LIN WEN-CHIH & ANOR
v.
PACIFIC FOREST INDUSTRIES SDN BHD & ANOR

Federal Court, Putrajaya
Abang Iskandar Abang Hashim PCA, Mohd Zawawi Salleh, Zabariah Mohd Yusof FCJJ
[Civil Appeal No: 02(f)-38-07-2021(S)]
7 August 2023

Civil Procedure: *Res judicata — Applicability of — Claim for debt owed by company to former directors/shareholders (plaintiffs) — Whether plaintiffs' case caught by res judicata — Whether plaintiffs entitled to a fresh claim due to earlier suit being premature — Whether important elements of res judicata established and proven — New issues — Whether caught by principle of res judicata in wider sense*

Company Law: *Debts — Claim for debt owed by company to former directors/shareholders (plaintiffs) — Whether plaintiffs' case caught by res judicata — Whether plaintiffs entitled to a fresh claim due to earlier suit being premature — Whether important elements of res judicata established and proven — New issues — Whether caught by principle of res judicata in wider sense*

This case concerned a claim for a debt owed by a company to former directors/shareholders. The plaintiffs were brothers of Taiwanese nationals who were former shareholders and directors of the 1st defendant. They ceased to be shareholders/directors of the 1st defendant when they sold their shares to the 2nd defendant's representative and nominee. It was not disputed that at all material times the 1st defendant was indebted to the plaintiffs. The debt was admitted, acknowledged and evidenced, primarily through the 1st defendant's Letter of Acknowledgement, which was guaranteed by the 2nd defendant's Letter of Undertaking. The plaintiffs filed a suit in 1997 ('1997 suit') claiming the balance sum of the debt. They were unsuccessful, but filed another suit in 2013 ('2013 suit') against the defendants seeking the same amount. The High Court dismissed the 2013 suit, and the Court of Appeal affirmed that decision.

In this appeal, although the plaintiffs were granted leave to appeal on 10 questions of law, the one issue herein that would determine and dispose of the appeal was whether the plaintiffs' case was caught by *res judicata*. The plaintiffs highlighted that *res judicata* did not apply mainly because: (i) the 1997 suit was held to be premature, entitling the plaintiffs to a fresh claim. As regards the 'premature' 1997 suit, the plaintiffs challenged the Court of Appeal's assessment of the meaning of 'premature' in relation to the issue of *res judicata*; and (ii) the 2013 suit included new issues of unjust enrichment; reciprocal enforcement of the terms contained in the Letter of Acknowledgement; self-

induced frustration; and void or voidability of the payment arrangement – which were all not included in the 1997 suit.

Held (dismissing the appeal with costs):

(1) Upon careful examination of the written judgment of the Court of Appeal, specifically those paragraphs where the 'premature' issue was discussed, there was no redefinition of the word 'premature' as alleged. In fact, its understanding of the meaning of 'premature' was consistent with what the Courts in the 1997 suit had described. The Court of Appeal had analysed the present case and concluded that 'premature' as meant by the High Court and the Federal Court in the 1997 suit exemplified the fact that 'the plaintiffs had not complied with the terms of the Letter of Acknowledgement (cl 5) so as to trigger the 1st defendant's obligation to pay in cash' that the plaintiffs had not made out their case for purposes of the claim which was predicated on the Letter of Acknowledgement.' The above statement by the Court of Appeal was in line with what the High Court stated in the 1997 suit that 'since the plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature.' On this basis, there was no error by the Court of Appeal in its understanding of the meaning of 'premature' in the 1997 suit. (paras 40-42)

(2) In a challenge based on *res judicata*, the Court was also entitled to examine and analyse the written judgments of the 1997 suit and all other relevant records of appeal. In this respect, the important elements of *res judicata* were established and proved – that the identity of the subject matter of the present claim which was based on the same admission of debt evidenced through the Letter of Acknowledgement and the Letter of Undertaking had been conclusively dealt with on merits by the Courts in the 1997 suit; and that the parties were exactly similar. On the new issues raised, this Court agreed with the findings and decision of the Court of Appeal that those new issues, albeit being newly raised, were issues which fell under the category where the plea of *res judicata* applied, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (paras 42-45)

