MEGA PALM SDN BHD & ANOR
v.
HUN TEE SIANG & ORS

Court of Appeal, Putrajaya
Nor Bee Ariffin, S Nantha Balan, Mariana Yahya JJCA
[Civil Appeal No: W-02(IM)(NCVC)-1557-08-2021]
10 March 2022

Civil Procedure: *Judgments and orders — Consent order — Enforcement of — Whether a party seeking to enforce and/or apply for consequential orders or reliefs under a consent order must do so in original action where consent order was recorded or must do so by way of a fresh action — Terms of consent order and reliefs sought in original action — Whether High Court had requisite jurisdiction to hear and determine fresh action*

This appeal by the appellants turned on the question whether a party which sought to enforce and/or apply for consequential orders or reliefs under a consent order, must do so in the original action where the consent order was recorded or must do so by way of a fresh action. The respondents in this appeal had sued the appellants in an action which was filed in 2015 ("Suit 698"). Suit 698 was resolved apparently after intense negotiations which resulted in the parties recording a consent order in 2017 ("Consent Order"). Pursuant to the Consent Order, the appellants had undertaken that they would attend to and perform all their obligations as stipulated therein. However, the terms of Consent Order were not honoured. The respondents commenced committal proceedings in Suit 698 against the appellant and two of their directors. The High Court held that there were substantial breaches or non-compliance with the Consent Order and that the appellants and their directors were therefore guilty of contempt. The two directors were ordered to pay a fine of RM70,000.00 each. In 2021, the respondents filed a fresh action (the subject matter of the present appeal) by way of Originating Summons ("OS"), ostensibly to enforce the Consent Order and to obtain various other consequential reliefs. The appellants applied to strike out the OS, contending that the High Court had no jurisdiction to entertain the OS and that any enforcement must be pursued in Suit 698. It was also contended that the reliefs sought in the OS were in fact a unilateral variation of the terms of the Consent Order. The Judicial Commissioner dismissed the appellants' application, resulting in the present appeal.

Held (dismissing the appeal with costs):

(1) In this instance, it became necessary to ask the question – whether the terms of the Consent Order were identical to the reliefs sought in Suit 698,

or were they entirely different, or some sort of a hybrid. Upon comparison, whilst most of the terms of the Consent Order were, on the facts, substantially identical or similar to the reliefs sought in Suit 698, there were two terms in the Consent Order, namely paras 9 and 10 of the Consent Order, which were not part of the prayers in Suit 698. As mentioned earlier, the parties had "intense negotiations" and the Consent Order was the product of that consensual effort. Of course, during negotiations, there would be the "give and take process" and parties thereafter agreed upon terms which they were comfortable with. During that process, new terms, which went beyond the reliefs sought in the original suit, might be agreed upon. There was nothing wrong with that. In fact, that it was part and parcel of the compromise process. The question was whether the Consent Order in its present form was one which might be enforced in Suit 698 itself. This court did not think that it could be done by an application within Suit 698. Since the terms of the Consent Order were not entirely identical to the reliefs sought in Suit 698, the Consent Order was one which went beyond the scope of the action per Suit 698 and as such, a fresh or independent action, ie the OS was necessary. As such, the High Court had the requisite jurisdiction to hear and determine the OS. (paras 44-47)

Case(s) referred to:

Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors [1981] 1 MLRA 525 (refd)

Green v. Rozen and Others [1955] 2 All ER 797; [1955] 1 WLR 741; 99 Sol Jo 473 (folld)

Hock Hua Bank Bhd v. Sahari Bin Murid [1980] 1 MLRA 687 (refd)

Hun Tee Siang & Ors v. Mega Palm Sdn Bhd & Anor [2021] MLRHU 2484 (refd)

In Re Hearn [1913] 18 LT 452 (folld)

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 1 MLRA 101 (refd)

Lee Heng Moy & Ors v. Pacific Trustees Berhad & Ors [2016] 4 MLRA 529 (refd)

Lee Teng Siong v. Lee Kheng Lian & Ors [2006] 2 MLRA 169 (refd)

Looh Ah Chuang @ Loh Boo Chuan & Anor v. Soo Ker Sik & Ors [2020] 3 MLRA 159 (refd)

Mageaswaran Veerapathiran v. Pengerusi Dan Ahli Jawatankuasa Mini Estet Risda Mukim Ampang Tinggi Dan Purun, Kuala Pilah, Negeri Sembilan & Ors [2018] MLRHU 948 (refd)

Pembinaan Jaya Zira Sdn Bhd v. MP Bersatu Mega Sdn Bhd & Another Appeal [2019] 4 MLRA 78 (refd)

Teoh Seow Chiew v. Mega Palm Sdn Bhd & Anor [2021] MLRHU 2271 (refd)

Tong Lee Hwa & Anor v. Chin Ah Kwi And Tong Chong Fah v. Chin Ah Kwi [1971] 1 MLRA 882 (folld)

Legislation referred to:

Rules of Court 2012, O 7 r 3(1), O 18 r 19(1)(a), (b) or (c), (3)

Counsel:

For the appellants: Justin T Y Voon (Christina Chin Tee Shan with him); M/s Justin Voon Chooi & Wing

For the respondents: Nicholas Ooi Boon Seng (Natalie Ooi Wan Qing & Ong Ing Siew with him); M/s Ooi & Ooi

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This appeal turns on the question whether a party which seeks to enforce and/or apply for consequential orders or reliefs under a consent order, must do so in the original action where the consent order was recorded, or whether it must do so by way of a fresh action. To put the issue in context, the respondents in this appeal had sued the appellants in an action which was filed in 2015. The suit was resolved apparently after intense negotiations. This resulted in the parties recording a consent order in 2017. Pursuant to the consent order, the appellants had undertaken that they would attend to and perform all their obligations as stipulated therein. However, the terms of consent order were not honoured. The Respondents commenced committal proceedings in the 2015 suit against the appellant and two of their directors. The High Court held that there were substantial breaches or non-compliance with the consent order and that the appellants and their directors were therefore guilty of contempt. The two directors were ordered to pay a fine of RM70,000.00 each.

