# N CHANTHIRAN NAGAPPAN

**v.**

# KAO CHE JEN

Federal Court, Putrajaya
Mohamad Zabidin Mohd Diah CJM, Nallini Pathmanathan, Rhodzariah Bujang FCJJ
[Civil Appeal No: 02(I)-54-09-2021(Q)]
17 May 2023

***Company Law:*** *Liquidators — Proceedings against — Whether leave of winding up Court should be obtained before commencing any proceedings against liquidator — Statutory provisions, interpretation of — Doctrine of stare decisis*

The respondent was a contributory and director ('Contributory') of one STM Transformers Sdn Bhd ('Company'). On 9 May 2013, another contributory of the Company filed a petition to wind up the Company on just and equitable grounds pursuant to s 218(1)(i) of the Companies Act 1965 ('1965 Act'). The Company was consequently wound up by the High Court and the appellant was appointed as the Company's liquidator ('Liquidator'). Over the years, the Contributory had initiated a series of proceedings against the Liquidator seeking, among others, to remove the Liquidator and to compel him to produce the Company's documents and accounts. Having been unsuccessful in all of those proceedings, the Contributory commenced another action against the Liquidator in the High Court, which culminated in the present appeal. The Liquidator raised a preliminary objection that the Contributory had failed to obtain leave of the winding up Court to commence the action. The High Court allowed the Liquidator's preliminary objection.

Dissatisfied, the Contributory appealed to the Court of Appeal which unanimously allowed the appeal and remitted the matter to the High Court to be heard on the merits. The Court of Appeal reasoned that its function was not to read words into a statute, but to give effect to every word in the statute. In support of this proposition, the Court of Appeal cited its previous decision in *Kao Che Jen v. N Chanthiran Nagappan* ('*Kao Che Jen*'), which arose from another action initiated by the Contributory to remove the Liquidator. The Court of Appeal then went on to hold that s 486(2) of the Companies Act 2016 ('2016 Act') did not stipulate that leave was required before any creditor or contributory might apply to the Court with respect to any exercise or proposed exercise of any of the powers conferred on a liquidator by the said section. The Liquidator was then granted leave to appeal to the Federal Court on the following questions of law: (1) whether the prior leave of the winding up Court was required in order for legal proceedings to be commenced against a Court-appointed liquidator in respect of matters transacted by the Liquidator

in the course of the liquidation under Divisions 1 and 2 of Part IV of the 2016 Act; and (2) if the answer to question (1) was in the negative, whether such proceedings were to be brought in the winding up Court and/or within the winding up proceedings if, amongst others, an order against the Liquidator in his official capacity was sought.

**Held** (allowing the appeal with costs):

**(1)** The phrase 'subject to the control of the Court' in s 236(3) of the 1965 Act essentially meant that a liquidator was answerable to the court in the performance of his duties. He was obligated to conduct the winding up process pursuant to the order granted by the winding up Court. Once the Liquidator was sanctioned to perform his duties by virtue of his appointment by the winding up Court, no party could interfere with him save with the permission of the winding up Court. It would amount to an abuse of process if proceedings could be commenced against the Liquidator before a different court, notwithstanding the supervision exercised by the winding up Court over the Liquidator and the winding up process as a whole. Leave of Court referred to the sanction and permission of the Court. In seeking leave of Court, a prospective litigant informed the court regarding a proposed step to be taken in a proceeding. Since a liquidator was subject to the control of the Court as provided under ss 236(3) and 277(2) of the 1965 Act, the Court should be advised in the event any action, including an application to remove the Liquidator, was proposed to be initiated against the Liquidator. In other words, the phrase 'subject to the control of the Court' in s 236(3) of the 1965 Act was equivalent to a requirement for leave of Court to commence proceedings against the Liquidator. This interpretation of s 236(3) was in line with the common law position adopted in other jurisdictions. Similarly, s 277(2) of the 1965 Act, by requiring the Court to enquire into any alleged misconduct by the Liquidator, effectively imposed a requirement for leave of Court to be obtained prior to any action being taken against the Liquidator. Furthermore, a liquidator had the status of an officer of the Court pursuant to r 63 of the Companies (Winding-Up) Rules 1972 ('Winding-Up Rules'). It followed that the winding up Court, having appointed the Liquidator, had the sole authority to supervise, discipline and, if necessary, remove its officer. As such, leave of the winding up Court should be obtained before commencing any proceedings against the Liquidator. (paras 53-55)

**(2)** Section 17A of the Interpretation Acts 1948 and 1967 made it clear that a statutory provision ought to be read in a contextual, as opposed to a purely textual, manner. Unfortunately, however, the Court of Appeal in *Kao Che Jen* resorted to the latter approach when interpreting ss 232(1) and 266 of the 1965 Act. In interpreting these provisions, the Court of Appeal failed to consider the wider context of Part X of the 1965 Act and the Winding-Up Rules. Neither did the Court undertake any analysis of the rationale behind the winding up process. Although the Court of Appeal justified its approach on the basis of giving effect to the legislative intent, that was precisely what the Court failed to do by adopting a strictly grammatical reading of the relevant provisions.

The Court of Appeal in the instant appeal accorded an overly simplistic interpretation to s 486(2) of the 2016 Act (which was in *pari materia* with s 236(3) of the 1965 Act) and failed to consider the provision in the context of Part IV of the 2016 Act and the Winding-Up Rules. In the circumstances, the decision of the Court of Appeal in the instant appeal was flawed as it adopted the reasoning *in toto* of *Kao Che Jen*. More significantly, the decision of the Court of Appeal in the instant appeal did not make any reference to the Federal Court judgment in *Ooi Woon Chee & Anor v. See Teow Chuan & Ors & Other Appeals*, which was premised on the principle that leave of the winding up Court was required before the commencement of proceedings against a Court-appointed liquidator. The Court of Appeal in the instant appeal was bound by the doctrine of *stare decisis* to follow this pronouncement from the apex Court. In failing to do so, the Court of Appeal in the instant appeal had committed a fundamental error of law. (paras 58, 66 & 67)

**(3)** It followed that Question (1) would be answered in the affirmative. As such, it was not necessary for Question (2) to be answered. (para 69)

**Case(s) referred to:**

*Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2006] 4 MLRH 110 (refd)*

*Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain [2022] 4 MLRA 547 (folld)*

*Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 1 MLRA 672 (folld)*

*Chin Cheen Foh v. Ong Tee Chew [2003] 1 MLRH 279 (refd)*

*Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 MLRA 89 (folld)*

*Jagdis Singh Banta Singh & Anor v. Return 2 Green Sdn Bhd [2021] 2 MLRA 418 (overd)*

*KTM Transformers Sdn Bhd v. N Chanthiran Nagappan [2015] MLRAU 211 (refd)*

*Kao Che Jen v. N Chanthiran Nagappan [2016] 1 MLRA 218 (overd)*

*Lloyd-Owen v. Bull [1936] 4 DLR 433 (refd)*

*Mamone & Anor v. Pantzer (2001) 36 ACSR 743 (refd)*

*Mosbert Berhad (In Liquidation) v. Stella D' Cruz [1985] 1 MLRA 558 (refd)*

*NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 MLRA 609 (refd)*

*Ooi Woon Chee & Anor v. See Teow Chuan & Ors & Other Appeals [2012] 1 MLRA 687 (folld)*

*Re Siromath [1991] 1 ACLC 587 (refd)*

*Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd [2004] 2 MLRH 749 (refd)*

*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [2009] 5 MLRH 462 (refd)*

*Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd [2019] 3 MLRA 70 (overd)*

*Sydlow v. TG Kotselas [1996] 14 ACLC 846 (refd)*

*Tai Kwong Goldsmiths & Jewellers (Under Receivership) v. Yap Kooi Hee & Ors [1994] 1 MLRA 412 (refd)*

*Tebin Mostapa (As Administrator Of The Estate Of Mostapa Asan, Deceased) v. Hulba-Danyal Balia & Anor (As Joint Administrators Of The Estate Of Balia Munir, Deceased) [2020] 4 MLRA 394 (refd)*

*Tee Siew Kai (Liquidators For Merger Acceptance Sdn Bhd (In Liquidation)) v. Machang Indah Development Sdn Bhd (In Liquidation) (Previously Known As Rakyat Corp Sdn Bhd) [2020] 2 MLRA 295 (refd)*

*TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow [1995] 5 MLRH 110 (refd)*

*Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal [2009] 3 MLRA 495 (refd)*

