KETUA PENGARAH HASIL DALAM NEGERI

v.

BAR MALAYSIA

Court of Appeal, Putrajaya
Yaacob Md Sam, S Nantha Balan, Darryl Goon Siew Chye JJCA
[Civil Appeal No: W-01(A)-304-05-2018]
27 October 2021

Legal Profession: *Professional privilege — Accounting books and records of law firms containing clients' accounts — Whether Director-General of Income Tax could demand access to them for audit purposes — Whether accounts privileged from disclosure — Whether s 142(5)(b) Income Tax Act 1967 enabling Director-General's access to them had the effect of overriding s 126 Evidence Act 1950 on solicitor-client privilege — Whether advocate and solicitor included in the word "practitioner" in s 142(5)(b) Income Tax Act — Whether solicitor's client account enjoyed privilege under s 126 Evidence Act*

Statutory Interpretation: *Construction of statutes — Section 142(5) Income Tax Act 1967 on Director-General of Income Tax having right of access to documents and information for audit purposes and s 126 Evidence Act 1950 on such information being subject to solicitor-client privilege — Whether s 142(5) had the effect of overriding s 126 thereof*

The High Court found in favour of the respondent, the Malaysian Bar, for declarations that the actions of the appellant, the Director-General of Income Tax, in carrying raids on law firms to conduct audits on their clients' accounts and demanding access to accounting books and records pertaining to the clients' accounts were in breach of the solicitor-client privilege under s 126 of the Evidence Act 1950 ('EA'). The High Court also found that s 142(5) of the Income Tax Act 1967 ('ITA') enabling the Director-General having access to them did not override the solicitor-client privilege under s 126 EA. The appellant who had claimed that the audits were necessary to ensure tax compliance by taxpayers, now appealed against the High Court decision. The issues were: (1) whether s 142(5) ITA had the effect of overriding the solicitor-client privilege under s 126 EA; (2) whether the solicitor-client privilege under s 126 pertained to only communications between solicitors and clients; and (3) whether the word "practitioner" in s 142(5)(b) ITA referred to advocates and solicitors or merely to other practitioners such as tax agents and accountants.

Held (dismissing the appeal):

(1) Section 142(5)(a) ITA began with a qualifying proviso that excluded the operation of Chapter IX of Part III of the EA which contained s 126 EA. Section 126 EA was among those recognised and expressed to be unaffected or undermined save as provided in para (b) of s 142(5) ITA. Section 142(5)(b)

ITA which began with the words "notwithstanding any other written law" also excluded s 126 EA. (paras 23, 24, 25, 26, 27, 28 & 40)

(2) Section 142(5)(b) ITA precluded the claim to any privilege from disclosure, information that was prepared or kept by any practitioner or firm of practitioners and the terms "practitioner" or "firm of practitioners" did not include advocate and solicitor or firm of advocates and solicitors. (para 49)

(3) The privilege under s 126 EA was an absolute one. The common law principle "once privileged, always privileged" applied. The only one exception where privilege, when it existed, might cease was if the advocate and solicitor's client expressly consented to its disclosure. (para 50)

(4) The purpose of s 142(5)(b) ITA was to remove privilege from disclosure in the circumstances set out therein. It did not have the effect of repealing or abrogating s 126 EA or to deny its applicability altogether *vis a vis* the court, the Special Commissioners, the Director-General or any authorised officer. If that was the intention of the legislature, it would have been clearly spelt out. (para 56)

(5) On the appellant's purpose of wanting to access the clients' accounts of advocates and solicitors to ensure tax compliance by taxpayers, the ITA created a host of offences which included the failure to furnish return or give notice of chargeability (s 112), making incorrect returns (s 113) and willful evasion (s 114). Further, if there was a legitimate basis for wanting to gain access to the clients' accounts of advocates and solicitors, the appellant could do so by invoking the proviso to s 126 EA. The proviso made it clear that the privilege under s 126 did not apply to communications made in furtherance of any illegal purpose and to any fact observed by an advocate in the course of his employment showing that any crime or fraud had been committed. (paras 69-71)

(6) Section 80 ITA ("Power of access to buildings and documents, etc") was a general provision and of no assistance to the appellant in the interpretation of s 142(5) ITA. Section 80 would only provide authority for the Director-General or an authorised officer to gain access to the documents and information sought if s 126 EA was overridden by s 142(5)(b) ITA, which was not the case here. (para 72)

(7) The classes of information protected under s 126 EA were very wide as an advocate and solicitor's legal brief could be multifaceted and wide ranging. The client's account and information relating thereto did fall within the purview of s 126 EA. (paras 76 & 79)

Case(s) referred to:

Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia And The Government Of Malaysia [1981] 1 MLRA 557 (refd)

Bullock & Co v. Corry & Co [1878] 3 QBD 356 (refd)

Commissioner of Inland Revenue v. West Walker [1954] NZLR 191 (refd)

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 1 MLRA 248 (folld)

Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] 2 MLRH 803 (refd)

Ghulam Nabi Dar And Others v. State Of Jammu And Kashmir And Others [2013] MLRFU 218 (refd)

Ho Tack Sien & Ors V. Rotta Research Laboratorium SpA & Anor And Another Appeal; Registrar Of Trade Marks (Intervener) [2015] 3 MLRA 611 (refd)

Lee Lee Cheng v. Seow Peng Kwang [1959] 1 MLRA 246 (refd)

Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors And Another Appeal [2015] 5 MLRA 1 (refd)

Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 2 MLRA 135 (refd)

Minister Of Finance Government Of Sabah v. Petrojasa Sdn Bhd [2008] 1 MLRA 705 (refd)

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

Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson [2009] 4 MLRA 265 (affd)

Re Packers and Others v. Deputy Commissioner of Taxation 53 ALR 589 (refd)

S D Rani & Ors v. John Pillai [1969] 1 MLRH 201 (refd)

Tan Chong Kean v. Yeoh Tai Chuan & Anor [2018] 2 MLRA 95 (refd)

Legislation referred to:

