CHONG NGE WEI & ORS

v.

KEMAJUAN MASTERON SDN BHD

Federal Court, Putrajaya
Abdul Rahman Sebli, Zabariah Mohd Yusof, Harmindar Singh Dhaliwal FCJJ
[Civil Appeal No: 03-1-08-2020(B)]
23 March 2022

Contract: *Breach — Damages — Quantum — Whether claim for damages for purpose provided in cl 12 of statutory sale and purchase contract under Schedule H of Housing Developers (Control and Licensing) Regulations 1989 required proof of actual loss to be shown before damages could be awarded — Whether appellants' quotation constituted sufficient evidence of damages suffered due to breach*

Land Law: *Housing developers — Breach of agreement – Damages, quantum of — Whether claim for damages for purpose provided in cl 12 of statutory sale and purchase contract under Schedule H of Housing Developers (Control and Licensing) Regulations 1989 required proof of actual loss to be shown before damages could be awarded — Whether appellants' quotation constituted sufficient evidence of damages suffered due to breach*

This appeal arose from the decision of the Court of Appeal allowing the respondent's appeal against the decision of the Judicial Commissioner ("JC") who affirmed the decision of the Senior Assistant Registrar ("SAR") to award damages in the sum of RM380,500.00 to the appellants for breach of contract. The question of law for which the appellants had been granted leave to appeal was: "Whether a claim for damages for the purpose provided in cl 12 of the statutory sale and purchase contract under Schedule H of the Housing Developers (Control and Licensing) Regulations 1989 required proof of actual loss to be shown before damages could be awarded?" The appellants were purchasers of six apartment units of a housing project which was developed by the respondent. The sale and purchase agreements ("SPAs") entered into between the parties were statutory contracts of sale under the Housing Development (Control and Licensing) Act 1966. Delivery of vacant possession was to be within 36 months from the date of the SPAs, failing which the respondent would have to pay liquidated and ascertained damages ("LAD") under cl 22. If the respondent failed to complete the common facilities within the same time frame, it must pay LAD under cl 24. As it turned out, the respondent not only failed to deliver vacant possession but also failed to complete the common facilities within the stipulated time. Despite that, it refused to pay LAD.

Other than breaching cls 22 and 24 of the SPAs, it was also the appellants' case that the respondent breached cl 12 when it changed the building material

for the outer brick walls of the properties from autoclaved aerated concrete building blocks to flexcore without their written consent. The appellants sued the respondent together with the landowner and the architect (not parties to this appeal) claiming, *inter alia*, LAD under cls 22 and 24 or, alternatively, damages for breach of contract under cl 12. The appellants' claims were allowed by the High Court, and of concern to the present appeal was the court's decision to allow the appellants' claims for damages for breach of cl 12 of the SPAs. There was no appeal against the decision, which meant the respondent accepted liability for breach of contract, subject to assessment of the quantum of damages. The SAR assessed damages to be in the sum of RM380,500.00 together with interests and costs. Dissatisfied with the quantum awarded, the respondent appealed to the JC, who dismissed the appeal. The respondent then appealed to the Court of Appeal and succeeded. The whole decision of the High Court was reversed and set aside, leaving the appellants with no compensation at all, not even nominal damages. Hence, the present appeal by the appellants.

Held (allowing the appeal with costs):

(1) Clause 12 of the SPAs did not fall within the definition of a damages clause, which was "an amount contractually stipulated". There was no amount stipulated in cl 12, unlike cls 22 and 24. Nor was there in the clause "any other stipulation by way of penalty" within the meaning of s 75 of the Contracts Act 1950. The appellants' case therefore rested or fell on the question of whether the quotation they had produced constituted sufficient evidence of the damages that they had suffered as a result of the breach of cl 12 of the SPAs by the respondent. (paras 48-49)

(2) The appellants were *prima facie* entitled to the costs of replacing the flexcore with autoclaved aerated concrete building blocks as would put them in a position to have the building material they contracted for, and the quotation provided *prima facie* proof of the sum "which will meet the costs" of the remedial works, which included the dismantling of the existing walls. In the absence of rebuttal evidence, it did not lie in the mouth of the respondent to say that the sum of RM380,500.00 claimed by the appellants was "excessive and unreasonable", least of all to be wholly disproportionate to the advantages of reinstatement. That was the sum that the appellants' contractor had determined would meet the costs of the remedial works and that was the only evidence before the court, which both the SAR and the JC had accepted as proof of the loss suffered by the appellants. The principle that the defendant had no burden to offer rebuttal evidence had no application where the plaintiff had produced *prima facie* proof of loss. (paras 59-60)

(3) As for the quantum of damages, the SAR's determination did not warrant a re-assessment, let alone a complete setting aside by an appellate court. It was clear that the SAR had not acted on wrong principles or had made an entirely erroneous estimate of the damages that the appellants had suffered.

The figure of RM380,500.00 divided by six units constituted only a sum of RM63,416.66 for each unit. The respondent did not produce any evidence to the contrary. As the developer of the housing project, it would have been easy for the respondent to determine if the sum quoted by the appellants' contractor was reasonable or otherwise. It was, after all, its own housing project. In the face of the quotation, which remained uncontradicted by any other evidence, it was futile for the respondent to make the bare and unsubstantiated allegation that the sum of RM380,500.00 claimed by the appellants was "excessive and unreasonable" and that more than one quotation was required to prove the cost of replacing flexcore with autoclaved aerated concrete building blocks. The sum of RM380,500.00 must therefore be taken as representing the reasonable cost of the remedial works. (paras 61-63)

