PEMBINAAN SPK SDN BHD

v.

CONAIRE ENGINEERING SDN BHD-LLC & ANOR AND ANOTHER APPEAL

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Abang Iskandar Abang Hashim PCA, Mary Lim Thiam Suan FCJ
[Civil Appeal Nos: 02(f)-59-10-2021(W) & 02(f)-60-10-2021(W)]
23 February 2023

Civil Procedure: *Judgment — Foreign judgment, enforcement of — Foreign country not a First Schedule country under Reciprocal Enforcement of Foreign Judgments Act 1958 — Whether foreign judgment enforceable by common law action in Malaysia if judgment not proved as a foreign judgment or order in accordance with Evidence Act 1950*

This was a common law action for the enforcement of a foreign judgment, necessitated by the fact that the judgment, a judgment entered in default, emanated from the Abu Dhabi Court of First Instance ('Abu Dhabi Judgment'), and the United Arab Emirates was not a reciprocating country listed under the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). The claim was allowed at the High Court and the decision was affirmed on appeal although the Court of Appeal did vary the award on the interest rate. Subsequently, leave was granted on the following questions of law: (i) whether a foreign judgment was enforceable by a common law action in Malaysia (the foreign country not being a First Schedule country under the REJA) if the judgment was not proved as a foreign judgment or order in accordance with the Evidence Act 1950 ('EA'); (ii) whether a foreign judgment purporting to be a default judgment where liability on quantum and assessment of compensation was decreed *in absentia* satisfied the basic rules of fair procedure and natural justice to be enforceable by way of a common law action in the Malaysian courts; (iii) in a common law action to enforce a foreign judgment not being a First Schedule country under the REJA, without the foreign judgment being proved in accordance with Chapter V of the EA, whether there was a sustainable cause of action for other evidence to be admitted and weighed; (iv) in a common law action to enforce a foreign judgment not being a First Schedule country under the REJA, whether the party responding to the common law action was limited only to the defences set out in *See Hua Daily News Bhd v Tan Thien Chin & Ors*; (v) in a common law action to enforce a foreign judgment not being a First Schedule country under the REJA, whether the applicant suing upon that judgment as a cause of action was obliged to prove its claim on liability and quantum; and (vi) whether a non-REJA foreign

judgment benefited from the same limited defences against the registration of a First Schedule REJA foreign judgment under s 5 of the REJA.

Held (allowing the appeal):

(1) On the facts of the instant case, since only a copy and not the original of the Abu Dhabi Judgment was exhibited, and that copy exhibited was furthermore not certified, verified or authenticated in the manner prescribed under the EA, there was actually no proof of the document central and critical to the underlying cause of action. The inclusion of the exhibit copy in Part B of the Bundles of Documents did not render an inadmissible document, admissible. The testimony of the respondent's witness, PW1, the solicitor who handled the case at the Abu Dhabi Court of First Instance, was merely corroborative and could not supplant the primary evidence of the Abu Dhabi Judgment itself. Consequently, absent the Abu Dhabi Judgment, the claim of the respondent remained unproved and for this reason alone, should have been dismissed. The problem caused by the stark absence of the original Abu Dhabi Judgment was exacerbated by the state of the four translations (that came attached together with the copy of the Abu Dhabi Judgment). Quite apart from the incomplete state of the fourth translation where only the first page was translated, the discrepancies of the names and hence the identities of the defendants sued at the Abu Dhabi First Instance Court permeated throughout the judgment itself. The names of the defendants in that action appeared not only on the first page but also at various parts of the judgment itself. Also, contrary to the respondent's assertion, the liability of the appellants was not stated as joint and several but 'jointly'. The answer to Questions 1 and 3 must thus be answered in the negative. With this, there was no need to examine and deliberate on the remaining questions which were questions dealing with the matter of defence. With the respondent's case unproved, the issue of defence did not arise. (paras 31-34)

Case(s) referred to:

Bank of Scotland PLC v. Wilson [2008] BCJ No 1124 (refd)

Hong Pian Tee v. Les Placements Germain Gauthier Inc [2002] 1 SLR(R) 515 (refd)

Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation [1986] 1 MLRA 103 (refd)

Poh Soon Kiat v. Desert Palace Inc [2010] 1 SLR 1129 (refd)