(3) Thus, the Court of Appeal was correct in applying the principle of *res judicata* to the circumstances of this appeal when holding that the issues raised in the 2013 suit were identical and bore similarities with those raised in the 1997 suit. Those issues raised in the 2013 suit were issues that could have been raised in the 1997 suit and, as such, they were caught by the principle of *res judicata* in the wider sense. This Court, therefore, declined to answer the questions posed because the outcome of that exercise would not alter the decision of the Court of Appeal. (paras 5-6)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 1 MLRA 611 (folld)

Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 2) [1966] 2 All ER 536 (folld)

Greenhalgh v. Mallard [1947] 2 All ER 255 (refd)

Henderson v. Henderson [1843] 3 Hare 100 (folld)

Hoystead v. Taxation Commissioner [1926] AC 155 (folld)

Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2019] 2 SSLR 283 (refd)

Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2000] 4 MLRH 443 (refd)

Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2008] 1 MLRA 690 (refd)

Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor [2021] 2 MLRA 376 (refd)

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 2 MLRA 471 (refd)

The Pacific Bank Bhd v. Chan Peng Leong [1998] 1 MLRA 81 (refd)

Yat Tung Investment Co v. Dae Heng Bank & Anor [1975] AC 581 (refd)

Legislation referred to:

Limitation Ordinance 1952, s 14

Counsel:

For the appellants: Roland Cheng Ho Wah; M/s Roland Cheng & Co

For the respondents: Alex Decena (Victor Chong Thien Loi, Leslie Chaw with him); M/s Poh & Victor Chong

JUDGMENT

Abang Iskandar Abang Hashim PCA:

Introduction

[1] We heard this appeal on 14 February 2022 with 10 questions of law (QOL) granted at the leave stage for our determination. The 10 QOLs concern mainly issues of unjust enrichment; *res judicata*; limitation; constructive/implied trust; estoppel; frustration; reciprocal promises; and appellate jurisdiction. The 10 QOLs read:

(i) Whether the test for unjust enrichment is "act or delivery of thing that can be said to have done by the Plaintiffs which was not intended to be done gratuitously that had benefitted the defendants?

(ii) Whether *res judicata* applies to a 2nd action filed after the Federal Court in a 1st action has ruled it to be premature with unsatisfied conditions precedent?

(iii) Whether the time ceases to run under the Sabah Limitation Ordinance ("SLO") during the duration of prosecution and appeal of a 1st action subsequently ruled by the Federal Court as premature and such time is excluded for filing a 2nd action?

(iv) Whether an admission of debt found and not extinguished can be categorised under constructive or implied trust thereby excluded under s 9 of SLO?

(v) Whether estoppel *per se* applies to admitted debt by a party from reneging its obligation to pay the admitted debt?

(vi) Whether a claim for unjust enrichment and/or for frustration falls under item 97 or 102 of SLO? If so, whether the limitation for unjust enrichment and/or frustration is 6 years or 12 years?

(vii) Whether a 2nd Panel of Court of Appeal may revisit and revise a finding by the 1st Panel of Court of Appeal on a same point of law and or fact? If so, what are the conditions under which a 2nd Panel of Court of Appeal may do so?

(viii) When does the cause of action arise and limitation starts to run for an admitted debt found to be not extinguished?

(ix) Whether the findings and pleadings in earlier judgments in a 1st action in respect of the same case by the High Court and Federal Court are binding on a 2nd Panel? If so, what are the circumstances in which the Court may go beyond the pleaded case and refer to an earlier judgment on the same case?

(x) Whether the test is "objective aim" or "real nature of transaction" to determine the order of performance of reciprocal promises?

[2] Before us, the major attack of the Court of Appeal decision was in respect of the alleged reopening of the issues that were already decided in the 1st 1997 suit in the sense that the Court of Appeal had redefined the meaning of "premature" inconsistent with what was held and decided by the Courts in the 1997 suit. This was raised in relation to the *res judicata* issue.

[3] Other matters concern the defence of limitation to the admitted debt that was allegedly not extinguished, unjust enrichment, constructive trust, frustration, estoppel and reciprocal promises.

Our Decision

[4] Having read the cause papers and parties' written submissions and having heard and considered the oral submissions by both the learned Counsel on all issues raised, we were unanimous in our view that the one issue that will determine and dispose of the appeal was whether the Appellants' case was caught by *res judicata*.

[5] In that regard, we were with the learned Counsel for the Respondents that the Court of Appeal justices were correct in applying the principle of *res judicata* to the circumstances of this appeal when holding that the issues raised in the 2013 suit were identical and bore similarities with those raised in the 1997 suit. Those issues raised in the 2013 suit were issues that could have been raised in the 1997 suit and as such, they were caught by the principle of *res judicata* in the wider sense.