(4) Unfortunately, the Court of Appeal had, on the facts, erroneously found the quotation to be defective on the ground that it did not contain details of the material to be replaced. It was an undisputed fact that the respondent had used flexcore instead of autoclaved aerated concrete building blocks, in breach of cl 12 of the SPAs. As such, there could not be any confusion on the part of the respondent as to what material the contractor was required to replace the flexcore with. As for the costs of the material which the Court of Appeal said was not stated in the quotation, the quotation did in fact provide a detailed breakdown of the works to be carried out and the rates and amounts in ringgit terms for each item of work, giving a grand total of RM380,500.00. This sum must necessarily include the costs of the autoclaved aerated concrete building blocks, the material to be used to replace flexcore. That was the whole purpose of the remedial exercise, which was to place the appellants "in the same situation as if the contract had been performed." (paras 64, 67 & 69)

(5) For all the reasons aforesaid, the answer to the leave question was in the affirmative and on the evidence, damages in the sum of RM380,500.00 had been proven by the appellants as found by the SAR and the JC. (para 70)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2019] 6 MLRA 494 (refd)

Bonham Carter v. Hyde Park Hotel Ltd 64 TLR 177 (refd)

Cubic Electronics Sdn Bhd v. Mars Telecommunications Sdn Bhd [2019] 2 MLRA 83 (distd)

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 1 MLRA 124 (refd)

Rawyards Coal Co (1880) 5 App Cas 25 (refd)

Strange and Others v. Westbury Homes (Holdings) Ltd and Another [2009] EWCA Civ 1247 (folld)

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1994] 1 MLRA 420 (refd)

Tenaga Nasional Berhad v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 MLRA 1 (refd)

WM Cory & Son Ltd v. Wingate Investments (London Colney) Ltd (1981) 17 BLR 104 (folld)

Legislation referred to:

Contracts Act 1950, s 75

Rules of Court 2012, O 37 rr 1, 5

Counsel:

For the appellants: Amarjeet Singh (Avtar Singh with him); M/s Avtar

For the respondent: Chetan Lachman Jethwani (Ashok Kandiah & Norvindran Sivarajah with him); M/s Kandiah Partnership

JUDGMENT

Abdul Rahman Sebli FCJ:

[1] This appeal arose from the decision of the Court of Appeal allowing the respondent's appeal against the decision of the learned Judicial Commissioner (JC) who affirmed the decision of the learned Senior Assistant Registrar (SAR) to award damages in the sum of RM380,500.00 to the appellants for breach of contract.

[2] The question of law for which the appellants had been granted leave to appeal is as follows:

> "Whether a claim for damages for the purpose provided in Clause 12 of the statutory sale and purchase contract under Schedule H of the Housing Developers (Control and Licensing) Regulations 1989 requires proof of actual loss to be shown before damages could be awarded?"

[3] For the facts of the case, we are taking the liberty to replicate those that the Court of Appeal had set out in its judgment, with the necessary modifications. They are as follows. The seven appellants, two of whom are husband and wife, were purchasers of six apartment units of a housing project known as Golden Heights of Taman Mas Sepang, Phase 3 which was developed by the respondent. The sale and purchase agreements (SPAs) entered into between the appellants and the respondent were statutory contracts of sale under the Housing Development (Control and Licensing) Act 1966.

[4] Delivery of vacant possession was to be within 36 months from the date of the SPAs failing which the respondent would have to pay liquidated and ascertained damages (LAD) under clause 22. If the respondent failed to complete the common facilities within the same time frame, it must pay LAD under clause 24.

[5] As it turned out, the respondent not only failed to deliver vacant possession but also failed to complete the common facilities within the stipulated time. Despite that, it refused to pay LAD.

[6] Other than breaching clauses 22 and 24 of the SPAs, it was also the appellants' case that the respondent breached clause 12 when it changed the building material for the outer brick walls of the properties from autoclaved aerated concrete building block to flexcore without their written consent.

[7] The appellants sued the respondent together with the landowner and the architect (not parties to this appeal) claiming *inter alia* LAD under clauses 22 and 24, or alternatively damages for breach of contract under clause 12.

[8] After a full trial of the action, the appellants' claims were allowed by the High Court on 31 May 2012. Of concern to the present appeal is the court's decision to allow the appellants' claims for damages for breach of clause 12 of the SPAs. There was no appeal against the decision, which means the respondent accepted liability for breach of contract, subject to assessment of the quantum of damages.

[9] We need to mention in passing that there was an additional claim for distress, discomfort and inconvenience but were disallowed by the learned SAR as they were not awarded by the High Court on 31 May 2012.

[10] The High Court order relating to the award of damages for the respondent's breach of clause 12 of the SPAs was in the following terms:

> "2 Defendan Pertama dan Defendan Ketiga adalah bertanggungan secara bersama dan/atau berasingan membayar gantirugi Plaintif-Plaintif bagi kemungkiran kontrak bagi Klausa 12 perjanjian jual beli dengan Plaintif-Plaintif masing-masing bersama dengan faedah keatasnya pada kadar 8% setahun dari tarikh kemungkiran tersebut sehingga tarikh pembayaran penuh.
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> 3. Gantirugi serta faedah yang diperintahkan dalam perenggan 2 di atas hendaklah ditaksirkan oleh Pendaftar Mahkamah Tinggi."

[11] The appellants filed the Notice for Directions on 11 September 2017, more than four years after the order for assessment was made by the High Court on 31 May 2012. It is unclear why there was this delay of more than four years by the appellants. Rules 1 and 5 of O 37 of the Rules of Court 2012 require directions for assessment of damages to be applied for within one month from the date of the order or judgment, or six months from the date of judgment for the appointment of assessment of damages. It does not appear however that the respondent had any issue with this delay on the part of the appellants. It is therefore a non-issue in this appeal.

[12] On 19 April 2018, the learned SAR assessed damages to be in the sum of RM380,500.00 together with interests and costs. This sum was for replacement/repair costs of the appellants' 6 units under clause 12 of the SPAs in relation to

which the appellants had, at the assessment proceedings, tendered a quotation prepared by their contractor N-Tatt Construction Sdn Bhd as proof of their claims for damages.