See Hua Daily News Sdn Bhd v. Tan Thien Chin & Ors [1985] 1 MLRA 436 (refd)

Y Narasimha Rao & Others v. Y Venkata Lakshmi & Another [1991] 3 SCC 451 (refd)

Legislation referred to:

Court Order Enforcement Act RSBC 1996 (Canada), Schedule 4, c 78

Evidence Act [Ind], ss 74, 76, 77, 86

Evidence Act 1950, ss 62, 65, 74(1), 76, 77, 78(1)(f), 86

Reciprocal Enforcement of Judgments Act 1958, ss 5, 11, First Schedule
Rules Of Court 2012, O 67 r 3, O 92
Rules of Court (Canada), r 54(2)

Other(s) referred to:

Dicey, Morris & Collins, *The Conflict of Laws* (Sweet & Maxwell, 14th Edition, 2006), Vol 1, para 14-020

Counsel:

[Civil Appeal No: 02(f)-59-10-2021(W)]

For the 1st appellant: Foong Kitson (Nicholas Poon & Michelle Liu with him); M/s Kit & Associates

For the 1st respondent: Gurdial Singh Nijar (John Khoo Boo Lai, Abraham Au & Jimmy Gay Choon Hee with him); M/s Ismail, Khoo & Associates

For the 2nd respondent: Cyrus Das (Foo Joon Liang, Lee Hui Juan & Kho Jia Yuan with him); M/s Gan Partnership

[Civil Appeal No: 02(f)-60-10-2021(W)]

For the appellant: Cyrus Das (Foo Joon Liang, Lee Hui Juan & Kho Jia Yuan with him); M/s Gan Partnership

For the respondent: Gurdial Singh Nijar (John Khoo Boo Lai, Abraham Au & Jimmy Gay Choon Hee with him); M/s Ismail, Khoo & Associates

JUDGMENT

Mary Lim Thiam Suan FCJ:

[1] This was a common law action for the enforcement of a foreign judgment. This course of action was necessitated by the fact that the judgment, a judgment entered in default, emanated from the Abu Dhabi Court of First Instance, and the United Arab Emirates is not a reciprocating country listed under the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 [REJA]. The claim was allowed at the High Court and the decision was affirmed on appeal although the Court of Appeal did vary the award on the interest rate, that it was to run from the date of the judgment in Abu Dhabi instead of from the date of decision at the High Court.

[2] On 5 October 2021, leave was granted on the following questions of law:

i. Whether a foreign judgment is enforceable by a common law action in Malaysia (the foreign country not being a First Schedule country under the Reciprocal Enforcement of Foreign Judgment Act 1958 ("REJA") if the judgment is not proved as a foreign judgment or order in accordance with the Evidence Act 1950?

ii. Whether a foreign judgment purporting to be a default judgment where liability on quantum and assessment of compensation was decreed *in absentia* satisfies the basic rules of fair procedure and natural justice to be enforceable by way of a common law action in the Malaysian courts?

iii. In a common law action to enforce a foreign judgment not being a First Schedule country under the REJA, without the foreign judgment being proved in accordance with Chapter V of the EA 1950, whether there is a sustainable cause of action for other evidence to be admitted and weighed?

iv. In a common law action to enforce a foreign judgment not being a First Schedule country under the REJA, whether the party responding to the common law action is limited only to the defences set out in *See Hua Daily News Bhd v. Tan Thien Chin & Ors* [1985] 1 MLRA 436; ?

v. In a common law action to enforce a foreign judgment not being a First Schedule country under the REJA, whether the applicant suing upon that judgment as a cause of action is obliged to prove its claim on liability and quantum?

vi. Whether a non-REJA foreign judgment benefits from the same limited defences against the registration of a First Schedule REJA foreign judgment under s 5 of REJA?

Broad Facts

[3] The respondent, Conaire Engineering Sdn Bhd-LLC, is registered as a foreign company under the laws of Abu Dhabi, United Arab Emirates while the appellants in the two appeals are registered companies in Malaysia. By a letter of understanding dated 7 May 2007, Al Tamouth Investments LLC appointed a joint-venture company, SPK-Bina Puri JV, as the main contractor for a residential, commercial and entertainment development project at Al Reem Island in Abu Dhabi, United Arab Emirates. On 14 July 2007, SPK-Bina Puri JV appointed the respondent as the subcontractor for mechanical, electrical and plumbing works in the project. Al Tamouth Investments LLC issued taking-over certificates in June 2011, certifying the project was completed subject to certain outstanding defective works. The respondent initiated legal proceedings against SPK-Bina Puri JV as well as Al Tamouth Investments LLC at the Abu Dhabi Plenary Commercial Court, a Court of First Instance.

