TAN SRI DATO' LIM CHENG POW

v.

BELLAJADE SDN BHD & ANOTHER APPEAL

Federal Court, Putrajaya
Vernon Ong, Abdul Rahman Sebli, Zabariah Mohd Yusof, Hasnah Mohammed Hashim, Rhodzariah Bujang FCJJ
[Civil Appeal Nos: 02(f)-135-11-2017(W) & 02(f)-136-11-2017(W)]
30 September 2021

Land Law: *Tenancy — Tenancy agreement — Claim for outstanding rentals — Whether an approval by state authority given under s 204D National Land Code operated as approval of land use under s 124 of Code — Whether change of condition of land under s 124 of Code took effect upon endorsement of same on issue document of title to land in question — Whether tenancy for commercial use of land which was by condition for residential use illegal and void having regard to decisions of Federal Court in Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd and Toh Huat Khay v. Lim A Chang*

These two appeals by the appellants pertained to a tenancy agreement ("agreement") in respect of a block of 23-storey office building in Ampang named Plaza Palas, entered into by its owner, Bellajade Sdn Bhd ("Bellajade") and CME Group Berhad ("CME"), its tenant. CME's performance of the agreement was guaranteed by Tan Sri Dato' Lim Cheng Pow ("Tan Sri Lim"). The agreement was for a fixed period of three years commencing from the date of completion of a sale and purchase agreement between Bellajade and the previous owner of Plaza Palas, Orion Choice Sdn Bhd ("Orion Choice"), who still retained ownership of another block of building comprising serviced apartments built on the same nine parcels of land as Plaza Palas. Orion Choice obtained ownership of the said lands from one Kris Angsana Sdn Bhd ("Kris Angsana"). Given that Kris Angsana was then a company in liquidation, Orion Choice was cited in the agreement as the beneficial owner of the land. At that material time, as well as at the time when the dispute between the parties herein was filed in court, the category of use for the said lands stated on the land titles was "Building" with "Residential" as their express condition. Kris Angsana then applied to the Land Administrator under s 204D of the National Land Code ("NLC") for surrender, re-alienation and change of the said condition from "Residential" to "Commercial" and "Mixed Development". This was followed by an application by Orion Choice to the Kuala Lumpur City Council ("Council") for approval – which was also granted – to amend the building plans for Plaza Palas, to use it for a commercial purpose. The said application to the Land Administrator was granted vide a letter of approval but subject to payment of RM1,550,172.00, which was inclusive of a premium in the sum of RM1,531,179.00. Pursuant to a full payment of the premium, a certificate was

issued by the Department of Land and Mines, Kuala Lumpur, acknowledging the payment and stating that Kris Angsana's application was approved.

The agreed rental in the agreement was RM1,018,750.00 per month and CME paid six months' rental after taking over the premises but that was all. This led to Bellajade filing a suit in the High Court against CME and Tan Sri Lim for the outstanding rentals as at 27 December 2013, starting from the month of May 2013 in the sum of RM8,401,756.85, as well as the amount of rentals for the remaining period of the tenancy. CME, on the other hand, filed a counter-claim for the rentals, rental deposit and utilities bills which it had paid to Bellajade on the ground, *inter alia*, that the agreement was void for flouting an express condition. Bellajade's claim was dismissed whereas CME's counter-claim was allowed by the Judicial Commissioner. This decision was reversed on appeal by the Court of Appeal. Subsequently, the Federal Court granted leave to CME and Tan Sri Lim to appeal against the said decision based on these three questions of law: (i) whether an approval by the state authority given under s 204D of the NLC operated as an approval of land use under s 124 of the NLC; (ii) whether a change of condition of land under s 124 of the NLC took effect upon endorsement of the same on the issue document of title to the land in question; and (iii) whether a tenancy for commercial use of land which was by condition for residential use was illegal and void having regard to the decisions of the Federal Court in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* ("*Singma's* case") and *Toh Huat Khay v. Lim A Chang* ("*Toh Huat Khay's* case").

Held (allowing the appellants' appeals in part):

(1) Since the crux of the legal dispute between the parties lay with the express condition of the land and in view of the first two leave questions, Kris Angsana's application for "Surrender, Re-alienation, Amalgamation and Conversion of Land Use" under s 204D of the NLC, and the approval thereof, was instrumental and crucial to the resolution of the parties' dispute herein. In this regard, the letter from the Land Administrator and the certificate confirming the approval were relevant. What was noteworthy from both documents was the fact that the application was expressly stated to have been made under s 204D of the NLC and in the said certificate, the condition of the land titles was clearly stated to be mixed development for the purpose of apartments and offices only. It was, therefore, not one made solely for a change of condition under s 124(4) of the NLC, given the express citation of s 204D in both the application and the certificate of approval although in the certificate the said section was put in the alternative. The reason to invoke s 204D was obvious because this development was not on a single parcel but nine parcels of land. Hence the need for amalgamation of the same to suit the extensive development built on it and given the nature of that development there was an equal need to make that application under s 124(4). The mere fact that s 204D was only stated in the alternative in the said certificate did not mean, on the clear facts of this case, that it was not invoked by the Land Administrator. Hence, when

such an application was made under s 204D, the governing provisions were those provided under that part of the NLC which was titled "Surrender and Re-alienation – Special Provisions". Therefore, the first leave question on the peculiar facts of this case should be answered in the positive, because of the clear evidence that Kris Angsana's application to the Land Administrator was made both under ss 204D and 124(4). Otherwise, generally speaking, the answer to the said question would be in the negative because there would be instances when an application to surrender and re-alienate the land for the purpose of amalgamation would not involve a change in its stipulated use and condition. (para 11)

(2) It was clear from s 124 of the NLC that upon approval of the application for the said change, the State Authority would direct that the subject matter of the approval be endorsed on the land title. It was to be equally emphasised that s 113(a) of the NLC in turn provided that the condition and restriction in interest on the land be subject to the changes which resulted from the granting of any application under s 124(1). From a reading and understanding of the provisions, the NLC did not stipulate when was the effective date for the approval of the change in condition unlike that for alienation of land as provided in s 78(3) of the NLC and change in category of land use in s 124(1)(a). In the absence of such specific provision, that effective date should be when the same was similarly endorsed on the title. This was because, firstly, it was settled law that under the Torrens system, which land law was subject to, that the register was "everything" and therefore, the change of use of the land would only take effect upon its endorsement on the land title. Secondly, even if there was an approval by the State Authority to transfer the land but without the consequential mandatory requirements of s 124(7) being carried out, to wit, the entry of a memorandum in Forum 7C by the Registrar on the register and issue document of title of the approval to strike off or delete the restriction approved, that was insufficient to legalise the transfer since the restriction was still endorsed on the land title. Therefore, the second leave question should be answered in the affirmative. (paras 13-14)