[13] Details of the works to be undertaken and the costs to be incurred for replacing flexcore with autoclaved aerated concrete building block were specified in the quotation. The term of payment was 30% upon award, 50% upon completion of dismantling of the existing wall and the balance 20% upon completion of all works.

[14] The respondent did not seriously dispute the need for repair works to be done on the properties due to its breach of clause 12 of the SPAs. Its objection was only to the amount of damages awarded by the learned SAR, and only on the following two grounds:

(i) that it was excessive and unreasonable;

(ii) that it was only based on one quotation and that more quotations ought to have been tendered to ascertain the necessity for the particular works in the quotation.

[15] The first ground relates to quantum whilst the second relates to sufficiency of proof - that the appellants should have produced more than one quotation instead of just one. This is tacit confirmation by the respondent that it had no issue with the appellants proving damages by way of quotation except that more than one was required "to ascertain the necessity for the particular works in the quotation". What this means is that the respondent's interest was only in putting the appellants to strict proof that the works were necessary.

[16] The issue therefore turns on the question whether it was necessary for the appellants to carry out the "particular works in the quotation" and if so what was the cost involved. In our view, having regard to the fact that the respondent had used wrong material for the construction of the outer walls in breach of clause 12 of the SPAs, it is unacceptable for the respondent to say that there was no necessity for the appellants to replace the wrong material with the right material. That was the appellants' call, not the respondent's call.

[17] What concerned the Court of Appeal however was the failure by the appellants to adduce evidence that they had accepted the quotation in order to create a binding contract between them and the contractor. With due respect, we do not think this has any bearing on the issue raised by the respondent, which was whether the sum quoted in the quotation was excessive and unreasonable and that more than one quotation was needed by the appellants to prove their losses.

[18] The main argument raised by the respondent in the courts below and repeated before us was that the learned SAR was wrong in holding that since the respondent offered no alternative quotation, "the court is left with no choice but to accept the plaintiffs' quotation".

[19] Dissatisfied with the quantum of damages awarded by the learned SAR, the respondent appealed to the Judge in Chambers. The appeal was dismissed by the learned JC who held that "the defendants/appellants have no excuse but to honour payment of damages to the plaintiffs/respondents as already ordered subject to this assessment being done in order to quantify the amount of damages to be paid". The learned JC found as follows:

(i) the learned SAR had rightly rejected the respondent's challenge to the appellants' costs of repairs and had applied the correct measure of damages under clause 12, which is the cost of erecting a wall to the contract specification on his own land and not the amount by which the appellants' land as investment property was diminished;

(ii) the respondent did not rebut the quotation relied upon by the appellants by providing an alternative quotation from another independent contractor to suggest that the costs of RM380,500.00 as repair/replacement costs was "excessive and wrongful";

(iii) the respondent offered a "bare challenge" with a failure to offer rebuttal evidence;

(iv) the sum of RM380,500.00 "is an acceptable amount of damages for the repair and replacement cost to put right the defects". This is because the amount of damages to be paid would be the measure of damages for breach of the term to build the units sold to the appellants and is the cost of erecting or putting the correct material instead of the defective material so supplied or fixed to the units of the appellants.

[20] Being again dissatisfied with the decision of the High Court, this time with the decision of the learned JC, the respondent appealed to the Court of Appeal and succeeded. The whole decision of the High Court was reversed and set aside, leaving the appellants with no compensation at all, not even nominal damages as the Court of Appeal was of the view that on the facts and circumstances of the case, the appellants were not entitled to such damages although the respondent had been adjudged to be fully liable by the High Court. The respondent had advanced the following grounds in assailing the decision of the learned JC:

(i) the learned JC erred in law and fact in dismissing the respondent's appeal on the assessment of damages;

(ii) the learned JC erred in fact and/or in law in failing to take into account relevant facts in the affidavits and submissions of the respondent;

(iii) the learned JC erred in fact and/or law in accepting the quotation as being a proper value of the loss;

(iv) the learned JC erred in failing to consider that there was failure to prove loss;

(v) the learned JC erred in fact and/or law in failing to consider that the quotation does not show the losses suffered by the appellants;

(vi) the learned JC erred in fact and/or law in dismissing the respondent's appeal on the ground that respondent failed to produce any quotation to rebut the appellants' quotation.

[21] It was a frontal attack on the learned SAR's and the learned JC's acceptance of the quotation as proof of damages. The argument was accepted by the Court of Appeal. It held that the quotation was not evidence of the damages suffered by the appellants. As for the reasons why, the Court of Appeal's explanation is provided in the following paragraphs of the grounds of judgment:

> "[13] The central point made by the appellant is that the respondents did not discharge their burden of proving the quantum of damage suffered; that the quotation dated 10 October 2013 which was prepared by N-Tatt Construction Sdn Bhd for 'repair' and construction of new brick wall to replace all existing Flexcore wall of six (6) unit apartments for a total of RM380,500.00 was not evidence of the damages suffered by the respondents because:
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> i. there was no further evidence adduced by the respondents to show that repair works were indeed done to repair the units; and
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> ii. a quotation is merely an offer to undertake the requisite work.
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> [14] There was really no conclusive evidence led to show that repair works were done to the units; there were not even photographs or proof of payments made for the repairs tendered to prove the damage suffered. From the terms of the quotation, it was only an offer which lapsed after 30 days if not accepted by the respondent; and there was no evidence of any concluded or binding contract between the respondents and N-Tatt Construction Sdn Bhd based on that quotation."