Evidence Act 1950, s 126

Income Tax Act 1967, ss 80, 98(3), 112, 113, 114, 142(2), (5), (a)(ii), (b), 153(1)(b), Schedule 5

Inland Revenue Department Act of 1952 [NZ], s 16A

Interpretation Acts 1948 and 1967, s 17A

Legal Profession Act 1976, ss 3, 78(1), (2)

Tax Administration Act 1994 [NZ], s 20

Counsel:

For the appellant: Ahmad Isyak Mohd Hassan (Mohammad Hafidz Ahmad & Mohammad Danial Ahmad with him); Senior Revenue Counsel

For the respondent: Anand Raj (Foong Pui Chi & Abhilaash Subramaniam with him); M/s Shearn Delamore & Co

JUDGMENT

Darryl Goon Siew Chye JCA:

[1] On 3 November 2016, the respondent, the Malaysian Bar, wrote to the appellant, the Ketua Pengarah Hasil Dalam Negeri. By this letter, the appellant was informed that the respondent had received complaints from its members.

The complaints were that the appellant had been carrying out raids on law firms to conduct audits on their clients' accounts and insisting on having sight of accounting books and records pertaining to these accounts.

[2] In its letter, the respondent expressed its objections and its view that the documents and information sought by the appellant were protected by solicitor-client privilege and may not be made available to the appellant.

[3] On 7 December 2016, the appellant replied. The appellant maintained that the audits complained of were necessary to ensure "tax compliance" by taxpayers. The Appellant maintained that the audits were not in breach of any solicitor-client privilege by reason of s 142(5) of the Income Tax Act 1967 ("ITA") which overrides the provisions of Chapter IX of Part III of the Evidence Act 1950 ("EA") and the Legal Profession Act 1976 ("LPA"). Accordingly, it was maintained that the actions of the appellant complained of were not in breach of any solicitor-client privilege.

[4] In light of the divergent views of the parties and their disagreement as to whether the law relating to solicitor-client privilege was being ignored and under threat by the appellant's actions complained of, the respondent brought the matter to Court seeking several declarations on the issue.

[5] On 2 April 2018, the High Court ruled in favour of the respondent and made the declarations sought. In essence the learned High Court Judge (as His Lordship then was) held that s 142(5) of the ITA did not override s 126 of the EA. Thus, the privilege provided under s 126 of the EA precluded the appellant from insisting on documents or information in respect of or relating to the clients' accounts of advocates and solicitors. The appellant appealed.

[6] This is the decision of the court in respect of the appellant's appeal.

The Declarations Sought By The Respondent

[7] The declarations sought by the respondent were set out in the judgment of the High Court and they are reproduced below:

> "(i) a Declaration that s 142(5) of the ITA does not entitle or empower the Defendant to disregard the privilege under Malaysian Law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his / her client, whether contained in any book, statement, account or other records of any description whatsoever (hereinafter collectively referred to as "Client Communications"), and which privilege is referred to variously under Malaysian law as "legal privilege" (hereinafter referred to as "Privilege") by requesting or demanding access to, or disclosure of, such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;
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> (ii) a Declaration that Part V. of the ITA generally, and s 80 of the ITA in particular, do not entitle or empower the Defendant to disregard

the Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

(iii) a Declaration that Privilege under Malaysian law generally, and as referred to in ss 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require an Advocate and Solicitor to reject any request or demand of the Defendant for access to, or disclosure of, any, Client Communications, unless Privilege is waived by the Client."

[8] The key legislative provisions are reproduced hereunder for ease of reference.

[9] Section 80 of the ITA states as follows:

"Power of access to buildings and documents, etc.

80. (1) For the purposes of this Act the Director-General shall at all times have full and free access to all lands, buildings and places and to all books and other documents and may search such lands, buildings and places and may inspect, copy or make extracts from any such books or documents without making any payment by way of fee or reward.

(1A) Where the Director-General exercises his powers under subsection (1), the occupiers of such lands, buildings and places shall provide the Director-General or an authorized officer with all reasonable facilities and assistance for the exercise of his powers under this section.

(2) The Director-General may take possession of any books or documents to which he has access under subsection (1) where in his opinion—

(a) the inspection of them, the copying of them or the making of extracts from them cannot reasonably be undertaken without taking possession of them;

(b) they may be interfered with or destroyed unless he takes possession of them; or

(c) they may be needed as evidence in any legal proceedings instituted under or in connection with this Act.

(3) Where in the opinion of the Director-General it is necessary for the purpose of ascertaining income in respect of the gains or profits from a business for any period to examine any books, accounts or records kept otherwise than in the national language, he may by notice under his hand require any person carrying on the business during that period to furnish within a time specified in the notice (not being less than thirty days from the date of service of the notice) a translation in the national language of the books, accounts or records in question:

Provided that in East Malaysia this subsection shall have effect as if the words "or English" were inserted after the words "national language" wherever they occur."

[10] Section 142(5) under Chapter 3 of ITA states as follows:

"Evidential provisions 142. (1) ...

(5) (a) Save as provided in paragraph (b) nothing in this Act shall—

(i) affect the operation of Chapter IX of Part III of the Evidence Act 1950 [Act 56]; or

(ii) be construed as requiring or permitting any person to produce or give to a court, the Special Commissioners, the Director-General or any other person any document, thing or information on which by that Chapter or those provisions he would not be required or permitted to produce or give to a court.

(b) Notwithstanding any other written law, where any document, thing, matter, information, communication or advice consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions or dealings of any person (whether an advocate and solicitor, his client, or any other person), it shall not be privileged from disclosure to a court, the Special Commissioners, the Director-General or any authorized officer if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person.

(c) Paragraph (b) shall also apply with respect to any document, thing, matter, information, communication or advice made or brought into existence before the commencement of that paragraph."

[11] Section 126 of the EA, including the explanation provided thereunder, states as follows:

"Professional communications

126. (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation — The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an advocate: "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A, a client, says to B, an advocate: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure."