*Yap Cheng Hai v. Yap Cheng Hai Feng Shui Center Of Excellence Sdn Bhd & Ors [2010] 16 MLRH 338 (folld)*

*Zainal Abidin Putih & Anor v. Che Wan Development Sdn Bhd [1992] 1 MLRA 71 (refd)*

**Legislation referred to:**

Companies Act 1965, ss 181A, 217, 218(1)(i), 226(3), 227(2), 232(1), 236(3), 240, 266, 277(2)

Companies Act 2016, ss 453(2), 482(b) , 486(2), 510(1)

Companies (Winding-Up) Rules 1972, r 63

Interpretation Acts 1948 and 1967, s 17A

**Other(s) referred to:**

Daniel Tan, *On the Sharp Edge of Public Duty and Private Interests — The Liquidator's Duty to be Objective, Impartial and Independent,* October 2009, Law Gazette, Law Society of Singapore

Hugh K Thomson, *A Practical View of the Receiver's Relationship With Other Office Holders — The Liquidator,* 2000, 16(2) IL& P 74

Rabindra S Nathan, *Law and Practice of Corporate Insolvency in Malaysia*, 2009, Chapter 11, para 11.001

**Counsel:**

*For the appellant: Alvin Chong Chee Vun (Jonathan with him); M/s Idris, Alvin Chong & Partners Advocates*

*For the respondent: Lim Heng Choo (Analissa Lim with him); M/s Lim & Lim Advocates*

**JUDGMENT**

**Nallini Pathmanathan FCJ:**

**A. Introduction**

**[1]** The sole issue in this appeal is whether leave of Court is required for the commencement of proceedings against a Court-appointed liquidator.

**[2]** The long-established position in this jurisdiction is that leave is obtained from the winding-up Court prior to such commencement. However, in two recent decisions, namely *Kao Che Jen v. N Chanthiran Nagappan* [2016] 1 MLRA 218 ('*Kao Che Jen*') and the instant appeal, the Court of Appeal has departed from this long-established position. It is therefore incumbent upon this Court to clarify the relevant legal principles in this regard.

**B. Background Facts**

**[3]** The respondent, Kao Che Jen is a contributory and director ('the Contributory') of one STM Transformers Sdn Bhd ('the Company'). On 9 May 2013, one Ong Jin Ek, another contributory of the Company, filed a petition to wind up the Company on just and equitable grounds pursuant to s 218(1)(i) of the Companies Act 1965 ('the 1965 Act'). The Company was consequently wound up by the High Court in Kuching on 21 June 2013. The appellant, N.Chanthiran A/L Nagappan was appointed as the Company's liquidator ('the Liquidator').

**[4]** Over the years, the Contributory has initiated a series of proceedings against the Liquidator seeking, among others, to remove the Liquidator and to compel him to produce the Company's documents and accounts. Having been unsuccessful in all of those proceedings, the Contributory commenced another action against the Liquidator in the Kuching High Court, which has culminated in the present appeal. However, the Contributory did not obtain leave of Court prior to commencing these proceedings and as stated earlier, this comprises the basis for the entire appeal.

**C. The High Court**

**[5]** The present appeal arose from an application by the Contributory dated 6 April 2018, where the Contributory claimed that the Liquidator had failed to perform his duties and accordingly sought a Court order to compel the Liquidator to do the following:

(a) To call a creditors' meeting within 7 days of the Court order;

(b) To invite all the Company's creditors to submit their proofs of debt;

(c) To disclose the name of the Company's trust account, the name of the bank that maintains the said account, any payments into the said account and the collection of debts from a list of purported debtors;

(d) To show the steps taken by the Liquidator in the liquidation process; and

(e) To disclose all the expenses incurred in the liquidation process and the purpose of the said expenses.

**[6]** The Liquidator raised a preliminary objection that the Contributory had failed to obtain leave of the winding up Court to commence the action. In

response, the Contributory contended that such leave was not required as the action was grounded on the Liquidator's failure to discharge his duties and was not against the Liquidator personally.

**[7]** The Contributory's argument did not find favour with the High Court Judge, who allowed the Liquidator's preliminary objection relying on the Court of Appeal decision in *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 1 MLRA 672 ('*Chi Liung Holdings*'), which held that leave of Court is required before an action can be commenced against a Court-appointed liquidator. The High Court Judge noted that the Court of Appeal in *Chi Liung Holdings* had referred to s 236(3) of the 1965 Act. This provision is in *pari materia* with s 486(2) of the Companies Act 2016 ('the 2016 Act'), which provides as follows:

> "**486. Powers of liquidator in winding up by Court**
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is **subject to the control of the Court** and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers."
>
> [Emphasis Added]

## D. The Court of Appeal

**[8]** Dissatisfied with the decision of the High Court, the Contributory appealed to the Court of Appeal. The appeal was centred solely on the issue of whether leave of the winding up Court was required under s 486(2) of the 2016 Act for the Contributory to commence proceedings against the Liquidator. On 11 August 2020, the Court of Appeal unanimously allowed the appeal and remitted the matter back to the High Court to be heard on the merits.

**[9]** The Court of Appeal reasoned that its function is not to read words into a statute, but to give effect to every word in the statute. In support of this proposition, the Court of Appeal cited its previous decision in *Kao Che Jen*, which interestingly, as alluded to earlier, arose from another action initiated by the Contributory to remove the Liquidator. The Court of Appeal then went on to hold that s 486(2) of the 2016 Act does not stipulate that leave is required before any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of the powers conferred on a liquidator by the said section.

## E. The Federal Court

**[10]** On 9 September 2021, the Liquidator was granted leave to appeal to the Federal Court on the following questions of law:

> (1) Whether the prior leave of the winding up Court is required in order for legal proceedings to be commenced against a Court-appointed liquidator in respect of matters transacted by the liquidator in the course of the liquidation under Divisions 1 and 2 of Part IV of the Companies Act 2016.

(2) If the answer to question (1) is in the negative, whether such proceedings are to be brought in the winding up Court and/or within the winding up proceedings if, amongst others, an order against the liquidator in his official capacity is sought.

**F. The Liquidator's Submissions**

**[11]** Learned Counsel for the Liquidator pointed out that there are presently two conflicting lines of authority on the issue of whether prior leave of the winding up Court is required before proceedings can be commenced against a Court-appointed liquidator. It was submitted that the Court of Appeal decisions in *Chi Liung Holdings, Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLRA 495 and *KTM Transformers Sdn Bhd v. N Chanthiran Nagappan* [2015] MLRAU 211 have established the position that leave of Court is required in order to commence proceedings against a liquidator, but that the Court of Appeal has departed from this well-settled position in two recent decisions, namely *Kao Che Jen* and the instant appeal.

**[12]** Learned Counsel sought to distinguish *Kao Che Jen* from the instant appeal on the basis that the former involved an application by the Contributory to remove the Liquidator pursuant to s 232(1) of the 1965 Act (which is in *pari materia* with s 482 of the 2016 Act) and is therefore not applicable to the instant appeal which is premised on s 486(2) of the 2016 Act.

**[13]** It was further submitted that as a Court-appointed liquidator is an officer of the Court, leave should be obtained from the winding up Court before proceedings are commenced against him in respect of the performance of his duties. Learned Counsel for the Liquidator argued that the Court of Appeal in the instant appeal erred in deciding that the absence of the word "leave" in s 486(2) of the 2016 Act means that leave is not required to sue a liquidator. It was submitted that in so holding, the Court of Appeal in the instant appeal disregarded the long line of cases which have decided to the contrary. Counsel further submitted that a requirement for leave will prevent vexatious litigants from filing repeated legal actions against a liquidator and in turn allow him to focus on completing the liquidation process.

**G. The Contributory's Submissions**

**[14]** Learned Counsel for the Contributory submitted that s 486(2) of the 2016 Act does not have any express words that require leave to be obtained before proceedings can be commenced against a liquidator. It was accordingly submitted that the Court cannot read the words "leave of the Court" into s 486(2) of the 2016 Act where there are no such words in that provision.

**[15]** Counsel drew a comparison between s 486(2) of the 2016 Act and 24 other provisions in the 2016 Act which expressly spell out a requirement for leave of Court to be obtained. It was contended that the absence of a similarly express

requirement in s 486(2) of the 2016 Act evidences Parliament's intention that no such leave is required for the commencement of proceedings against a liquidator.