[22] Clearly, what the Court of Appeal required of the appellants was for them to prove that they had actually carried out remedial works on the properties and that payments had already been made before they could claim for damages. In other words, the appellants could not rely on the quotation alone to prove damages. They must produce evidence of the amount of money that they had already spent on the remedial works, and then only could they claim for the costs of such works from the respondent. In short, compensation for the respondent's breach of clause 12 of the SPAs should be by way of reimbursement and not by way of damages.

[23] The principle that guided the Court of Appeal in determining quantum of damages was that it was not for the respondent to prove any loss suffered by the appellants, or that there was a more reasonable sum. It went on to hold

that there was no burden on the respondent to offer rebuttal evidence unless and until the appellants had discharged their burden of establishing damages, citing this court's decision in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 1 MLRA 420. That was a case on wrongful termination of agreement where this court *inter alia* held that a purchaser who has been awarded damages to be assessed has to prove loss and damages that:

> "... can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at p 178:
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> > ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it."

[24] In deciding against the appellants on the issue of damages, the Court of Appeal's view was that clause 12 of the SPAs is not a damages clause but Clauses 22 and 24 are, and that clause 12 merely provides for rights and obligations of the parties and the remedy available in the event of breach.

[25] This brings us to the pivotal issue in this appeal, which is whether the Court of Appeal was right in holding that the quotation does not constitute evidence of the damages suffered by the appellants. The appellants' entitlement to damages is provided by clause 12 of the SPAs which reads:

> "12. Materials and workmanship to conform to description
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> The said Parcel together with all the common property shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule hereto and in accordance with the plans approved by the Appropriate Authority which description and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority. The Purchaser shall not be liable for the costs of such changes or deviations and in the event that the changes or deviations involved the substitution or use of cheaper materials or the omission of works originally agreed to be carried out by the Vendor the Purchaser shall be entitled to a corresponding reduction in the purchase price herein **or to damages in respect thereof**."
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> [Emphasis Added]

[26] There is no ambiguity in the contractual provision. It entitles the appellants to claim for damages in the event the respondent used different materials for the construction of the properties without their written consent, in this case using flexcore to construct the outer walls of the properties instead of using

autoclaved aerated concrete building block as contracted for.

[27] The Court of Appeal posed the question: Whether, in having their damages for a breach of clause 12 assessed, the appellants were required to prove actual loss? It answered the question in the affirmative, while at the same time acknowledging that should there be any change or deviation which involved substitution or use of cheaper materials or even omission of works that were originally agreed, clause 12 entitled the appellants to a corresponding reduction in the purchase price or to damages in respect thereof.

[28] Obviously the Court of Appeal was mindful of the fact that the appellants had the choice of either to claim for a corresponding reduction in the purchase price of the properties, or to claim for damages. The point to note here is that it was not the appellants' case that the respondent had used cheaper material for the construction of the outer walls. Their case was that the respondent used different material in breach of clause 12 of the SPAs, for which they were entitled to damages as an alternative to a claim for a reduced price of the properties.

[29] As we have alluded to earlier, instead of using autoclaved aerated concrete building block to construct the outer walls of the properties, the respondent used flexcore without the written consent of the appellants. This much was deemed to be admitted by the respondent by not appealing against the decision of the High Court, and the damages that the appellants claimed for was nothing more than the cost of replacing flexcore with outoclaved aerated concrete building block for the outer walls.

[30] The Court of Appeal was however troubled by what it considered to be a failure by the learned SAR and the learned JC to appreciate what exactly was the true nature of the appellants' cause of action under clause 12 of the SPAs and what were their complaints under the clause - was it substitution or use of cheaper materials, or was it omission of works originally agreed, and what was the remedy ordered by the court? It went on to say that how the assessment of damages was to be done and how damages were to be measured would depend on what was pleaded and what the learned JC ordered and interpreted against the pleaded claim.

[31] Our view on the matter is that whatever may be the pleaded issues and orders of the High Court that the learned SAR and the learned JC might have misappreciated, what is clear from the judgment of the Court of Appeal is that the reason why it decided against the appellants was because the appellants failed to adduce any evidence of their losses due to the respondent's breach of clause 12, resulting in a total failure to discharge their legal burden of proof. This is reflected in paras [39] and [40] of the judgment, which we reproduce below for ease of reference:

> "[39] It then comes down to the question of whether any evidence was led to prove the extent of that loss. What did the respondents suffer as a result of the

> appellant's failure to obtain their written consent for the change of materials? The respondents could very well have claimed for a corresponding reduction in the purchase price of the subject property if the effect of the change affected that value. This was well within their entitlement under clause 12. They did not. Instead, they opted for damages; again which they were entitled to under clause 12.
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> [40] It is our view that this brings about an inference, and a reasonable one we would say, that the change did not have any adverse effect, not even a reduction in the value or purchase price of the subject property. More so when one appreciates the type of properties purchased by the respondents. The respondents are owners of six different units of a 10 storey block of apartments [Block D], each of them at different levels, for instance 2nd, 4th and 8th floor. Each of them own and occupy their respective units together with other owners who, at least not that we are aware of, are not claimants, and who may very well have no issue with the changed external wall. And, from what we can see, the necessary certificates of fitness for occupation must have been issued even with the changed materials, as the respondents have already gone into occupation. The "Court should not wear blinkers and ignore" obvious facts - see *Tan Sri Khoo Teck Puat*, speaking of ensuring that there is no double recovery, that claimants should not be making substantial profits only because of a breach of contract, or putting claimants in a better position than they would have been in if the contract had been performed.
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> [41] This is what we mean when we say that the assessment and award of damages is a judicial exercise of discretion that must be properly conducted on correct principles of law and supported by valid, admissible evidence. That is not to say that there is no breach as far as the respondents are concerned because there is; it just needs to be proved. Still, the respondents' complaints were of damage caused by reasons of the change in materials used for their external walls and each of them must prove their damage.
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> [42] Hence, whilst the breach was proved and the respondents were entitled to compensation in the form of damages, the respondents needed to adduce evidence on what exactly were their losses and the quantum."