[4] On 17 March 2015, the respondent obtained judgment of AED20,718,958.25 against SPK-Binapuri JV [Abu Dhabi Judgment]. On 11 April 2016, the respondent commenced proceedings against the two appellants to enforce the Abu Dhabi Judgment here in Malaysia. The action was premised on the Abu Dhabi Judgment.

[5] The action was resisted on several fronts. Amongst which is the lack of knowledge of the existence of the Abu Dhabi Judgment and/or the related proceedings at the Abu Dhabi Court of First Instance; wrong parties; and

reliance on the terms of the subcontract and the letter of understanding. After filing Defence, the erstwhile solicitors of the appellants issued a letter to the solicitors of the respondent informing that they had no objections for the respondent to institute attachment proceedings on monies paid into Court by Al Tamouth Investments LLC. This letter forms almost centre stage of arguments at the High Court; an issue which we will deal with later.

[6] In support of its claim at the High Court, the respondent tendered an English translation of the Abu Dhabi Judgment which was handed down in the Arabic language by the Abu Dhabi Plenary Commercial Court. The whole judgment is in Arabic, including the names of the parties. This first translation prepared by Magdy F.E. Sherbiny [PW2] was vigorously challenged, particularly on the identity of the party(s) sued. This led to three other translations, this time prepared by Rabiey Ebada Mohd [Ebada]. The fourth translation apparently got the names of the appellants correct with the aid of information obtained from trade licences sourced from an online search at the Economics Department of Abu Dhabi. The respondent provided this source material to Ebada.

[7] The first three translations each had a copy of the Abu Dhabi Judgment. The fourth did not. This fourth translation, however, was incomplete as it translated only the first page of the Abu Dhabi Judgment.

[8] None of the translations had the original copy of the Abu Dhabi Judgment attached. In fact, an original copy of the Abu Dhabi Judgment was never produced.

[9] Ebady did not testify. Only Magdy F. EL Sherbiny [PW2] did. Ebady's explanation for his absence, that both he and PW1 could not both be away from the office at the same time during Ramadhan was accepted by the trial Judge. With that, the learned Judge allowed PW2 to explain the contents of the three translations that were done by Ebada.

Common Law Right Of Action

[10] As clearly explained in *See Hua Daily News Sdn Bhd v. Tan Thien Chin & Ors* [1985] 1 MLRA 436, the main advantage of the Reciprocal Enforcement of Judgments Act 1958 was to provide for "direct execution of foreign judgments". It "obviates the necessity of first obtaining a local judgment with the attendant requirement of establishing jurisdiction over the defendant as a pre-condition". At page 437, the Federal Court then proceeded to discuss the various defences that may be raised to an action on the judgment at common law:

(1) that the foreign Court had no jurisdiction;

(2) that the judgment was obtained by fraud;

(3) that the judgment would be contrary to public policy; and

(4) that the proceedings in which the judgment was obtained were opposed to natural justice.

[11] It was pointed out that similar defences were available under s 5 of REJA. The Federal Court then proceeded to discuss the merits of the defence of fraud raised. The requirements for establishing an action on a judgment at common law were not discussed as that was not in issue.

[12] While REJA serves to facilitate direct execution of foreign judgments, it is only in respect of those reciprocating countries listed in the First Schedule to the Act. The right to sue in common law upon a judgment obtained in another jurisdiction nevertheless, remains. Of course, a claimant can always opt to sue upon the underlying cause, be it in tort, contract or for any other complaint without relying on the foreign judgment.

[13] At common law, a foreign judgment is treated as an implied obligation to pay a debt, that debt being the sum awarded by the foreign Court. *Sans* REJA, that foreign judgment cannot be enforced as a judgment. That foreign judgment only creates a debt between the same parties. It provides a cause of action on which the debtor can be sued on our shores. It is the judgment that is obtained from our Courts and not the foreign judgment that is enforceable as a judgment in this country.