**[16]** Learned Counsel for the Contributory further relied on *Kao Che Jen* and the Supreme Court's decision in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 MLRA 609 in arguing that the function of the Court is confined to giving effect to the meaning of the words in s 486(2) of the 2016 Act and that the Court is not entitled to import into the provision any requirement that is not found within that provision.

**[17]** It was further submitted that the Court of Appeal in *Chi Liung Holdings* erred in imposing a requirement for leave to be obtained before an action is brought against a liquidator as such requirement is not based on any express provision in s 236(3) of the 1965 Act (which is in *pari materia* with s 486(2) of the 2016 Act), but is instead premised on the grounds that the liquidator is appointed by the Court. Counsel submitted that this amounts to reading into s 236(3) of the 1965 Act an additional requirement of leave which is not contained in that provision.

**H. Origins Of The Office Of A Liquidator**

**[18]** The emergence of the modern-day liquidator can be traced back to the United Kingdom's Joint Stock Companies Winding-up Act 1848, which empowered the Master of the Court of Chancery to appoint the "official manager" of a joint-stock company that had been wound up. The rule that a liquidator should act under the control and direction of the Court originated from the position occupied by the official manager under this Act (see Daniel Tan, '*On the Sharp Edge of Public Duty and Private Interests − The Liquidator's Duty to be Objective, Impartial and Independent*' (*Law Gazette*, Law Society of Singapore, October 2009)).

**[19]** The role of the official manager was, however, short-lived. The official manager was replaced under the Joint Stock Companies Act 1856 by the liquidator who became the person entrusted with the task of winding up the affairs of a company (see Rabindra S Nathan, *Law and Practice of Corporate Insolvency in Malaysia* (Thomson Reuters Asia 2019) − Chapter 11 at para 11.001).

**[20]** The primary function of a liquidator is to realise the assets of the wound-up company and pay the resulting proceeds to the general body of unsecured creditors (see: Hugh K Thomson, 'A Practical View of the Receiver's Relationship With Other Office Holders − The Liquidator' (2000) 16(2) IL&P 74'). In other words, a liquidator represents the entire class of unsecured creditors. It is therefore crucial for the Court to ensure that a liquidator does not face unwarranted interference in the process of discharging his duties.

## I. The Position In Malaysia

**[21]** *Chi Liung Holdings*, a decision of the Court of Appeal, established the principle that leave of the winding up Court should be obtained before proceedings can be commenced against a liquidator. The primary basis of the Court's reasoning is s 236(3) of the 1965 Act. That reasoning is that since the liquidator is appointed by the Court and has the status of an officer of the Court, leave of the Court is necessary to proceed against him. This is what the Court said:

> "At our resumed hearing, we struck off this appeal as we agreed with the learned Judge that the motion, as such, in the first place, required the leave of the Court before it could be brought but not for the reason found by the Judge. **Firstly, we read the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):**
>
> > **The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.**
>
> **We are of the view from the above provision, it is clear that a liquidator having been appointed by the Court, is an officer of the Court. It goes without saying leave of the Court is needed before an action is commenced against him and officers like him.**"
>
> [Emphasis Added]

**[22]** The Court of Appeal, in its reasoning, took note of the rationale in *Lloyd-Owen v. Bull* [1936] 4 DLR 433 ('*Lloyd-Owen*'), which held that a Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is the liquidator's function to ensure that all assets of the company are brought into the winding up. However, in doing so, the liquidator is bound to ensure that there is no unnecessary usage of the assets and that no vexatious or oppressive actions are taken out in the company's name. The Court of Appeal in *Chi Liung Holdings* then laid down the test for granting leave to sue a liquidator, namely that the Court should be satisfied as to the probable success of the proposed claim and that the proposed claim should not be vexatious or merely oppressive. This was necessary to ensure that no unnecessary or wasteful claim is initiated against the liquidator. In its reasoning, the Court of Appeal stated as follows:

> "While we agree that the applicant may proceed against the liquidator, we are, however, firmly of the view the procedure is that **the applicant must have first obtained authority from the winding-up Judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned Judge should take is as given in the Privy Council case of *Lloyd-Owen v. Bull* cited above. As advised in that case, he has to obtain authority from a Judge below who will act liberally but must satisfy himself as to the**

> **probable success of this application and he has to give an assurance to the sanctioning Judge that his action is not vexatious or merely oppressive. The Court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like.** Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs."
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> [Emphasis Added]

**[23]** It is clear from the foregoing that the basis for the requirement of leave when commencing proceedings against a liquidator stems primarily from the statutory provision in s 236(3) of the 1965 Act (and now in s 486(2) of the 2016 Act).

**[24]** The Court of Appeal decision in *Chi Liung Holdings* was followed in *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110 ('*TN Metal Industries*'), where the High Court similarly found that leave of the Court should be obtained before commencing an action against a Court-appointed liquidator since he is an officer of the Court. The High Court further held that a party seeking such leave should establish a strong *prima facie* case against the liquidator. In so holding, the Court made the following observations in relation to the role and status of a liquidator:

> "His task is an onerous one. He is charged with a number of statutory duties and he has a right to apply to Court for directions and guidance. **He is an officer of the Court. He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might seek to level at him. He ought to be protected against such abuse unless there is sufficient *prima facie* evidence to support such allegations. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegations he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.**"
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> [Emphasis Added]

**[25]** The decisions in *Chi Liung Holdings* and *TN Metal Industries* as set out above were followed in *Chin Cheen Foh v. Ong Tee Chew* [2003] 1 MLRH 279, where the High Court observed that:

> "...**As a Court appointed provisional liquidator, the defendant is an officer of the Court and the Court will jealously protect him**...
>
> ...
>
> In a nutshell, from these authorities it can rightly be said that **before bringing an action against the defendant who is an officer of the Court by virtue of his position as a Court appointed provisional liquidator, the plaintiff should first obtain leave of the winding up Court. In the context of the**

**present case, leave was not obtained by the plaintiff before he proceeded to file the present civil suit against the defendant in the defendant's personal capacity. This was certainly wrong in procedure and this Court would not condone such laxity.**"

[Emphasis Added]

**[26]** In *Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd* [2004] 2 MLRH 749 ('*Sarawak Timber Industry*'), the High Court cited the Australian Federal Court case of *Sydlow v. TG Kotselas* [1996] 14 ACLC 846 ('*Sydlow*') and the decision of the Supreme Court of New South Wales in *Re Siromath* [1991] 1 ACLC 587 ('*Siromath*'), which explained the rationale behind the requirement to obtain leave of the Court before suing a liquidator. It was held as follows:

"33. However it is equally clear that **the Court will not allow the liquidator to be subjected to unnecessary litigation or for the winding up process to be wrongfully impeded. One way in which the Court achieves this is by requiring the grant of leave before an action can be brought against a liquidator.** Thus in the Australian case of *Sydlow v. TG Kotselas* [1996] 14 ACLC 846 at p 852, it was held:

... **the Court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongfully impede that process. One way in which this can be carried out is to require the grant of leave by the Court in respect of any action against an official liquidator, so that the Court can satisfy itself that there is no wrongful interference with the process.**

34. And in another Australian case, *Re Siromath* [1991] 1 ACLC 587 it was held:

**The control by the Court over the circumstances in which, and the extent to which, its own officers are to be subjected to personal pecuniary liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the Court of its own process**..."

[Emphasis Added]

**[27]** In short, the control by the Court of any such action against the liquidator acts as a filter against vexatious, frivolous and improperly motivated proceedings.

**[28]** On the test for granting leave to commence proceedings against a liquidator, the High Court in *Sarawak Timber Industry* referred to its previous decision in *TN Metal Industries* and concurred with the reasoning therein that there should be more than a mere allegation against the liquidator. The High Court further held that when misfeasance proceedings are brought against the liquidator, the applicant should prove pecuniary loss to the wound-up company.

**[29]** In *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2006] 4 MLRH 110 ('*Abric*'), the High Court observed that a liquidator is expressly recognised as an officer of the Court pursuant to r 63 of the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules'), which reads as follows:

> "63. Officers of Court
>
> All liquidators appointed by the Court shall be officers of the Court."