[2] In 2021, the respondents filed a fresh action (the subject matter of the present appeal), ostensibly to enforce the consent order and to obtain various other reliefs which have been described as consequential reliefs. The appellants applied to strike out the fresh action contending that the High Court had no jurisdiction to entertain the fresh action and that any enforcement must be pursued in the original 2015 action. It is also contended that the reliefs sought in the fresh action are in fact a unilateral variation of the terms of the consent order.

The Consent Order

[3] In the present context, the original action is Kuala Lumpur High Court Suit No: 22NCVC-698-12/2015 ("Suit 698") wherein a Consent Order dated 16 May 2017 ("the Consent Order") was recorded. The Consent Order was arrived at after intense negotiations before it was recorded. The fresh action refers to Kuala Lumpur High Court Originating Summons No: WA-24NCVC-68-01-2021 dated 11 January 2021 ("the OS"). The appellants before

us, namely, Mega Palm Sdn Bhd (Company No: 388170-M) ("1st appellant") and Country Heights Properties Sdn Bhd (Company No: 312142-M) ("2nd appellant") were the defendants in Suit 698, and respondents in the OS.

[4] This is an appeal by the appellants against the decision of the Learned Judicial Commissioner dated 22 July 2021 dismissing the appellants' application (via encl 29) under O 18 r (r) 19(1)(a), (b) or (c) and O 18 r 19(3) of the Rules of Court 2012 ("ROC") to strike out and dismiss the OS.

[5] The Judicial Commissioner's judgment is reported as *Hun Tee Siang & Ors v. Mega Palm Sdn Bhd & Anor* [2021] MLRHU 2484 (HC).

Background

[6] The 1st respondent, Country Heights Damansara Residents' Association, Kuala Lumpur (CHDRA), is the residents' association which was formed on 23 October 2009 by the registered proprietors of bungalow lots in Country Heights Damansara (CHD). The remaining 31 respondents, ie, the 2nd to 32nd respondents are registered proprietors of bungalow lots in CHD, having purchased them from both appellants. The 1st appellant is the sole developer of the CHD development and is a wholly-owned subsidiary of the 2nd appellant. The 2nd appellant in turn is a wholly owned subsidiary of Country Heights Holdings Bhd. About 20 years ago, the appellants advertised CHD as one of the most exclusive neighbourhoods in Kuala Lumpur as they began selling bungalow lots in CHD to the public.

[7] According to the respondents despite the fact that it has been 20 years since the sales and purchase agreements (SPAs) were signed by the 2nd to 32nd Respondents, the appellants still have not fully performed their contractual obligations thereunder. Under the SPAs, the appellants have a contractual obligation to maintain, among others, service roads, street lights and water pump house at Lot 826, Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala, 60000 Kuala Lumpur (Water Pump House) (collectively, Basic Infrastructures) until the same are handed over to the appropriate authorities, namely, Dewan Bandaraya Kuala Lumpur (DBKL), Syarikat Bekalan Air Selangor Sdn Bhd (SYABAS) (now Pengurusan Air Selangor Sdn Bhd (AIR-SEL)) and Tenaga Nasional Bhd (TNB).

[8] In 2015, the same 32 respondents commenced Suit 698 against the appellants for breaches of obligations, among others, to maintain the Basic Infrastructures and to hand-over the same to the Appropriate Authorities. On 16 May 2017, the respondents and Appellants recorded the Consent Order before the Learned Judge, Justice Datuk Nor Bee Bte. Ariffin. It is important to mention, for the record, that the parties before us confirmed that they had no objections to the constitution of the present panel of Judges, *albeit* that Justice Datuk Nor Bee binti Ariffin, the Chairperson of the present panel, was the Judge before whom the Consent Order was recorded.

The Consent Order

[9] The terms of the Consent Order are as follows:

1. Defendan-Defendan adalah di bawah suatu obligasi untuk menyenggarakan ('maintain') Infrastruktur Asas (termasuk jalan perkhidmatan, Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur dan lampu-lampu Jalan) di Country Heights Damansara ("CHD") hingga Infrastruktur Asas tersebut diserahkan kepada Pihak Berkuasa Wajar termasuk Dewan Bandaraya Kuala Lumpur ("DBKL"), Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS") dan Tenaga Nasional Berhad ("TNB").

2. Defendan-Defendan adalah di bawah suatu obligasi untuk membuat bayaran kepada TNB dan SYABAS untuk bil-bil utiliti tertunggak di CHD sehingga Infrastruktur Asas (termasuk jalan perkhidmatan, Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur dan lampu-lampu Jalan) diserahkan kepada Pihak Berkuasa Wajar, termasuk DBKL, SYABAS dan TNB.

3. Defendan-Defendan hendaklah menyerahkan Infrastruktur Asas (termasuk jalan perkhidmatan, Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur dan lampu-lampu jalan) kepada Pihak Berkuasa Wajar termasuk DBKL, SYABAS dan TNB pada atau sebelum 31 Ogos 2017.

4. Defendan-Defendan hendaklah menyenggara secara berterusan Infrastruktur Asas (termasuk jalan perkhidmatan, Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur dan lampu-lampu jalan) di CHD sehingga Infrastruktur Asas tersebut diserahkan kepada Pihak Berkuasa Wajar termasuk DBKL, SYABAS dan TNB.

5. Defendan-Defendan hendaklah membuat bayaran kepada TNB untuk semua bil-bil utiliti tertunggak di CHD, termasuk bil-bil elektrik bagi Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur dan bil-bil eletrik bagi lampu-lampu jalan.

6. Defendan-Defendan hendaklah membuat bayaran kepada SYABAS untuk semua bil-bil utiliti tertunggak di CHD, termasuk bil-bil air bagi Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur.

7. Defendan-Defendan hendaklah membuat bayaran kepada TNB untuk semua bil-bil utiliti di CHD, dalam tempoh masa yang ditetapkan oleh TNB sehingga Infrastruktur Asas (termasuk jalan perkhidmatan, Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur dan lampu-lampu jalan) diserahkan kepada Pihak Berkuasa Wajar termasuk DBKL, SYABAS dan TNB.