[32] Quite clearly, what the Court of Appeal meant in paras [39] and [40] above was that since the appellants chose not to claim for a reduction in the purchase price of the properties (which was well within their right under clause 12) and instead claimed for damages (which was also well within their right under clause 12), the change in material for the construction of the outer walls of the properties did not have any adverse effect, not even in reducing the value or purchase price of the properties, and at the same time implying that the appellants were trying to make a double recovery and substantial profits from the respondent's breach of contract.

[33] With the greatest of respect to the Court of Appeal, the inference drawn is unjustified and sends the wrong message to housing developers that they could change contract materials at their whims and fancies without having to face any legal consequence. Obviously the reason why the appellants did not ask for a reduced price for the properties was because they chose to exercise

their alternative right under clause 12 of the SPAs to claim for damages for the respondent's wrongful act of using a different material for the construction of the outer walls without their written consent.

[34] There is nothing in clause 12 of the SPAs to say that damages could only be claimed in the event the respondent used material that is cheaper than the contracted material. What entitles the appellants to claim for damages under the clause is the unauthorized use by the respondent of material that is different from what was contracted for. It is therefore unfair to draw any unfavorable inference against the appellants for opting to claim for damages instead of claiming for a reduction in the price of the properties and to conclude that because of that, the change in the material had no adverse effect on the value or purchase price of the properties.

[35] The Court of Appeal's further observations that the other owners of the housing project did not file any claim against the respondent and that the necessary certificates of fitness for occupation must have been issued by the relevant authority (even with the change of materials) were again misconceived and unjustified and again we say this with the greatest respect to the Court of Appeal. In any case, it is irrelevant to the question of whether the appellants were entitled to damages for the respondent's breach of clause 12 of the SPAs.

[36] The fact is, there is no evidence before the court as to why the other owners of the housing project did not file any claim against the respondent. Nor is there evidence if the certificates of fitness had or had not been issued by the relevant authority. It is impossible to say if the court's mind had not been prejudiced by taking into account irrelevant considerations.

[37] The fundamental principle as to damages was expounded by Lord Blackburn more than 100 years ago in *Rawyards Coal Co* (1880) 5 App Cas 25, 39 where he said that the measure of damages is:

> "... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

[38] In *Tan Sri Khoo Teck Puat*, Edgar Joseph Jr FCJ delivering the judgment of this court explained the basis for assessment of damages in the following terms:

> "The basis of assessment
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> In outline, the victim of a breach of contract is entitled to compensation for any loss which results from the breach and which is neither too 'remote', or unlikely, a consequence nor one which he could have avoided by taking reasonable steps in 'mitigation'. He is 'to be placed in the same situation as if the contract had been performed' (*Robinson v. Harman* (1848) 1 Ex 850 at p 855). This involves considering his overall position. The damages should compensate him for the performance which he should have received but has

> not, with deductions for any savings he has or should have made through not having to perform himself or by other action, such as entering a substitute transaction with someone else. Any profit which he is only able to make because of the breach of contract should also be deducted. These deductions are made in accordance with the general principle that an award of damages should not put the victim in a better position than if the contract had been performed; he should recover no more than he has lost. Punitive or exemplary damages might be awarded where a breach of contract was also a tort, but in English law they are not awarded for a mere breach of contract (*Perera v. Vandiyar* [1953] 1 WLR 672)."
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> [Emphasis Added]

[39] The only way the appellants in the present case could be placed "in the same situation as if the contract had been performed" would be to have the wrong material replaced with the right material, ie flexcore with autoclaved aerated concrete building block for the outer walls of the properties, as contracted for. Surely costs would be involved in carrying out such remedial works.

[40] At the risk of being repetitive, it needs to be emphasised that the respondent had been found liable for breaching clause 12 of the SPAs and had been ordered to pay damages in the sum of RM380,500.00 to the appellants, being the cost of replacing the flexcore with autoclaved aerated concrete building block for the outer walls of the properties.

[41] The only issue left for the court's determination was whether the quotation produced by the appellants constituted proof of the losses they had suffered in terms of the costs that they would have to bear in order to place them "in the situation as if the contract had been performed". If it was, the Court of Appeal would have been unjustified in interfering with the concurrent findings of the learned SAR and the learned JC that damages in the sum of RM380,500.00 had been proved by the appellants.

[42] The principle is that an appellate court is always slow to interfere with the trial court's assessment of damages and the two situations in which an appellate court would be justified in interfering by re-assessment of the damages would be where the trial judge had acted on wrong principle or had made an entirely erroneous estimate of the damages. We do not think it is necessary to cite any authority for this trite proposition of law.

[43] There is no question that the appellants must prove their losses and "it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it." (*Bonham Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at p 178). That is also trite law. But the appellants' claim for damages does not suffer from that infirmity. They have provided proof of the damages by producing a quotation prepared by a building contractor to support their claims for the cost of replacing the flexcore with autoclaved aerated concrete building block.

[44] The respondent raised no objection when the quotation was tendered as evidence at the assessment proceedings before the learned SAR, and there is no dispute that the quotation is not documentary evidence that is *per se* inadmissible such that failure to object to its admission would not turn it into admissible evidence. The respondent's objection to the quotation was only raised during submissions, and even then it was only over the appellants' reliance on the single quotation to prove expenses, which the respondent alleged was not only unreasonable but also "wildly unfair".

[45] Before us, learned counsel for the appellants argued that clause 12 of the SPAs is a damages clause and being a damages clause, it is covered by s 75 of the Contracts Act 1950 ("the Contracts Act") and for that reason the appellants were entitled to a reasonable compensation irrespective of whether actual loss is suffered or proven, citing *Cubic Electronics Sdn Bhd v. Mars Telecommunications Sdn Bhd* [2019] 2 MLRA 83; *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 1 MLRA 124; *Tenaga Nasional Berhad v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 MLRA 1; *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2019] 6 MLRA 494. Section 75 of the Contracts Act reads as follows:

> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, as the case may be, the penalty stipulated for."