(3) The obvious answer to the third leave question, given the clear pronouncements made by this court in the two cases cited in it, that is, *Singma's* case and *Toh Huat Khay's* case, was a "yes" but answering it and the second leave question in the affirmative did not necessarily mean a complete legal victory for CME and, consequentially, Tan Sri Lim. This was because of the peculiarity of the facts in this case as unlike the land owners in the aforesaid two cited cases who did not take any official step to remove the restriction of interest on the land (in *Toh Huat Khay's* case) and was unsuccessful in its application to change the category of land use (in *Singma's* case), Bellajade in this case was in a completely reversed position. On the facts, not only was the approval granted, even Plaza Palas was given the certificate for occupation by the Council and was obligated by it to pay an assessment tax on a commercial rate. Even the stipulated premium at the time of approval was paid when the tenancy agreement was entered into. Therefore, unlike *Singma's* case, there was

no obvious intention to commit or even perpetuate the illegality. The dealing between the parties, in other words, was above board at the start. Although the Judicial Commissioner had rightly held that the granting of the certificate for occupation for the Plaza Palas by the Council had no bearing on the express condition of the title but that certificate added another dimension to the sincerity of Bellajade when entering the agreement, for it reinforced the official approval on the change in condition. The Council, being a public entity, must be presumed to have made a diligent search of the land title's condition before issuing the said certificate. It could not be, unless there was evidence to the contrary, that one arm of the public authority was oblivious to what the other was doing. Thus, at the time the agreement was entered, the change in condition was effectively in place though not formally endorsed on the land title yet. (para 15)

(4) From the evidence and facts, since the increase in premium (by the state authority) in the present case was not paid at the material time of this dispute, the pre-requisite to effect the change in condition was not met. Thus, from the relevant date onwards, Bellajade could not presuppose that the said change in condition was still effective or in place and under the said circumstances, the agreement had by then been rendered void. Bellajade was, therefore, only entitled to claim the outstanding rentals from May 2013 until December 2015 but not until the end of the three years' tenancy period as it prayed for in the statement of claim. (para 23)

Case(s) referred to:

CME Group Berhad v. Bellajade Sdn Bhd & Another Appeal [2019] 1 MLRA 171 (refd)

Doshi v. Yeoh Tiong Lay [1974] 1 MLRA 255 (refd)

Holman v. Johnson [1975] 98 ER 1120 (refd)

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 MLRA 418 (distd)

Teh Bee v. K Maruthamuthu [1977] 1 MLRA 110 (folld)

Toh Huat Khay v. Lim A Chang [2009] 4 MLRA 397 (distd)

Legislation referred to:

Contracts Act 1950, ss 24, 66

Courts of Judicature Act 1964, ss 69, 78

National Land Code 1965, ss 78(3), 113(a), 124(1)(a), (c), (4), (7), 124A, 137, 142, 148, 197, 200, 204C, 204D

Counsel:

For Civil Appeal No 02(f)-135-11-2017(W)

For the appellant: Wong Rhen Yen (Sim Kok Yew & Mohd Khairi Ahmad Tarmizi with him); M/s K Y Sim & Co

For the respondent: M Pathnamanathan (Michele Kaur, Tee Yee Man & Shirin Pathmanathan with him); M/s Sun & Michele

For Civil Appeal No 02(f)-136-11-2017(W)

For the appellant: Guok Ngek Seong (Leong Xin Wen with him); Guok Partnership

For the respondent: M Pathnamanathan (Michele Kaur, Tee Yee Man & Shirin Pathmanathan with him); M/s Sun & Michele

JUDGMENT

Rhodzariah Bujang FCJ:

[1] These two appeals pertain to a tenancy agreement ("the agreement") in respect of a block of 23 storey office building in Ampang named Plaza Palas, entered into by its owner, Bellajade Sdn Bhd ("Bellajade") and CME Group Berhad ("CME"), its tenant. CME's performance of the agreement was guaranteed by Tan Sri Dato' Lim Cheng Pow ("Tan Sri Lim"). The agreement was for a fixed period of three years commencing from the date of completion, that is, 20 February 2013, of a sale and purchase agreement dated 25 March 2012 between Bellajade and the previous owner of Plaza Palas, Orion Choice Sdn Bhd ("Orion Choice"), who still retained ownership of another block of building comprising service apartments built on the same nine parcels of land at Plaza Palas. Orion Choice obtained ownership of the said lands from one Kris Angsana Sdn Bhd ("Kris Angsana"). This fact is mentioned in Recital A of the agreement and the date of that sale and purchase agreement was 11 June 2011. Given that Kris Angsana was then a company in liquidation, Orion Choice was cited in the agreement as the beneficial owner of the land. At that material time, as well as at the time when the dispute between the parties herein was filed in court, the category of use for the said lands stated on the land titles was "Building" with "Residential" as their express condition.

[2] About six months after the sale and purchase agreement with Orion Choice, that is, on 1 December 2011, Kris Angsana applied to the Land Administrator for surrender, re-alienation and change of the said condition from "Residential" to "Commercial" and "Mixed Development". This was followed by an application dated 2 March 2012 by Orion Choice to Kuala Lumpur City Council ("the Council") for approval, which approval was granted, to amend the building plans for Plaza Palas, to use it for a commercial purpose. The said application to the Land Administrator was granted on 8 May 2012 but subject to payment of RM1,550,172.00 which is inclusive of a premium in the sum of RM1,531,179.00. It is expressly stated in the said letter of approval that the land use is "Bangunan" and the express condition is "…pembangunan bercampur bagi tujuan pangsapuri dan pejabat sahaja". Bellajade subsequently applied and was granted a Certificate for Occupation ("CFO") for Plaza Palas by the Council on 27 November 2012 to use it for the purpose as stipulated on the building plan, that is commercial. The said approval incorporates the use of the other block consisting the service apartments mentioned earlier. Pursuant to a full payment of the premium on 14 February 2013, a certificate dated 18 February 2013 was issued by

the Department of Land and Mines, Kuala Lumpur, acknowledging the payment and stating that Kris Angsana's application "yang dikemukakan di bawah s 204D Kanun Tanah Negara" has been approved. That certificate is titled "Sijil Pengesahan Kelulusan Permohonan Di Bawah s 124, 124A, 137, 142, 148, 197, 200 atau 204D Kanun Tanah Negara 1965". As seen from the narration of the facts above, the agreement was entered on 21 February 2013, seven days after the said payment was made, which is a day after Bellajade paid Orion Choice the balance of the purchase price amounting to RM139,250,000.00.