[6] We therefore declined to answer the questions posed before us because the outcome of that exercise will not alter the decision of the Court of Appeal.

Background Facts And Antecedent Proceedings

[7] We begin by stating the background facts and the antecedent proceedings which are relevant and material in order to better appreciate the why and how *res judicata* applies in this appeal.

Parties' Relationship

[8] This case concerns a claim for debt owed by a company to former directors/shareholders. Lim Wen-Chih and Lim Wen-Chuan ("Plaintiffs") are brothers of Taiwanese nationals who were former shareholders and directors of Pacific Forest Industries Sdn bhd ("1st Defendant"). They ceased to be shareholders/directors of the 1st Defendant when they sold their shares to one Liu Ho-Tien who was described as the representative and nominee of Dutaland Berhad, formerly known as Mycom Berhad ("2nd Defendant").

[9] It was not disputed that at all material times the 1st Defendant was indebted to the Plaintiffs a total sum of RM10,134,000.00 as of 28 August 1996. The debt was admitted, acknowledged and evidenced, primarily through the 1st Defendant's Letter of Acknowledgement dated 12 November 1996, and which was guaranteed by the 2nd Defendant's Letter of Undertaking similarly dated 12 November 1996.

[10] The 1st Defendant's Letter of Acknowledgement is the most critical document as, although it was supposed to evidence parties' agreement on the mode of payment of the admitted debt, there were differences of interpretation by the parties of their rights and responsibilities in respect of the debt's settlement, particularly in respect of the following clauses, which we reproduced in verbatim:

"...

2) We shall sell and you shall purchase timber products manufactured by us ("the Timber Products") at a price consistent with the prevailing market price and costing the same amount as the Outstanding Sum plus the Agreed Interest ("the Timber Products Price") from us over a period of ten (10) months from today and to be delivered over four (4) shipments;

3) the Timber Products Price shall be deducted from and setoff against the Outstanding Sum and the Agreed Interest;

4) subject to item 5 hereinafter contained, the Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set-off against the Timber Products Price;

5) in the event that we shall fail, refuse and/or neglect to supply any of the Timber Products ordered by you or if any of the Timber Products supplied by us shall not be in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the Timber Products or replace the defective Timber Products and we have failed to do so, to cancel the order for such Timber Products or reject such Timber Products. Upon the order for such Timber Products being cancelled or such Timber Products being rejected and returned to us, we shall then pay cash *in lieu* of such Timber Products to you and such cash payment shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest; and

..."

[11] Pursuant to this arrangement, one delivery of Timber Products was successfully completed, hence reducing the debt amount to either RM6,223,241.00 as claimed by the Plaintiffs, or RM5,431,454.87 as alleged by the 1st Defendant.

The 1st 1997 Suit

[12] In 1997, the Plaintiffs filed the suit to claim RM6,223,241.00 being the balance of the outstanding sum. This claim was dismissed by the High Court on the basis of "premature" as the "Plaintiffs failed to comply with the terms stipulated in exh P2 (the Letter of Acknowledgement) within the time specified or within a reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen" as there was only one concluded order for the Timber Products out of four orders as contemplated in the Letter of Acknowledgement. The said decision is reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor* [2000] 4 MLRH 443.

[13] On appeal, the Court of Appeal reversed the findings of the High Court and set aside its decision on the basis of "frustration" as reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd (formerly known as Veramax Sdn Bhd) & Anor* [2008] 1 MLRA 690.

[14] On further appeal to the Federal Court, both the Defendants succeeded in setting aside the decision of the Court of Appeal and reinstating the judgment of the High Court because the "frustration" issue which was the basis of the Court of Appeal's decision was not the Plaintiffs' pleaded ground. The decision of the Federal Court is reported in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 2 MLRA 471.

[15] Notwithstanding, the matter did not end there. Another action was taken about 3 years after the 2009 decision of the Federal Court.

[16] Despite knowing that the 1st Defendant had stopped operating the sawmill in July 1998, the Plaintiffs issued another fresh order dated 23 October 2012 for the supply of Timber Products purportedly as per the Letter of Acknowledgement. Thirty days were given for shipment of the Timber Products. Nothing was forthcoming from the 1st Defendant. Thereafter, the Plaintiffs issued another letter in December 2012 cancelling the purchase order and demanding immediate cash payment of RM6,223,241.00. A letter of demand was also sent to the 2nd Defendant as a guarantor. In May 2013, the Plaintiffs filed the writ claiming the said sum together with interest thereto.