[14] The law in this regard was examined by Chan Sek Keong CJ in *Poh Soon Kiat v. Desert Palace Inc* [2010] 1 SLR 1129, 1139, citing Dicey, Morris & Collins on *The Conflict of Laws* (Sweet & Maxwell, 14th Edition, 2006) at vol. 1 para 14-020 as follows:

> For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, e.g. in a divorce suit. It must order X, the defendant in the [enforcement] action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum, it will be treated as being ascertained; if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, though it may be *res judicata*. The judgment must further be for a sum other than a sum payable in respect of taxes or the like, or in respect of a fine or other penalty.

[15] In order to be enforceable, the foreign *in personam* judgment must be final and conclusive between the same parties and it must be rendered by a Court of competent jurisdiction – see *Hong Pian Tee v. Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515.

[16] Consequently, it is imperative that the foreign judgment is produced to prove the claim. This is because the principle of merger does not apply in the case of a cause of action founded on foreign judgments.

[17] In this respect, there are ample provisions in the Evidence Act 1950 [Act 56] on how such foreign judgments are to be admitted and treated by our Courts. These provisions cannot be ignored.

[18] In *Bank of Scotland PLC v. Wilson* [2008] BCJ No 1124, albeit a case based on the mandatory requirements of r 54(2) of the Rules of Court and the Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, it is none the less instructive on the importance and significance of compliance with the rules of evidence on admissibility. In that case, aside from a lack of evidence of service of cause papers on the respondent, the petitioner bank had failed to include a certified copy of the judgment under the seal of the original court. In the Court's view, this "deficiency was more than a mere irregularity".

[19] The Canadian Convention has been incorporated into domestic law; it forms Schedule 4 to the Court Order Enforcement Act RSBC 1996, c 78 and read with r 54(2) of the Rules of Court provides for "simple and rapid procedures" for the registration of judgments from reciprocating countries. Under r 54(2), a certified copy of the judgment under the seal of the original court is required to be exhibited. The bank failed to provide both. Although the bank's petition for registration of the default judgment issued by the Birmingham County Court was dismissed on the ground of denial of natural justice in that the respondent, a director and officer of the company and who had guaranteed the company's indebtedness to the bank, had not been given the opportunity to appear and defend himself at the proceedings in Birmingham, England, the Supreme Court of British Columbia also rejected the bank's request to treat the deficiency under r 54(2) as "curable irregularities" that do not nullify proceedings. The Supreme Court held that the failure to provide the certified copy of the judgment under the seal of the County Court "is a fundamental evidentiary problem".

[20] In *Y Narasimha Rao & Others v. Y Venkata Lakshmi & Another* [1991] 3 SCC 451, the 1st appellant and the 1st respondent had been married in Tirupati, India in 1975. In 1978, the 1st appellant obtained a decree dissolving that marriage from the Circuit Court of St Louis Missouri, USA. In 1981, the 1st appellant married the 2nd appellant in Yadgirigutta, India. The 1st respondent filed a complaint of bigamy against the appellants. The complaint was dismissed by the Magistrates Court. In allowing the criminal revision, the High Court held that the magistrate was wrong in admitting a photocopy of the judgment of the Missouri Court. The decision of the High Court was upheld but on different grounds.

[21] According to the Supreme Court of India, a photocopy of the decree was admissible as secondary evidence as it is prepared by a mechanical process which in itself ensures the accuracy of the original. However, the decree that was admitted by the learned magistrate did not conform with the requirements of ss 74, 76 and 77 of the Indian Evidence Act. Section 74(1) provides that documents forming the acts or records of the acts of public judicial officers of a foreign country are public documents while s 76 read with s 77 of the Act, allowed certified copies of such documents to be produced in proof of

their contents. While the photocopy of the decree had been certified by the Deputy Clerk for the Circuit Clerk of the Circuit Court of Missouri, it had not been further certified by representative of the Indian Government in the United States as required under s 86 of the Indian Evidence Act to enjoy the presumption with regard to its genuineness and accuracy. As such, the decree was inadmissible for want of certificate under s 86 and was thus unenforceable. The decision of the High Court was consequently upheld but on "a more substantial and larger ground" with a direction to the learned magistrate to proceed with the matter "as expeditiously as possible, preferably within four months from now as the prosecution is already a decade old".