**[30]** Based on the above provision, the High Court in *Abric* emphasised that the Court will not allow proceedings to be brought against its officer without leave of the Court. It was held as follows:

> "[24] Therefore in reality the action proposed by the applicant against the liquidator is in respect of the performance of his official duties. **The liquidator however is an officer of the Court. Rule 63 of the Companies (Winding Up) Rules 1972 is clear on this point. The Court will not permit its officer to be sued without investigation of the merits of the case. Thus leave of Court is necessary before such an action can be commenced.**..."
>
> [Emphasis Added]

**[31]** Furthermore, the High Court in *Abric* cited the same Australian cases referred to in *Sarawak Timber Industry* and reiterated that a prospective litigant should demonstrate a *prima facie* case before leave to commence proceedings against a liquidator can be granted and that pecuniary loss to the company needs to be shown when misfeasance proceedings are brought against the liquidator. The High Court observed that:

> "[28] **In ascertaining whether leave ought to be granted, the Court has to satisfy itself that there is no wrongful interference in the liquidation process. The Court will not allow the liquidator to be subjected to unnecessary litigation or for a winding up process to be wrongfully impeded. One way in which the Court achieves this is by requiring the grant of leave before an action can be brought against a liquidator.** This was made clear in the Australian case of *Sydlow v. TG Kotselas* [1996] 14 ACLC 846 at p 852 where it was held:
>
> > ... **the Court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongly impede that process. One way in which this can be carried out is to require the grant of leave by the Court in respect of any action against an official liquidator, so that the Court can satisfy itself that there is no wrongful interference with the process.**
>
> [29] **The control by the Court over the circumstances in which and the extent to which its own officers are to be subjected to personal liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the Court of its own process** (see: *Re Siromath* [1991] 1 ACLC 587).

> [30] **Therefore, before leave could be granted, the Court must be satisfied that there is sufficient *prima facie* evidence to support any allegation made against the liquidator.** The Court finds support in the decision of the High Court in *TN Metal Industries Sdn Bhd v. Ng Pyek Yew* [1995] 5 MLRH 110...
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> [31] In *Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd* [2004] 2 MLRH 749, it was ruled that **when misfeasance proceedings are brought, it is necessary for the applicant not only prove his allegations but also necessitates him to prove pecuniary loss to the company.**"
>
> [Emphasis Added]

**[32]** In *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal* [2009] 3 MLRA 495 ('*Woodsville*'), the Court of Appeal reaffirmed its earlier decision in *Chi Liung Holdings* that leave of the winding up Court is required before an action can be brought against a liquidator. The Court of Appeal also rejected the contention that leave of the winding up Court is only required when the proposed action against a liquidator is filed before a different Court. The Court of Appeal said:

> "[18] We would agree with the submission of learned Counsel for the liquidator. Upon perusing the authorities referred to earlier, **we are of the unanimous view that prior leave from the Court is required before the appellant can make any application for leave under O 52 r 2 of the Rules of the High Court as against the liquidator, him being an officer of the Court.** It is clear that the appellant was not armed with such leave when he made the application against the liquidator.
>
> [19] As discussed earlier, learned Counsel for the appellant in referring to *In re Maidstone Palace of Varieties Limited*, argued that leave of the winding up Court is required only when the proposed action against a liquidator is pursued in another Court other than the winding up Court. We do not agree with Counsel's proposition. **Whether the purported action against the liquidator is in another Court or the winding up Court is irrelevant.**..."
>
> [Emphasis Added]

**[33]** In *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [2009] 5 MLRH 462 ('*See Teow Guan*'), the High Court cited the decision of the Supreme Court of New South Wales in *Mamone & Anor v. Pantzer* (2001) 36 ACSR 743 ('*Mamone*'), which explained the twofold purpose underlying the requirement for leave to proceed against a liquidator, namely that the Court has a duty to protect its officer from spurious and vexatious litigation as well as to prevent wrongful interference with the winding up process. The High Court further held that in granting leave to sue a liquidator, the Court should be satisfied that the proposed claim has sufficient merit and the Court has the discretion to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the proposed claim. The High Court held as follows:

"[6] What are the principles upon which leave is granted to commence legal action against a liquidator in the present context? The legal position was considered in *Mamone & Anor v. Pantzer* (2001) 36 ACSR 743 where Santow J held as follows:

> ... **The applicable principles and their public purpose which underlie the requirement that a prospective litigant must obtain leave to sue a Court-appointed liquidator can be stated in the following propositions**:
>
> (i) **The Court will protect its officer from spurious or vexatious litigation**: *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25 at p 29; *Re Magic Australia Pty Ltd (in liq)* [1992] 7 ACSR 742 at p 746; 10 ACLC 929 at p 932; and
>
> (ii) **The Court will protect the integrity of the winding up process to ensure no wrongful interference with that process**: *Sydlow Pty Ltd (in liq) v. TG Kotselas Pty Ltd* (1996) 65 FCR 234 at p 241; 144 ALR 159 at p 165-6.

**To those ends, a prospective litigant must, to obtain the necessary leave, demonstrate its claim has sufficient merit. What is sufficient is affected by the circumstances and timing in which that leave is sought. Moreover Courts recognise that liquidators, like administrators, often have to make decisions on the run; to expect perfection in those circumstances is unrealistic.** In *Sydlow* above, Tamberlin J stated at FCR 242; ALR 165:

> **The discretionary power of the Court to grant leave must be exercised having regard to all the circumstances of the particular cases and bearing in mind the need to protect the integrity of its process.... there must be more than mere assertion. The Court's discretion may be exercised on many grounds, including, but not limited to, the sufficiency of the evidence adduced, as to the prospects of success of the action on the application for leave**...

[7] To summarise, **the Court is bound to keep in mind its duty to protect the liquidator from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process in deciding on whether or not to grant leave. On the facts of any particular case, sufficient merits have to be shown... mere assertion is insufficient. The Court is at liberty to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the prospective suit. It is evident therefore that there must be a minimum or threshold level of evidence substantiating the claim of a breach of duty to warrant the grant of leave.**

[8] **And locally in *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor*** [2006] 4 MLRH 110 **Ramly Ali J (now JCA) went further to hold that a *prima facie* case is required**...

[9] It is evident from the cases above that **the grant of leave cannot be merely cursory. It requires an analysis of the evidence put forward in support of the alleged breaches by the liquidator to ascertain whether such evidence is merely frivolous and vexatious and is in effect bare assertion, or whether**

**it meets a threshold level which warrants categorisation as possessing sufficient merit. In deciding on this issue in any particular case, the Court is entitled to take into account a multitude of circumstances and factors. A significant indicator will be pecuniary loss.**"

[Emphasis Added]

**[34]** In the landmark case of *Ooi Woon Chee & Anor v. See Teow Chuan & Ors & Other Appeals* [2012] 1 MLRA 687 ('*Ooi Woon Chee*'), the Federal Court clarified the test for the granting of leave to commence proceedings against a liquidator. It was held that in order to successfully obtain such leave, a prospective litigant should demonstrate a *prima facie* case (see: *Abric* at p 116; *TN Metal Industries* and *Sarawak Timber Industry*). The Court explained that the *prima facie* standard was imposed in order to protect the Court's officer and the winding up process. The Federal Court also held that in applying the test of whether a *prima facie* case was made out, the Court is compelled to evaluate the evidence led to determine whether such test is in fact met (see: *Mamone*). It was further held that pecuniary loss suffered by the wound-up company should be shown (see: *Abric*). This is what the Federal Court stated:

"[11] **For leave to be granted to proceed with the 505 Suit, pecuniary loss must be shown, otherwise the action would be a waste of time and costs.** On this point in the case of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2006] 4 MLRH 110 at p 116 it was held that **in an application for leave to commence proceedings for, *inter alia*, breach of duty against a liquidator, it is necessary to prove pecuniary loss to the company.**

...

[15] **In order to succeed for the granting of leave the majority contributories must also make out a *prima facie* case, a standard to protect the Court's officer and the winding up process** (see the cases of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd* [2006] 4 MLRH 110; *TN Metal Industries Sdn Bhd v. Ng Pyak Yeow* [1995] 5 MLRH 110 and *Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd* [2004] 2 MLRH 749. These cases show that **in applying the test, the Court is compelled to evaluate the evidence led to determine whether the test is met.** In *Mamone And Another v. Pantzer* (2001) 36 ACSR 743, it was held that **prospective litigant must, to obtain leave, demonstrate its claim has sufficient merit.**"

[Emphasis Added]

**[35]** In proceeding to set out the test for granting leave to commence proceedings against a liquidator, the Federal Court in *Ooi Woon Chee* has confirmed that such leave is in fact required. This pronouncement of the Federal Court, being the Apex Court, has established a principle of law in this jurisdiction to the effect that leave of the winding up Court is required before proceedings can be commenced against a Court-appointed liquidator.

