onerous duty as an advocate and solicitor to see that justice is upheld. At the same time as an officer of the court he has a duty towards the court. Indeed his duty to the court is most important. It is his duty to protect the dignity of court. It is therefore expected of him to show respect for the administration of justice."

[68] His Lordship further said:

> As a member of the Bar he should have shown greater respect for an order of "court. On the contrary he had blatantly challenged the validity of the order. The defendant obtrusively defied the power of the court and therefore has committed contumelious conduct against the order of court.
>
> .....He has completely brushed aside the order of court. He manipulated and schemed an action to suit his own purpose ignoring the supremacy of the order of court."

[69] Lord Goddard through his judgment in *Parashuram Detaram Shamdasani v. King-Emperor* [1945] AC 264, 270 observed,

> "Their Lordships would once again emphasise what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended."

[70] In conclusion, for the reasons we have given above, we are satisfied that contempt of court has been proved beyond reasonable doubt against the respondents and HK for intentional disobedience of the Federal Court.

[71] We are therefore, of the view that such conduct and behaviour of the respondents and HK were contumacious and disrespectful. In the circumstances of this case we are satisfied beyond reasonable doubt that the respondents and HK are guilty of contempt of court.

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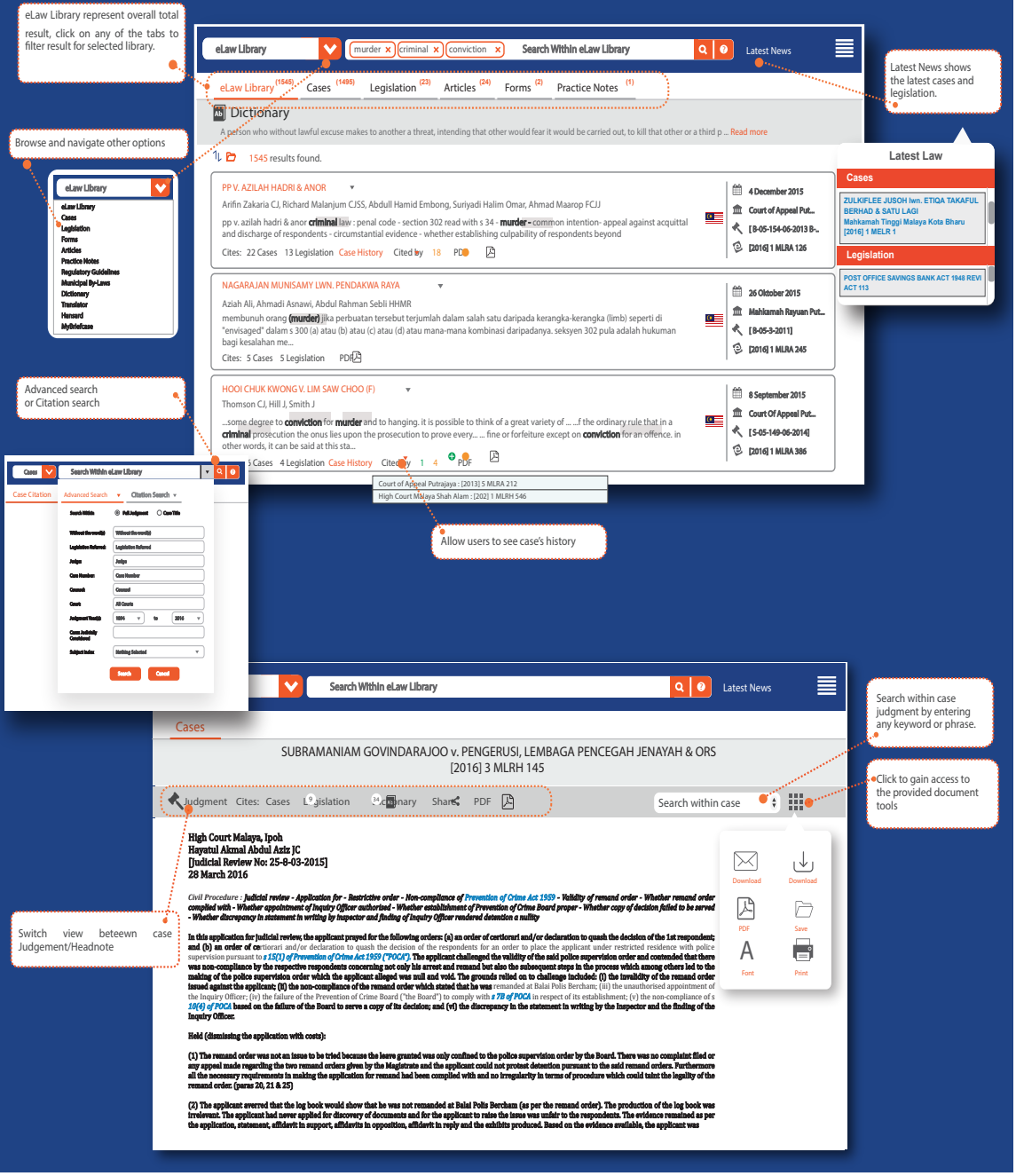