[17] The Defendants admitted receiving the notices and demands by the Plaintiffs. However, they denied liability mainly on two grounds – limitation and *res judicata*. Hence, a striking out application was filed and was allowed by the High Court.

[18] However, on appeal, the Court of Appeal reinstated the 2013 suit and set aside the High Court striking out order. Leave to appeal to the Federal Court was dismissed, and a review of the said Federal Court's decision was withdrawn. The 2013 suit then proceeded to trial. It is reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2019] 2 SSLR 283.

[19] In this 2013 suit, the High Court was of the view that the claim was not barred by limitation or *res judicata*. Limitation did not set in because the "parties were actively involved during the process of litigation in the 1997 suit when the said suit was filed on 22 November 1997 until it was finally decided on 7 September 2009 by the Federal Court after the appeal arising from the High Court and the Court of Appeal".

[20] As regards *res judicata*, the High Court provided 3 main reasons. Firstly, it noted that the 2013 suit concerned the claim for "the fresh order of Timber Products they made on 23 October 2012 after the expiry of the 10 months' period as per the term of the letter of Acknowledgement and subsequent to the pronouncement of the judgment in the 1997 suit." The High Court was of the view that "this fresh order in 2012 is made possible since the previous High Court held that the Plaintiffs' claim is premature due to incomplete orders which finding is confirmed and upheld by the Federal Court".

[21] Secondly, it was of the view that the Defendants' striking out application which was initially allowed by the High Court, was dismissed by the Court of Appeal. Further, by virtue of the dismissal for leave to appeal to the Federal Court, the High Court took the stance that "this only goes to show that the Federal Court is of the view that the principle of *res judicata* had no application in this case", such that based on the principle of *stare decisis*, the Plaintiffs' claim was not caught by *res judicata.*

[22] Thirdly, the High Court referred to the decision of the Court of Appeal in *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 1 MLRA 81 ("*The Pacific Bank Bhd*") to support its view that the dismissal of the Plaintiffs' claim in 1997 on the ground of premature was not a bar to the recovery of the said debt in the 2013 suit.

[23] Having so decided however, the High Court dismissed the Plaintiffs' claim after a full trial. We do not intend to delve into every aspect of the High Court's findings, but will focus on those aspects relating to its dismissal, on evidence, of the Plaintiffs' claim.

[24] Briefly, the High Court viewed that although the Defendants admitted the debt, the parties were however bound by the agreed mechanism for the payment according to the Letter of Acknowledgement, that is "by way of contra and set-off against the purchase price of the sale and supply of Timber Products over the period of 10 months." Importantly, the High Court found that there was only one concluded sale and which was set-off against the debt.

[25] The High Court also found that the alleged 3 other orders were mere enquiries and not formal offers to purchase the Timber Products due to the absence of agreement on the pricing. As the Plaintiffs failed to prove these 3 further orders and that the 1st Defendant had refused to sell the Timber Products and/or had quoted higher price, the 1st Defendant cannot be said to have failed to fulfil its obligation under the Letter of Acknowledgement.

[26] In other words, the High Court was of the view that based on the Letter of Acknowledgement, the Plaintiffs were duty bound to first make the orders before the 1st Defendant can supply the ordered Timber Products. Hence, the High Court found that the Plaintiffs, "by their own conduct had failed to comply with the express and clear terms of the Letter of Acknowledgement".

[27] The cash payment cl 5 was also not triggered as no evidence was adduced to show that "the 1st Defendant had refused to sell the Timber Products or if the Timber Products are sold, they were not in accordance with the specification or defective which give the Plaintiffs the right to cancel the order and to claim for cash payment upon the expiry of the specified period."

[28] Another important finding was that the 2012 fresh order was held to be a sham order to trigger utilisation of cash payment in cl 5 of the Letter of Acknowledgement, despite knowing that the 1st Defendant had already closed down in 1998.