**[36]** More recently, the law applicable to the grant of leave for the commencement of proceedings against a liquidator was considered by the Federal Court in *Tee*

*Siew Kai (Liquidators For Merger Acceptance Sdn Bhd (In Liquidation)) v. Machang Indah Development Sdn Bhd (In Liquidation) (Previously Known As Rakyat Corp Sdn Bhd)* [2020] 2 MLRA 295 ('*Tee Siew Kai*'). This case concerned the issue of whether a party, that is neither a creditor nor a contributory of a wound-up company, has the *locus standi* to seek leave to initiate an action against the liquidator of that company. In deciding this issue, the Federal Court discussed the rationale behind requiring prior leave of Court to sue a liquidator and reiterated the test for the grant of such leave as set out in *Ooi Woon Chee*. The Federal Court has accordingly reaffirmed that leave of the winding up Court is indeed required before proceedings can be commenced against a liquidator. The Court observed as follows:

> "[74] This brings into focus the secondary issue of when and how leave ought to be granted to proceed against a Court appointed liquidator personally.
>
> [75] **It is apt at this juncture to consider the role of the winding up Court in a liquidation.** For this we turn to the case of *Lloyd-Owen v. Alfred E Bull & Ors* [1936] 1 DLR 433 where the Privy Council observed that:
>
> > **A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success: where as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.**
>
> [76] **The underlying rationale behind requiring prior leave of Court is to avoid wasteful litigation being conducted against liquidators and the like and to preclude unwarranted and wrongful interference with the winding up process**: *Chi Liung Holdings* at p 677 and *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [2009] 5 MLRH 462 at para [7].
>
> [77] **The 'probable success' test mentioned above has been further refined by this Court in *Ooi Woon Chee & Anor v. See Teow Chuan & Ors* & *Other Appeals*** [2012] 1 MLRA 687. **There this Court undertook a consideration of the factual matrix of the case before concluding that no *prima facie* case had been made out. It was held that in order to succeed in an application for the grant of leave the party seeking such leave must make out a *prima facie* case** (citing, *inter alia*, *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2006] 4 MLRH 110 at p 116, *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1995] 5 MLRH 110, and *Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd* [2004] 2 MLRH 749).
>
> [78] **More significantly, this Court held that in applying the test of whether a *prima facie* case was made out, the Court is compelled to evaluate the evidence led to determine whether such test is in fact met** (see *Mamone And Another v. Pantzer* (2001) 36 ACSR 743 where it was held that **the claim has to have sufficient merit**).

[79] **It was also held that pecuniary loss suffered by the company in liquidation ought to be shown** (citing *Abric*)."

[Emphasis Added]

**[37]** Based on the above authorities, the position adopted by the Malaysian Courts thus far can be summarised as follows:

(a) A Court-appointed liquidator is an officer of the Court and therefore leave of the winding up Court should be obtained before proceedings can be commenced against him. In this regard:

(i) In *Chi Liung Holdings* (at p 674), the Court of Appeal cited s 236(3) of the 1965 Act (which, as stated earlier, is in *pari materia* with s 486(2) of the 2016 Act) in support of its reasoning that a liquidator appointed by the Court is an officer of the Court;

(ii) In *Abric* (at para [24]), the High Court referred to r 63 of the Winding-Up Rules, which expressly recognises a liquidator as an officer of the Court;

(b) The rationale underlying the requirement that a prospective litigant should obtain leave to sue a Court-appointed liquidator is twofold:

(i) The Court will protect its officer from spurious or vexatious litigation;

(ii) The Court will protect the integrity of the winding up process to ensure no wrongful interference with that process;

(See: *Tee Siew Kai* at para [76]; *Chi Liung Holdings* at p 675; *See Teow Guan* at paras [6] — [7]; *Abric* at paras [28] — [29], and *Sarawak Timber Industry* at paras [33] — [34]);

(c) Leave of the winding up Court is required regardless of whether the proposed action against a liquidator is filed before the winding up Court or another Court.

(see: *Woodsville* at para [19]);

(d) The test for granting leave to commence proceedings against a Court-appointed liquidator was initially formulated in *Chi Liung Holdings* (at p 674), where the Court of Appeal held that the Court should be satisfied as to the probable success of the proposed claim and that the proposed claim should not be vexatious or merely oppressive. This test was further refined

by the Federal Court in *Ooi Woon Chee* (at paras [10] — [15]), where it was held as follows:

(i) The party seeking leave to proceed against a liquidator should make out a *prima facie* case (see: *Abric* at p 116; *TN Metal Industries* and *Sarawak Timber Industry*). In applying the test of whether a *prima facie* case was made out, the Court is compelled to evaluate the evidence led to determine whether such test is in fact met; and

(ii) Pecuniary loss suffered by the wound-up company should be shown (see: *Abric*).

**J. The Court of Appeal Decision In *Kao Che Jen***

**[38]** Notwithstanding the well-settled position as set out above, namely that leave of the winding up Court should be obtained before proceedings can be commenced against a Court-appointed liquidator, the Court of Appeal in the instant appeal adopted a diametrically opposite approach. As noted earlier, the Court of Appeal in the instant appeal arrived at its decision by relying on its previous decision in *Kao Che Jen*. It is therefore pertinent to examine the reasoning adopted by the Court of Appeal in *Kao Che Jen* in order to ascertain and comprehend the decision in that case, and in turn, the decision of the Court of Appeal in the instant appeal.

**[39]** As explained earlier, *Kao Che Jen* involved the same parties as in the present appeal. In *Kao Che Jen*, the Contributory filed an application seeking to remove the Liquidator premised on s 232(1) of the 1965 Act and to appoint the official receiver as the new liquidator. The Court of Appeal held that there was no requirement to obtain leave before commencing proceedings to remove the Liquidator. The rationale for this conclusion can be found, *inter alia*, in paras 7, 27 and 28 of the judgment. In essence, the Court of Appeal held:

(a) A cursory reading of s 232(1) of the 1965 Act does not disclose, on the face of it, any requirement for leave as a prerequisite to any application to remove a liquidator;

(b) Section 266 of the 1965 Act also does not have any such express provision that requires leave;

(c) Therefore, the expressed legislative intent of the law shows that no such requirement is necessary and accordingly leave is not a condition precedent for the purposes of making an application for the removal of a liquidator in a winding up ordered by the Court;

(d) At paras 27 and 28, the Court of Appeal held that s 232(1) of the 1965 Act was to be compared with s 226(3) of the 1965 Act which expressly stipulates that leave of Court is required before proceeding with or against a company which has been wound up;

(e) Similarly, a comparison was drawn with s 181A of the 1965 Act which expressly requires leave of Court before an action may be brought on behalf of a company by a complainant;

(f) Consequently, the Court of Appeal concluded that if indeed leave is required for the removal of a liquidator, that would have been expressly stipulated as a necessity under s 232(1) of the 1965 Act;

(g) It is incorrect to construe a statute by reading words into a section which does not clearly contain those words;

(h) Applying the rules of statutory construction, it was patently wrong for the Judge of first instance to construe s 232(1) of the 1965 Act as stipulating a need for leave of Court to be obtained prior to the removal of a liquidator; and

(i) Accordingly, the Court of Appeal held that there is no requirement for leave prior to the initiation of an action or proceedings to remove a liquidator.

**[40]** For ease of reference, we reproduce s 232(1) of the 1965 Act, which provides as follows:

"Section 232. General provisions as to liquidators.

(1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court."

**[41]** We also reproduce s 266 of the 1965 Act, which reads as follows:

"Section 266. Removal of liquidator.

The Court may, on cause shown, remove a liquidator and appoint another liquidator."

Sections 232(1) and 266 of the 1965 Act (in *pari materia* with ss 482 and 453(2) of the 2016 Act respectively)

**[42]** As noted above, s 232(1) falls within Subdivision (2) of Division 2 of the 1965 Act, which is entitled "WINDING UP BY THE Court". Sections 217 to 226 relate to the application of winding up. Sections 227 to 240 of Subdivision (2) refer to liquidators. Section 232(1) of the 1965 Act therefore falls within the subdivision relating to liquidators. As stated above, s 232(1) of the 1965 Act is preceded by a heading "General provisions as to liquidators ". Section 232(1) of the 1965 Act, as reproduced above, stipulates that a liquidator in a winding up by the Court is appointed by the Court and on cause shown, can be removed by the Court. It also allows for the Court-appointed liquidator to resign. The rest of the provisions in s 232 of the 1965 Act relate to the remuneration of a liquidator and the ratification of his acts.

