KRISHNASAMY KUPPUSAMY & ANOR

v.

PENGARAH HOSPITAL SULTANAH AMINAH & ORS AND OTHER APPEALS

Court of Appeal, Putrajaya
Lee Swee Seng, Mariana Yahya, Wong Kian Kheong JJCA
[Civil Appeal Nos: J-01(IM)(NCVC)-113-03-2022, J-01(IM)(NCVC)-114-03-2022 & J-01(IM)(NCVC)-115-03-2022]
2 November 2023

Civil Procedure: *Appeal — Dismissal of claim for damages by parents/dependents of patients who died due to a fire at the Sultanah Aminah Hospital, Johore Bahru — Applications for leave to adduce in appeal proceedings, affidavit by retired State Health Director (2nd defendant) pertaining to statements previously made to plaintiff — Claim filed more than three years after the incident — Whether claim time-barred — Whether Federal Government (4th defendant) estopped by statements made by State Health Director from relying on three-year limitation period under s 2(a) of the Public Authorities Protection Act 1948 — Whether leave of the Court of Appeal required for subsequent evidence to be used in hearing of appeals*

Evidence: *Admissibility — Applications for leave to adduce in appeal proceedings, affidavit by retired State Health Director/2nd defendant pertaining to statements previously made to plaintiffs — Claim for damages by parents/dependents of patients who died due to a fire at the Sultanah Aminah Hospital, Johore Bahru — Claim filed more than three years after the incident — Affidavit not available to plaintiffs during hearing of applications to strike out plaintiffs' claims for being time barred — Whether Federal Government/4th defendant estopped by statements made by State Health Director from relying on three-year limitation period under s 2(a) of the Public Authorities Protection Act 1948 — Whether leave of the Court of Appeal required for subsequent evidence to be used in hearing of appeals*

The respective appellants (plaintiffs) in the three appeals were the parents and dependents of three out of six patients who had passed away due to a fire that broke out in the intensive care unit (ICU) of the Sultanah Aminah Hospital, Johore Bahru (Hospital) on 25 October 2016. The Johore State Health Director and the Hospital's director at the material time, namely Dr Selahuddeen Abdul Aziz (Dr Selahuddeen) and Dr Aman Rabu (Dr Aman) respectively, met and informed the family members of the six deceased patients including the plaintiffs, that the question of compensation would only be considered upon completion of the report regarding the incident by the Independent Inquiry Committee (IIC) that was formed by the Ministry of Health (MOH) and headed by a retired Court of Appeal Judge. The IIC's report had since been completed and was forwarded to the MOH in June 2018, but todate, was never made public

and Dr Selahuddeen had since retired. On 2 September 2020, the respective plaintiffs *vide* three separate suits (three suits), commenced proceedings against the respondents (defendants). The defendants successfully applied to strike out the three suits for having been filed after the expiry of the three-year limitation period (three striking out applications). Hence the three appeals which were jointly heard, wherein the question that arose for determination was whether the Federal Government/4th defendant was estopped by the statements made by the Johore State Director/2nd defendant, from relying on the three-year limitation period under s 2(a) of the Public Authorities Protection Act 1948 (PAPA). The plaintiffs also by way of three separate applications (three leave applications) sought leave for the affidavit affirmed by Dr Selahuddeen attesting to what was said by him and Dr Aman during the meetings that were held with the family members of the six deceased patients, including the plaintiffs between February 2018 and October 2019. The three leave applications were opposed by the defendants on the grounds that the contents of the said affidavit constituted hearsay evidence and were inadmissible, and even if they did not contain hearsay evidence, the same did not concern the three-year limitation period and thus did not have a determining influence on the High Court's decisions within the meaning of rule 7(3A)(b) of the Rules of the Court of Appeal 1994 (RCA).

Held (allowing the three appeals; ordered accordingly):

(1). The three striking out applications were interlocutory proceedings within the meaning of Order 41 r 5(2) of the Rules of Court 2012 (ROC 2012) from which the instant three appeals arose. Premised on *Tokai Corporation v DKSH Malaysia Sdn Bhd*, Order 41 r 5(2) of the ROC 2012 may be read with rule 4 of the RCA for the contents of Dr Selahuddeen's affidavit to be taken into account in the instant appeals. (paras 17-18)

(2) Pursuant to the second part of s 69(2) of the Courts of Judicature Act 1964 read with the second part of rule 7(2) of the RCA, leave of the Court of Appeal was not required for the said affidavit of Dr Selahuddeen to be used in the hearing of appeals. In any event, the two conditions in r 7(3A) of the RCA had been satisfied by the plaintiffs in that the said affidavit was not available to the plaintiffs during the hearing of the defendants' striking out applications, and that the contents of the said affidavit would have been likely to have had a determining influence on the High Court's decisions. Accordingly the 3 leave applications ought to be allowed. (paras 22, 25, 26 & 27)

(3) The phrase 'any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority' in s 2(a) of the PAPA referred to any person who performed a written law, public duty and/or public authority. (para 31)

(4) A public officer and the Federal and State Government or Public Authority (Government/Public Authority) that was vicariously liable for the public

officer's act, omission, or conduct, may be estopped by any statement and/or conduct by the public officer and/or the Government/public authority from relying on the three-year limitation period. (para 33)