8. Defendan-Defendan hendaklah membuat bayaran kepada SYABAS untuk semua bil-bil utiliti di CHD, dalam tempoh masa yang ditetapkan oleh SYABAS sehingga Infrastruktur Asas (termasuk jalan perkhidmatan, Rumah

Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur) diserahkan kepada Pihak Berkuasa Wajar termasuk DBKL, SYABAS dan TNB.

9. Plaintif-Plaintif akan memohon kepada Pihak Berkuasa Wajar untuk kebenaran bagi menukar tanah yang kini ditanda sebagai penggunaan ruang terbuka kepada penggunaan pusat komuniti. defendan-defendan akan melakukan semua yang perlu untuk menyokong permohonan tersebut. Defendan-defendan hendaklah menanggung kos untuk penukaran penggunaan tanah tersebut, jika ada, sehingga RM10,000.00. Sekiranya kos untuk penukaran penggunaan tanah tersebut adalah melebihi RM10,000.00, jumlah lebihan hendaklah ditanggung oleh Pihak-Pihak di sini secara sama rata. Defendan-defendan juga akan menempatkan semula ('relocate') struktur sedia ada Pusat Sumber ('Resource Centre') yang terletak di Master Title GRN No 72272, Lot No 65630, Mukim Batu, Kuala Lumpur ("Master Title Lot No 65630") (di petak no 7 dan 9) (sesalinan hakmilik dan pelan dilampirkan di sini) untuk tanah tersebut setelah kebenaran diperolehi untuk perubahan penggunaan kepada penggunaan pusat komuniti pada kos mereka sendiri. Semua kos berkaitan dan utiliti (air dan elektrik) akan ditanggung oleh plaintif-plaintif.

10. Plaintif-plaintif adalah dibenarkan untuk kekal di atas tanah di mana Pusat Sumber kini terletak (di atas parcel no 7 dan 9 Master Title Lot No 65630) dan menggunakan Pusat Sumber sehingga kelulusan untuk tanah pusat komuniti diperolehi daripada Pihak Berkuasa yang Wajar dan struktur Pusat Sumber ditempatkan semula.

11. Defendan-defendan hendaklah membayar ganti rugi khas berjumlah RM41,625.15 yang merupakan bayaran yang dibuat oleh Country Heights Damansara, Kuala Lumpur Residents' Association ("CHDRA") bagi defendan-defendan untuk bil elektrik tertunggak dari bulan Oktober 2014 hingga Mac 2015 untuk Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur.

12. Defendan-defendan hendaklah membayar ganti rugi khas berjumlah RM954.00 yang merupakan bayaran yang dibuat oleh CHDRA untuk sewa generator bagl Rumah Pam Air di Lot 826 Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala 60000 Kuala Lumpur.

13. Defendan-Defendan hendaklah membayar ganti rugi khas berjumlah RM329.95 yang merupakan bayaran yang dibuat oleh CHDRA untuk penghantaran 3 lori air untuk penduduk-penduduk di CHD.

14. Faedah pada kadar 5% setahun dari tarikh Perintah ini sehingga penyelesaian penuh.

15. Tiada perintah untuk kos.

[10] It is the respondents' case that despite the passage of 4½ years after the Consent Order was entered into, the appellants have still not complied with the terms of the Consent Order. According to the respondents, the appellants have only handed over the service roads and street lights to DBKL but have

not handed over the Water Pump House and all water related infrastructure including the TNB meter located in the Water Pump House (collectively, Water Infra-structure) to AIR-SEL. This fact was confirmed by AIR-SEL in their Statutory Declaration dated 28 April 2021.

[11] The respondents have alleged that the appellants are in breach of the terms of the Consent Order. The respondents were left with no choice and had to commence the OS to seek legal redress and damages in view of the appellants' flagrant breaches of the terms of the Consent Order. The OS was filed on 11 January 2021. The respondents allege that the appellants have committed five categories of breaches under the Consent Order, namely:

> Breach 1 - Failure to maintain Basic Infrastructures until the same are taken over by Appropriate Authorities;
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> Breach 2 - Failure to pay AIR-SEL outstanding utility bills until the Basic Infrastructures are taken over;
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> Breach 3 - Failure to pay TNB outstanding utility bills of the Water Pump House until the Basic Infrastructures are taken over;
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> Breach 4 - Failure to hand over Basic Infrastructures in CHD to Appropriate Authorities; and
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> Breach 5 - Failure to relocate the Resource Centre.

[12] As stated earlier, the respondents had also taken out committal proceedings against the present Appellants and two of their directors for having committed contempt of court by reason of their failure to ensure that the terms of the Consent Order are complied with. The High Court held that the appellants and its directors were in contempt. The directors were ordered to pay a fine of RM70,000.00 each. See: *Teoh Seow Chiew v. Mega Palm Sdn Bhd & Anor* [2021] MLRHU 2271 (HC).

[13] In paras 20-46 of the judgment the learned Judge who heard the committal proceedings, examined the exact terms of the Consent Order which the purchasers contended had been breached. Then in paras 47-59 of the judgment the Judge considered the question whether there were breaches of the Consent Order. The judge determined that the Consent Order was breached in material respects and proceeded to find the appellants guilty of contempt.

[14] At any rate, for purposes of the present appeal, it is fair to say that the breaches that were committed by the appellants and which are still continuing, are quite clearly explained in the submissions and in Appendix 1 and Appendix 2 attached to the submissions that were filed by the solicitors for the respondents.

[15] Given the present circumstances, it takes very little to persuade us that the respondents" assertions and complaints of and concerning the breaches or non-compliance of the Consent Order, are true. In this regard, it should be

noted that the appellants' response or challenge to the OS is predicted on a jurisdictional and procedural challenges. The appellants have not asserted that they have complied with the terms of the Consent Order. Rather, their position is that they need more time to comply with the terms of the Consent Order.

[16] Before we turn to the reliefs sought in the OS, it is perhaps relevant to mention that on 27 January 2021, the respondents obtained an *Ex-Parte* Order in terms of their application (Encl 18) with penal endorsements.