The Issues In This Appeal

[12] For the purpose of its appeal, the appellant distilled and set out in its submissions three issues that need to be determined by the Court, namely:

"a. Whether s 142(5) of the ITA 1967 overrides the Solicitor-Client Privilege as provided under s 126 of the EA 1950.

b. Whether the Client's Account under the Legal Firm's name and administered by the Firm falls within the ambit of Privilege under s 126 of the EA 1950 as s 126 of the EA 1950 provides Privilege only for communications between solicitors and client.

c. Whether the word "practitioner" in s 142(5)(b) of the ITA 1967 refers to and includes "advocate and solicitor" or it merely refers to other practitioners such as tax agent and accountant."

The term "solicitor-client privilege" is here used to refer specifically to the privilege provided under s 126 of the EA.

[13] Central to this entire appeal is the construction and interpretation of the ITA and its possible effect on the EA and as such, it is appropriate that what has been adopted by the Federal Court as the correct approach be reiterated. In *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 1 MLRA 137, Gopal Sri Ram JCA (sitting in the Federal Court) stated as follows:

"78 ... The correct approach to be adopted by a court when **interpreting a taxing statute** is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] AC 739:

> First, the **words are to be given their ordinary meaning**. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v. Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
>
> Secondly, '... **one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied**. One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v. Regeim* [1945] 2 All ER 499; [1946] AC 119).
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> Thirdly, the **object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended**. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction."

[Emphasis Added]

Whether Section 142(5) Of The ITA Overrides S 126 Of The EA And Whether An Advocate And Solicitor Is Included In The Term "Practitioner" In S 142(5)(b) Of The ITA?

[14] Issues (a) and (b) posed by the appellant are here dealt with together as they are necessarily inter-related. The determination of whether s 142(5) of the ITA overrides s 126 of the EA would require the consideration and determination whether advocates and solicitors are included in the term "practitioner" in s 142(5)(b) of the ITA. It is well settled that the construction of any document, be it a written contract or statute, should not be compartmentalised or considered in isolation such as to exclude other provisions in that same contract or statute that may shed light on the provision being construed (see *Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors And Another Appeal* [2015] 5 MLRA 1).

[15] It was contended by the appellant that the opening words in s 142(5)(a) of ITA namely, "save as provided in paragraph (b) ...", means "except" or "other than", relying on the observation of Ariffin Zakaria FCJ in *Minister Of Finance Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 1 MLRA 705. On this basis it was contended that s 126 of the EA, being part of Chapter IX of Part III of the EA, is subject to and has been ousted by s 142(5)(b), by virtue of the provision in s 142(5)(a). Putting it another way, the operation of Chapter IX of Part III

of the EA, was made subject to s 142(5)(b) – accordingly, s 142(5)(b) would prevail over that part of the EA.

[16] This argument made on behalf of the appellant was followed by another that relates to the opening words of s 142(5)(b) namely, "Notwithstanding any other written law.". The word "other" was omitted in the appellant's written submissions. This was no doubt due to a typographical error. This non-obstante clause, it was contended, allows s 142(5)(b) to override the provisions of Chapter IX of Part III of the EA, and along with it, s 126 of the EA and those provisions that cater for solicitor-client privilege. Such is the effect of a non-obstante clause, so held by the Federal Court in *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia And The Government Of Malaysia* [1981] 1 MLRA 557. Reference was also made to the decision of the Federal Court on this point in *Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson* [2009] 4 MLRA 265. Also cited was the decision of the India Supreme Court in *Ghulam Nabi Dar And Others v. State Of Jammu And Kashmir And Others* [2013] MLRFU 218.

[17] It was further contended on behalf of the appellant that while the provisions of the ITA in question are clear, however, should there be any doubt or "grey area" as it was put, the purposive approach should be adopted. This would be an approach consonant with s 17A of the Interpretation Acts 1948 and 1967. To this end, and in line with Lord Donovan's fourth point in Mangin, regard should be had to the Explanatory Statement to the Bill of Act A225 1974 which resulted in the current s 142(5), where it was stated:

> "The amendment of s 142 of the Act proposed in cl 3 of this Bill would enable disclosure of information contained in records to be required and to be made and prevents Privilege from being claimed in respect of such information, notwithstanding any other written law to the contrary. This amendment is to be deemed to have come into force on 1 January 1974."

The explanatory statement it was contended, clearly discloses the purpose of the amendment. It was to oust or exclude any privilege that is attached to professional communication such as those provided in s 126 of the EA.

[18] Accordingly, it was maintained on behalf of the appellant that coupled with the provisions in s 80 of the ITA, the appellant may require the documents that it had been seeking from the clients' accounts of advocates and solicitors and thus legal firms

[19] It was also submitted on behalf of the appellant that the learned Judge had erred when he concluded that the word "practitioner" in s 142(5)(b) does not include an advocate and solicitor. It was submitted that no other person except advocates and solicitors are protected with the shield of privilege provided under s 126 of the EA. That advocates and solicitors are recognised as "practitioners" accords with the decision in *S D Rani & Ors v. John Pillai* [1969] 1 MLRH 201.

[20] The respondent's contrary contention was that the privilege afforded by s 126 of the EA should not be abrogated save by clear and unequivocal legislative language, which is absent in this case. It was also contended that the non obstante provision cannot go beyond its limits (see *Ho Tack Sien & Ors V. Rotta Research Laboratorium SpA & Anor And Another Appeal; Registrar Of Trade Marks (Intervener)* [2015] 3 MLRA 611). In essence, s 126 of the EA was not overridden by s 142(5)(b) of the ITA upon a proper construction of the latter.

[21] As a starting point, with respect, we find the explanatory statement given to the legislature in respect of the amendment to s 142 of the ITA somewhat unhelpful in respect of the issues to be determined. While it is clear that the amendment seeks to prevent any assertion of privilege, its extent appears to be unclear. The phrase "notwithstanding **any other written law**" [Emphasis Added] is reproduced in the explanatory statement. What then is that "other written law"? Indeed, did the provision introduced go to the extent of abrogating or removing "solicitor-client privilege" altogether *vis-a-vis* the appellant? It is obvious that such was not expressly spelt out.