(5) The three-year limitation period was not a substantive, but a procedural defence, and as was recognised in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd,* the doctrine of estoppel applied to bar a party's reliance on a limitation defence under the Limitation Act 1953. There was no reason in principle and policy why the equitable estoppel doctrine could not be invoked against public officers and/or the Government/public authority in respect of the three-year limitation period. In accordance with good public governance, public officers and the Government/Public Authority should not make statements and/or conduct themselves in a manner that may cause any person to be irreparably prejudiced. (para 33)

(6) On the facts the three suits were neither frivolous nor vexatious within the meaning of Order 18 r 19(1)(b) of the ROC 2012 nor did they constitute an abuse of the Court process under Order 18 r 19(1)(d) of the ROC 2012. It was not a plain and obvious case for the three suits to be dismissed given that there was a triable issue as regards whether the defendants were estopped by the statements made by Dr Selahuddeen and Dr Aman from relying on the three-year limitation period. (paras 34-36)

(7) In the circumstances, it was only just for the plaintiffs to be granted leave under Order 18 r 19(1) of the ROC 2012 read with Order 1A and Order 2 r 1(2) of the ROC 2012 to amend their statement of claim to include a pleading that the defendants were estopped by the statements made by Dr Selahuddeen and Dr Aman from relying on the three-year limitation period. (para 40)

Case(s) referred to:

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 1 MLRH 144 (refd)

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 1 MLRA 738 (refd)

Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan [2004] 2 MLRA 21 (refd)

Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLRHU 900 (folld)

Yap Chee Keong Holdings Sdn Bhd v. Cosmopolitan Avenue Sdn Bhd [2022] 3 MLRH 481 (refd)

Legislations referred to:

Courts Judicature Act 1964, s 69(1), (2), (3)

Public Authorities Protection Act 1948, s 2(a)

Rules Of Court 2012, O 1A, O 2 r 1(2), O 18 r 19(1)(b)(d), O 41 r 5(1)(2)

Rule Of The Court Appeal 1994, rr 7(1), (2), (3), (3A)(a)(b)

Counsel:

For the appellants: S. Gunasegaran (& Tan Po Au with him); M/s Zaman & Associates

For the respondents: Zahilah Mohammad Yusoff; AG's Chambers
Syazana Abdul Lajis; State Legal Advisor's Office, Johore

JUDGMENT

Wong Kian Kheong JCA:

A. Introduction

[1] The above three appeals (3 Appeals) raise a novel question of whether the Federal Government (4th Defendant) may be estopped by statements made by, among others, Johore State Health Director (2nd Defendant) from relying on the three-year limitation period (Three-Year Limitation Period) provided in s 2(a) of the Public Authorities Protection Act 1948 (PAPA).

B. Background

[2] We shall refer to parties as they were in the High Court (HC).

[3] A fire broke out on 25 October 2016 (Fire) in the Intensive Care Unit (ICU) of Sultanah Aminah Hospital, Johore Bahru (Hospital).

[4] Six patients in the Hospital's ICU perished in the Fire (6 Deceased Persons).

[5] The plaintiffs (Plaintiffs) in the above three suits (3 Suits) are the parents and dependents of three out of the 6 Deceased Persons.

[6] The 1st defendant is the Hospital's Director while the 3rd defendant is the Director-General of the Ministry of Health (MOH). This judgment shall refer to all the defendants collectively in these 3 Appeals as the "Defendants".

[7] After the Fire, MOH formed a seven-member "Independent Inquiry Committee" (IIC) to inquire into the cause of the Fire and to make the necessary recommendations to the 4th Defendant. The IIC was headed by a retired Judge of Court of Appeal (JCA), Dato' Seri Mohd Hishamudin Bin Mohd Yunus.

[8] In June 2018, IIC handed its report (IIC's Report) to MOH. Until the date of this written judgment, IIC's Report has not been released to the public.

C. Legal Proceedings

C(1). 3 Suits

[9] The Plaintiffs filed the 3 Suits in the HC on 2 September 2020.

[10] The Defendants filed three applications to strike out the 3 Suits on the ground that the 3 Suits had been instituted after the expiry of the Three-

Year Limitation Period on 25 October 2019 (Defendants' 3 Striking Out Applications).

[11] On 15 February 2022, the learned Judicial Commissioner (JC) in the HC allowed the Defendants' 3 Striking Out Applications with costs of RM2,500.00 to the Defendants for each of the 3 Suits (3 HC Decisions). The Plaintiffs have filed the 3 Appeals to the Court of Appeal (CA) against the 3 HC Decisions.

[12] The Plaintiffs have applied to CA and obtained an order for these 3 Appeals to be heard together [Joint Hearing (3 Appeals)].

C(2). Joint Hearing (3 Appeals)

[13] For the purpose of the Joint Hearing (3 Appeals), the Plaintiffs filed three notices of motion for leave of CA to adduce an affidavit affirmed on 5 April 2023 by Dr Selahuddeen Bin Abdul Aziz (Dr Selahuddeen) for the purpose of the hearing of these 3 Appeals [Plaintiffs' 3 Leave Applications (Dr Selahuddeen's affidavit)].