[46] On this issue, we are inclined to agree with learned counsel for the respondent that none of the cases relied on by the appellants has any relevance to the issue before the court. The cases are unique to their own peculiar facts and circumstances and cannot be applied across the board. Cubic Electronics and Morello Sdn Bhd relate to claims on forfeiture of deposits. Tenaga National was a case on meter tampering and one which the damage arising could not be calculated by the aggrieved party. Ang Ming Lee dealt with a unilateral variation of the Schedule H Statutory Form of contract which this court duly struck down.

[47] The appellants have also taken a contradictory position with regard to clause 12 of the SPAs. Their position that clause 12 is a damages clause contradicts their pleaded case that due to the respondent's breach of clause 12, they were entitled to assessment of damages. But having requested for damages to be assessed, the appellants now contend that there is no need for proof of actual loss before the court can assess and determine damages.

[48] We agree with the Court of Appeal that clause 12 of the SPAs does not fall within the definition of a damages clause, which is "an amount contractually stipulated" (see *Black's Law Dictionary*). There is no amount stipulated in clause

12, unlike clauses 22 and 24. Nor is there in the clause "any other stipulation by way of penalty" within the meaning of s 75 of the Contracts Act.

[49] The appellants' case therefore rests or falls on the question whether the quotation constitutes sufficient evidence of the damages that they had suffered as a result of the breach of clause 12 of the SPAs by the respondent. We were not referred by the parties to any decision of this court specifically on the issue but we find the following two decisions of the English Court of Appeal to be of relevance, if not directly on point.

[50] In *WM Cory & Son Ltd v. Wingate Investments (London Colney) Ltd* (1981) 17 BLR 104, the specification for the car park under the contract was as follows:

> "Concrete hard-standings and heavy vehicle service road shall be laid and designed to support 40 tons (vehicles). These areas shall be formed to the width and length indicated on the drawings and shall be complete with kerbs and adequate surface water drainage, complete with petrol interceptors where appropriate."

[51] The defendants (appellants) did not provide concrete hard- standings as contracted for but instead provided a car park surfaced with tarmacadam. The following was one of two preliminary issues that was agreed for determination at the trial:

> Were the plaintiffs entitled to an award of damages which will meet the costs of:
>
> (a) Replacing the existing hard-standing with a reinforced concrete hard-standing which will comply with the requirements of Clause 37 of the Specification annexed to the Agreement dated 12 March 1971; or
>
> (b) Removing the existing tarmacadam surface and replacing it with 75 mm of hot rolled asphalt; or
>
> (c) Carrying out such local repairs as may be necessary to the existing sub-base and thereafter placing 40 mm of hot rolled asphalt over the existing tarmacadam surface?

[52] The High Court answered the question in the affirmative. Sir Douglas Frank QC (sitting as Deputy Judge of the High Court) alluded to the principle that *prima facie* the plaintiff was entitled to such damages as would put him in a position to have the building he contracted for, unless the cost of reinstatement was wholly disproportionate to the advantages of reinstatement. It followed that the plaintiffs were entitled to an award of damages which would meet the cost of replacing the existing hard-standings with a reinforced concrete hard-standings which would comply with the requirements of clause 37 of the specification annexed to the agreement dated March 12, 1971.

[53] The defendants' appeal against the decision was dismissed by the Court of Appeal. It was held, *inter alia*, that the defendants failed to show that the plaintiffs had acted unreasonably in asking for concrete instead of asphalt. The plaintiffs were therefore entitled to the cost of concrete hard-standings.

[54] In *Strange and Others v. Westbury Homes (Holdings) Ltd and Another* [2009] EWCA Civ 1247, the issues before the court were (i) the measure of damages in circumstances where repairs have not been carried out, and (ii) where the court must consider the merits of two competing quotations.

[55] The facts of the case as outlined in the headnotes are these. By agreements made in 2001 the first defendant (Westbury) agreed to sell freehold properties in Rotherham to the claimants. It was accepted that Westbury was in breach of these agreements by supplying brickwork which was chipped and damaged and of poor workmanship. A series of ineffective steps to remedy the defects were made. The claimants issued proceedings in January 2008. In December 2008 agreement was reached as to remedial work that was required.

[56] In February 2009 the claimants obtained quotations for remedial works from Milton Construction Ltd in the sums of £27,250, £28,250 and £27,250 for the three properties. Westbury on its part obtained a quotation from a firm called Gunpoint. The trial judge awarded the sums claimed by the claimants together with £5,000 for the residual diminution in value and £2,000 general damages for inconvenience and distress.

[57] Westbury appealed. In dismissing the Appeal, it was *inter alia* held by the Court of Appeal that the trial judge was entitled to find that the Milton quotations represented the reasonable cost of remedial works. The alternative figures produced by Westbury were not offering to do all the work needed to remedy the defects.

[58] The relevance of the two cases to the present appeal is that although no remedial works had been carried out by the claimants to rectify the defects in the works, damages were awarded to them. This answers the Court of Appeal's view that actual works must first be carried out and actual expenses must first be incurred before the appellants could claim for damages. In WM Cory & Son Ltd, the plaintiffs were held to be entitled to an award of damages "which will meet the costs" of the remedial works whilst in Strange and others, damages were awarded based on the quotations produced by the claimant.

[59] Applying the principles in the two cases to the facts of the present case, the appellants were *prima facie* entitled to the cost of replacing the flexcore with autoclaved aerated concrete building block as would put them in a position to have the building material they contracted for, and the quotation provided *prima facie* proof of the sum "which will meet the costs" of the remedial works, which includes dismantling of the existing walls.