[22] It would seem that the issue whether s 142(5) has the effect of overriding the privilege provided under s 126 of the EA has never been tested, despite the existence of s 142(5) for over 40 years.

[23] To start with, s 142(5) begins with a para (a). While this para (a) begins with a qualifying proviso, it then goes on to state in (i) that nothing in the ITA shall affect the operation of Chapter IX of Part III of the EA. Thus, a particular chapter, and part, of the EA was specifically stated and expressed to be unaffected, "save as provided in para (b)". Within Chapter IX of Part III of the EA is found s 126 and the provision relating to the privilege provided.

[24] Quite apart from the fact that the operation of Chapter IX of Part III of the EA is not affected as expressly stated in paragraph (i), s 142(5)(a)(ii) spells out that nothing in the ITA shall be construed as "requiring or permitting" any person to produce or give to a court, the Special Commissioners, the Director-General or any other person any document, thing or information on which by Chapter IX or those provisions he would not be required or permitted to produce or give to a court.

[25] Thus, the provisions in s 126 of the EA relating to privilege, is among those recognised and expressed to be unaffected or undermined, "save as is provided in para (b)" ie s 142(5)(b).

[26] Two points may be drawn from s 142(5)(a). First, the legislature specifically singled out that part of the EA which includes s 126 and expressed that its operation is not to be affected by the Act. Secondly, by reason of the proviso, that part of the EA singled out may only be affected "… as provided in para (b)".

[27] The question then arises as to the extent or in what way, the operation of Chapter IX of Part III of the EA is affected by s 142(5)(b).

[28] Having expressly referred to and identified Chapter IX of Part III of the EA in s 142(5)(a), (b) then begins with the words "notwithstanding any other written law"".

[29] In *Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson* [2009] 4 MLRA 265, p 272, Heliliah FCJ made it clear that:

> "The term 'notwithstanding' means generally 'not to stand against it', or 'in the way' or 'overriding'."

[30] Thus, having expressed in paragraph (a) that, subject to paragraph (b), the operation of Chapter IX of Part III of the EA is not to be affected by the ITA, the non obstante provision in paragraph (b), under the same subsection, then refers to "other written law". The question that follows is whether "other written law" refers to Chapter IX of Part III of the EA or some undisclosed "other written law".

[31] Section 142(5)(b) may be dissected into three parts. The first is the non obstante provision. The second deals with what may be described as the subject matter of the provision ie the document, thing, matter information, communication etc ... "of a person". In parenthesis, it is made clear that the "person" referred to in s 142(5)(b) may be an advocate and solicitor, his client or any other person. Third, the circumstances in which privilege from disclosure may not be invoked, and against whom.

[32] The second part of s 142(5)(b) is directed very broadly at any document, thing, matter, information, communication or advice which is then narrowed down to only those consisting or relating wholly or partly to receipts, payments, income, expenditure, or financial transactions or "dealings of a person". Although not of any great significance for the purposes of this case, the term "dealings" would probably have to be read *ejusdem generis* to the preceding items ie to be financial in nature. As for who that "person" might be, as indicated, it may be any one whether an advocate and solicitor, his client or "any other person". At this juncture it is to be noted that advocates and solicitors are specifically referred to as such. It is also to be noted that what is of concern here is the document, thing, matter, information, communication etc ... of "a person", who could be an advocate and solicitor, his client or any other person.

[33] As for the third part of s 142(5)(b), it removes any claim of privilege from disclosure *vis a vis* the Court, the Special Commissioners, the Director-General or authorised officers, of any of the subject matter described that is "**prepared or kept by** any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person". [Emphasis Added]

[34] Learned counsel for the appellant maintained that "practitioner" or "firm of practitioners" in this context can only mean advocates and solicitors as no one else enjoys the privilege that advocates and solicitors do under s 126 of the EA.

[35] With respect, firstly, it is quite settled law that the privilege is not that of the advocate and solicitor but a privilege of the client of an advocate and solicitor (see *Tan Chong Kean v. Yeoh Tai Chuan & Anor* [2018] 2 MLRA 95 at para 25). Hence, only the client may waive the privilege or consent to its waiver.

[36] Secondly, by token of this same argument made on behalf of the appellant, one would therefore expect the legislature to refer only to, and to use the term, advocate and solicitor. Instead however, another term is used ie "practitioner", within that very same provision. The different term used here results in a third entity being brought into the equation, ie a "practitioner", who has the information sought in any book, account, statement or other record prepared or kept by him. As such, the provision can only mean the required data or information found in any record kept or prepared by a third party and not the "person" (which includes an advocate and solicitor or his client) himself.

[37] By way of contrast, learned counsel for the respondent pointed to s 16A of the New Zealand Inland Revenue Department Act of 1952. Section 16A was said to have been brought about by a decision of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v. West Walker* [1954] NZLR 191.

[38] Section 16A of the New Zealand legislation provided as follows:

> "**Privilege for confidential communication between legal practitioners and their clients**
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> 16A (1) Subject to subsection two of this section, any information or book or document shall, for the purposes of sections thirteen to sixteen of this Act, be privileged from disclosure, if-
>
> (a) It is a confidential communication, whether oral or written, passing between a **legal practitioner** in his professional capacity and his client, whether made directly or indirectly through an agent of either; and
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> (b) It is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
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> (c) It is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.
>
> (2) Where the information or book or document consists wholly or partly of, or relates wholly or partly to, the receipts, payments, income, expenditure, or financial transactions of a specified person (whether the **legal practitioner**, his client, or any other person), it shall not be privileged from disclosure if it is contained in, or comprises the whole or part of, any book, account, statement, or other record prepared or kept by the **legal practitioner** in connection with a

trust account of the **legal practitioner** within the meaning of section seventy of the Law Practitioners Act 1955.

(3) Except as provided in subsection one of this section, no information or book or document shall for the purposes of sections thirteen to sixteen of this Act be privileged from disclosure on the ground that it is a communication passing between a **legal practitioner** and his client.