[14] Dr Selahuddeen's affidavit stated as follows, among others:

(1) Dr Selahuddeen was Johore State Health Director from February 2018 until October 2019;

(2) between February 2018 and October 2019, Dr Selahuddeen (as the then Johore State Health Director) met with family members of the 6 Deceased Persons (including the Plaintiffs) [Family Members (6 Deceased Persons)] with Dr Aman Bin Rabu (Dr Aman) (the Hospital's Director at that time) (Meetings). At the Meetings:

   (a) Dr Selahuddeen provided updates to the Family Members (6 Deceased Persons) regarding the status of IIC's inquiry;

   (b) Dr Selahuddeen and Dr Aman had informed the Family Members (6 Deceased Persons) that IIC's Report was not ready and the question of compensating the Family Members (6 Deceased Persons) would only be considered by the 4th Defendant after the completion of IIC's Report [Statements (Dr Selahuddeen/Dr Aman)]; and

   (c) minutes of the Meetings were prepared by MOH [Minutes (Meetings)] but Dr Selahuddeen did not have access to the Minutes (Meetings) as he had retired from public service in October 2019;

(3) before Dr Selahuddeen's retirement, he attended a MOH meeting chaired by the then Minister of Health and was informed of the following matters-

(a) the IIC's Report had been prepared and submitted to MOH; and

(b) the IIC's Report could not be released to the public because the Cabinet had yet to approve its release; and

(4) Dr Selahuddeen could not inform the Family Members (6 Deceased Persons) that the IIC's Report had been prepared because he had already retired.

C(3). Defendants' Objections To Plaintiffs' 3 Leave Applications (Dr Selahuddeen's affidavit)

[15] We reproduce below the relevant parts of s 69 of the Courts of Judicature Act 1964 (CJA), r 7 of the Rules of the Court of Appeal 1994 (RCA) and O 41 r 5 of the Rules of Court 2012 (RC):

"Section 69 CJA - **Hearing of appeals**

(1) **Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers** and duties, as to amendment or otherwise,**of the High Court, together with full discretionary power to receive further evidence** by oral examination in Court or through a remote communication technology, **by affidavit**, or by deposition taken before an examiner or commissioner.

(2) **The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.**

(3) **Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.**

Rule 7 RCA - **Power of Court to** amend, **admit further evidence**, or draw inferences of fact

(1) **The Court shall have all the powers** and duties, as to amendment or otherwise,**of the appropriate High Court, together with full discretionary power to receive further evidence** by oral examination in Court,**by affidavit**, or by deposition taken before an examiner or Commissioner.

(2) **Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.**

(3) **Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.**

(3A) **At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that**:

(a) **at the hearing before the High Court or the subordinate Court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and**

(b) **the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate Court, as the case may be.**

Order 41 r 5 RC - **Contents of affidavit**

(1) **Subject to O 14, rr 2(2) and 4(2), to paragraph (2) of this rule and to any order made under O 38, r 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.**

(2) **An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds hereof.**"

[Emphasis Added]

[16] The learned Senior Federal Counsel (who represented the Defendants in these 3 Appeals) has opposed the Plaintiffs' 3 Leave Applications (Dr Selahuddeen's affidavit) on the following two grounds:

(1) the contents of Dr Selahuddeen's affidavit constituted hearsay evidence and were not admissible in the 3 Appeals according to O 41 r 5(1) RC; and

(2) even if Dr Selahuddeen's affidavit did not contain hearsay evidence, the Court should not allow the Plaintiffs to use Dr Selahuddeen's affidavit in the 3 Appeals. This is because the contents of Dr Selahuddeen's affidavit did not concern the Three-Year Limitation Period and would not have a "determining influence" on the 3 HC Decisions within the meaning of r 7(3A)(b) RCA.

Our Decision

D. Whether O 41 R 5(1) RC Bars Admission Of Dr Selahuddeen's Affidavit

[17] RCA are silent regarding use of affidavits for the hearing of appeals in CA. Consequently, r 4 RCA provides that RC shall apply "*mutatis mutandis*" with regard to the question of whether CA can take into account the contents of Dr Selahuddeen's affidavit in these 3 Appeals.

[18] If Dr Selahuddeen's affidavit is admissible as "further evidence" in the 3 Appeals (please refer to Parts E and F below), we are of the view that the contents of Dr Selahuddeen's affidavit may be considered by the CA. The following reasons support this decision:

(1) in *Tokai Corporation v. DKSH Malaysia Sdn Bhd* [2016] MLRHU 900, at [16(2)], the HC has explained the scope of O 41 r 5(1) and (2) RC as follows-

> "[16(2)] ... **Order 41 r 5(1) RC provides that an affidavit may contain only such facts as the deponent of the affidavit is able of his or her own knowledge to prove. In the Singapore High Court case of *Wong Hong Toy & Anor v. Public Prosecutor* [1985] 1 MLRA 345, at 351, Lai Kew Chai J held that O 41 r 5(1) of the then Singapore's Rules of the Supreme Court 1970 [RSC (Singapore)] "enshrines the evidentiary rule against the admission of hearsay evidence". Order 41 r 5 RSC (Singapore) is similar to our O 41 r 5 RC.**
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> **Order 41 r 5(1) and (2) RC provide 4 exceptions wherein an affidavit may contain hearsay evidence, namely when there is an application of the following**:
>
> (a) Order 14 r 2(2) RC;
>
> (b) Order 14 r 4(2) RC;
>
> (c) Order 41 r 5(2) RC; and
>
> (d) a Court order has been made under O 38 r 3(1) RC."
>
> [Emphasis Added]; and