[3] Reverting back now to the agreement, the agreed rental was RM1,018,750.00 per month and CME paid six months rental after taking over the premises but that was all. This led to Bellajade filing a suit in the High Court against CME and Tan Sri Lim for the outstanding rentals as at 27 December 2013, starting from the month of May 2013 in the sum of RM8,401,756.85, as well as the amount of rentals for the remaining period of the tenancy. CME, on the other hand , filed a counter-claim for the rentals, rental deposit and utilities bills which it had paid to Bellajade on the ground, *inter alia*, that the agreement was void for flouting the said express condition. However, it is to be noted that after the service of the writ of summons and statement of claim, CME paid the rentals for June and July 2013 as evidenced by their solicitor's letter, M/s Faizah, Lim and Associates dated 24 February 2014 (at p 78 of the Common Core Bundle of Documents) with an unkept promise, to settle the balance of the arrears on or by 30 April 2014.

[4] Bellajade's claim was dismissed whereas CME's counter-claim was allowed by the learned Judicial Commissioner after a full trial but which decision was reversed on appeal by the Court of Appeal. On 13 November 2017, the Federal Court granted leave to CME and Tan Sri Lim to appeal against the said decision based on these three questions of law:

(i) Whether an approval by the state authority given under s 204D of National Land Code 1965 operates as an approval of land use under s 124 of National Land Code?

(ii) Whether a change of condition of land under s 124 of National Land Code 1965 takes effect upon endorsement of the same on the issue document of title to the land in question?

(iii) Whether a tenancy for commercial use of land which is by condition for residential use is illegal and void having regard to the decisions of the Federal Court in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 MLRA 418 and *Toh Huat Khay v. Lim A Chang* [2009] 4 MLRA 397?

[5] On 12 March 2018, this court consisting a panel of five judges ("the earlier panel"), to wit, Justice Zulkefli bin Ahmad Makinuddin, President Court of Appeal ("Justice Zulkefli"), Justice Zaharah binti Ibrahim, Chief Judge of

Malaya ("Justice Zaharah"), Federal Court Justices, Zainun binti Ali ("Justice Zainun"), Azahar bin Mohamed ("Justice Azahar", as he then was) and Balia Yusof bin Haji Wahi ("Justice Balia") heard the appeals and reserved its decision. That decision was delivered on 25 September 2018 but without the presence of Justice Zulkefli, although His Lordship had prepared the grounds of judgment for the majority of the judges who allowed the appeal as His Lordship had by then resigned, the exact date of resignation being 31 July 2018. The salient parts of the majority judgment were read out in open court by Justice Azahar whilst that of the minority written by Justice Zainun. The said judgments are reported in *CME Group Berhad v. Bellajade Sdn Bhd & Another Appeal* [2019] 1 MLRA 171.

[6] Bellajade filed an application to review the said decision under s 78 of Courts of Judicature Act 1964, which was allowed on 14 February 2019, on the ground of coram failure, premised on Justice Zulkefli's resignation as stated above. CME and Tan Sri Lim followed with another review application of their own to further review the said review decision which was dismissed on 13 October 2020. Thus, these appeals were heard afresh by this court on 27 January 2021 and at the conclusion of which, the judgment was again reserved. This then is our grounds for the said judgment which we would start off by giving a more detailed description of the legal dispute troubling the parties.

Legal Dispute

[7] As can be gleaned from the leave questions granted to Bellajade, the crux of the parties' legal dispute lies with the condition of title for the said lands. It bears repeating that at the material time when the tenancy agreement was entered into, the express condition endorsed therein on the use of the land was residential. Thus, the alternative defence pleaded at para 19 of CME's defence is that the agreement was void because it described the use of the premises as "commercial" which is against the said condition. The learned Judicial Commissioner made a finding that the agreement was illegal on the basis that the contemplated use of the premises contravened the said express condition, citing *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 MLRA 418, as authority in support of the said finding. His Lordship also found acquiescence of the illegality alleged against CME was not proven. We pause here to mention that in *Singma*'s case *(supra)*, the plaintiff had rented out a portion of its land to the defendant for the express purpose, as stipulated in the tenancy agreement, of operating a factory when the category of land use was agriculture and with an express condition that it be used for the cultivation of pineapple and rubber. Coming back to the appeals before us, the learned Judicial Commissioner found, and the earlier panel agreed with him, that the tenancy agreement was void under s 24 of the Contracts Act 1950 ("Contracts Act") because the consideration was illegal and Bellajade could not avail itself of s 66 of the Contracts Act as "compensation for the advantage (if any) which had accrued to CME in its occupation of the premises on the ground that CME was unjustly enriched". Based on the said finding the learned

Judicial Commissioner also dismissed Bellajade's claim against Tan Sri Lim because firstly, Bellajade had participated in the illegality that had rendered the agreement void and secondly, on the application of the principle *ex turpi causa non oritur actio*.

[8] The Court of Appeal reversed the decision of the learned Judicial Commissioner on the grounds, firstly, that His Lordship erred in applying the ratio in *Singma*'s case *(supra)* as the facts in the cited case are distinguishable in that Singma had before entering into the tenancy agreement applied unsuccessfully to change the category of land use from agriculture to industrial. Furthermore, it had been issued a notice in Form 7A of the National Land Code 1965 ("the NLC") to remedy its breach of the land use and demolish the factory but which directive it did not comply with. Therefore, this court, in *Singma*'s case *(supra)*, held that the said breach was "willful, if not contumacious" for the clear intention of the appellant was to use the land on which the factory was built for an unlawful purpose. It further held that the appellant is deemed to have been aware of the illegality of the agreement when they entered it and consequently, s 66 of the Contracts Act could not assist them. Thus, the decision of the learned Judicial Commissioner in *Singma*'s case *(supra)* that the contract was void under s 24 of the Contracts Act was therefore affirmed.

[9] The Court of Appeal however found that the facts in these appeals before us are different in that, as we had mentioned earlier, there was the application made by Kris Angsana to the Land Administrator, to change the se of the land to not just commercial in fact but also mixed development which had been approved vide a letter dated 8 May 2012. This approval was conditional upon payment of RM1,550,172.00 which amount includes the sum of RM1,531,179.00 being the premium for the said change which was paid on 14 February 2013. Therefore, as against the learned Judicial Commissioner's findings that the process of conversion had commenced, the Court of Appeal found that process had in fact been completed when the agreement was entered into. Since here it was just a change in the express condition, as opposed to category of land use, the Court of Appeal held that under s 124(4) of the NLC, the said change need not be endorsed on the land title in order for it to be effective. The Court of Appeal also considered the evidence that the Council had on 27 November 2012, issued a certificate for occupation of the Plaza Palas which is further evidence of the change of land use to "commercial" and "mixed development" and the learned Judicial Commissioner erred when he held that the said certificate has no bearing on the express condition.