[17] Under the *Ex-Parte* Order, the appellants were required pay a sum of RM1.75 Million to the respondents within 30 days from the date of the Order. The High Court also granted a *Mareva* injunction up to the limit of RM1.0 Million.

[18] On 10 February 2021 the respondents also obtained the *Ad-Interim* Order in terms of their application (Encl 27) with penal endorsements. Pursuant to the *Ad-interim* Order, the appellants were required to pay RM1.75 Million on or before 28 February 2021.

[19] On 26 February 2021 the appellants paid the sum of RM 1.75 million to the respondents' solicitors as per the terms of the *Ex-Parte* and *Inter-Partes* Orders.

OS - Reliefs

[20] The reliefs sought in the OS are as follows.

INJUNCTION

1. an order that the appellants, jointly and severally, do pay RM1.75 million (Handover Monies) to the Plaintiff's solicitors within fourteen (14) days from the date of this order;

2. following the Plaintiffs solicitors' receipt of the Handover Monies, the Plaintiff's solicitors shall, within 14 days, pay:

2.1. RM495,192.60 to Pengurusan Air Selangor Sdn Bhd (SYABAS), being the appellants' outstanding water charges as at 26 December 2020;

2.2. RM73,281.77 to Tenaga Nasional Berhad (TNB), being the appellants' outstanding electricity charges as at 20 November 2020;

2.3. Lembaga Lebuhraya Malaysia (LLM) up to RM650,000.00 to satisfy the conditions imposed by LLM as stated in LLM's letter dated 28 January 2020; and

2.4. Chew Kiong Lam Construction Sdn Bhd up to RM528,630.00 to complete the construction and rectification works to the water pump house at Lot 826, Pump Service Corridor Pump House, Kg Bkt Lanjan, Sg Penchala, 60000 Kuala Lumpur (Water Pump House);

DISPOSAL OF ASSETS

3. an order to restrain the appellants, jointly or severally, in any way, whether through itself, directors, employees, servants, agents and/ or representatives or otherwise howsoever, from parting with, transferring, disposing, dissipating, removing from the jurisdiction of the Malaysian Court (Jurisdiction) and/ or otherwise dealing with the Defendant's assets within this Jurisdiction, in so far as the amount does not exceed RM1 million, until the complete handover of the Basic Infrastructures (as defined in para 5 below) to the Appropriate Authorities (as defined in para 5 below);

DISCLOSURE OF INFORMATION

4. that the appellants do within fourteen (14) days of this order, file in Court and serve on the respondents' solicitors an affidavit disclosing and identifying with full particularity:

4.1. the balance works to be done (including the requirements for the complete handover of the Water Pump House and all water related infrastructure including the TNB meter located in the Water Pump House to SYABAS); and

4.2. the full value of balance cost required to fully comply with the Consent Order dated 16 May 2017;

COMPLIANCE WITH CONSENT ORDER DATED 16 MAY 2017

5. that the appellants do complete the handover of service roads, Water Pump House and street lights (Basic Infrastructures) to the appropriate authorities including Dewan Bandaraya Kuala Lumpur (DBKL), / or TNB (Appropriate Authorities) by or before 31 May 2021. Failing which, the appellants shall, jointly and severally, pay the respondents damages of RM2,000.00 per day until the date of completion of handover;

6. that the appellants do complete the relocation of the Resource Centre situated on Master Title GRN No 72272, Lot No 65630, Mukim Batu, Kuala Lumpur (on parcels. No 7 and 9) to the new location referred to in the Consent Order dated 16 May 2017 by or before 31 May 2021. Failing which, the appellants shall, jointly and severally, pay the respondents damages of RM500.00 per day until the date of completion of relocation;

OTHER ORDERS

7. the respondents be given liberty to apply;

8. costs on an indemnity basis and shall be paid forthwith by the appellants, jointly and severally, to the respondents;

9. damages to be assessed; and

10. such further and/ or other reliefs to the respondents as this Court deems fit.

The Issues

[21] Essentially, it was contended by the appellants that the OS is a fresh action which can only be filed only when a party is seeking to set aside a consent order and not when "enforcing" it or when seeking consequential reliefs or additional reliefs, which ought to be done in the original suit (Suit 698). The respondents accept that the reliefs sought in the OS could have been made in Suit 698. But they say that it is not fatal if this is pursued by way of a fresh action (the OS).

[22] The respondents sought refuge in a passage from the Court of Appeal case of *Lee Teng Siong v. Lee Kheng Lian & Ors* [2006] 2 MLRA 169 (CA) where Gopal Sri Ram JCA (as he then was) held that:

> [8] In my judgment, the consent order vested in the plaintiff a cause of action he did not previously have against the defendants. *Tong Lee Wah & Anor v. Chin Ah Kwi & Ors* [1971] 1 MLRA 882 is authority for the view I take. In that case, Gill FJ when delivering the unanimous decision of the Federal Court said:
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> > After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement (see *Attorney-General v. Tomline* (1877 - 8) 7 Ch D 388).
> >
> > The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake or an error arising from an accidental slip or omission, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action (see *Ainsworth v. Wilding* [1896] 1 Ch 673). The same rule must apply, a fortiori, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order.
> >
> > In *re Hearn* [1913] 18 LT 452, 737 is usually cited as the authority for the proposition that a consent order, embodying a new agreement between the parties beyond the scope of the action, can only be enforced in a fresh suit. In that case not only did the compromise go outside the ambit of the original action but, first, no liberty to apply had been reserved at all and the stay was absolute and unqualified, and, secondly, the relief sought by an application in the same proceedings was not a mere enforcement of the agreed terms but to modify them to give effect to the original intention in changed circumstances. It was held by Sargant J that such an application could not be made by a summons in the original action which was commenced in 1908 by originating summons, but that independent proceedings must be taken. An appeal against that decision was dismissed by the Court of Appeal. The main ground for the decision in the Court of Appeal was that the applicant was seeking relief against trustees outside the ambit of the compromise itself, but Cozens-Hardy M.R. went on to say at p 738:

> But apart from that, although that alone is a sufficient ground for dismissing this appeal, there is also this further ground - namely, that this is an attempt to enforce, not a title under the will, which alone was dealt with by the trustees' summons, but an entirely new and independent bargain between the husband and the wife, and that could not be done in the old proceedings.