[22] The requirement to produce the original copy of the Abu Dhabi Judgment is more acute in the present appeals as the original judgment is not in the National Language or even in the English language. Further, all four translations of the Abu Dhabi Judgment as prepared by the respondent remain in substantial dispute throughout the trial. That original copy of the Abu Dhabi Judgment is primary evidence which must be proved under s 62 of the Evidence Act 1950. Although secondary evidence of such documents may be accepted under s 65, it must be in accordance with the provisions of ss 74, 78 and 86 of the Evidence Act 1950.

[23] The Abu Dhabi Judgment is a public document under s 74:

> Public documents
>
> 74. The following documents are public documents:
>
> (a) documents forming the acts or records of the acts of:
>
> (i) the sovereign authority;
>
> (ii) official bodies and tribunals; and
>
> (iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and
>
> (b) public records kept in Malaysia of private documents.

[24] However, before that Abu Dhabi Judgment may be admitted into evidence and used by the Courts here, it must adhere to the terms of s 78 which reads as follows:

> Proof of certain official documents
>
> 78. (1) The following public documents may be proved as follows:
>
> (a) acts, orders or notifications of the Government of Malaysia or of any State in any of its departments-
>
> (i) by the records of the departments certified by the heads of those departments respectively;

(ii) by a Minister in the case of the Government of Malaysia, and by the Chief Minister, a State Minister (if any), the State Secretary or the Permanent Secretary to the Chief Minister in the case of a State Government; or

(iii) by any document purporting to be printed by the authority of the Government concerned;

(b) the proceedings of Parliament or of any of the federal legislatures that existed in Malaysia before Parliament was constituted or of the legislature of any State - by the minutes of the body or by the published Acts of Parliament, Ordinances, Enactments or abstracts or by copies purporting to be printed by the authority of the Government concerned;

(c) proclamations, orders or regulations issued by the Crown in the United Kingdom or by the Privy Council or by any Minister or department of the Crown - by copies or extracts contained in the London *Gazette* or in the *Gazette* or in any State *Gazette* or purporting to be printed by Her Britannic Majesty's Printer;

(d) the acts of the Executive or the proceedings of the legislature of a foreign country - by journals published by their authority or commonly received in that country as such, by a copy certified under the seal of the country or sovereign or by a recognition thereof in some Act, Ordinance or Enactment of Malaysia or of any State;

(e) the proceedings of a municipal body, town board or other local authority in Malaysia - by a copy of the proceedings certified by the lawful keeper thereof, or by a printed book purporting to be published by the authority of that body;

(f) public documents of any other class in a foreign country - by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

[Emphasis Added]

[25] In the case of a foreign judgment, either the original is to be produced or if a copy is relied on, then that copy must be certified in accordance with s 78(1)(f) together with proof of the character of the document according to the law of the foreign country; in this case of Abu Dhabi.

[26] Alternatively, the Abu Dhabi Judgment is admissible if it fulfils the requirements of s 86:

Presumption as to certified copies of foreign judicial records

86. The court may presume that any document purporting to be a certified copy of any judicial record of any country not being a part of the Commonwealth is genuine and accurate if the document purports to be certified in any manner which is certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

[27] In these appeals, a copy of the original Abu Dhabi Judgment was attached together with the translations. Two observations on these attachments.

[28] First, the Abu Dhabi Judgment, be it the original or a copy of the original, was not itself tendered. It was merely exhibited as an attachment to another document, the translation. Next, while a copy of such a judgment may be admitted as secondary evidence, the copy in question is still inadmissible because the copy exhibited was not certified in accordance with the requirements of either s 78(1)(f) or s 86. There appears to be a seal at the bottom of some of the pages in the copy of the Abu Dhabi Judgment attached, but it is unclear as to what the seal is as it is partially in English with the words "JUDICIAL DEPARTMENT" but the rest of the words are in the Arabic language.

[29] The admission of a translation, or of any of the four translations required under O 92 of the Rules of Court 2012 for that matter, does not *ipso facto* admit the copy of the original Abu Dhabi Judgment which remains intrinsically inadmissible for want of compliance with s 78 or s 86. It is settled law that inadmissible evidence remains inadmissible even if no objections were taken by the parties; more so when erroneously admitted contrary to the relevant principles under the Evidence Act − see Supreme Court in *Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation* [1986] 1 MLRA 103.