[10] On the counter-claim of CME which the learned Judicial Commissioner allowed because the agreement was one which it discovered to be void under s 66 of the Contracts Act because it was not aware of the contravention of the express condition of title, the Court of Appeal held based on *Doshi v. Yeoh Tiong Lay* [1974] 1 MLRA 255, that CME had constructive knowledge of the breach of the express condition. That evidence of the said knowledge is derived from

the fact that CME's solicitor, M/s Faizah, Lim and Associates, was the very same one who had acted for Orion Choice in the sale and purchase agreement with Bellajade and the said solicitor "could not have been ignorant" of the contravention of the express condition of land use. Thus, CME's counter-claim was dismissed.

Consideration Of The Appeals

[11] Since the crux of the legal dispute between the parties lies with the express condition of the land and in view of the first two leave questions, Kris Angsana's application for "Surrender, Re-alienation, Amalgamation and Conversion of Land Use" under s 204D of NLC, and the approval thereof, is instrumental and crucial to our resolution of the parties' dispute herein. In this regard, the letter from the Land Administrator dated 5 September 2013, and the certificate confirming the approval, are relevant and what is noteworthy from both documents is the fact that the application is expressly stated to have been made under s 204D of the NLC and in the said certificate, the condition of the land titles is clearly stated to be mixed development for the purpose of apartments and office only. It is therefore, not one made solely for a change of condition under s 124(4) of the NLC, given the express citation of the said s 204D in both the application and the certificate of approval although in the certificate the said section was put in the alternative, that is, "atau". The reason to invoke s 204D is pretty obvious because, as stated earlier, this development is not on a single parcel of land but nine parcels of land. Hence the need for amalgamation of the same to suit the extensive development built on it and given the nature of that development there is an equal need to make that application under s 124(4). The mere fact that s 204D is only stated in the alternative in the said certificate does not mean, on the clear facts of this case that it was not invoked by the Land Administrator. The reason why we say so is because of, firstly, s 204C which lays out the condition before an approval under s 204D is granted and it reads as follows:

> "204C. Condition for approval of surrender and re-alienation.
>
> (1) No surrender and re-alienation under this Part shall be approved by the State Authority unless the following conditions are satisfied:
>
> (a) That the portions and units of the land to be re-alienated conform in shape, area, measurements, location and **intended use** with a layout plan approved by the appropriate authority;
>
> (b) That no item of land revenue is outstanding in respect of the land;
>
> (c) That the land is not under attachment by any court
>
> (d) that there are no registered interests in the land; and
>
> (e) that every person or body specified in sub-section (2) has consented in writing to the making of the application"
>
> [Emphasis Added]

Thus, it is explicit from the words emphasised above that a change in land use and by necessary implication, even its condition can be incorporated into that application. We said "implication" because both land use and its condition are covered by the same s 124 and furthermore, s 113(a) on the change in condition refers to s 124(1). Section 113(a) reads as follows:

> "113(a) The condition and restriction in interest applicable to any alienated land shall, after becoming fixed by the operation of any of the preceding provisions of this Chapter, be subject to all such changes as may result from-
>
> (a) the granting of any application by the proprietor under subsection 124(1)".

Hence, when such an application is made under s 204D, the governing provisions are those provided under that part of the NLC which is titled "Surrender and Re-alienation - Special Provisions". Therefore, the first leave question on the peculiar facts of this case should be answered in the positive, because of the clear evidence that Kris Angsana's application to the Land Administrator was made both under ss 204D and 124(4). Otherwise, generally speaking, the answer to the said question would be in the negative because there would be instances when an application to surrender and re-alienate the land for the purpose of amalgamation would not involve a change in its stipulated use and condition.

The Second Leave Question

[12] Nevertheless, despite holding the above view, we could not agree with learned counsel for the appellants that s 78(3) of the NLC which provides that alienation of land takes effect upon registration of the register document of title applies in the case before us because that provision is specifically for alienation. It makes perfect sense that such a process is only effective when it is registered in the document of title, otherwise it would carry serious implications and may even be open to abuse. Since there is a specific provision governing the effective date for variation or changes in land use and its condition, which is s 124, then that should be the one which must be given effect to. For the purpose of this appeal, s 124(4) is the relevant one which is reproduced below with subsection(1)(c):

> "124 (1) The proprietor of any alienated land may apply to the State Authority under this section for:
>
> (c) the amendment of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the imposition of any new express condition or restriction in interest.
>
> (4) The State Authority may approve any application under paragraph (c) of sub-section (1) either in the terms in which it was submitted or, with the consent of the applicant and any other persons or bodies whose consent thereto was required under the proviso to that sub-section, subject to such modifications as it may think fit, and shall, in either case, direct as appropriate-

(a) The amendment of any condition or restriction in interest endorsed on the document of title to the land, or

(b) The endorsement on that document of title of a note of the amendment of any condition or restriction which is merely referred to therein, or

(c) The endorsement on that document of title of any new condition or restriction in interest".

[13] It is clear from that said provision that upon approval of the application for the said change, the State Authority would direct that the subject matter of the approval be endorsed on the land title. It is to be equally emphasised that s 113(a) which we had reproduced earlier, in turn provides that the condition and restriction in interest on the land be subject to the changes which result from the granting of any application under s 124(1).

[14] From our reading and understanding of the above provisions, the NLC does not stipulate when is the effective date for the approval of the change in condition unlike that for alienation of land as provided in s 78(3) and change in category of land use in s 124(1)(a). In the absence of such specific provision, that effective date, in our view, would be when the same is similarly endorsed on the title. We say this because, firstly it is settled law that under the Torrens system, which our land law is subject to, that the register is, to repeat the word of Ali Ag CJ (Malaya) in *Teh Bee v. K Maruthamuthu* [1977] 1 MLRA 110 thereof, "everything" and therefore, the change of use of the land will only take effect upon its endorsement on the land title. This cited case concerns the appellant's claim as the registered land owner for vacant possession of her land which was occupied by the respondent. The respondent resisted the claim on the principal ground that the title was null and void. That was because the appellant had failed to pay the requisite fees imposed by the State Authority for alienation of the land to her and the time specified under the approval for her to do so had also lapsed. Nevertheless, the Federal Court gave her the relief she prayed for on account of the registration on the land title in her name as the registered landowner as aforesaid. Secondly, as held by this court in *Toh Huat Khay v. Lim A Chang* [2009] 4 MLRA 397, even if there was an approval by the State Authority to transfer the land but without the consequential mandatory requirements of s 124(7) being carried out, to wit, the entry of a memorandum in Form 7C by the Registrar on the register and issue document of title of the approval to strike off or delete the restriction approved, that is insufficient to legalise the transfer since the restriction is still endorsed on the land title. This cited case concerns a restriction in interest endorsed on a temporary occupation licence issued to the deceased regarding the transfer of the land, but inspite of that restriction the transfer was effected to the defendant after approval by the Land Administrator although there was no such entry being recorded on the land title. Thus, the Federal Court affirmed the High Court decision to set aside the transfer. This very same s 124(7) is equally applicable to an approval for change in condition in these appeals because of the clear requirement in the said provision and when it is read with sub-section (1)(c) and (4) which we

had reproduced earlier. This we must do given the opening sentence of s 124(7) which we have emphasised in a reproduction of that provision below.