(2) the Defendants' 3 Striking Out Applications are "interlocutory proceedings" within the meaning of O 41 r 5(2) RC. These 3 Appeals emanate from the Defendants' 3 Striking Out Applications. Consequently, premised on *Tokai Corporation*, we may apply O 41 r 5(2) RC read with r 4 RCA to take into account the contents of Dr Selahuddeen's affidavit in these 3 Appeals. We further rely on the following judgments in the HC:

(a) in *Datuk Amir Kahar Tun Haji Mustapha v. Tun Mohd Said Keruak & Ors* [1994] 2 MLRH 792, to determine an application to

strike out a suit, Abdul Kadir Sulaiman J (as he then was) had admitted an affidavit pursuant to O 41 r 5(2) RC. According to *Datuk Amir Kahar,* at p 792 to 793:

> "**The defendants' application is under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the Court. The application is supported by the affidavit of Wong Kian Kheong affirmed on 7 September 1994. The said affidavit merely refers to various affidavits-in-reply of the defendants filed as replies to the plaintiff's main application in the originating summons. Based on those affidavits-in-reply, the deponent verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants, and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of the Court. In opposition to this application of the defendants, the plaintiff filed an affidavit in opposition affirmed on 22 September 1994. In the affidavit in opposition of the plaintiff, he questioned the propriety of those affidavits-in-reply referred to by the deponent of the affidavit in support of this application, since those affidavits are meant for the trial/hearing of the originating summons which had been fixed for hearing. So, the immediate issue which calls for a decision is whether the application of the defendant is defective in the light of the nature of the affidavit in support. … Order 18 r 19 does not spell out the requirement of any affidavit in support of the application**. This is different from an application made under O 14 where, by r 2(1) thereof, the application must be made by summons supported by an affidavit. Similarly with an application under O 81, where by r 2(1) thereof, an affidavit is required for the application. Again, an application under O 49 r 2 is required to be supported by an affidavit. Similarly with an application under O 50 r 3, where the application must be supported by an affidavit. To cite yet another form of application is an application under O 29 r 1(2) of the RHC which must be supported by an affidavit, whereas under O 18 r 19, it merely requires an application to be made. There is no requirement in the rule of an affidavit accompanying the application.**An application by summons-in-chambers is no doubt an interlocutory proceeding and O 41 r 5(2) mentions an affidavit sworn for the purpose of being used in interlocutory proceedings. But in the absence of any express requirement of an affidavit to support the application in O 18 r 19, it is my view that for an application under the rule, the affidavit in support of the application is not mandatory. In the circumstances, the affidavit of Wong Kian Kheong in support of this application of the defendants is of no consequence or significance. In any event, if I am wrong in holding that an affidavit is not a prerequisite for an application under O 18 r 19, then according to O 41 r 5(2), an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources**

> **and grounds thereof. In that light, the affidavit of Wong Kian Kheong in this case is not defective because after a reference to those affidavits, he deposed that based on the aforesaid affidavits, he verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of Court. … In the circumstances, the plaintiff's objection has no merit.**"
>
> [Emphasis Added]; and

(b) the above judgment in *Datuk Amir Kahar* has been applied in *Kerajaan Malaysia v. PKNS Engineering & Construction Bhd* [2019] MLRHU 1601, at [9].

E. When Can "Further Evidence" Be Admitted In CA?

[19] Firstly, "further evidence" in s 69(1) to (3) CJA, r 7(1), (2), (3) and (3A) RCA (Relevant Statutory Provisions) means evidence which had not been adduced in the HC or Subordinate Court (HC/Subordinate Court).

[20] Secondly, three categories of "further evidence" can be identified in the Relevant Statutory Provisions, namely:

(1) "further evidence" which is intended to be used by an applicant (Applicant) in interlocutory applications in the CA [Further Evidence (Interlocutory CA Application)];

(2) "further evidence" which is intended to be relied on by an Applicant in the hearing of an appeal in the CA [Further Evidence (Appeal)] but the Further Evidence (Appeal) only came into being after the hearing in the HC/Subordinate Court (Subsequent Evidence); and

(3) Further Evidence (Appeal) was available to the Applicant at the time of the hearing in the HC/Subordinate Court but was not adduced in the HC/Subordinate Court (Existent Evidence).