[23] For the appellants it was contended that the respondents cannot maintain the OS the High Court had no jurisdiction to entertain the variation of the Consent Order sought via the OS (except under slip-rule), including a claim for damages which was not contemplated by the Consent Order.

[24] Counsel for the appellants made reference to:

(a) *Hock Hua Bank Bhd v. Sahari Bin Murid* [1980] 1 MLRA 687 (Federal Court);

(b) *Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors* [1981] 1 MLRA 525 (Federal Court) and

(c) *Mageaswaran Veerapathiran v. Pengerusi Dan Ahli Jawatankuasa Mini Estet Risda Mukim Ampang Tinggi Dan Purun, Kuala Pilah, Negeri Sembilan & Ors* [2018] MLRHU 948.

[25] Counsel for the appellants argued that prayer 3 on Post-Judgment Mareva and prayer 4 for Discovery ought to be filed in Suit 698 and not via the OS.

[26] The Judicial Commissioner declined to strike out and dismiss the OS. The Judicial Commissioner took the position the High Court had the requisite jurisdiction and that it was not fatal for the respondents to have pursued the enforcement action via the OS or to seek consequential reliefs.

Memorandum Of Appeal

[27] The appellants' complaints may be gathered from the Memorandum of Appeal which read as:

> 1. The Learned Judicial Commissioner had erred in fact and/or in law in his decision in dismissing the appellant's application, as defendants vide Notice of Application (encl 29) dated 23 February 2021 that the Originating Summons dated 11 January 2021 ("said OS") be struck out and/or the action in High Court be dismissed.
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> 2. The Learned Judicial Commissioner had erred in fact and/or in law in not deciding that this case is a direct, plain and obvious case to be struck out.
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> 3. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the said OS at the High Court is filed outside the jurisdiction of the Court.
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> 4. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the said OS is purportedly an

enforcement and/or relief based on the alleged breach of the Consent Order dated 16 May 2017 (hereinafter be referred to as "said Consent Order") which ought to be filed in Kuala Lumpur High Court Suit No: 22NCvC-698-12-2015 (hereinafter be referred to as "Suit 698") and not via the commencement of a new suit below, where a fresh suit ought to only be filed when it is applying to set aside a consent order (which is not the case here).

5. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the said OS in substance, seeks to *inter-alia* unilaterally amend, alter and/or vary the terms of the said Consent Order already entered in Suit 698 without the appellants' consent. The Court also has no jurisdiction to do so. It is not possible, ie:

(a) Prayer 1 of the said OS prays for a Mandatory Order that the appellants to set aside a sum of RM1.75 million to be paid to the respondents' solicitors, which was not in the said Consent Order;

(b) Prayer 5 of the said OS *inter-alia* added and/or imposed a "liquidated ascertained damages" type of term of RM2,000.00 per day against the appellants, if the appellants failed to hand over the "basic infrastructures" to "appropriate authorities" on/before "31 May 2021", which was not in the said Consent Order;

(c) Prayer 6 of the said OS *inter-alia* added and/or imposed a "liquidated ascertained damages" type of term of RM500.00 per day against the appellants, if the appellants failed to complete the relocation of the "Resource Centre" on/before "31 May 2021", which was also not in the said Consent Order;

(d) Prayer 9 of the said OS prays for "damages to be assessed", which was also not in the said Consent Order.

6. The Learned Judicial Commissioner had further erred in fact and/or in law in not taking into proper consideration that:

(a) The Court has no jurisdiction to grant an "interlocutory mandatory injunction" to compel payment of monies.

(b) The Court has no jurisdiction to grant damages for purported breach of the said Consent Order, when the said Consent Order does not specify this.

7. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the relief prayed by the respondents under the said OS for inter-alia a "Mareva Injunction" Order (see prayer 3 of the said OS) and a Discovery Order (see prayer 4 of the said OS), even if meritorious (which is denied), ought to be sought under Suit 698 and not through a new suit via the said OS herein.

8. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that ALL the relief prayed for by the respondents under the said OS via the commencement of a fresh suit below is clearly unsustainable and/or an abuse of process.

9. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the respondents had also initiated a Contempt/Committal proceeding against the appellants and the appellants' Directors in Suit 698 based on the same allegation of alleged "breaches" of the said Consent Order.

10. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the respondents attempted to litigate the same issue, ie the alleged "breaches" of the said Consent Order both via the said OS and via the contempt/committal proceedings in Suit 698 at the same time, ie 2 different Courts to determine the same issue of alleged "breach", which would cause duplicity and/or confusion and/or inconsistent judgment/order of the Court.

11. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the respondents ought not to be allowed to take contradicting/conflicting/inconsistent stands where:

a. On one hand, the respondents wish to pursue Committal proceedings against the appellants and their Directors in Suit 698 based on the terms of the said Consent Order; but

b. On the other hand, the respondents wish to extend, amend, vary and/or change the terms of the said Consent Order via the said OS and opted to pursue an "enforcement" of the said Consent Order here based on the same background facts and issues.

12. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the purpose of the said OS is to oppress the appellants and to add terms which were never in the said Consent Order including *inter-alia*:

c. The setting aside of the sum of RM1.75 million (a sum which the appellants did not readily have at the material time), paying "liquidated ascertained damages" and for "damages to be assessed". This setting aside of such substantial sum of monies is also not a "Mareva Injunction" which can only attach the existing assets of the appellants; and/or

d. To restrain the appellants from dealing with its assets within the Jurisdiction where the amount does not exceed RM1 million, which in effect would prevent the appellants from paying out and/or expending any monies including for the normal course of business and/or legitimate expenditures which are usually below RM1 million.

13. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the respondents appear to "set up" the appellants into breaching a Court Order which the appellants could not comply.

14. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the said Consent Order creates an Estoppel wherein the respondents ought not to be allowed to reopen the same via the said OS.