**[43]** Having perused the context within which s 232(1) of the 1965 Act is placed in the scheme of matters relating to liquidators in a winding up scenario

who are appointed by the Court, it appears that s 232(1) of the 1965 Act is a statutory provision conferring the power to appoint and remove liquidators on the Court. Put another way, where there is a power of appointment, there generally should reside a power of removal. And this is statutorily embodied in s 232(1) of the 1965 Act. It vests the power of appointment and removal in the winding up Court. It is evident even from s 232(1) of the 1965 Act itself that any removal of a Court-appointed liquidator can only be done by the Court and to that extent, requires the leave of Court.

**[44]** In the context of the control of the winding up Court over liquidators and the removal of liquidators, it is relevant in our view to take into account the provisions of Division 4 of the 1965 Act, which sets out statutory provisions which are applicable to every mode of winding up. Subdivision (1) contains general provisions applicable to both winding up by the Court and voluntary winding up. Section 277(2) of the 1965 Act (which is in *pari materia* with s 510(1) of the 2016 Act) provides specifically for control of the Court over liquidators:

> "**Control of Court over liquidators**
>
> (2) **The Court shall take cognizance of the conduct of liquidators**, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or **if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit**."
>
> [Emphasis Added]

**[45]** This subsection therefore statutorily recognises that it is the winding up Court that retains control over liquidators and that any complaint by any creditor or contributory warrants an inquiry into the matter. It is clear from all these provisions that any application to remove a liquidator can only be undertaken by a Court, that too the winding up Court that appointed him as the liquidator in the first place. The single issue is therefore whether the Court is to undertake a *prima facie* assessment of the significance of the complaint and then proceed to hear the matter in full, namely by the grant of leave, or whether the Court is bound to undertake a full investigation into each and every complaint of contributories and creditors when a complaint is levelled against a liquidator. In both instances, the matter is before the winding up Court. It is simply whether the requirement for leave as a first step or as an initial requirement is envisaged under these statutory provisions or not.

**[46]** The Court of Appeal in its decision in *Kao Che Jen* undertook a literal reading of s 232(1) of the 1965 Act in determining that no such leave was required simply because there were no such express words to that effect. This brings to the fore the issue of the mode of statutory construction to be adopted when interpreting a statute.

**[47]** As we have stated earlier, the nub of the reasoning of the Court of Appeal in *Kao Che Jen* is that it is the duty of the Court, when interpreting a statute, to construe it according to the intention of the legislature. To this end, it was held that the Court must give effect to the legal meaning of a statute just as it reads where the law is plain, straightforward and unambiguous. The function of the Court is limited to interpreting and giving effect to the words used by the legislature. The Court is not entitled to read words into a statute unless a clear reason for it is to be found in the statute itself, citing decisions of the Federal Court and the Supreme Court.

**[48]** The Court of Appeal observed that neither s 232(1) nor s 266 of the 1965 Act expressly imposes a requirement for leave as a prerequisite before any application to remove a liquidator can be commenced. It was accordingly held that the expressed legislative intent of the law plainly and logically shows that no such requirement is necessary.

**[49]** The Court of Appeal further justified its reasoning by comparing s 232(1) of the 1965 Act with s 226(3) of the 1965 Act, which expressly requires leave of Court before an action or proceeding can be proceeded with or commenced against a company when a winding up order has been made or a provisional liquidator has been appointed, and s 181A of the 1965 Act, which imposes a similar requirement before a complainant may bring, intervene in or defend an action on behalf of a company. The Court of Appeal held that Parliament would have expressly provided in s 232(1) of the 1965 Act for leave to be obtained before an application to remove a liquidator can be commenced, as it did in ss 226(3) and 181A of the 1965 Act, if that is the legislative intent.

**[50]** However, with the greatest of respect, it is not tenable to draw an analogy between s 232(1) of the 1965 Act, which provides a power of appointment and removal to the Court in relation to a liquidator in a compulsory winding up situation, with s 226(3) of the 1965 Act, which deals with the initiation of an action or continuation of proceedings against the company in liquidation. They are two completely disparate issues. The only similarity that may be gleaned is if the two statutory provisions are read in a literal and grammarian fashion. Similarly, s 181A of the 1965 Act deals with a statutory derivative action which again has no nexus with the appointment and removal of a liquidator in a winding up by the Court. In order to comprehend the true intent of Parliament in relation to whether or not leave is required, it is necessary to construe ss 232(1) and 277(2) in the context of the purpose and object of the 1965 Act. This is borne out of s 17A of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts').

**[51]** The winding up of a company is governed by Part X of the 1965 Act (which is now reflected in Part IV of the 2016 Act) and the Winding-Up Rules. The primary object of winding up a company is to collect and distribute the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts (see: *Mosbert Berhad (In Liquidation) v. Stella D' Cruz* [1985] 1

MLRA 558 at p 559). Thus, the predominant role of a liquidator is to safeguard the interests of the unsecured creditors.

**[52]** The winding up Court maintains control and supervision over a liquidator to ensure that the winding up process is carried out in an orderly manner. This function of the winding up Court is enshrined in s 236(3) of the 1965 Act, which stipulates as follows:

> "**236. Powers of liquidator**
>
> ...
>
> (3) The exercise by the liquidator of the powers conferred by this section shall be **subject to the control of the Court**, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers."
>
> [Emphasis Added]

**[53]** The phrase "subject to the control of the Court" in s 236(3) of the 1965 Act essentially means that a liquidator is answerable to the Court in the performance of his duties. He is obligated to conduct the winding up process pursuant to the order granted by the winding up Court. Once the liquidator is sanctioned to perform his duties by virtue of his appointment by the winding up Court, no party can interfere with him save with the permission of the winding up Court. It would amount to an abuse of process if proceedings can be commenced against the liquidator before a different Court notwithstanding the supervision exercised by the winding up Court over the liquidator and the winding up process as a whole.

**[54]** Leave of Court refers to the sanction and permission of the Court. In seeking leave of Court, a prospective litigant informs the Court regarding a proposed step to be taken in a proceeding. Since a liquidator is subject to the control of the Court as provided under ss 236(3) and 277(2) of the 1965 Act, the Court should be advised in the event any action, including an application to remove the liquidator, is proposed to be initiated against the liquidator. In other words, the phrase "subject to the control of the Court" in s 236(3) of the 1965 Act is equivalent to a requirement for leave of Court to commence proceedings against the liquidator. This interpretation of s 236(3) of the 1965 Act is in line with the common law position adopted in other jurisdictions. Similarly, s 277(2) of the 1965 Act, by requiring the Court to enquire into any alleged misconduct by the liquidator, effectively imposes a requirement for leave of Court to be obtained prior to any action being taken against the liquidator.

**[55]** Furthermore, as set out earlier, a liquidator has the status of an officer of the Court pursuant to r 63 of the Winding-Up Rules. It follows that the winding up Court, having appointed the liquidator, has the sole authority to supervise, discipline and, if necessary, remove its officer. As such, leave of the

winding up Court should be obtained before commencing any proceedings against the liquidator.

**[56]** When s 232(1) of the 1965 Act is read together with ss 236(3) and 277(2) of the 1965 Act and r 63 of the Winding-Up Rules, the inevitable conclusion should be that leave of the winding up Court is required before proceedings for the removal of a liquidator can be commenced. The Court of Appeal in *Kao Che Jen* ought to have taken such a holistic construction of the provisions of the 1965 Act and the Winding-Up Rules.

**[57]** When interpreting a statutory provision, the Court must consider the purpose and object of the underlying statute. Section 17A of the Interpretation Acts states as follows:

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

(See also: *Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain* [2022] 4 MLRA 547 ('*Bursa Malaysia Securities*'), and *Tebin Mostapa (As Administrator Of The Estate Of Mostapa Asan, Deceased) v. Hulba-Danyal Balia & Anor (As Joint Administrators Of The Estate Of Balia Munir, Deceased)* [2020] 4 MLRA 394).