[30] If the copy of the Abu Dhabi Judgment is carefully examined, it will be noticed that it is not even certified, verified or authenticated, except for the "seal" mentioned earlier. Order 67 of the Rules of Court 2012, made pursuant to the Courts of Judicature Act 1964 [Act 91] read with s 11 of REJA, contains specific procedural requirements on how applications for the recognition of judgments under REJA are to made. Under O 67 r 3, the foreign judgment itself must be exhibited; and where a copy is tendered, that copy must be verified, certified or authenticated. Where the foreign judgment is not in the English language, a translation is further required and that translation must also be certified by a notary public or authenticated by affidavit. Both the original or a certified copy of the original must be tendered together with a certified copy of the translation.

[31] Although what has just been discussed above pertains to the procedure for recognition of foreign judgments under REJA, and we are dealing with a common law action upon a foreign judgment; we do not see why the evidentiary rules should be any different particularly in the face of the specific

provisions of the Evidence Act 1950 as identified earlier. Since only a copy and not the original of the Abu Dhabi Judgment was exhibited, and that copy exhibited was furthermore not certified, verified or authenticated in the manner prescribed under the Evidence Act 1950, there is actually no proof of the document central and critical to the underlying cause of action. The inclusion of the exhibit copy in Part B of the Bundles of Documents does not render an inadmissible document, admissible − see para [29] above. The testimony of the respondent's witness, PW1, the solicitor who handled the case at the Abu Dhabi Court of First Instance, is merely corroborative and cannot supplant the primary evidence of the Judgment itself.

[32] Consequently, absent the Abu Dhabi Judgment, the claim of the respondent remains unproved and for this reason alone, should have been dismissed.

[33] The problem caused by the stark absence of the original Abu Dhabi Judgment problem is exacerbated by the state of the four translations. Quite apart from the incomplete state of the fourth translation where only the first page was translated, the discrepancies of the names and hence the identities of the defendants sued at the Abu Dhabi First Instance Court permeate throughout the judgment itself. The names of the defendants in that action appear not only on the first page but also at various parts of the judgment itself − see for instance pages 369, 370. Also, contrary to the respondent's assertion, the liability of the appellants is not stated as joint and several but "jointly" − see the second adjudgment which is translated as "The first three Defendants shall be compelled to jointly pay to Plaintiff .....".

[34] The answer to Qs 1 and 3 must thus be answered in the negative. With this, there is no need to examine and deliberate on the remaining questions which are questions dealing with the matter of defence. With the respondent's case unproved, the issue of defence does not arise.

Conclusion

[35] The appeals are thus allowed and the decisions of the Court of Appeal and High Court are set aside with costs.