[60] In the absence of rebuttal evidence, it does not lie in the mouth of the respondent to say that the sum of RM380,500.00 claimed by the appellants was

"excessive and unreasonable", least of all to be wholly disproportionate to the advantages of reinstatement. That was the sum that the appellants' contractor had determined would meet the cost of the remedial works and that was the only evidence before the court, which both the learned SAR and the learned JC had accepted as proof of the losses suffered by the appellants. The principle that the defendant has no burden to offer rebuttal evidence has no application where the plaintiff has produced *prima facie* proof of loss.

[61] As for the quantum of damages, we are firmly of the view that the learned SAR's determination does not warrant a re-assessment, let alone a complete setting aside by an appellate court. It is clear that the learned SAR had not acted on wrong principle or had made an entirely erroneous estimate of the damages that the appellants had suffered. The figure of RM380,500.00 divided by six units constituted only a sum of RM63,416.66 for each unit.

[62] The respondent did not produce any evidence to the contrary. It did not even provide any alternative figure as was done by the 1st defendant in *Strange and Others (supra)*. As the developer of the housing project, it would have been easy for the respondent to determine if the sum quoted by the appellants' contractor was reasonable or otherwise. It should have been able to determine if, for example, it was reasonable for the remedial cost of replacing the flexcore with autoclaved aerated concrete building block to be in the sum of RM380,500.00 (RM63,416.66 for each unit) as claimed by the appellants, and if not, why not. It was, after all, its own housing project.

[63] In the face of the quotation, which remains uncontradicted by any other evidence, it was futile for the respondent to make the bare and unsubstantiated allegation that the sum of RM380,500.00 claimed by the appellants was "excessive and unreasonable" and that more than one quotation was required to prove the cost of replacing flexcore with autoclaved aerated concrete building blocks. The sum of RM380,500.00 must therefore be taken as representing the reasonable cost of the remedial works.

[64] Unfortunately, the Court of Appeal erroneously found the quotation to be defective on the ground that it does not contain details of the material to be replaced. This is what the Court of Appeal said at paragraphs [55] and [56] of the judgment:

> "[55] ... we further find that the quotation "for repair and construction of new brick wall to replace all existing flexcore wall of six (6) unit apartments" did not indicate any replacement with the original materials of "Brick Wall (autoclaved aerated concrete building block)"; neither were costs of such materials quoted. The quotation merely sets out preliminary, builder's work, mechanical & electrical work, demobilization, clearing & cleaning work and handing over work; without explaining how or why such work was called for.
>
> [56] If one were to examine the Fourth Schedule of the SPAs setting out the building description under clause 12, it will be seen that the external wall comes under "Structure". As alluded to earlier, the respondents own

six different units in the 10 storey-block of apartments; and the respondents proposed that their external walls be replaced. Since the intent of damages in contract is to put the parties post contract, that is, the position the parties would have been in had the contract been performed, the quotation ought to contain details of the materials for the "Brick Wall (autoclaved aerated concrete building block)" and the related costs. As we can see from the quotation, there is none."

[65] Contrary to the Court of Appeal's finding, the quotation does mention "Construction of brick wall including all internal and external plastering work and all painting work" under item 2.4. Under the heading "Structure, External Wall" of the Fourth Schedule to the SPAs, "brick wall" refers to "Brick Wall (autoclaved aerated concrete building block)".

[66] Thus, although the contractor did not use the words "autoclaved aerated concrete building block" in the quotation, the "brick wall" it mentioned in item 2.4 must, in the context of the appellants' request for a quotation on the costs of the remedial works, be understood as a reference to autoclaved aerated concrete building block and not just any brick wall.

[67] It is an undisputed fact that the respondent had used flexcore instead of autoclaved aerated concrete building block, in breach of clause 12 of the SPAs. As such, there cannot be any confusion on the part of the respondent as to what material the contractor was required to replace the flexcore with.

[68] Furthermore, the respondent in its affidavit in reply affirmed by one Ng Chee Kun did not say that the "brick wall" mentioned in the quotation was not or could not be autoclaved aerated concrete building block. The respondent should have made its position clear because the appellants in their affidavit in support had earlier affirmed as follows at para 7:

"Beralaskan perkara diatas, plaintif-plaintif yang lain dan saya berhak kepada gantirugi setakat kos pembaikan unit-unit hartanah tersebut **mengikut deskripsi atau spesifikasi bahan binaan yang dinyatakan dalam perjanjian-perjanjian jual beli** dengan defendan pertama. Bagi maksud pembaikan unit-unit hartanah tersebut dengan bahan binaan yang mengikut deskripsi atau spesifikasi untuk mengatasi kerosakan serta penukaran bahan binaan, bahagian struktur bangunan akan **diganti dan dibina semula dengan menggunakan bahan binaan mengikut deskripsi atau spesifikasi asal yang dipersetujui** atau dijangka mengikut perjanjian jual beli dengan defendan pertama."

[Emphasis Added]

[69] As for the cost of the material which the Court of Appeal said was not stated in the quotation, the quotation does in fact provide a detailed breakdown of the works to be carried out and the rates and amounts in ringgit terms for each item of work, giving a grand total of RM380,500.00. This sum must necessarily include the cost of autoclaved aerated concrete building block which was the material to be used to replace flexcore. That, it will be remembered, was the

whole purpose of the remedial exercise, which was to place the appellants "in the same situation as if the contract had been performed".

[70] For all the reasons aforesaid, our answer to the leave question is in the affirmative and that on the evidence, damages in the sum of RM380,500.00 had been proved by the appellants as found by the learned SAR and the learned JC. In the circumstances, we are constrained to hold that the Court of Appeal was wrong in reversing the decision of the High Court. Accordingly, we allow the appeal with costs and restore the decision of the High Court.