> Section 124
>
> "(7) **Upon approval by the State Authority under this section**, the Land Administrator shall sign a memorandum in Form 7C in accordance with the direction of the State Authority and shall present the same, and on the memorial thereof being made, the Registrar shall make an entry on the register and issue documents of title to the land and shall note the date thereof and the authority therefor, and authenticate the same under his hand and seal".
>
> [Emphasis Added]

Therefore, the second leave question should be answered in the affirmative.

The Third Leave Question

[15] The obvious answer to this question, given the clear pronouncements made by this court in the two cases cited in it, that is, *Singma*'s case *(supra)* and *Toh Huat Khay*'s case *(supra)*, is a yes but answering it and the second leave question in the affirmative does not necessarily mean a complete legal victory for CME and consequentially, Tan Sri Lim. This is because of the peculiarity of the facts now before us as unlike the land owners in the aforesaid two cited cases who did not take any official step to remove the restriction of interest on the land (in *Toh Huat Khay*'s case) and was unsuccessful in its application to change the category of land use (in *Singma*'s case), Bellajade in this case was in a completely reverse position. As stated earlier, not only was the approval granted, even Plaza Palas was given the certificate for occupation by the Council and was obligated by it to pay an assessment tax on a commercial rate. It is again worth emphasising that even the stipulated premium at the time of approval was paid when the tenancy agreement was entered into. Therefore, unlike *Singma*'s case *(supra)*, there was no obvious intention to commit or even perpetuate the illegality. The dealing between the parties, in other words, was above board at the start. Although the learned Judicial Commissioner had rightly held that the granting of the certificate for occupation for the Plaza Palas by the Council has no bearing on the express condition of the title but in our view that certificate adds another dimension to the sincerity of Bellajade when entering the agreement for it reinforces the official approval on the change in condition. We say that because the Council being a public entity, it must be presumed to have made a diligent search of the land title's condition before issuing the said certificate. It cannot be, unless there is evidence to the contrary, that one arm of the public authority is oblivious to what the other is doing. Thus, at the time the agreement was entered, the change in condition was effectively in place though not formally endorsed on the land title yet.

[16] The imposition of further premium afterwards which were not settled yet at the material time of the dispute should not be completely held against Bellajade for the crucial time here is the execution date of the agreement. With

the approval and full satisfaction of the condition imposed to effect the change of land use, we would agree with Bellajade that what was left to be done at that material time was the administrative act of endorsing the change on the land title. Thus, the agreement was not *void ab initio*. In the face of this finding, we are of the view that the question of knowledge of the alleged illegality of the said condition on the part of CME is immaterial to the issue of its liability to pay the rentals as claimed. However, for the sake of argument, we would address this point now.

[17] Learned counsel for the appellants submitted, citing *Holman v. Johnson* [1975] 98 ER 1120, and of course *Singma*'s case *(supra)*, in view of the illegality upon which the cause of action was based, the court should not lend its hand to Bellajade to allow its claim. In response, learned counsel for the appellants submitted that CME had no notice of the illegality at that material time and therefore the learned Judicial Commissioner had rightly ordered restitution in its favour. He said this absence of knowledge was conceded to by learned counsel for Bellajade at the trial as can be seen from the notes of proceeding reproduced at Tab 16 of the Further Common Core Bundle of Documents at p 251 thereof. The said notes of proceeding reads as follows:

> "Mah: So we have a situation where the CME has entered into a Tenancy Agreement. It's appears not to have any notice of the fact the condition of land use right, is residential, and it appears as though it is a contravention of an express condition of title. They entered into the Tenancy and it appears that they only subsequently found out.
>
> Plf: Yes.
>
> Mah: I understand that, Faizal, Lim & Associates did they also act for CME?
>
> Plf: For a short while in February.
>
> Mah: In fact they are not obligated from informing CME of, in fact the obligation of confidentiality would prohibit them from informing another client of matters relating to another client, right?
>
> Plf: Yes.
>
> Mah: So there's no question at all. **It appears as there is no question at all that at least there's no evidence before me right, that can lead me to the conclusion that CME knew at the time which is signed the Tenancy Agreement that there was an express condition of title that would contravene the stated aim of the Tenancy Agreement.**
>
> Pit: **Yes My Lord.**"
>
> [Emphasis Added]

[18] The finding of constructive knowledge by the Court of Appeal (which was never pleaded by Bellajade) based on the two letters dated 14 February 2013 and 19 February 2013 written by M/s Faizah, Lim & Associates then

acting for Orion Choice was erroneous, submitted learned counsel further, because these letters were never adduced at the trial and only brought to the attention of the Court of Appeal in an affidavit of its counsel and filed as an additional appeal record after parties were asked to make further submissions by the said court.

[19] With respect to the Court of Appeal, we are of the view that the above point on knowledge or rather the lack thereof, on the part of CME are validly made by learned counsel, especially the non-pleading point and in the face of the said admission as quoted above. As for the point on the additional evidence, that would be addressed subsequently in our judgment. Therefore, again with respect to the Court of Appeal, the said knowledge should not have been imputed on CME to fasten liability on their part and the evidence which stands in their favour is that it only found out about the express condition on the land use when it conducted a search on the land on 28 October 2013 as shown in the official documents of the Department of Land and Mines, Kuala Lumpur appearing at pp 50 until 87 at Tab 4 of the Further Common Core Bundle of Document.

Increase In Premium

[20] We would turn next to the issue of the additional evidence which relates to the increase in premium. As mentioned earlier, at the hearing in the Court of Appeal, two letters from office of the Director of Land and Mines, Federal Territory dated 16 November 2015 and 16 December 2015 addressed to Bellajade's solicitor were filed by way of annexures to the affidavit of Koek Tiang Kung (a Director of Bellajade) affirmed on 19 November 2015 and 7 January 2016, respectively. These are additional evidence filed pursuant to s 69 of Courts of Judicature Act 1964 which allows reception of evidence which occurred post the High Court decision under the court's discretion. As pointed out by Bellajade's counsel in his submission before us, the said evidence was received by the court without objection by their legal opponents except to say that the evidence was not material, which contention, with respect we could not agree with. Given the importance of these two letters to our ultimate decision in this appeal, they would be reproduced in full below and the emphasis is all ours.