(4) Where any person refuses to disclose any information or book or document on the ground that it is privileged under this section, the Commissioner or that person may apply to a Magistrate for an order determining whether the claim of privilege is valid; and, for the purposes of determining any such application, the Magistrate may require the information or book or document to be produced to him. An application under this subsection may be made in the course of an enquiry under section fifteen of this Act to the Magistrate who is holding the inquiry.

(5) For the purposes of this section the term "**legal practitioner**" means a barrister or solicitor of the Supreme Court, and references to a **legal practitioner** include a firm in which he is a partner or is held out to be a partner.

(6) This section shall apply with respect to information, books, and documents made or brought into existence before the commencement of this section as well as to information, books, and documents made or brought into existence after the commencement of this section."

[Emphasis Added]

Reference was then made to the successor of s 16A, namely s 20 of the New Zealand Tax Administration Act 1994.

[39] There may be similarities between the s 16A of the New Zealand legislation and s 142 of the ITA, but they are not the same. There are clearly differences in the language used. As such, the New Zealand legislation is of little assistance in the interpretation of s 145(2) of ITA. However, the point made by learned counsel for the respondent is the fact that the term "legal practitioner" is expressly used in the New Zealand legislation thus leaving no ambiguity or room for doubt. Indeed, not only the term "legal practitioner" is used, it is also specifically defined to include a barrister or solicitor of the Supreme Court.

[40] The use of the term "practitioner" in s 142(5)(b) does give rise to difficulty when viewed *vis-a-vis* s 126 of the EA. Section 126 itself makes no reference to "practitioner" or "practitioners". It is expressly and specifically limited to advocates and solicitors and their clients. Thus, "any other written law" in the opening words of s 142(5)(b), would appear to exclude s 126 of the EA.

[41] The term "advocate and solicitor" appears only once in the ITA and that is in s 142(5)(b). Elsewhere in the ITA, for example ss 98(3), 153(1)(b) and also in Schedule 5, the term "advocate" is used. Although the term "advocate and

solicitor" is not defined under the ITA, it certainly has a statutory meaning. Section 3 of the Legal Profession Act 1976 defines "advocate and solicitor" to mean an advocate and solicitor of the High Court admitted and enrolled under that Act or under any written law, prior to the coming into operation of the Act.

[42] What therefore is clear is that the term "advocate and solicitor" used in s 142(5)(b) is possessed of a technical and statutory meaning. As the learned High Court Judge pointed out, it is not to be supposed that Parliament had intended the term to be used in a different sense. Indeed, there is equally no reason to suppose that the term was intended to be equated with the word "practitioner" when that term "practitioner" is specifically used in s 142(5)(b) instead of, and after the express use of, the term "advocate and solicitor".

[43] In fact, the concluding words of s 142(5)(b) are "... practitioner or firm of practitioners or **any other person**" [Emphasis Added]. Again, the choice made was to use "**any other person**" but not "advocate and solicitor".

[44] As Thomson CJ said in *Lee Lee Cheng v. Seow Peng Kwang* [1959] 1 MLRA 246 at p 250, and an observation referred to by the learned High Court Judge:

> "It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly."

Though the term practitioner is not "used repeatedly" in the provisions under consideration, the general inference that different words refer to different things remain.

[45] Similarly, in *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 2 MLRA 135, p 142, Arifin Zakaria FCJ (as His Lordship then was) stated that:

> "[33]... It is a principle of statutory interpretation that when the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended, and **if different language is used in contiguous provisions, it must be presumed to have done so designedly** (See NS Bindrai's *Interpretation of Statutes* (8th edn) at p 275)."
>
> [Emphasis Added]

It would follow *a fortiori*, where different words are used within the same provision.

[46] It is therefore difficult to avoid the conclusion that a difference was intended when the term "practitioner" rather than "advocate and solicitor" was the term expressly chosen by the legislature.

[47] Even though it may be contended that the term "practitioner" could be wider than the more specific term "advocate and solicitor", it is nevertheless

difficult to avoid the conclusion that when the two different terms are used within the very same provision, in the manner set out in s 142(5)(b) of the ITA, the narrower term would have been carved out of the wider term and excluded.

[48] Thus s 142(5)(b) may be distilled into its constituent parts and read as follows:

(i) notwithstanding any other written law,

(ii) any document, thing, matter, information, communication or advice,

(iii) consisting wholly or partly of or relating wholly or partly to, receipts, payments, income, expenditure, or financial transactions or dealings,

(iv) of a person (whether an advocate and solicitor, his client or any other person),

(v) shall not be privileged from disclosure to a Court, the Special Commissioners or any authorised officers,

(vi) if it is contained in, or comprises the whole or part of, any book, account, statement or other record,

(vii) prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person.

[49] We would respectfully agree with the learned High Court Judge that as it stands, s 142(5)(b) precludes the claim to any privilege from disclosure, information that are "prepared or kept by" any practitioner or firm of practitioners and the terms "practitioner" or "firm of practitioners" do not include "advocate and solicitor" or "firm of advocates and solicitors".

[50] It should be borne in mind that the privilege under s 126 of the EA is an absolute one. Once privilege attaches, it continues no matter in whose hands the privileged data might end up in. The common law principle "once privileged, always privileged" applies. There is only one instance where privilege, when it exists, may cease and that is if the person who enjoys that privilege, the advocate and solicitor's client, expressly consents to its disclosure. This was so held by the Federal Court in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 1 MLRA 248. In that case when dealing with s 126 of the EA, Nik Hashim FCJ stated at pp 253-254:

> "[23] Similarly, the Court of Appeal's finding at p 311 that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege does not accord with the clear imperative terms of s 126 which makes no such reference, either expressly or by implication, to such a contention.

> [24] It is true that a legal opinion sought is implicitly confidential but the exception under s 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating 'privilege' as being co-extensive with 'confidentiality' is untenable.
>
> [25] Hence, I hold that the legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder, ie the client."

See also *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 2 MLRH 803.

[51] Among the questions posed to the Federal Court in the case of *Anthony See Teow Guan* was, specifically, whether the principle at common law relating to legal professional privilege, namely 'once privileged, always privileged' is recognised under the Evidence Act. The answer to this question was provided by the Federal Court in the affirmative.