15. The Learned Judicial Commissioner had erred in fact and/or in law in not taking into proper consideration that the respondents had failed to comply with the mandatory requirements under O 7 r 3(1) of the Rules of Court 2012.

Our Decision

[28] It is trite that a consent order operates as a contract and that if it is sought to be impugned, then a fresh action has to be filed for that purposes. In *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 1 MLRA 101 (Federal Court) posited at p 118, that:

> It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose: see eg *Huddersfield Banking Co Ltd v. Henry Lister & Sons Ltd* [1895] 2 Ch 273 ...

[29] At p 119 the Federal Court said:

> A consent order is an order of the court carrying out an agreement between the parties.
>
> It used to be thought at one time that only a ground of fraud could cause a consent order to be set aside.
>
> It is now well settled that a consent order can be set aside on the same grounds as those on which an agreement may be set aside, see eg again Huddersfield Banking Co.

[30] In so far as any variation of a Consent Order is concerned, it is also trite that the only possible way in which a consent order could be altered/varied would be by the consent of all the parties. See: the Federal Court's decision in *Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors* [1981] 1 MLRA 525 (FC). The principles in regard to the status of a Consent Order was lucidly explained by Mary Lim JCA (as she then was in *Lee Heng Moy & Ors v. Pacific Trustees Berhad & Ors* [2016] 4 MLRA 529 (CA), where she said [30],

> "... It is fairly settled and trite law that an order of the court reached by consent of the parties involved is in effect a contract between those parties - see *Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors* [1981] 1 MLRA 525. Such a consent order must therefore be given its full contractual effect - see *Tan Geok Lan v. La Kuan* [2004] 1 MLRA 165.
>
> Such an order remains valid, effective and binding on all the parties involved until and unless the order is set aside for some vitiating reason - see the Federal Court's decision in *Tong Lee Hwa & Anor v. Chin Ah Kwi And Tong Chong Fah v. Chin Ah Kwi* [1971] 1 MLRA 882. In fact, until that happens, until and unless the consent order is set aside, the consent order operates as an estoppel disallowing the defendants today from departing from its terms."

[31] Thus, a consent order is akin to a contract with the superadded judicial command as emphasised in *Tan Geok Lan v. La Kuan*. Once a consent judgment had been perfected, the parties are bound by it and the Court is duty bound

to enforce the agreed terms of the same. The Court is also not at liberty to vary any of the agreed terms unless with the mutual consent of the parties. The Judicial Commissioner took the position that the OS was not to vary the Consent Order, and that the reliefs sought were consequential to the terms of the Consent Order. It is obvious that since this was a striking out application, the Judicial Commissioner's view on the matter as to whether the reliefs were a variation or consequential, was not final and that the issues remain alive for mature consideration at the substantive hearing of the OS.

[32] Having said that, it is abundantly clear that the gravamen of the appeal really lies in the jurisdictional question which is not a matter of discretion. And the important and imperative question is whether the enforcement should be by way of a fresh action (ie the OS) or (as the appellants contend) should it have been pursued as an application under Suit 698? There are no easy answers to this conundrum. The case of *Green v. Rozen and Others* [1955] 2 All ER 797; [1955] 1 WLR 741; 99 Sol Jo 473 is a good example of the difficulties that lie in the path of a party who is armed with a settlement outcome, and seeks to enforce the settlement against the recalcitrant party.

[33] In *Green v. Rozen*, the plaintiff brought an action to recover £500 money lent by him to the defendants jointly, and a further sum of £50, alleged to be due from the first defendant as consideration for making the loan to the three defendants jointly. When the action came on for hearing on 11 January 1955, counsel informed the court that the action had been settled and what the terms of settlement were. By the agreed terms, which were set out on the backs of counsels' briefs and signed by counsel for both parties, the defendants were to pay to the plaintiff a sum of £450 by instalments, on the dates stated, and the taxed or agreed costs with the final instalment, and, if any instalment was in arrear, the whole debt and costs became due and payable at once. On the front of the briefs was written: "Before- J. By consent, all proceedings stayed on terms indorsed on briefs. Liberty to either side to apply". The court was not asked to make any order whatever, and no order was made staying all further proceedings. The defendants having failed to pay the last instalment and the costs, the plaintiff made an application in the original action asked for judgment for the amount of the final instalment and an order for the costs.

[34] Justice Slade held that the application must be refused because, the court having made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action. He ruled that the plaintiff's only remedy was to bring an action on the agreement of compromise.

[35] This is how Slade J put it:

> In my judgment, therefore, the plaintiff's remedy in this case to enforce the sum of £83 6s 8d, plus the taxed costs which the defendants agreed to be paid, must be by action on the new agreement. I am sorry to have to come to that conclusion, because it may mean starting a new action, under RSC Ord 14,

but, in my judgment, I have no jurisdiction-this is not a matter of discretion-to give to the plaintiff the relief which she seeks. In those circumstances the application must be refused.

[36] The question is whether the High Court which is to hear and determine the OS has the requisite jurisdiction to hear and determine the action and grant the reliefs as per the OS. As we said earlier, this is not a matter of discretion.

[37] We should say at once that if it were a matter of discretion, then based on the background facts and circumstances and in particular, the conduct of the appellants, the discretion would or should be in favour of allowing the OS to proceed to full hearing on merits. Hence, if there is no jurisdiction, then the OS must be struck out and dismissed.

[38] We think that the starting point in our search for the answer lies in the passage in *In Re Hearn* [1913] 18 LT 452 at p 737, which enunciated that "... a consent order, embodying a new agreement between the parties beyond the scope of the action, can only be enforced in a fresh suit".

[39] The first principle that may be culled from that case is that a fresh action is necessary if the compromise goes outside the ambit of the original action. Another aspect of the principle (second principle) of that case is that a fresh action is warranted if the relief sought by an application in the same proceedings was not a mere enforcement of the agreed terms but to modify them to give effect to the original intention in changed circumstances, which seems to be the very complaint that the appellants are making in this case.

[40] We shall leave aside the second principle and focus our attention to the first principle. Hence, the question is - are the terms of the Consent Order within the ambit of the relief sought in Suit 698 or are the terms an admixture of part of the original reliefs sought in Suit 698, with new reliefs added on.