Letter Dated 16 November 2015

PTG/WP 6/8008/2011(42)
4 Safar 1437H
16 November 2015
Tetuan Swan & Partners
Peguam bela & Peguam cara
Pusat Dagangan Phileo Damansara 1
Blok E 3A-10

No 9, Jalan 16/11
46350 Petaling Jaya

Tuan,

PERKARA: (I) **PERMOHONAN UNTUK MENGURANGKAN PREMIUM TAMBAHAN TANAH**

(II) **PERMOHONAN MELANJUTKAN TEMPOH MASA BAYARAN PREMIUM TAMBAHAN TANAH SEMENTARA MENUNGGU KEPUTUSAN RAYUAN**

HARTANAH: (1) GM 3 LOT 50, (2) GM LOT 51, (3) GM 37 LOT 52, (4) GM 2045 LOT 45, (5) GM 2402 LOT 90, (6) GM 2404 LOT 88, (7) GRN 539 LOT 57, (8) GRN 540 LOT 58, DAN (9) GRN 29727 LOT 92, KESEMUANYA DALAM SEKSYEN 88, BANDAR KUALA LUMPUR WILAYAH PERSEKUTUAN

TUAN TANAH: BELLAJADE SDN BHD

Dengan segala hormatnya saya diarah merujuk perkara tersebut di atas. Komunikasi antara Encik Ng dan saya pada 16 November 2015 adalah berkaitan.

2. Sukacita disahkan perkara-perkara yang berikut:

i) **Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (JKKT WPKL) telah meluluskan dalam mesyuarat pada 8 Mei 2012 permohonan serahbalik dan berimilik semula tanah bagi kegunaan perniagaan dan pembangunan bercampur (mixed development);**

ii) **Surat Kelulusan berserta Borang 5A mengikut nilaian tahun 2004 telah dikeluarkan pada 9 Mei 2012 dan pemilik tanah kemudiannya pada 14 Februari 2013 menjelaskan bayaran premium berjumlah RM1,531,179.00;**

iii) **JKKT WPKL pada 5 September 2013 telah memutuskan kadar premium yang telah dikenakan disemak semula mengikut kadar semasa dan Borang 5A baharu telah dikeluarkan meminta pemilik tanah menjelaskan bayaran premium tambahan berjumlah RM3,810,143.10;**

iv) Pejabat ini ada menerima permohonan pengecualian bayaran premium ini daripada pihak pemilik tanah; dan

v) Pejabat ini kemudiannya pada 10 September 2015 menerima permohonan pihak Tuan bagi memanjangkan segala keputusan dan kelulusan berkenaan tanah-tanah yang dimaksudkan kepada Bellajade Sdn Bhd selaku pemilik tanah yang baharu.

vi) **Memandangkan permohonan tersebut di atas ini perlu melalui kelulusan JKKT WPKL terlebih dahulu, sukacita Pejabat ini memohon sedikit masa lagi bagi memprosesnya. Pejabat ini akan berhubung dengan pihak Tuan sejurus keputusan diterima nanti. Segala kerjasama pihak Tuan dalam perkara ini amatlah dihargai dan didahului dengan ucapan terima kasih jua.**

Sekian.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

tt

(AMERUL FAZRIN BIN AMER JALALUDIN)
bp Pengarah Tanah dan Galian
Wilayah Persekutuan Kuala Lumpur

Letter Dated 16 December 2015

PTG/WP 6/8008/2011
16 Disember 2015
[SURAT BERDAFTAR/DENGAN TANGAN]
Tetuan Swan & Partners
Peguam bela & Peguam cara
Pusat Dagangan Phileo Damansara 1,
Blok E 3A-10,
No 9, Jalan 16/11,
46350 Petaling Jaya.

Tuan,

Rayuan Pemanjangan kelulusan terdahulu bagi permohonan Untuk Menyerahbalik dan Bermilik Bermula Tanah di Bawah Seksyen 204D Kanun Tanah Negara GM 35 Lot 50, GM 36 Lot 51, GM 37 Lot 52, GM 2045 Lot 45, GM 2402 Lot 90, GM 2404 Lot 88, GRN 539 Lot 57, GRN 540 Lot 58 dan GRN 29727 Lot 92, Seksyen 88, Bandar Kuala Lumpur Daripada Pemilik Tanah Asal, Kris Angsana Sdn Bhd Kepada Pemilik Tanah Baru, Bellajade Sdn Bhd.

Dengan segala hormatnya saya diarah merujuk kepada permohonan tuan mengenai perkara tersebut di atas.

2. **Adalah dimaklumkan bahawa Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur yang bermesyuarat pada 10 Disember 2015 telah dipertimbangkan permohonan tuan dan bersetuju menetapkan seperti berikut:-**

2.1 Dipanjangkan keputusan mesyuarat Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur Bilk e 635/2012 pada 8 Mei 2012 melalui Kertas Bil 6/1238/634/2012 yang diluluskan kepada Kris Angsana Sdn Bhd kepada Bellajade Sdn Bhd sebagai pemilik tanah yang baharu.

2.2 **Dikekalkan lain-lain keputusan yang telah ditetapkan di dalam Mesyuarat Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur Bil 635/2012 pada 8 Mei 2012 melalui Kertas Bil 6/1238/634/2012.**

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

tt

(NORLIANA BINTI MOHD MOKHTAR)
bp Pentadbir Tanah
Wilayah Persekutuan
Kuala Lumpur

[21] Very obvious from para 2.2 of the letter dated 16 December 2015 is the reiteration that all decisions made in the official meeting of the Department on 8 May 2012 are being maintained. The aforesaid decisions made on 8 May 2012 were conveyed to Kris Angsana *vide* the Department's letter dated 5 September 2013 and again given its similar importance to our resolution of the dispute of the parties, we would also reproduce the same below with our added emphasis.

Letter Dated 5 September 2013

PTG/WP 6/8008/201(30)
29 Syawal, 1434H
5 September, 2013
[SURAT BERDAFTAR/DENGAN TANGAN]
Tetuan Kris Angsana Sdn Bhd,
No 1128, 11th Floor
Block A, Damansara Intan,
No 1, Jalan SS 20/27
47400 Petaling Jaya.