[52] In *Anthony See Teow Guan* the privileged document, a legal opinion, had in fact been published by the appellant to various persons. The legal opinion was nevertheless held inadmissible by reason of the legal professional privilege provided under s 126 of the EA. In fact, the legal opinion in question was handed to the respondents in that case, ie the plaintiffs, by the auditors of the company who had secured the legal opinion. In allowing the appeal, Nik Hashim FCJ explained where the Court of Appeal had erred:

> "[20]... I agree with the appellant that the Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' (see per Cockburn CJ in *Bullock & Co v. Corry & Co* [1878] 3 QBD 356 at p 358) as being embodied in ss 126-129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 2 MLRH 803, which was adopted by the learned trial judge in the present case. Relying on the wording of s 126 of the Act, Eusoff Chin J (as he then was) in Dato' Au Ba's case held the maxim 'once privileged always privileged' applied. The court said at p 447:
>
> Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v. Corry & Co*)."

[53] In the case of *Dato' Au Ba Chi*, which was approved by the Federal Court in *Anthony See Teow Guan*, the privilege that existed continue to prevail even though the document in respect of which privilege was claimed, had been given by the defendant's solicitors to one of the plaintiffs.

[54] Thus, but for s 142(5)(b) of the ITA, financial information that enjoys the protection of privilege under s 126 of the EA contained in any document prepared by or in the possession of practitioners such as accountants, tax

advisors or agents and financial advisors would continue to be privileged from disclosure.

[55] By virtue of s 142(5)(b) of the ITA, the principle "once privileged, always privileged" is no longer subject to the one and only exception namely, where the person who enjoys the privilege expressly consents to its waiver. That then is the extent of the incursion into, or curtailment of, the privilege catered for under s 126 of the EA brought about by s 142(5)(b) of the ITA. In our view, no absurdity results from this interpretation of s 142(5)(b) of the ITA. It is also an interpretation that promotes the purpose of the legislation to delimit the extent of the privilege under s 126 of the EA. This interpretation is also in conformity with s 17A of the Interpretation Acts 1948 and 1967 which provides as follows:

> "17A. Regard to be had to the purpose of the Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

[56] It therefore cannot be said that the purpose of s 142(5)(b) to remove privilege from disclosure has not been achieved. That purpose is to preclude a claim of privilege from disclosure, in the circumstances therein set out. The purpose or objective of s 142(5)(b) was not to have the effect of repealing or abrogating s 126 of the EA or to deny its applicability altogether *vis-a-vis* the "... court, the Special Commissioners, the Director-General or any authorised officer". If that was the intention of the legislature, it could and would have been spelt out quite simply in an obvious and clear manner.

[57] The rationale for excluding advocates and solicitors in favour of the term "practitioners" is also apparent. If the objective is to investigate advocates and solicitors, suffice it to say that the client's account is a trust account in which is kept the client's monies, not monies of the advocate and solicitor. Until monies in such trust accounts are for valid reasons removed into the advocate and solicitor's "office account" or own account, the monies in the trust account are meant to be held for the client.

[58] That monies held or received for or on account of a client are to be kept in a separate client's account is a requirement to be found in the Solicitors' Account (Deposit Interest) Rules, 1990 ('SAR') made pursuant to subsections (1) and (2) of the s 78 of the Legal Profession Act 1976.

[59] Rule 3 of the SAR states as follows:

> "3. Duty to pay money into client account
>
> (1) Subject to r 9, every solicitor who **holds or receives client's money**, or money which under r 4 he is permitted and elects to pay into a client account, shall without delay pay such money into a **client account**."
>
> [Emphasis Added]

[60] Under the SAR, "client account" means a current or deposit account at a bank in the name of the solicitor in the title of which the word "client" appears. "Client's money" means "money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as solicitor or in connection with his practice as solicitor, agent, bailee, stakeholder or in any other capacity and includes solicitors' trust money but does not include money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners of the firm". For completeness, "solicitor" is defined to mean "an advocate and solicitor of the High Court and includes a firm of solicitors".

[61] Conversely, if the objective is to investigate the clients of advocates and solicitors, it would seem quite reasonable that the legislature should direct its attention to "practitioners" who would prepare or keep the type of information or communication, of a fiscal nature, of any person including those of advocates and solicitors and their clients. This is what the legislature has done in s 142(5)(b) and it has been done in a manner that includes not only information, communication etc ... of clients of advocates and solicitors but also of advocates and solicitors themselves and any other person ie anyone else.

[62] Courts must be slow to conclude that a provision in a particular legislation has the effect of negating or undermining a provision in another, save where the Legislature has manifested its intention so to do, in clear and unambiguous terms.

[63] In addition, and in this case, the privilege protected under s 126 of the EA is an ancient and important one. As pointed out by Richard Malanjum CJ (Sabah and Sarawak) (as His Lordship then was) in the case of *Tan Chong Kean*:

> "[27] The principle in s 126 was postulated centuries ago as an English common law principle in the case of *Berd v. Lovelace* [1576] 21 ER 33 in which the full report reads:
>
> > Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same; and that he shall be in no danger of any contempt, touching the not executing of the same process."

[64] His Lordship went on to explain the rationale and importance of the privilege:

> "[28] The rationale in the principle is to enable and protect an individual's ability to access to the justice system with complete disclosure of all necessary information to his legal adviser free from any hindrance in the form of fear that any disclosure by him of any communication may prejudice him in the future.

[29] The courts regard client legal privilege as a "substantive general principle which plays an important role in the effective and efficient administration of justice by the courts" (see: *Goldberg v. Ng* [1995] 185 CLR 83).