[21] Rule 7(3A) RCA only allows "further evidence" to be admitted at the "hearing of the appeal" if the following two conditions are satisfied cumulatively by the Applicant {2 Conditions [r 7(3A) RCA]}:

(1) the first of the 2 Conditions [r 7(3A)] {1st Condition [r 7(3A)]} is provided in r 7(3A)(a) RC and has two alternative limbs, namely:

(a) the "further evidence" was not available to the Applicant at the hearing in the HC/Subordinate Court [1st Alternative Limb (1st Condition)]. The 1st Alternative Limb (1st Condition) concerns Subsequent Evidence; or

(b) the "further evidence" existed at the hearing in the HC/Subordinate Court but was not available to the Applicant

despite the exercise of reasonable diligence by the Applicant [2nd Alternative Limb (1st Condition)]. The 2nd Alternative Limb (1st Condition) refers to Existent Evidence; and

(2) Rule 7(3A)(b) RC provides for the second of the 2 Conditions [r 7(3A)] {2nd Condition [r 7(3A)]}. There are two alternative limbs of the 2nd Condition [r 7(3A)], namely, the "further evidence", if true:

(a) would have had a determining influence upon the decision of the HC/Subordinate Court [1st Alternative Limb (2nd Condition)]; or

(b) would have been likely to have a determining influence upon the decision of the HC/Subordinate Court [2nd Alternative Limb (2nd Condition)].

[22] Rule 7(3A) RCA only applies to Further Evidence (Appeal) and not to Further Evidence (Interlocutory CA Application). Accordingly, the first part of s 69(2) CJA and the first part of r 7(2) RCA allow an Applicant to use Further Evidence (Interlocutory CA Application) without any leave of CA.

[23] It is clear that r 7(3A) RCA applies to Existent Evidence and an Applicant can only discharge the burden to persuade the CA to grant leave to admit the Existent Evidence at the hearing of the appeal in CA if the 2 Conditions [r 7(3A)] are satisfied cumulatively.

[24] The question that arises is whether r 7(3A) RCA applies to Subsequent Evidence. In the CA case of *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 2 MLRA 21:

(1) Mokhtar Sidin JCA delivered the 2-1 majority decision [Majority Judgment (*Sin Heap Lee-Marubeni*)] as follows, at [10] to [12] and [15] to [18]:

"[10] In order for the application to be allowed the appellant had to satisfy the conditions as stated in para (3A). There is no doubt in my mind that what the appellant attempted to produce was a happening after the facts. …

[11] As I have stated earlier, the appellant conceded that the evidence intended to be adduced did not occur before the trial or during the trial. It occurred long after the trial in the High Court had been concluded. It is clear to me that the evidence intended to be adduced was in respect of an occurrence long after the incident and after the trial. This evidence was the availability of an alternative access road to the respondent's land long after the trial (almost ten years after the respondent had filed the present action). It is clear to me that evidence was not only not available at the trial but also non-existent. …

[12] The second test as stated by para (3A) is that the new evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the High Court. ...

...

[15] It is clear from the above that the fresh evidence that the appellant intended to adduce further was on the assumption that the ground level of the land would be brought down but there was no evidence that that was so. This assumption was based on the fact that there were some earthworks on the respondent's land and the adjoining land. With those earthworks, the appellant assumed that the respondent's land could be entered from the other neighbouring adjoining lot which was to be developed some ten years after the respondent had filed this action. In my view, those facts have nothing to do with the damages suffered by the respondent. To find an alternative road to his land was the respondent's only option to make the optimum use of his land after the original access road had been destroyed.

[16] The appellant in its affidavit in reply affirmed by Ch'ng Cheah Chean on 19 July 2003 confirmed, my view that the application to adduce fresh evidence was only to make an assumption and assertion as stated at para 4(d): ...

[17] In my view, this is not evidence at all but only an assumption which the appellant could submit during the trial. In my view, there is no fresh evidence in the application at all.

[18] In my view, the application did not satisfy the conditions imposed by r 7 [RCA]. For that reason, by majority decision, we dismissed the application by the appellant."

[Emphasis Added]; and

(2) Abdul Aziz Mohamad JCA (as he then was) delivered the following dissenting judgment [Dissenting Judgment (*Sin Heap Lee-Marubeni*)], at [73] to [83]:

"[73] **The appellant applied, by a notice of motion, for leave, 'in the event that leave is necessary', to adduce further evidence in their appeal. The further evidence was as to a matter that occurred after the date of the decision of the High Court in this case, namely, evidence of extensive earthworks that were being carried out on the respondent's land that, it was claimed, would bring down the 'platform levels' of the land. The main purpose of the evidence was to prove that there would no longer be any need to construct a retaining wall to stabilize the slope of the respondent's land or, even if a retaining wall was still required, that its cost would be greatly reduced 'due to loss of land surcharge (weight of soil)', so that the compensatory damages would now not be as much as the RM3.6 million that was awarded.**

[74] **The respondent opposed the application. In his affidavit he contended, among other things, that the recent earthworks did not affect the height and configuration of the slope, that it is not permissible to ask the Appellate Court to reassess damages that have been properly assessed at the trial and that, in any event, the evidence failed to satisfy the three conditions for its reception.**

I understood the three conditions to be those that may be drawn from [r 7(3A) RCA].