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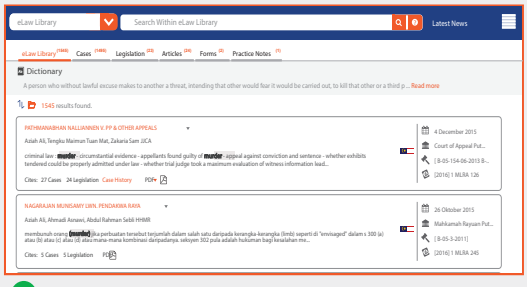

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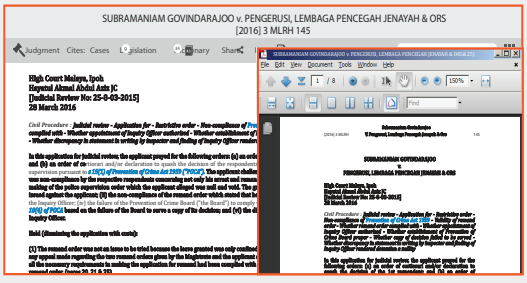

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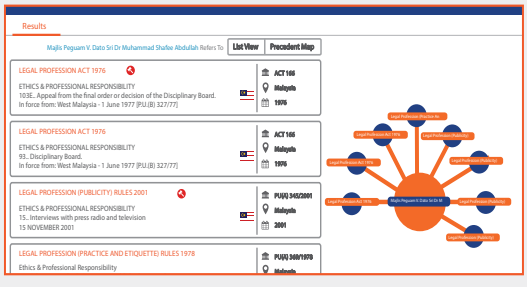

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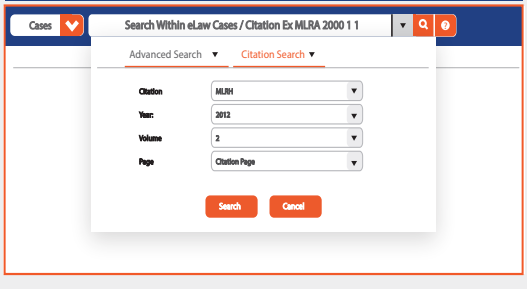

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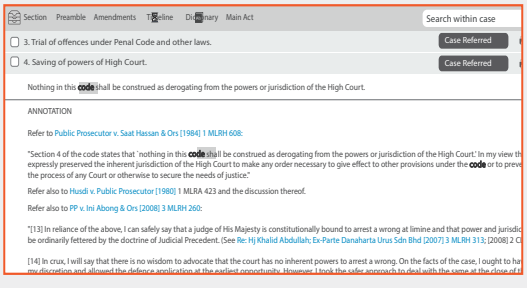

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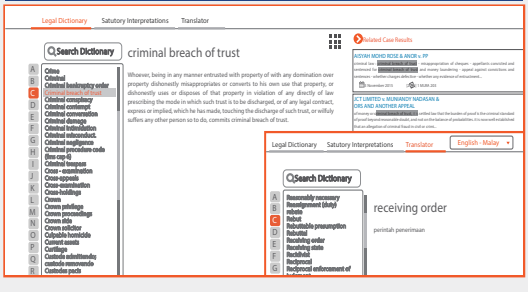

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