[30] In *Regina v. Secretary of State Home Department, ex parte Leech (No 2)* [1994] QB 198 Steyn LJ said this at p 211:

> Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice. **It is not without significance that counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly**.
>
> [Emphasis Added]

[31] In the Canadian case of *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] SCC 7; [2015] 1 SCR 401 the Supreme Court (per LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ and delivered by Cromwell J) held that:

> Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice
>
> ...
>
> ... The expectation of privacy in solicitor-client privileged communications is invariably high regardless of the context and nothing about the regulatory context of the Act or the fact that a regulatory agency undertakes the searches diminishes that expectation ... Solicitor-client privilege must remain as close to absolute as possible.**There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege no more than absolutely necessary**.
>
> ... It should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes. Principles of fundamental justice have three characteristics. They must be a legal principle; there must be significant societal consensus that they are fundamental to the way in which the legal system ought fairly to operate; and, they must be sufficiently precise so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The lawyer's duty of commitment to the client's cause meets this test. First, it is a normative legal principle and a basic tenet of our legal system. It has been recognized as a distinct element of a lawyer's broader common law duty of loyalty. Second, jurisprudence demonstrates that the principle is sufficiently precise to provide a workable standard. It does not countenance a lawyer's involvement in, or facilitation of, illegal activities and it is consistent with a lawyer taking appropriate steps to ensure that his or her services are not used for improper ends. Third, there is overwhelming evidence of a strong and wide-spread consensus concerning the fundamental importance in democratic states of protection

> against state interference with the lawyer's commitment to his or her client's cause. The duty is fundamental to the solicitor-client relationship and how the state and the citizen interact in legal matters. The lawyer's duty of commitment to the client's cause is essential to maintaining confidence in the integrity of the administration of justice."

[Emphasis Added]

[65] The foregoing observations, manifests the importance of the privilege enshrined in s 126 of the EA, as among other things, an "… important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice". They also testify as to why, "solicitor-client privilege must remain as close to absolute as possible. There must be a stringent norm to ensure protection and legislative provisions must interfere with the privilege **no more than absolutely necessary**" [Emphasis Added].

[66] Thus, before this important principle preserved by the legislature in the form presented in s 126 of the EA may be abrogated or undermined, the intention to do so must be manifest by the use of clear and unambiguous language. Anything less will not do.

[67] It is equally significant that, in the circumstances of this case, a contrary conclusion would have very far reaching consequences. The authority and power that may be effected by the appellant would have a blunderbuss effect. Without any cause, just or otherwise, the appellant may investigate numerous individuals through their legal advisors, many of whom the appellant may not even be aware of. Again, such wide ranging power, should it be allowed, may only be allowed upon the express intention of the Legislature, in clear and unequivocal terms.

[68] In our view, we do not find that s 126 of the EA has been overridden in its entirety by s 142(5)(b) of the ITA such that an advocate and solicitor may not assert the privilege provided under s 126 of the EA as against the appellant. We are of the view that it cannot be concluded that such was the clear and unequivocal intention of the Legislature.

[69] We hasten to add that if, however, there is basis upon which the appellant may rely on the proviso to s 126 of the EA, they remain able to do so. That proviso makes it clear that the privilege under s 126 of the EA does not apply to communications made in furtherance of any illegal purpose and to any fact observed by an advocate in the course of his employment as such, showing that any crime or fraud has been committed.

[70] In the context of the appellant's avowed purpose of wanting to access the clients' accounts of advocates and solicitors ie to ensure "tax compliance" by taxpayers, it is significant that the ITA creates a host of offences including for example the failure to furnish return or give notice of chargeability (s 112), making incorrect returns (s 113) and willful evasion (s 114). Therefore, if there is any legitimate basis for wanting to gain access to the clients' accounts of

advocates and solicitors the appellant may do so by invoking the proviso to s 126 of the EA.

[71] Unless the appellant can establish that the proviso to s 126 of the EA applies, the privilege provided thereunder will endure as against the appellant.

[72] As for the appellant's reference to s 80 of the ITA, it need only be said that as a general provision, it is of no assistance to the appellant in the interpretation of s 142(5) of the ITA. Of course, if indeed s 126 of the EA is overridden by s 142(5)(b) of the ITA, s 80 would provide authority for the Director-General or an authorised officer to gain access to the documents and information sought.

Whether A Solicitor's "Client Account" Enjoys The Privilege Under Section 126 Of The EA?

[73] Insofar as s 126 of the EA is concerned, it was contended on behalf of the appellant that the privilege does not extend beyond advice and communications between the client and his lawyer. Such would not include for example, an invoice rendered or documents in the client's account. In this regard reliance was placed on the observations of Connolly J of the Supreme Court of Queensland in *Re Packers and Others v. Deputy Commissioner of Taxation* 53 ALR 589.

[74] In *Re Packers and Others*, Connolly J of the Supreme Court of Queensland held in that case that legal professional privilege is confined to documents brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings. It was held that trust account ledgers are not communications made for the purpose of obtaining advice and cannot be regarded as a revelation of the nature of advice given. However, that was not a case concerned with any statutory provision on privilege such as s 126 of the EA.

[75] Section 126 of the EA is not as narrowly crafted as is suggested by the appellant. The privilege in s 126 is in respect of three identifiable classes of information namely:

(i) communication made to an advocate in the course and for the purpose of his employment as such advocate by or on behalf of his client;

(ii) contents or condition of any document with which the advocate has become acquainted in the course and for the purpose of his professional employment; and

(iii) advice given by the advocate to his client in the course and for the purpose of such employment.

[76] The classes of information protected under s 126 are clearly very wide. No doubt this is necessary as an advocate and solicitor's legal brief can be multifaceted and wide ranging.

[77] As is evident, legal advice given by an advocate to a client is but only one of the three classes of information protected by privilege.

[78] The term communication is not defined in the EA. However, the meaning of the word includes the means of sending or receiving of information (see the *Concise Oxford Dictionary*) or the imparting or exchange of information or something communicated, eg a message (see *Collins Concise Dictionary*). Financial information or data exchanged between an advocate and his client and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment as an advocate, would all come within the ambit of s 126 of the EA.

[79] We are therefore unable to agree with the appellant's contention that the client's account and information relating thereto do not come within the purview of s 126 of the EA.

Conclusion

[80] Having regard to the foregoing and for the reasons given, the appellant's appeal was dismissed. Given the circumstances of the case, the Court, in the exercise of its discretion, made no order as to costs.