[75] **We heard the application before commencing to hear the appeal. It was dismissed by a majority decision without hearing learned Counsel for the respondent. I was of the view, after hearing the submission of the appellants' learned Counsel and not having the opportunity to hear the submission of the respondent's learned Counsel, that the application should be allowed. I proceed to state my reasons.**

[76] **The question of the giving and reception of further evidence for civil appeals to the Court of Appeal is dealt with in s 69 [CJA] …**

[77] **It is clear from sub-section (2) that if the further evidence is as to matters which have occurred after the decision appealed from, it may be given 'in any case'. No leave is required. The giving of further evidence as to post-decision matters is a matter of right. It is also clear from the words 'save as to matters subsequent as aforesaid' in sub-section (3) that the requirements of special grounds and of leave laid down by the sub-section do not apply to post-decision matters.**

[78] **Except for the words 'Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals' in sub-section (1), the whole of s 69, all the five sub-sections of it, were, with very slight immaterial differences, reproduced in r 7 [RCA], the five sub-sections becoming the five paras of the rule in the same order. The effect of r 7 was of course the same as that of s 69. As far as post-decision matters are concerned, the giving of further evidence is a matter of right.**

[79] **Now a provision of an Act of Parliament ought not be re-enacted in subsidiary legislation, because the re-enactment will be merely an echo that has no existence, life or force of its own. Remove it, and the law is still there in the Act. Further, if the re-enactment is with modification, the modification is *ultra vires* and ineffective because it seeks to make modification in the law through subsidiary legislation in an area that Parliament has enacted for, unless the power to modify is expressly given by Parliament. The modification will inevitably have effects that are inconsistent with or repugnant to the provision as enacted by Parliament, and subsidiary legislation is incapable of doing that.**

[80] **I have to say all that because in 1998 r 7 was amended by introducing the following para (3A):** …

…

[81] **That is the paragraph that I mentioned earlier in connection with the three conditions to be satisfied. It imposes restrictions where none existed before. Further, the requirement in para (b) that the new evidence would have had or would have been likely to have had a determining influence on the decision that was made, read with para (a), would suggest that further evidence would only be allowed as to matters in existence before the decision, whereas previously further evidence as to post-decision matters was allowed, and as of right too.**

[82] **The changes brought about by para (3A) have not been made to s 69. Since para (3A) seeks to cling to r 7, and since r 7 has no existence, life or force of its own, but is merely an echo of s 69, r (3A) is nothing more but an attempt by subsidiary legislation to modify s 69. The attempt is *ultra vires* because subsidiary legislation is not capable of modifying an Act of Parliament, except by express authority of Parliament, which did not exist here.**

[83] **I was of the view, therefore, that s 69 is not affected by para (3A) and further evidence as to post-decision matters may still be given, and as of right. Therefore, merely as a formality to dispel any doubt, leave should be given to the appellants to give the further evidence that they sought to give. The question of its weight and effect would be matters to be considered in the appeal itself.**"

[Emphasis Added]

[25] In our view, leave of CA is not required for Subsequent Evidence because the second part of s 69(2) CJA {2nd Part [s 69(2) CJA]} and the second part of r 7(2) RCA {2nd Part [r 7(2) RCA]} have expressly allowed Subsequent Evidence to be used in the hearing of appeals without any leave of CA. In this regard-

(1) the Majority Judgment (*Sin Heap Lee-Marubeni*) had dismissed the application for leave of CA to adduce "further evidence" on the ground that the application was based on an "assumption" and there was no "further evidence" to be adduced at the hearing of the appeal in that case. Furthermore, the Majority Judgment (*Sin Heap Lee-Marubeni*) did not discuss the 2nd Part [s 69(2) CJA] and 2nd Part [r 7(2) RCA]; and

(2) we take the opportunity to approve the Dissenting Judgment (*Sin Heap Lee-Marubeni*) which can be supported by the following reasons:

(a) according to s 2(1)(e) of the Interpretation Acts 1948 and 1967 (IA), Part I IA applies to RCA because RCA are made after 31 December 1968 pursuant to CJA which has been revised under the Revision of Laws Act 1968. Section 23(1) IA (in Part I IA) provides for the doctrine of *ultra vires* as follows:

> **"Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency."**
>
> [Emphasis Added]

The application of s 23(1) IA has been explained by Mohd Zawawi Salleh FCJ in the Federal Court (FC) case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2019] 6 MLRA 307, at [81], as follows:

> "[81] **It is trite that subsidiary or delegated legislation shall not be broader than the enabling legislation. This general principle of statutory interpretation is codified in s 23 [IA]**. ..."
>
> [Emphasis Added]; and
>
> (b) RCA are made under s 17 CJA. If r 7(3A) RCA applies to Subsequent Evidence, this means r 7(3A) RCA is inconsistent with the 2nd Part [s 69(2) CJA] and by virtue of s 23(1) IA, r 7(3A) RCA is void to the extent of such an inconsistency.

[26] As explained in the above para 25, by reason of the 2nd Part [s 69(2) CJA] and 2nd Part [r 7(2) RCA], the Plaintiffs do not require leave of the CA to use Dr Selahuddeen's affidavit in these 3 Appeals.

F. Should CA Grant Leave For Plaintiffs To Use Dr Selahuddeen's Affidavit In 3 Appeals?

[27] Notwithstanding our opinion in the above para 25, we are of the view that the Plaintiffs have satisfied the 2 Conditions [r 7(3A)] as follows:

(1) the 1st Alternative Limb (1st Condition) is fulfilled because Dr Selahuddeen's affidavit was not available to the Plaintiffs during the hearing of the Defendants' 3 Striking Out Applications; and

(2) as explained in para 35 below, the contents of Dr Selahuddeen's affidavit would have been likely to have a determining influence on the 3 HC Decisions. In other words, the 2nd Alternative Limb (2nd Condition) has been satisfied by the Plaintiffs.