Tuan,

Permohonan untuk Menyerahbalik Kesemua Bahagian Tanah dan Berimilik Semula Tanah bagi Hakmilik GM 35 Lot 50, GM 36 Lot 51, GM 37 Lot 52, GM 2045 Lot 45, GM 2402 Lot 90, GM 2404 Lot 88, GRN 539 Lot 57, GRN 540 Lot 58 dan GRN 29727 Lot 92, Seksyen 88, Bandar Kuala Lumpur di Bawah Seksyen 204D Kanun Tanah Negara

Dengan segala hormatnya saya diarah merujuk kepada permohonan tuan bertarikh 1 Disember 2011 mengenai perkara tersebut di atas dan memaklumkan bahawa **Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur yang bermesyuarat pada 8 Mei 2012 telah mempertimbangkan permohonan tuan dan bersetuju menetapkan seperti berikut:-**

1.1 Diluluskan permohonan untuk menyerahbalik kesemua bahagian tanah GM 35 Lot 50, GM 36 Lot 51, GM 37 Lot 52, GM 2045 Lot 45, GM 2402 Lot 90, GM 2404 Lot 88, GRN 539 Lot 57, GRN 540 Lot 58 dan GRN 29727 Lot 92, Seksyen 88, Bandar Kuala Lumpur di bawah Seksyen 204D Kanun Tanah Negara dan tanah tersebut menjadi tanah Kerajaan.

1.2 Setelah tindakan di perenggan 1.1 di atas disempurnakan, diluluskan permohonan daripada tuan untuk memiliki tanah Kerajaan di bawah Seksyen 79 Kanun Tanah Negara bagi kawasan-kawasan sebagaimana yang ditunjukkan di atas Pelan Pra-Hitungan No 4/2002/U3 di bawah Seksyen 79 Kanun Tanah Negara dengan dikenakan syarat-syarat serta bayaran seperti berikut:

Kawasan berkeliling Warna Biru Untuk Pembangunan Bercampur

Jenis Suratan Hakmilik : Hakmilik Pejabat Tanah

Mukim: Bandar Kuala Lumpur

Taraf Pemilikan: Selama-lamanya

Premium: Tanah Kerajaan berasal dari tanah milik. RM750,00 smp

Cukai Tahunan: RM255 smp tertakluk kepada minimum RM106.00 per hakmilik (kadar pembangunan bercampur bagi tanah bandar)

Jenis Penggunaan Tanah: Bangunan

Syarat Nyata : Tanah ini hendaklah digunakan untuk pembangunan bercampur bagi tujuan pangsapuri dan pejabat sahaja.

Sekatan Kepentingan : -

2. Berikutan dengan keputusan-keputusan di atas, bayaran yang perlu dijelaskan adalah seperti berikut:

i) Premium : **RM5, 341, 322.10**

ii) Cukai Tahun Pertama : **RM 18, 873.00**

iii) Penyediaan dan Pendaftaran bagi satu (1) : **RM 120.00**

Pasang hakmilik RM120.00 sepasang

Bagi hakmilik pertama RM70.00 sepasang hakmilik berikutnya

Jumlah : **RM5,360,315.00**

(RM: Lima Juta Tiga Ratus Enam Puluh Ribu Tiga Ratus Lima Belas Sahaja)

3. **Oleh yang demikian, jika dipersetujui tuan dikehendaki mengemukakan bayaran- bayaran yang dikenakan berjumlah RM5,360,315.00 sebagaimana Borang 5A berkembar dalam tempoh tiga (3) bulan dari tarikh surat ini disampaikan. Tuan adalah diingatkan bahawa mengikut peruntukan 15 Kaedah-Kaedah Tanah Wilayah Persekutuan Kuala Lumpur 1995, sekiranya bayaran tidak dijelaskan dalam tempoh yang ditetapkan, kelulusan permohonan ini akan terbatal dengan sendirinya.** Disamping itu, tuan juga dikehendaki mengemukakan salinan resit cukai tanah tahun semasa bagi tanah berkenaan untuk tindakan Jabatan ini selanjutnya.

4. Segala pembayaran hendaklah dibuat melalui Wang Tunai, Wang Pos, Kiriman Wang Pos atau Bank Draf atas nama Pentadbir Tanah Wilayah

Persekutuan Kuala Lumpur bagi membolehkan tindakan susulan dapat diambil oleh Jabatan ini dengan seberapa segera.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

tt

(SUZAINI BIN AHMAD)
bp Pentadbir Tanah,
Wilayah Persekutuan,
Kuala Lumpur

[Emphasis Added]

[22] The fact that it is clearly stated in the letter dated 16 December 2015 that the other decisions made on 8 May 2012 are maintained, that surely means that the decision to increase the premium was also maintained. With respect to learned counsel for Bellajade, it could not be that just because that letter dated 16 December 2015 does not mention the letter dated 5 September 2013 on the increase in premium, it therefore means "by necessary implication that the increase in premium stated in the letter of 5 September 2013 was dropped or abandoned", because of and we reiterate, the specific reference to maintaining the decisions made in the meeting of the working committee on the 8 May 2012 where the decision to increase the premium was made.

[23] Learned counsel for Bellajade submitted that this letter dated 16 December 2015 is a nullity and that the state authority has no power under the National Land Code to subsequently vary, review, increase or impose a higher premium. With respect to learned counsel, on the facts and evidence before the court and without a proper legal action taken to quash the said decision it is simply not open for us to agree with him that it is so. Therefore, with effect from the date of the earlier mentioned letter dated 16 December 2015 and the undisputed evidence that the increase in premium was not paid at the material time of this dispute, the pre-requisite to effect the change in condition was not met. Thus, from the said date onwards, Bellajade could not presuppose that the said change in condition is still effective or in place and under the said circumstances, the agreement had by then, been rendered void. In conclusion, and for the reason stated above Bellajade is therefore, only entitled to claim the outstanding rentals from May 2013 until December 2015 but not until the end of the three years' tenancy period as it prayed in the statement of claim. In other words, what is allowed is the outstanding rental of RM8,401,756.85 as at 27 December 2013 (but minus the rentals for June and July 2013 which have been paid) and the rentals from January 2014 until December 2015, though it is only for half of that month of December and interests as prayed in paras 10(c) and (d) of the statement of claim.

[24] Given that the appeals of CME and Tan Sri Dato' Lim Cheng Pow, are only allowed in part, parties are ordered to bear their own cost in these appeals.