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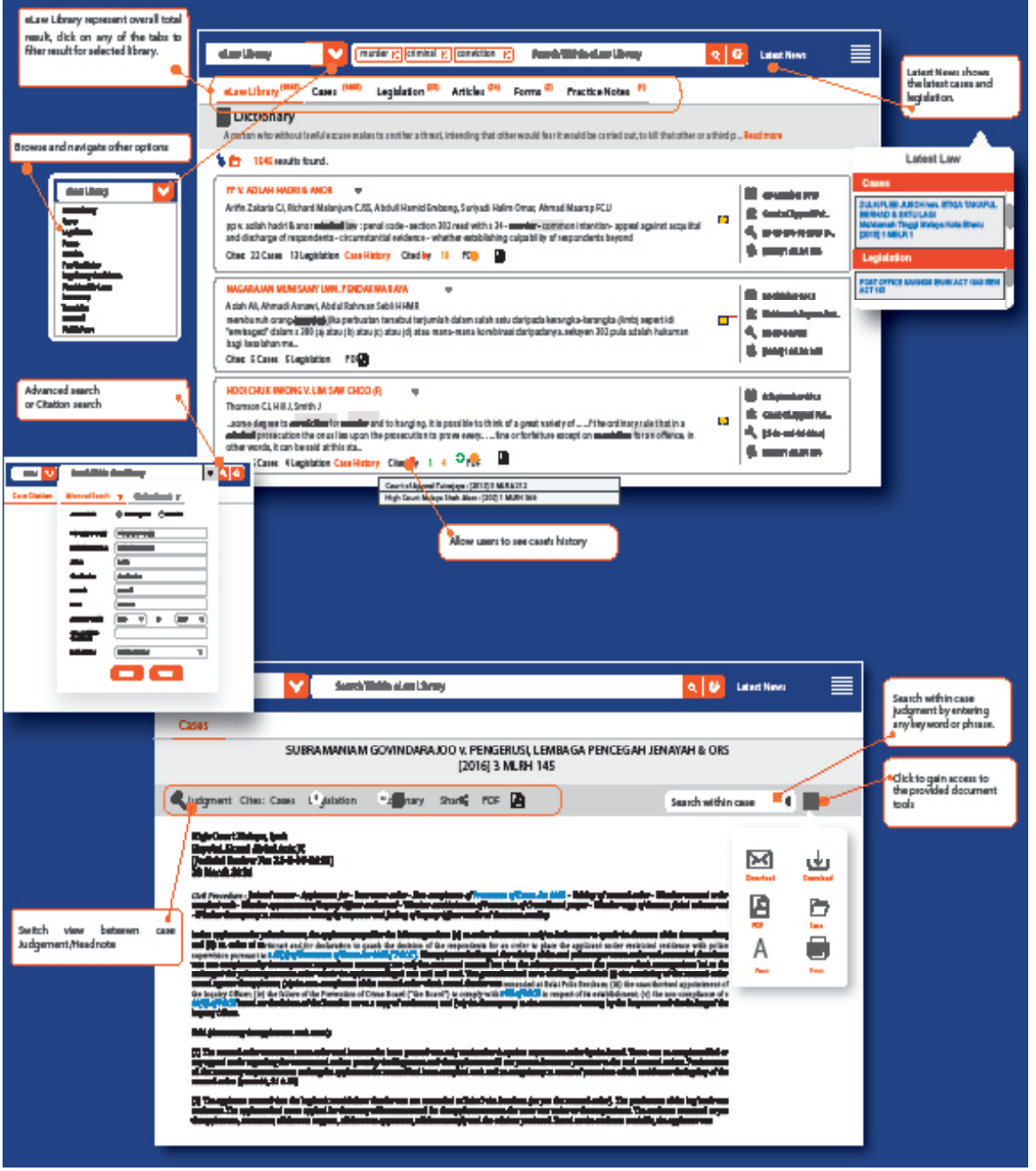

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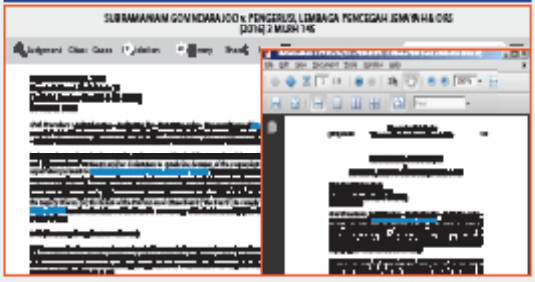

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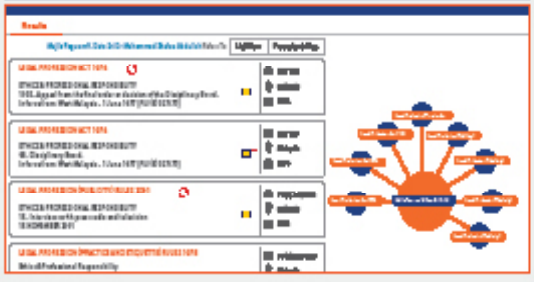

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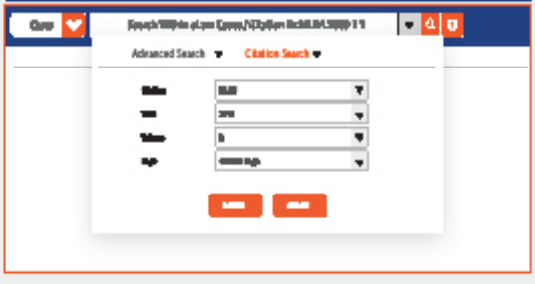

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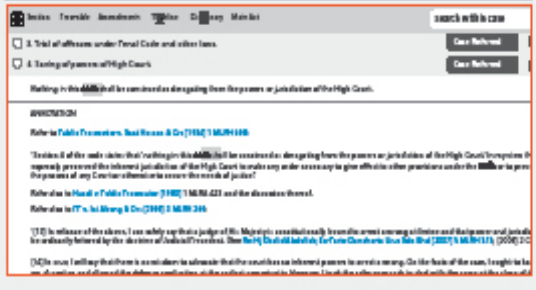

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