Premised on the above reasons, the Plaintiffs' 3 Leave Applications (Dr Selahuddeen's affidavit) are allowed by this Court without any order as to costs.

G. Whether Court Can Apply Equitable Estoppel Doctrine With Regard To Three-Year Limitation Period

[28] The Three-Year Limitation Period is provided in s 2(a) PAPA which reads as follows:

"2. **Where, after the coming into force of this Act, any suit, action**, prosecution **or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:**

(a) **the suit, action**, prosecution **or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of** or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;"

[Emphasis Added]

[29] In *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 1 MLRH 144, Edgar Joseph Jr J (as he then was) has explained in the HC that a defendant may be estopped from relying on a limitation defence provided by the Limitation Act 1953 (LA). It is decided in *Alfred Templeton,* at pp 226 and 228, as follows:

"**I must lastly consider whether one can estop oneself out of the Limitation Act.** ...

...

In *Kok Hoong v. Leong Cheong Kweng Mines Ltd* **[1963] 1 MLRA 343, a decision of the Privy Council from the then Federal Court of Malaysia, in a case of moneylenders, their Lordships said**:

... **there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not absolutely prohibitory and so do not preclude estoppels. One example of this is the Statute of Frauds (see** *Humphries v. Humphries* **[1910] 2 KB 531 CA in which it was no doubt considered that … the statute ought to be treated as regulating procedure, not as striking at essential validity) … a more direct test to apply … is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.**

These words are widely drawn and suggest that the Limitation Act can give way to estoppel. Indeed, there are ***dicta*** **in** ***Turberville v. West Ham Corporation*** [1950] 2 KB [1950] 2 KB 208 **which suggest that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings. And, in** *Othman & Anor v. Mek* **[1972] 1 MLRA 76, Ong CJ said:**

... **Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see** *Halsbury's Laws of England* **(3rd Ed) p 181. A right which becomes unenforceable merely by reason of limitation does not** ***ipso facto*** **perish or vanish into thin air: see** *Holmes v. Cowcher*

> **[1970] 1 WLR 835 where it was held that although under s 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not. If, as in that case, equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to the legal title?**
>
> **So far as may be necessary, I would hold that based on these *dicta* the Limitation Act is purely procedural: see** *Othman and Anor v. Mek* **[1972] 1 MLRA 76 and of** *Michell v. Harris Engineering Co Ltd* **[1967] 2 QB 703 (CA). And, therefore, in certain circumstances, one can estop oneself out of the Limitation Act by conduct.**"
>
> [Emphasis Added]

[30] The above decision in *Alfred Templeton* has been approved by the FC in the following judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 1 MLRA 738, at 746:

> "**Edgar Joseph Jr. J. (as he then was) in an illuminating judgment in** *Templeton v. Low Yat Holdings Sdn Bhd* **[1989] 1 MLRH 144 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the [LA].**"
>
> [Emphasis Added]

[31] The phrase "any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority" in s 2(a) PAPA refers to any person who performs a written law, public duty and/or public authority. For ease of convenience, in this judgment we will describe the person envisaged in s 2(a) PAPA as a "public officer".

[32] We are unable to find any previous Malaysian case which has decided on the application of the doctrine of equitable estoppel to a public officer who has relied on the Three-Year Limitation Period in s 2(a) PAPA.

[33] It is our view that:

(1) a public officer (X); and

(2) the Federal Government, State Government or public authority (Government/Public Authority) who is vicariously liable for X's act, omission and/or conduct may be estopped by any statement and/or conduct by:

(a) X;

(b) a public officer other than X (Y); and/or

(c) Government/Public Authority

from relying on the Three-Year Limitation Period.

The above decision is supported by the following reasons:

(i) the Three-Year Limitation Period is a procedural defence and not a substantive one. There may be a statement and/or conduct by X, Y and/or Government/Public Authority which makes it inequitable for X and/or Government/Public Authority to rely on the Three-Year Limitation Period;

(ii) *Alfred Templeton* and *Boustead Trading* have recognised the application of the doctrine of equitable estoppel to bar a party's reliance on a limitation defence pursuant to LA. There is no reason in principle and policy why equitable estoppel doctrine cannot be invoked against public officers and/or Government/Public Authority in respect of the Three-Year Limitation Period; and

(iii) in accordance with good public governance, public officers and Government/Public Authority should not make statements and/or conduct themselves in a manner which may cause any person to be irreparably prejudiced.

H. Was There A Triable Issue That Defendants Were Estopped By Statements (Dr Selahuddeen/Dr Aman) From Relying On Three-Year Limitation Period?

[34] In these 3 Suits, there is a triable issue regarding whether the Defendants are estopped by Statements (Dr Selahuddeen/Dr Aman) from relying on the Three-Year Limitation Period (Triable Issue).