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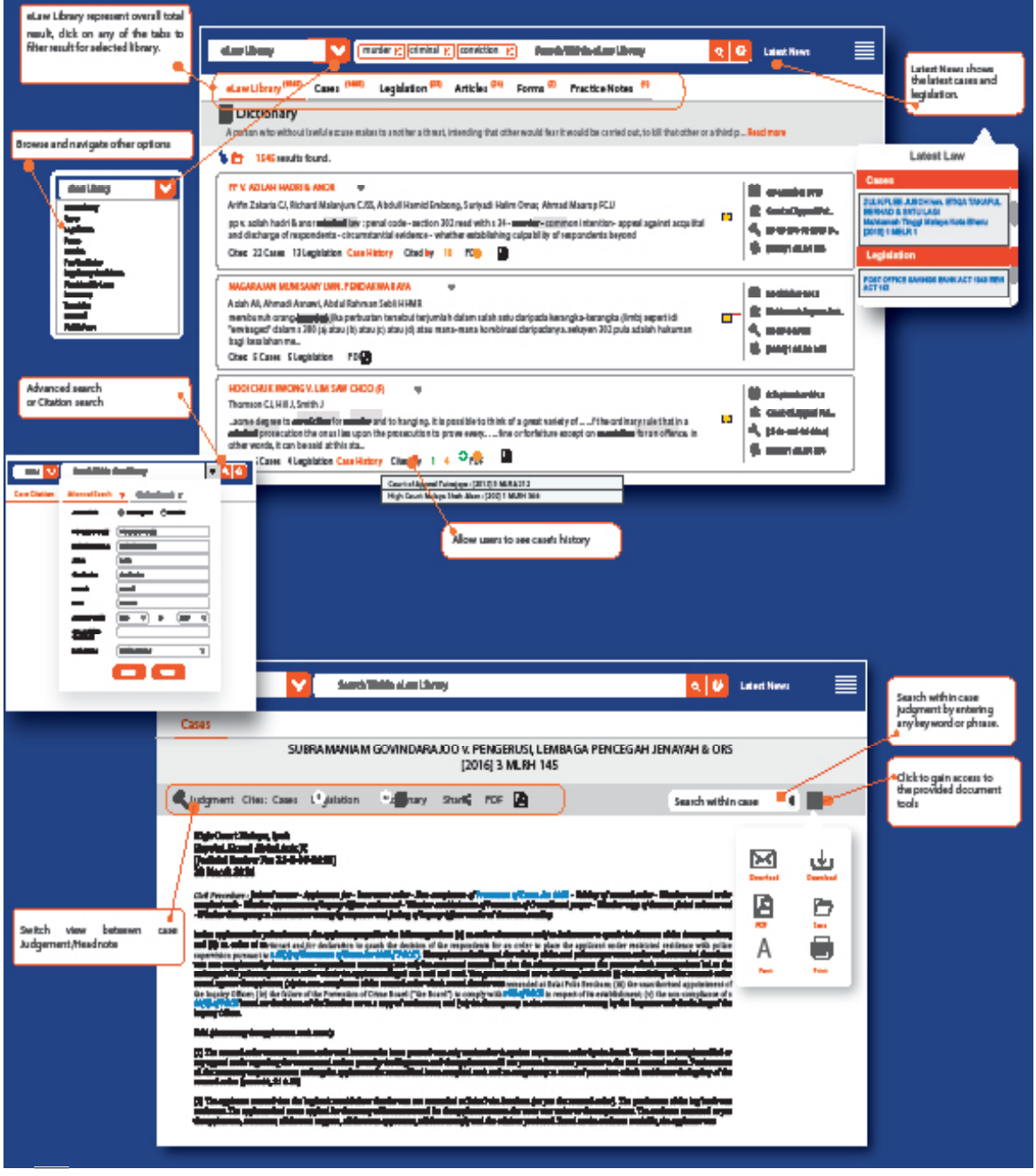

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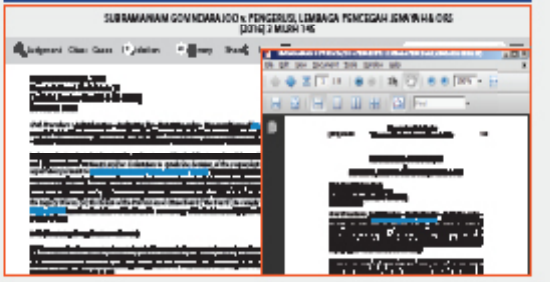

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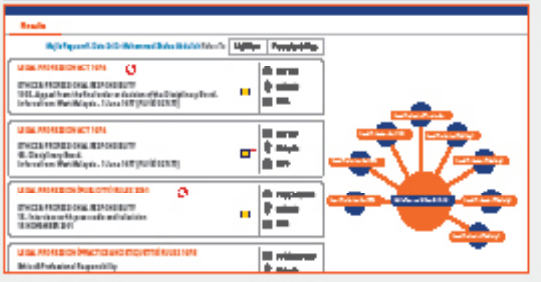

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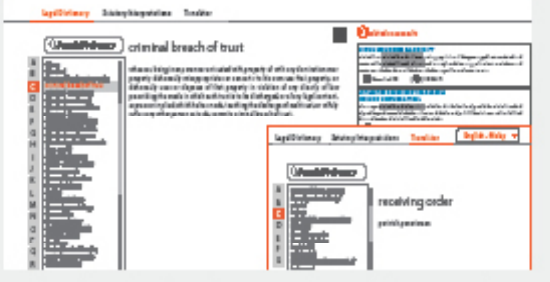

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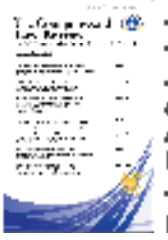

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