Plaintiffs' Appeal And Defendants' Cross Appeal On Limitation And *Res Judicata*

[29] Dissatisfied, the Plaintiffs appealed to the Court of Appeal. The Defendants also filed notice of cross-appeal against the High Court's decision in respect of the issues of limitation and *res judicata*. This is reported in *Lin Wen-Chih & Anor v. Pacific Forest Industries Sdn Bhd & Anor* [2021] 2 MLRA 376. Briefly, the Court of Appeal affirmed the High Court's dismissal of the Plaintiffs' claim but reversed the findings on limitation and *res judicata.*

[30] On limitation, the Court of Appeal held that the 2013 suit was statutorily barred as it was filed about 10 years after the action was time-barred by 9 November 2003. On suspension of the limitation period by virtue of the earlier 1997 suit which was finally disposed of by the Federal Court in 2009, the Court of Appeal found that the exclusionary provision in s 14 of the Limitation Ordinance 1952 was not applicable to the facts of the case as there was no issue of jurisdiction or defect of it in the 1997 suit.

[31] Commenting on the case of *The Pacific Bank Bhd* relied on by the High Court as the authority that permits the filing of a fresh action, the Court of Appeal reasoned the "premature" ground in the 1st 1997 suit was not in the same sense as described or envisaged in *The Pacific Bank Bhd* because the Court of Appeal therein held the 1st letter of demand to be defective, which effectively means no proper demand was made and as such, there was in law, no valid cause of action entitling the issuance of the fresh demand.

[32] As for *res judicata*, the Court of Appeal had, upon analysing relevant reported cases and after a careful examination of the judgment of the 1997 suit, found that the facts and circumstances of the present case come within the principle of *res judicata* in the wider sense because:

(i) Cause of action in both 1997 and 2013 suits were exactly the same which was based on the Letter of Acknowledgement and the Letter of Undertaking;

(ii) The subject matter of both suits was exactly the same – the alleged outstanding sum of RM6,223,241.00 except for the accruing interest claimed in the 2013 suit;

(iii) The evidence adduced and issues raised by the Plaintiffs in the 2013 suit were substantially similar to what was produced in the 1997 suit.

[33] On the alleged "new issues" in the 2013 suit regarding the Plaintiffs being relieved of the obligations upon the expiry of the set-off period; the "void or voidable" status of the arrangement of payment in the Letter of Acknowledgement; and unjust enrichment, the Court of Appeal viewed that "these are issues which could have been, but were not raised in the 1997 suit...". Hence, it was held that "*res judicata* applies in respect of the multitude of issues which had been raised in the 2013 suit which are identical or bear a striking similarity to the issues which were raised in the 1997 suit. And, in so far as the so-called new issues are concerned, those are barred by *res judicata* in the wider sense."

How Does *Res Judicata* Apply?

***Res Judicata* In The Wider Sense**

[34] In deciding that the facts and circumstances of this case fall within the *res judicata* in the wider sense, we referred to what the Supreme Court held in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 1 MLRA 611. Peh Swee Chin, FCJ (delivering the judgment of the Court), in accepting the well-established meaning, utility and necessity of *res judicata*, acknowledged the difference of opinion and school of thought as to its precise limits and application in particular cases.

[35] The Supreme Court preferred the view that issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the Court, are still covered by the doctrine of *res judicata*. The justification for holding to such view is, as aptly stated that:

> "...it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the Courts being found always one step behind the resulting increase in litigation."

[36] *Henderson v. Henderson* [1843] 3 Hare 100 was quoted as defining the application of *res judicata* "not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time".

[37] The "every point which properly belonged to the subject of litigation" in *Henderson* which was subsequently explained by Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 as covering "issues or facts which are so clearly

part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them" was quoted with approval by the Privy Council in *Yat Tung Investment Co v. Dae Heng Bank & Anor* [1975] AC 581.

[38] In this case, the Plaintiffs highlighted that *res judicata* did not apply mainly because:

(i) The 1997 suit was held to be premature, entitling the Plaintiffs to a fresh claim; and

(ii) the 2013 suit included new issues of unjust enrichment; reciprocal enforcement of the terms contained in the Letter of Acknowledgement; self-induced frustration; and void or voidability of the payment arrangement – which are all not included in the 1997 suit.

[39] As regards "premature" 1997 suit, the Plaintiffs challenged the Court of Appeal's assessment of the meaning of 'premature' in relation to the issue of *res judicata*. It was alleged that the Court of Appeal has ascribed other meaning to such word when stating the following:

> "[147] The next point we will make as to the 1997 suit being "premature" is that the word premature which was used by the trial Judge to describe that suit was perhaps somewhat of a misnomer. Our understanding is that the 1997 suit was not premature in the sense as described or envisaged in *The Pacific Bank* case."