**[58]** Section 17A of the Interpretation Acts makes it clear that a statutory provision ought to be read in a contextual, as opposed to a purely textual manner (see: *Bursa Malaysia Securities* at para [51]). Unfortunately, however, the Court of Appeal in *Kao Che Jen* resorted to the latter approach when interpreting ss 232(1) and 266 of the 1965 Act. In interpreting these provisions, the Court of Appeal failed to consider the wider context of Part X of the 1965 Act and the Winding-Up Rules. Neither did the Court undertake any analysis of the rationale behind the winding up process. Although the Court of Appeal justified its approach on the basis of giving effect to the legislative intent, that is precisely what the Court failed to do by adopting a strictly grammatical reading of the relevant provisions. In *Bursa Malaysia Securities*, the Federal Court observed as follows:

> "[77] Regrettably neither the High Court nor the Court of Appeal undertook any sort of consideration of the purpose nor principles set out in the rules in order to ascertain the meaning to be accorded to the word... This was explained on the basis that as there was no ambiguity there was no necessity to consider anything other than the express words used. This was understood to amount to a literal reading of the relevant rule falling for consideration. In so doing, the Court of Appeal misunderstood the function and purpose of the literal rule of statutory construction. **Reading the express words set out in a statute *in vacuo* and without taking into consideration the context in which those words are utilised, does not amount to a literal approach to statutory interpretation. That is a grammatical application of the meaning of words. Section 17A of the Interpretation Acts requires that the purpose and object of an Act and other instruments made under an Act must be**

> **undertaken when construing a statute. As s 17A is a statutory provision, it must be complied with.** Therefore, both the High Court and the Court of Appeal, in failing to undertake this task as provided for in s 17A, committed an error of law."
>
> [Emphasis Added]

**[59]** Interestingly, the Court of Appeal in *Kao Che Jen* referred to the Supreme Court decisions in *Zainal Abidin Putih & Anor v. Che Wan Development Sdn Bhd* [1992] 1 MLRA 71 and *Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors* [1994] 1 MLRA 412, which held that since receivers are appointed by the Court and are thus officers of the Court, leave of the Court should be obtained to proceed against them. The Court of Appeal also referred to its previous decision in *Woodsville* and acknowledged the principle established therein that leave of the Court is necessary to sue a liquidator by virtue of him being an officer of the Court.

**[60]** Nonetheless, the Court of Appeal in *Kao Che Jen* distinguished the above cases on the grounds that each of those cases concerned proceedings brought against the liquidator or receiver personally for certain acts or in connection with the performance of their duties and accordingly did not involve any legislative provision equivalent to ss 232(1) or 266 of the 1965 Act. The Court of Appeal emphasised that the action before it was governed by ss 232(1) and 266 of the 1965 Act, neither of which specified leave as a prerequisite to an application for the removal of a liquidator.

**[61]** The above is, with respect, an artificial distinction devoid of merits. There is, in substance, nothing that differentiates an application to remove a liquidator from an action commenced in respect of the performance of his duties. Both are proceedings which will interfere with the functions of an officer of the Court. The rationale behind imposing a requirement for leave before any proceedings can be brought against the liquidator is to protect him from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process. These reasons apply equally in the context of an action to remove the liquidator, where a requirement to seek prior leave of the winding up Court will protect the liquidator from having to defend himself against potentially frivolous applications for his removal, which will in turn allow him to focus on the task of administering the affairs of the wound-up company for the ultimate benefit of the unsecured creditors.

**[62]** In our view, this Court ought to adopt the reasoning in *Yap Cheng Hai v. Yap Cheng Hai Feng Shui Center Of Excellence Sdn Bhd & Ors* [2010] 16 MLRH 338 (which was found by the Court of Appeal in *Kao Che Jen* to have misconstrued s 232(1) of the 1965 Act). In finding that leave of the Court ought to be sought before initiating an application to remove a liquidator, Mary Lim JC (now FCJ) held as follows:

> "10.... Looking at the numerous provisions concerning the role, decisions, actions of the Liquidator, or any question arising in the course of the

liquidation, **it is clear that the Court maintains an overall supervisory role in the liquidation of any company. The Court needs to be informed in the event that the officer appointed to attend to the liquidation of the company is not progressing as the officer should under the related law and in the given circumstances. It is serious business to launch any allegation leading to a removal of a liquidator. Hence, leave of the Court ought to be sought.**"

[Emphasis Added]

**[63]** In short, the decision of the Court of Appeal in *Kao Che Jen* was based on a literal construction of ss 232(1) and 266 of the 1965 Act. In this context, it must be pointed out that s 266 of the 1965 Act refers to liquidators in the context of a voluntary winding up and not a compulsory winding up. To that extent, the use of s 266 of the 1965 Act is in error.

**[64]** The reasoning in *Kao Che Jen* has since been followed in two subsequent Court of Appeal decisions, namely *Shencourt Sdn Bhd v. Shencourt Properties Sdn Bhd* [2019] 3 MLRA 70 and *Jagdis Singh Banta Singh & Anor v. Return 2 Green Sdn Bhd* [2021] 2 MLRA 418. Both these cases similarly erred in holding that s 482(b) of the 2016 Act (which is in *pari materia* with s 232(1) of the 1965 Act) does not impose a requirement for leave of Court to be obtained before an action for the removal of a liquidator can be commenced. This has added to the confusion in relation to this issue.

**K. The Errors In The Judgment Of The Court of Appeal In The Instant Appeal**

**[65]** As stated earlier, the Court of Appeal in the instant appeal relied on *Kao Che Jen* in arriving at its finding that there is no requirement pursuant to s 486(2) of the 2016 Act (which is in *pari materia* with s 236(3) of the 1965 Act) for leave of Court to be obtained before an action can be brought against a liquidator. Section 486(2) of the 2016 Act is reproduced below for convenience:

"**486. Powers of liquidator in winding up by Court**

(2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is **subject to the control of the Court** and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers."

[Emphasis Added]

**[66]** Put simply, the Court of Appeal in the instant appeal held that the absence of the phrase "leave of the Court" from s 486(2) of the 2016 Act means that leave is not necessary to proceed against a liquidator. This is, for the reasons that have been enunciated at length above, a purely grammatical reading of the words in s 486(2) of the 2016 Act. As explained earlier, the requirement for leave of the winding up Court to be obtained before proceedings can be commenced against a liquidator is in fact contained within s 486(2) of the 2016 Act in the form of the phrase "subject to the control of the Court". The

Court of Appeal in the instant appeal, however, accorded an overly simplistic interpretation to s 486(2) of the 2016 Act and failed to consider the provision in the context of Part IV of the 2016 Act and the Winding-Up Rules. In the circumstances, it is our view that the decision of the Court of Appeal in the instant appeal is flawed as it adopted the reasoning *in toto* of *Kao Che Jen*.

**[67]** More significantly, the decision of the Court of Appeal in the instant appeal did not make any reference to the Federal Court judgment in *Ooi Woon Chee*, which was premised on the principle that leave of the winding up Court is required before the commencement of proceedings against a Court-appointed liquidator. The Court of Appeal in the instant appeal was bound by the doctrine of *stare decisis* to follow this pronouncement from the apex Court. In failing to do so, the Court of Appeal in the instant appeal has committed a fundamental error of law. The importance of adhering to the doctrine of *stare decisis* was explained by the Federal Court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 MLRA 89 as follows:

> "[2]... **It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability.** In *PP v. Tan Cheng Swee & Anor* [1980] 1 MLRA 572, Chang Min Tat FJ had occasion to restate the doctrine in words which are poignantly clear when he said (at p 573):
>
> > **It is… necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior Courts in a common law system such as ours to follow similarly.**
>
> [3] **Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the Courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.** This fact was certainly borne in mind by the Court of Appeal in *Periasamy Sinnappan & Anor v. PP* [1996] 1 MLRA 277 wherein Gopal Sri Ram JCA said (at p 293):
>
> > We may add that **it does not augur well for judicial discipline when a High Court Judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court Judges that they are bound by all judgments of this Court and of the Federal Court and they must, despite any misgivings a Judge may entertain as to the correctness of a particular judgment of either Court, apply the law as stated therein.**
>
> [4] **The observation is but a stark reminder to Judges of the importance of adhering to the doctrine.** That observation, although made in the context of a peculiar factual setting, is, in my view, equally applicable to the particular situation in the instant case where the Court of Appeal has refused, for insufficient reasons, to follow and apply the 'real danger of bias'

test for recusal enunciated by the Federal Court in *Majlis Perbandaran Pulau Pinang* and *Mohamed Ezam*. **Until such time when the Federal Court holds otherwise, this test must remain entrenched and binding on all inferior Courts including the Court of Appeal. Certainty in the law must prevail.**"

[Emphasis Added]

**L. The Questions Of Law**

**[68]** For the foregoing reasons, we were unable to agree with the submissions of the Contributory that no leave of Court is required to remove a Court-appointed liquidator appointed under a compulsory winding up regime.