[41] In this regard, it is relevant to mention that the principle in *Re Hearn* was applied in *Tong Lee Hwa & Anor v. Chin Ah Kwi And Tong Chong Fah v. Chin Ah Kwi* [1971] 1 MLRA 882 (Federal Court).

[42] The facts in *Tong Lee Hwa* were as follows:

(a) the case originated as a probate action which arose from the existence of three or four wills alleged to have been executed by one Chi Liung deceased shortly before her death.

(b) The deceased was the governing director of a private company known as Chi Liung & Son Ltd, holding only 30 out of the 3,000 shares issued by the company.

(c) Out of the remaining 2,970 shares, the present appellants between themselves owned 2,100 shares.

(d) After four days' hearing, the parties agreed to settle their dispute on terms set out in the schedule to a court order dated December 15, 1969.

(e) The order provided that the estate of Chi Liung deceased be administered as on an intestacy, that the terms of the settlement agreed to between the parties and annexed as a schedule to the court order be made a rule of court and that all parties including those who were not parties to the probate action, do have liberty to apply.

(f) The settlement was mainly concerned with the manner in which the parties were to acquire, by purchase, shares in the company.

(g) Sometime after the settlement, one of the parties filed a notice of motion seeking to extend the period fixed for her to complete the purchase of the shares.

(h) Although it was objected to by the other parties, the learned judge who heard the motion granted an order of extension of time on March 21, 1970.

[43] The matter was taken up to the Federal Court as an appeal from the order of the High Court granting extension of time. The issue which arose turned on the court's power or jurisdiction to vary its own order. The Federal Court allowed the appeal and held:

(1) the terms of settlement undoubtedly formed part of the court order which must be assumed to have been made with the consent of all the parties in the probate suit. The form in which it was made could not give rise to any question;

(2) although there was no specific mention in the court order regarding stay of proceedings, there could be no doubt that it was a final order in that it finally determined the dispute between the parties in relation to the wills set up, which was the only subject-matter of the probate action;

(3) in the present case, the terms of settlement, which were not within the ambit of the probate action, constituted a contract between the parties to the probate action in relation to their shares in the company. A substantial number of shares in the company belonged to persons who were not parties to the action. As a contract for the sale and purchase of all the company's shares required the concurrence of those persons, the parties to the action were to execute and to procure the execution of an agreement by all those other persons. Such an agreement was in fact duly executed. The contract, embodied in the terms of settlement in the schedule to the order in so far as it related to the company's shares, was accordingly fully performed by the

execution of that agreement by all the necessary parties, including parties who were not parties to the probate action. As from the execution of that agreement the rights and obligations of all parties in relation to the company's shares must be governed by that agreement;

(4) nowhere in the schedule to the arrangement was there any reference to that schedule being made a rule of court. It was the schedule to the order which was made the rule of court. As an agreement in terms of the settlement was in fact made, particularly when it involved parties other than those who were parties to the probate action, the result was to supersede the whole of the order, with the exception of two clauses which could still have been summarily enforced by an action in the probate proceedings. Apart from those two clauses, the rest of the schedule no longer existed for it to operate as a rule of court. Thus, by entering into the agreement contemplated by the order, the parties in fact agreed to substitute a new contract within the meaning of s 61 of the Contracts (Malay States) Ordinance, 1950, so that the original contract as contained in the order need not be performed. This new contract could be enforced only in a fresh action for specific performance or damages, to which all parties to the agreement would have to be joined, and its terms could not be varied on a motion in the probate action itself;

[44] Having regard to the principle as adumbrated by the cases referred to above, and since the point was not canvassed in the High Court, it became necessary to ask the question - whether the terms of the Consent Order were identical to the reliefs sought in Suit 698, or were they entirely different, or some sort of a hybrid. We therefore examined the Writ that was filed for Suit 698 (encl 11 PDF p 112-118) and compared it with the terms of the Consent Order.

[45] Having performed the comparative examination, we were satisfied that whilst most of the terms of the Consent Order were substantially identical or similar to the reliefs sought in Suit 698, there were two terms in the Consent Order, namely paras 9 and 10 of the Consent Order (see: para 10 above), which are not part of the prayers in Suit 698.

[46] As mentioned earlier, the parties had "intense negotiations" and the Consent Order was the product of that consensual effort. Of course, during negotiations, there will be the "give and take process" and parties thereafter agree upon terms which they are comfortable with. During that process, new terms, which go beyond the reliefs sought in the original suit, may be agreed upon. There is nothing wrong with that. In fact, it is part and parcel of the compromise process. The question is, whether the Consent Order in its present form is one which may be enforced in Suit 698 itself. We do not think that it can be done by an application within Suit 698.

[47] In our view, since the terms of the Consent Order are not entirely identical to the reliefs sought in Suit 698, the Consent Order is one which went beyond the scope of the action per Suit 698 and as such, a fresh or independent action, ie the OS was necessary. (See: *Green v. Rozen, Tong Lee Hwa* and *In Re Hearn)*. As such, the High Court has the requisite jurisdiction to hear and determine the OS.

[48] Before we conclude, we should also mention that the appellants also raised the objection that the respondents had failed to adhere to the mandatory rule under O 7 r 3(1) of the Rules of Court 2012 by failing to disclose in the OS a statement of question and/or issues to be determined nor sufficient particulars to identify the cause of action.

[49] In so far as this issue was concerned, the Judicial Commissioner relied on the Court of Appeal's decisions in *Looh Ah Chuang @ Loh Boo Chuan & Anor v. Soo Ker Sik & Ors* [2020] 3 MLRA 159 (CA) and *Pembinaan Jaya Zira Sdn Bhd v. MP Bersatu Mega Sdn Bhd & Another Appeal* [2019] 4 MLRA 78 (CA) and dismissed the objection. In our view, rightly so. It is really quite unarguable that based on the affidavits that were filed and exchanged, the appellants were fully apprised of the relief or remedy claimed in the OS and were fully aware of the grounds in support of the OS as per the Affidavits, and there was therefore no substantial miscarriage of justice or prejudice occasioned by the respondents' failure to comply with O 7 r 3(1) of the ROC. We have no hesitation in dismissing the appellants' said procedural objection.