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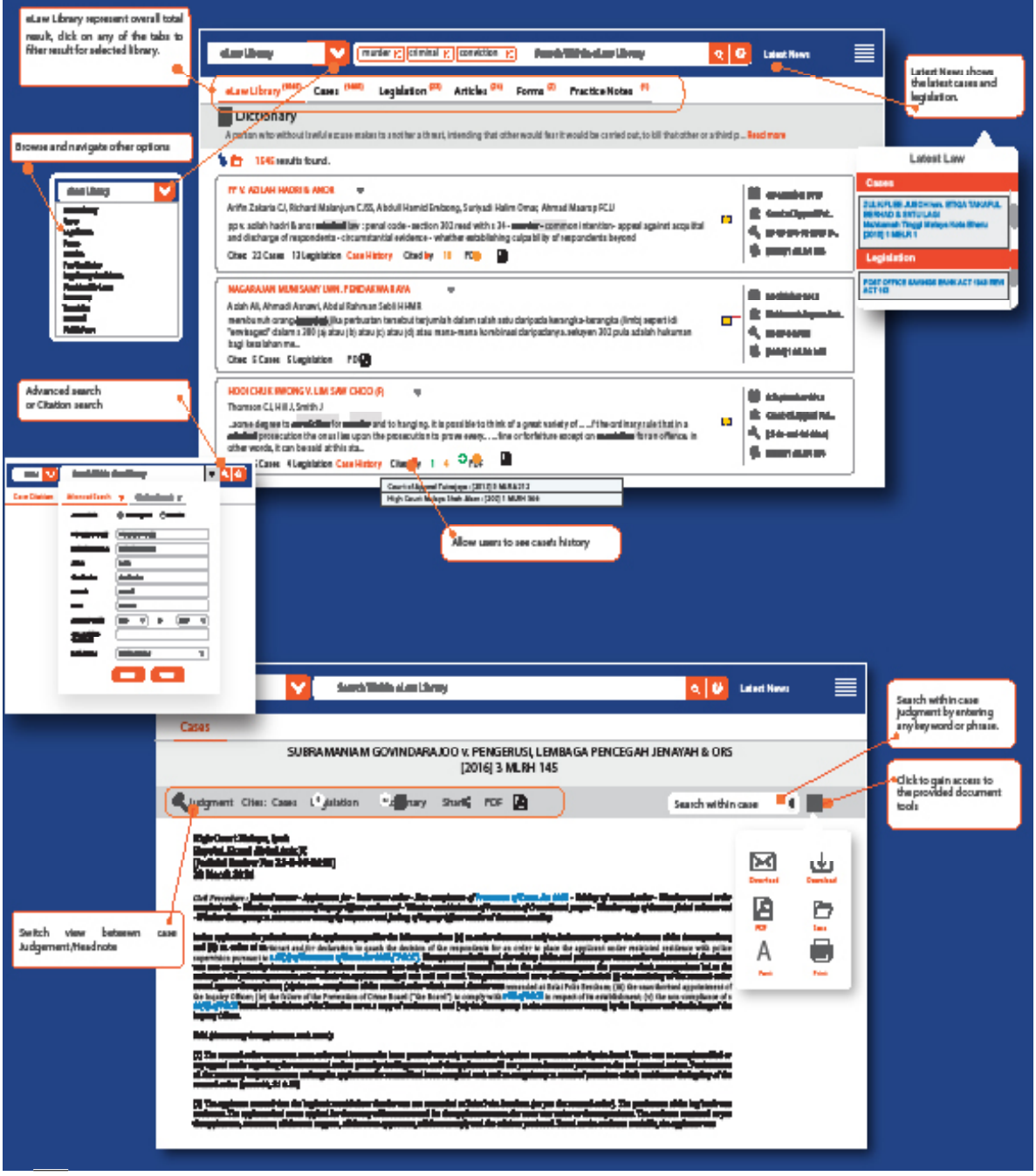

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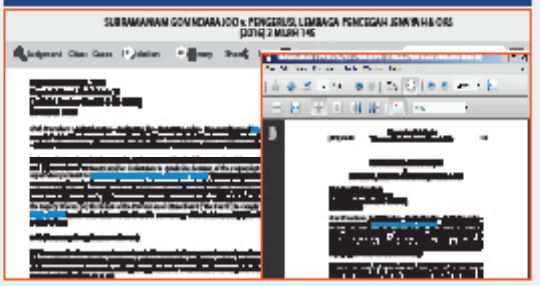

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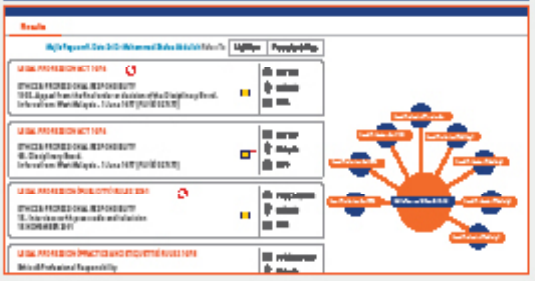

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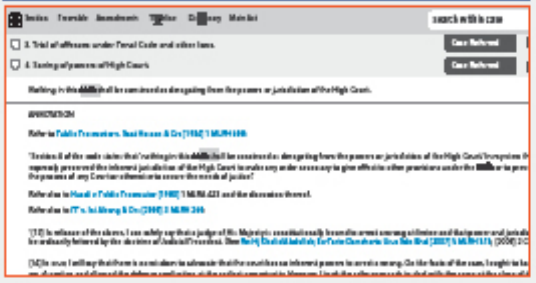

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