[40] We have carefully read and examined the written judgment of the Court of Appeal, specifically those paragraphs where "premature" issue was discussed, and we found that there was no redefinition of the word "premature" as alleged. In fact, its understanding of the meaning of "premature" was consistent with what the Courts in the 1997 had described.

[41] Firstly, it is important to understand that the authority used by the Plaintiffs which was also cited by the High Court in the 2013 suit as supporting the fresh claim was *The Pacific Bank Bhd* case where Gopal Sri Ram, JCA permitted the filing of a fresh action which was based on a defective invalid demand. In that regard, the Court of Appeal undertook a comparative analysis of the facts in *The Pacific Bank Bhd* and the present case, and concluded that "premature" as meant by the High Court and the Federal Court in the 1997 suit exemplified the fact that "the Plaintiffs had not complied with the terms of the Letter of Acknowledgement (cl 5) so as to trigger the 1st Defendant's obligation to pay in cash...that the Plaintiffs had not made out their case for purposes of the claim which was predicated on the Letter of Acknowledgement."

[42] The above statement by the Court of Appeal was in line with what the High Court stated in the 1997 suit that "since the Plaintiffs failed to comply with the terms stipulated in exh P2 within the time specified or within a reasonable time

after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature." On this basis, we found no error by the Court of Appeal in its understanding of the meaning of "premature" of 1997 suit.

[43] We must also add that in a challenge based on *res judicata*, the Court is entitled to examine and analyse the written judgments of the 1st 1997 suits and all other relevant records of appeal. As aptly stated by Lord Upjohn in the House of Lords' case of *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 that:

> "The broader principle of *res judicata* is founded on the twin principles so frequently expressed in Latin that they should be at an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts and reasons given by the Judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account..."

[44] In this respect, we were satisfied that the important elements of *res judicata* were established and proved – that the identity of the subject matter of the present claim which was based on the same admission of debt evidenced through the Letter of Acknowledgement and the Letter of Undertaking had been conclusively dealt with on merits by the Courts in the 1997 suit; and that the parties are exactly similar.

[45] On the new issues raised, we have highlighted that we agreed with the findings and decision of the Court of Appeal that those new issues, *albeit* being newly raised, are issues which fall under the category where "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (per Sir James Wigram, V-C in *Henderson v. Henderson* above).

[46] To conclude, we think it is appropriate to cite a passage by Lord Shaw (delivering the judgment of the Judicial Committee) in *Hoystead v. Taxation Commissioner* [1926] AC 155 in respect of the application of *res judicata*, in the following statement:

> "In the opinion of their Lordships, it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or

> the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle – namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

[47] Thus, given the strength of the authorities relied on in *Asia Commercial Finance*, we were constrained to hold that upon close examination and analysis of the facts and circumstances of this case, *res judicata* in the wider sense was rightly applied by the Court of Appeal.

[48] In the upshot, we dismissed the appeal with cost of fifty thousand ringgit to the Respondents to be paid by the Appellants subject to allocator fees. The decision of the Court of Appeal was therefore affirmed.