**[69]** It follows that the questions of law are answered as follows:

(a) Question 1

Whether the prior leave of the winding up Court is required in order for legal proceedings to be commenced against a Court-appointed liquidator in respect of matters transacted by the liquidator in the course of the liquidation under Divisions 1 and 2 of Part IV of the Companies Act 2016.

Answer: Yes, leave is required.

(b) Question 2

If the answer to question (1) is in the negative, whether such proceedings are to be brought in the winding up Court and/or within the winding up proceedings if, amongst others, an order against the liquidator in his official capacity is sought.

Answer: Since the answer to question (1) is yes, it is not necessary for the Court to answer question (2).

**[70]** For the foregoing reasons, we allowed the appeal with costs of RM50,000.00 subject to allocator.

**Rhodzariah Bujang FCJ:**

**[71]** I am moved to write this very brief judgment in support of that prepared by my learned sister, Nallini Pathmanathan, FCJ not to add anything to the facts and the law which have been so clearly and ably elucidated by my learned sister but to explain why I had taken a contrary stand in this case to the one that I took in *Shencourt Sdn Bhd*'s case *(supra)*, cited in para 64 of my learned sister's judgment, which judgment was written by my learned brother, Hamid Sultan, JCA.

**[72]** It behoves upon me to do this out of complete fairness to the respondent in this appeal and to better appreciate that contrary stand, I need to go back a little bit further in time when I was in the High Court. The parties in this case are fully

aware that it was my decision that was reversed by the COA in *Kao Che Jen*'s case *(supra)* mentioned in para 2 of my learned sister's judgment where I held that leave of the Court is required before an action can be commenced again a Court-appointed liquidator and I had, therefore, struck out the Originating Summons (OS no KCH-28-13/5/2013) filed by the respondent here against the appellant. That reversal by the Court of Appeal was done, as clearly shown by the case citation number, before the hearing of *Shencourt Sdn Bhd*'s case *(supra)*. In view of that reversal, I believed then, that I should not maintain the same stand that I took in the High Court when I sat in the Court of Appeal in *Shencourt Sdn Bhd*'s case *(supra)*.

**[73]** Back to the present case, I would say, with the utmost of respect to the respondent, that I am grateful for this opportunity and am fortified to reiterate that same stand which I took in the High Court for all the reasons, as I stated earlier, which had been clearly elucidated by my learned sister in her judgment. In particular, I would like to emphasise, as observed by my learned sister in para 67 of her judgment that we had in *Shencourt Sdn Bhd*'s case *(supra)*, likewise omitted to consider *Ooi Woon Chee*'s case, *(supra)* which we should have done.

**[74]** I would end this judgment of mine with a fervent hope that the explanation above would assist the parties herein to appreciate the reason for the obvious dichotomy in the judicial stand which I took in the Courts below on this longstanding issue regarding the requirement of obtaining leave of the Court before filing any action against a Court appointed liquidator.


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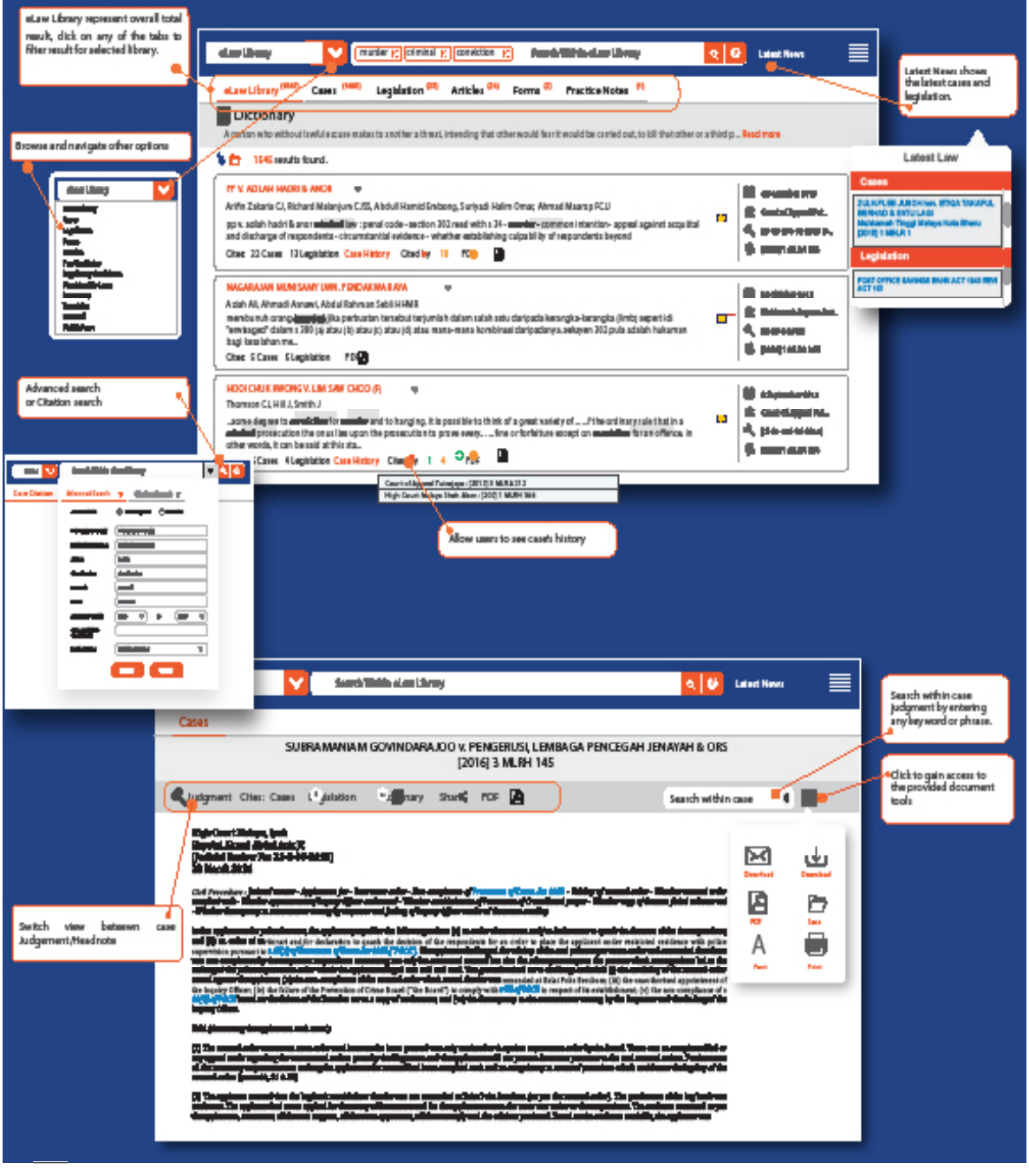

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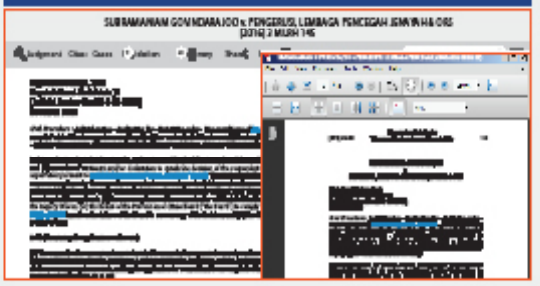

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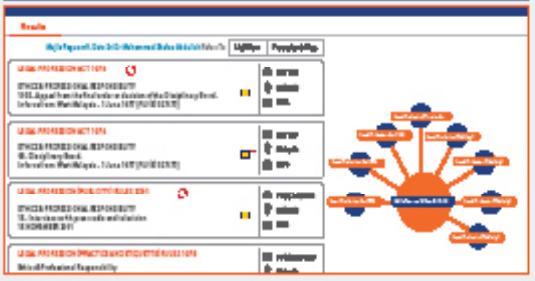

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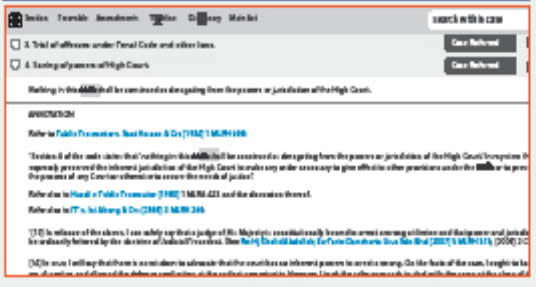

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