[50] Based on the reasons discussed and stated above, we are satisfied that there was no error or misdirection on the part of the Judicial Commissioner in dismissing encl 29. We therefore find no merits in this appeal and it is hereby dismissed with costs of RM15,000.00 (subject to allocatur).

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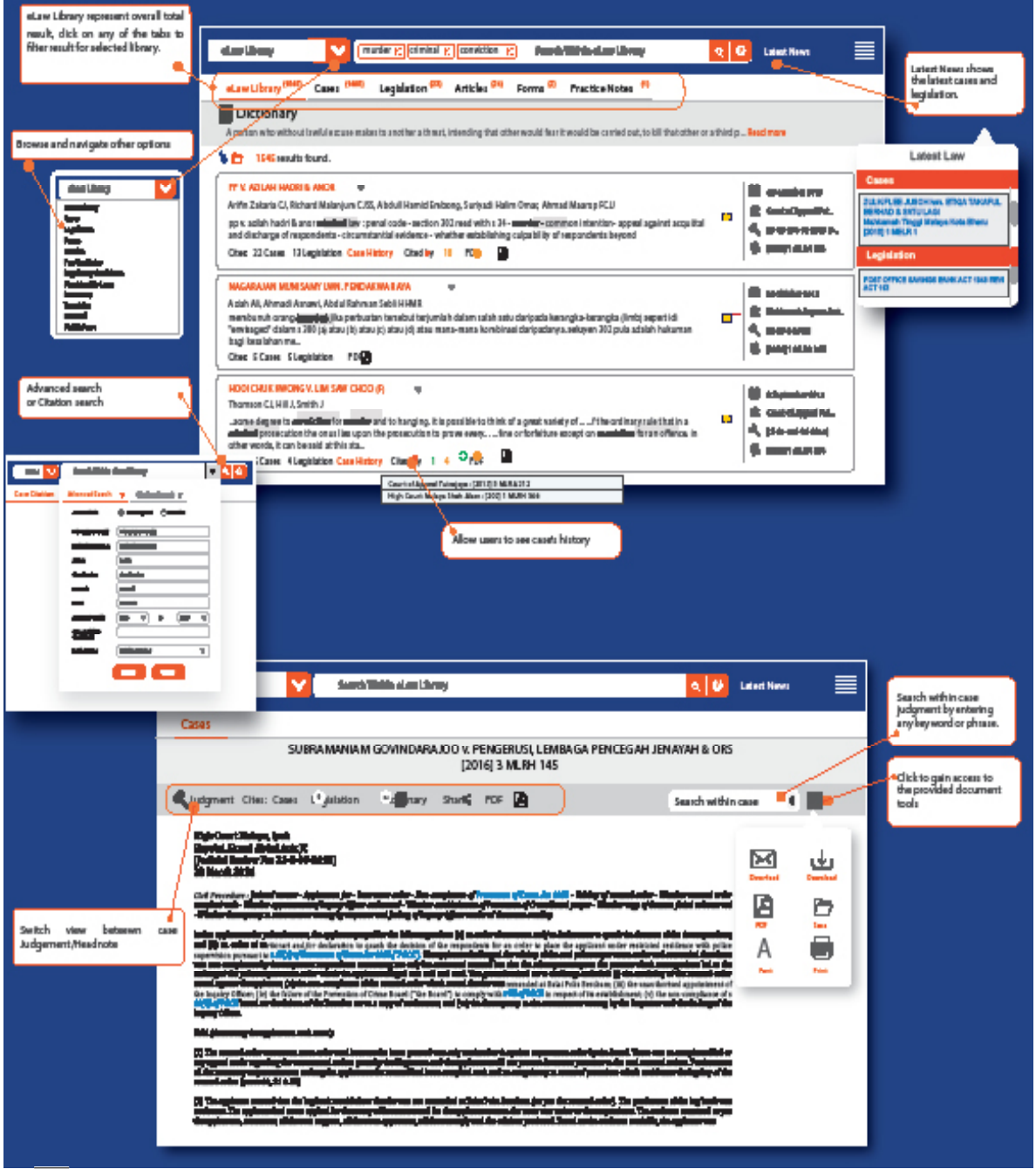

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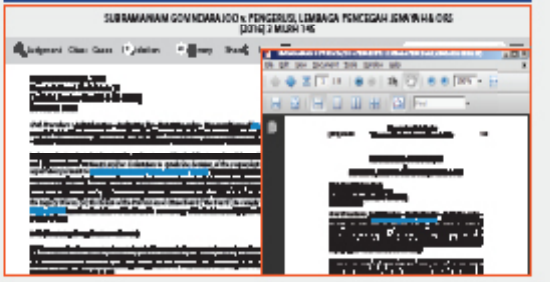

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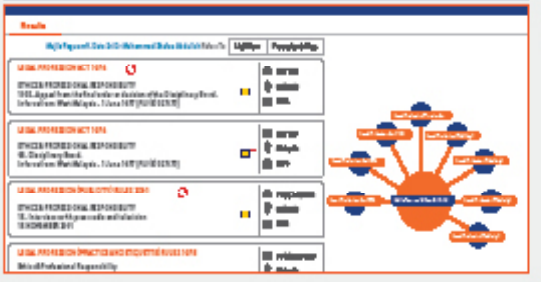

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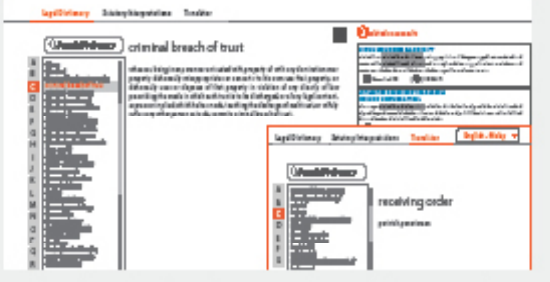

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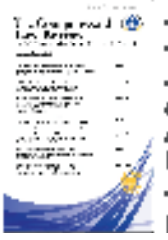

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