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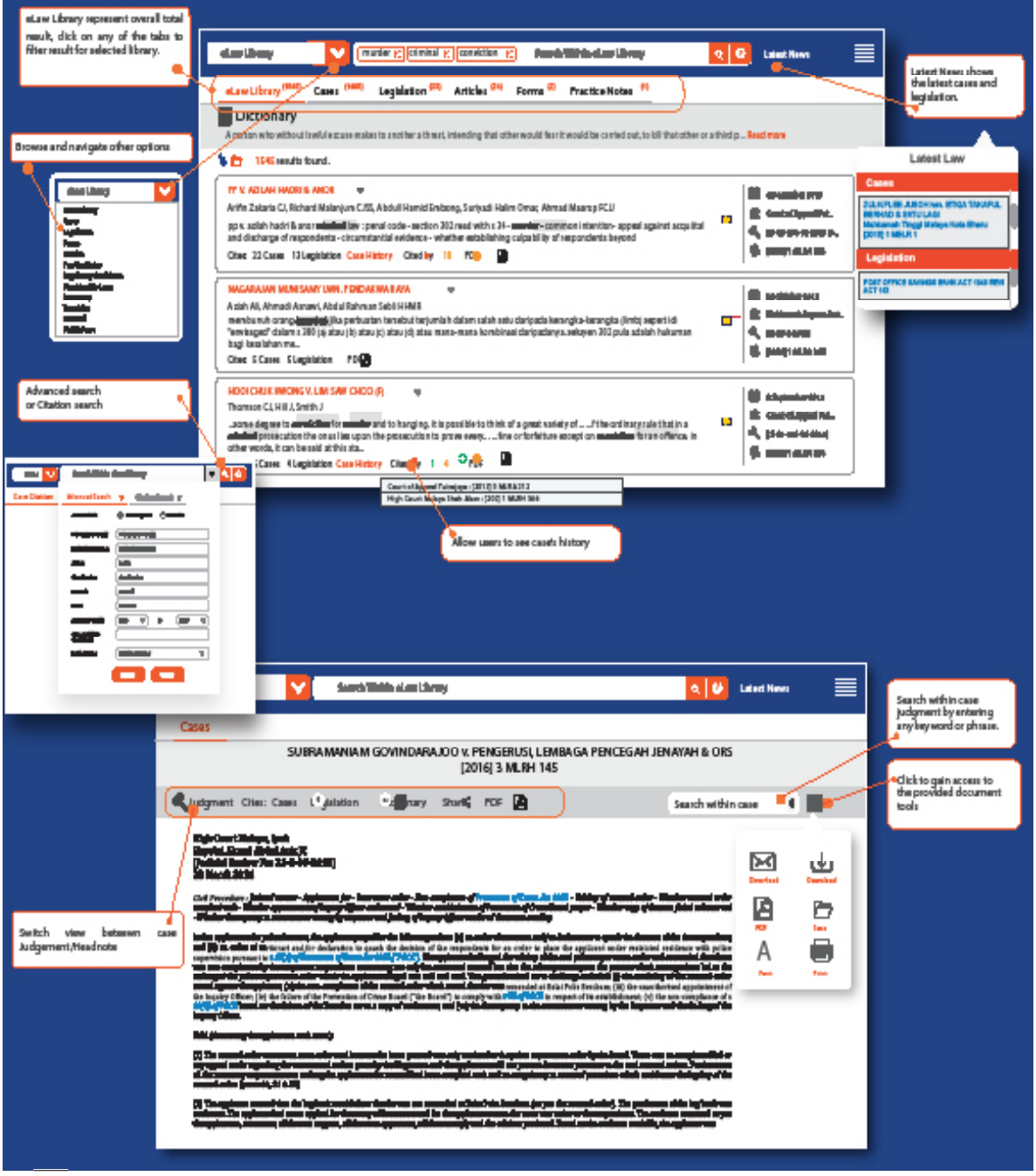

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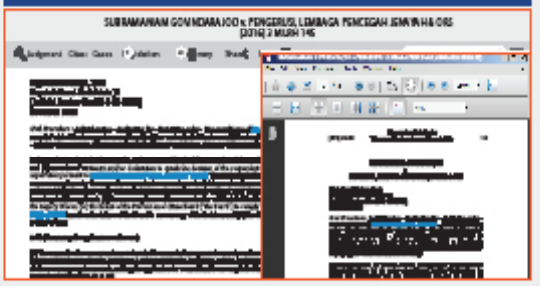

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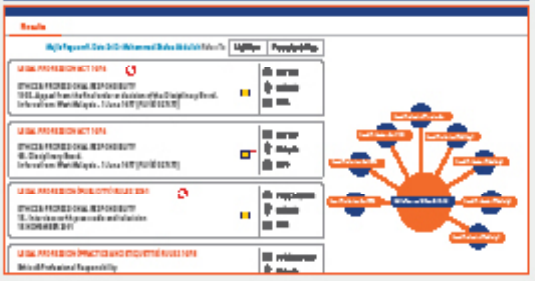

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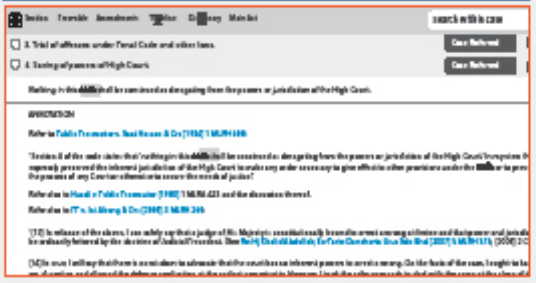

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