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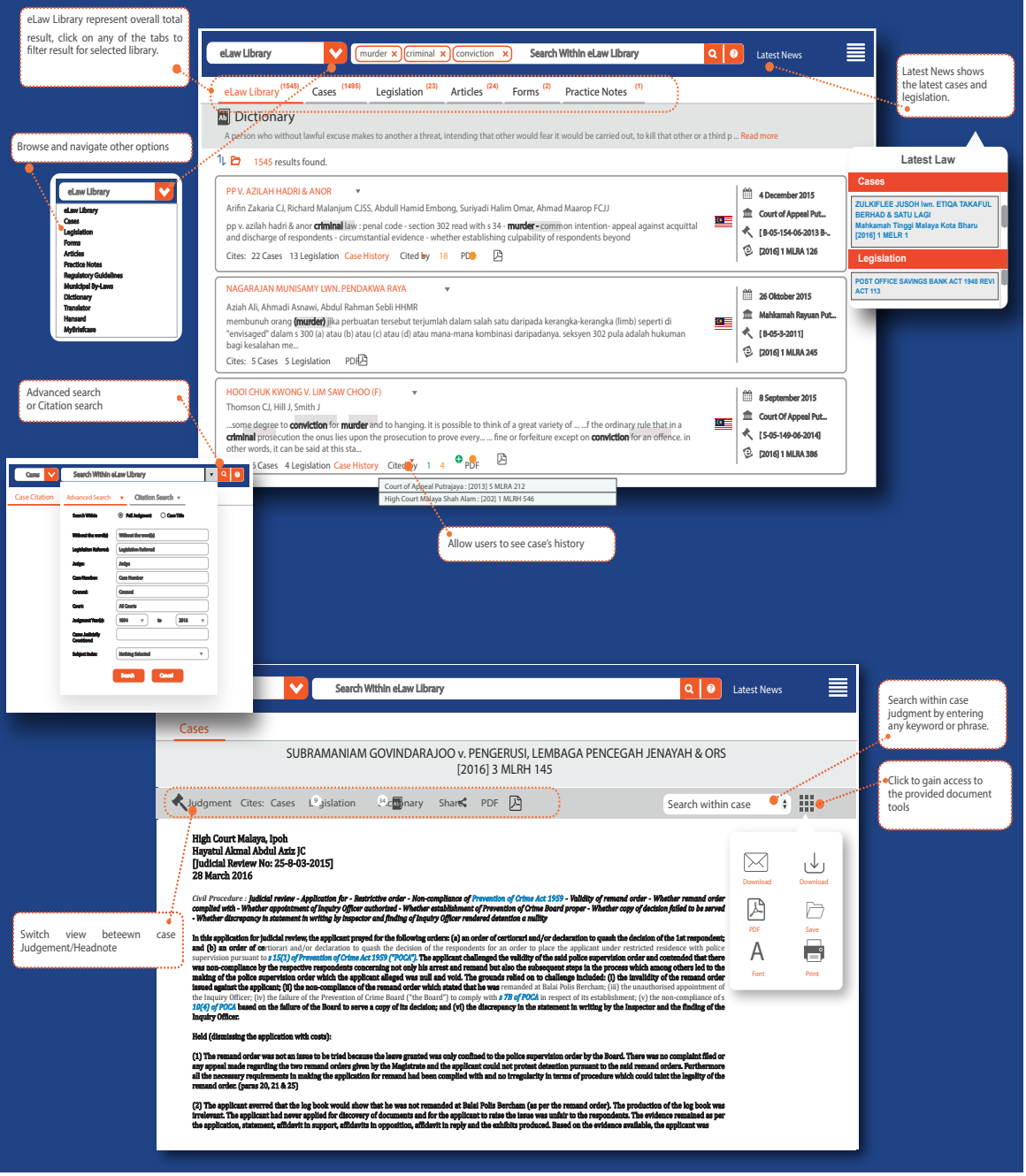

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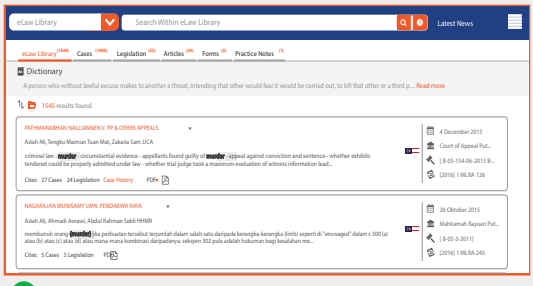

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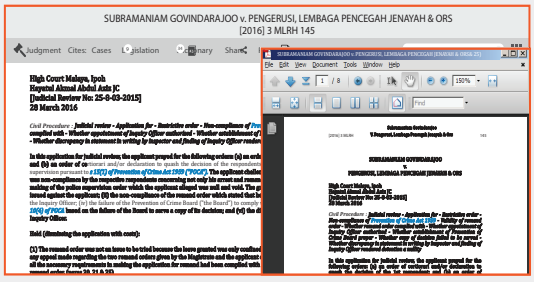

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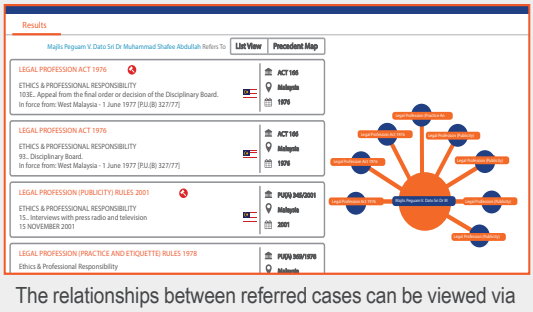

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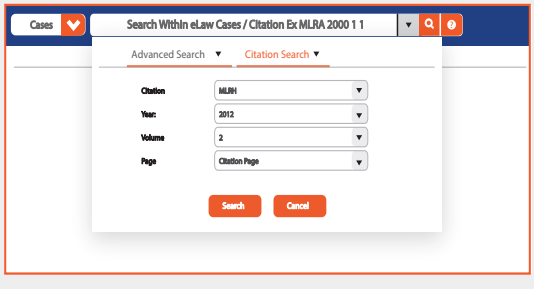

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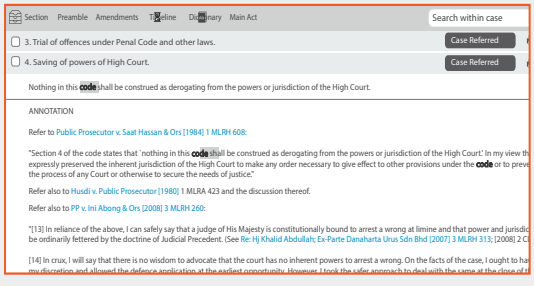

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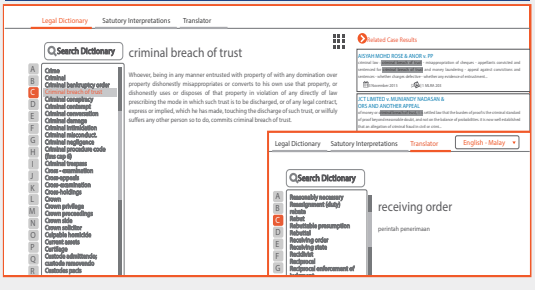

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