[35] The Triable Issue is supported by the following evidence and reasons:

(1) the IIC was formed by MOH and was headed by a retired JCA. The Plaintiffs knew of the formation of IIC and its inquiry;

(2) at the material time, Dr Selahuddeen and Dr Aman were the Johore State Health Director and Hospital's Director respectively. In other words, Dr Selahuddeen and Dr Aman held high office in MOH at the time of the making of the Statements (Dr Selahuddeen/Dr Aman);

(3) the Statements (Dr Selahuddeen/Dr Aman) were made to the Family Members (6 Deceased Persons) at the Meetings. Minutes (Meetings) had been prepared by MOH. It is therefore clear that

the Statements (Dr Selahuddeen/Dr Aman) were made in the course of the employment of Dr Selahuddeen and Dr Aman. The Statements (Dr Selahuddeen/Dr Aman) were not made off-the-cuff without any intention by the Defendants to be bound by the Statements (Dr Selahuddeen/Dr Aman); and

(4) any reasonable claimant in the position of the Plaintiffs who had been informed of the Statements (Dr Selahuddeen/Dr Aman), would be lulled into a false of complacency to file a suit after the preparation of the IIC's Report and after the lapse of the Three-Year Limitation Period. In other words, the Plaintiffs did not file the 3 Suits within the Three-Year Limitation Period because the Plaintiffs had relied on the Statements (Dr Selahuddeen/Dr Aman). In this sense, it is arguable that the Defendants are estopped by the Statements (Dr Selahuddeen/Dr Aman) from relying on the Three-Year Limitation Period to support the Defendants' 3 Striking Out Applications. Consequently, the contents of Dr Selahuddeen's affidavit would have been likely to have a "determining influence" on the 3 HC Decisions within the meaning of the 2nd Alternative Limb (2nd Condition).

[36] In view of the Triable Issue:

(1) it is not a plain and obvious case for the HC to strike out the 3 Suits — please refer to the judgment of the Supreme Court delivered by Mohd Dzaiddin SCJ (as he then was) in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 1 MLRA 611, at 614;

(2) the 3 Suits are neither frivolous nor vexatious within the meaning of O 18 r 19(1)(b) RC; and

(3) the 3 Suits do not constitute abuses of Court process as understood in O 18 r 19(1)(d) and O 92 r 4 RC.

It is to be borne in mind that even if a pleaded claim is weak and is not likely to succeed, this is not a ground in itself to strike out the claim — *Bandar Builder Sdn Bhd*, at p 615. In any event, the Triable Issue can only be resolved at a trial and not by way of affidavit evidence.

I. Should Plaintiffs Be Allowed To Amend Their Statements Of Claim (SOCs)?

[37] Order 1A, O 2 r 1(2) and O 18 r 19(1) RC provide as follows:

"Order 1A **In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.**

Order 2 r 1(2) **These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.**

Order 18 r 19(1) RC **The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:**

(a) **it discloses no reasonable cause of action** or defence, as the case may be;

(b) **it is scandalous, frivolous or vexatious;**

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) **it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**"

[Emphasis Added]

[38] It is decided by the HC in *Yap Chee Keong Holdings Sdn Bhd v. Cosmopolitan Avenue Sdn Bhd* [2022] 3 MLRH 481, at [68], that the Court has the following five discretionary powers under O 18 r 19(1) RC:

"[68] ... **The Court has the following five discretionary powers pursuant to O 18 r 19(1) RC:**

(1) the Court may strike out a pleading, endorsement on a pleading, an action or counterclaim;

(2) **the Court may allow a party to amend a pleading**, endorsement on a pleading,**action** or counterclaim;

(3) the Court may stay an action or counterclaim;

(4) the Court may dismiss an action or counterclaim; or

(5) the Court may enter a judgment in an action or counterclaim."

[Emphasis Added]

[39] In accordance with O 1A and O 2 r 1(2) RC, HC's discretionary powers pursuant to O 18 r 19(1) RC should be exercised with regard to the overriding interest of justice. In the disposal of the 3 Appeals, by virtue of s 69(1) CJA, the CA has all the powers of the HC.

[40] In view of the Statements (Dr Selahuddeen/Dr Aman) and the Triable Issue, it is only just for this Court to grant leave under O 18 r 19(1) RC read with O 1A and O 2 r 1(2) RC for the Plaintiffs to amend the SOCs so as to include a pleading that the Defendants are estopped by the Statements (Dr Selahuddeen/Dr Aman) from relying on the Three-Year Limitation Period (Estoppel Pleading). No injustice is occasioned to the Defendants by allowing the Plaintiffs to amend the SOCs because:

(1) the Defendants are entitled to amend their Defence in the 3 Suits with regard to the Estoppel Pleading; and

(2) irrespective of the Estoppel Pleading, the Defendants are at liberty to defend themselves at the trial of the 3 Suits as they see fit.

J. Conclusion

[41] Premised on the above reasons and Dr Selahuddeen's affidavit, the 3 Appeals are allowed with the following order:

(1) the 3 HC's Decisions are set aside;

(2) the 3 Suits are remitted to the HC to be tried before another Judge or JC;

(3) leave is granted to the 3 Plaintiffs to amend their SOCs to include the Estoppel Pleading within 14 days from the date of the order of this Court (with leave to the Defendants to amend their Defence in the 3 Suits in response to the amended SOCs); and

(4) costs of the 3 Appeals and Defendants' 3 Striking Out Applications shall follow the event of the trial of the 3 Suits.

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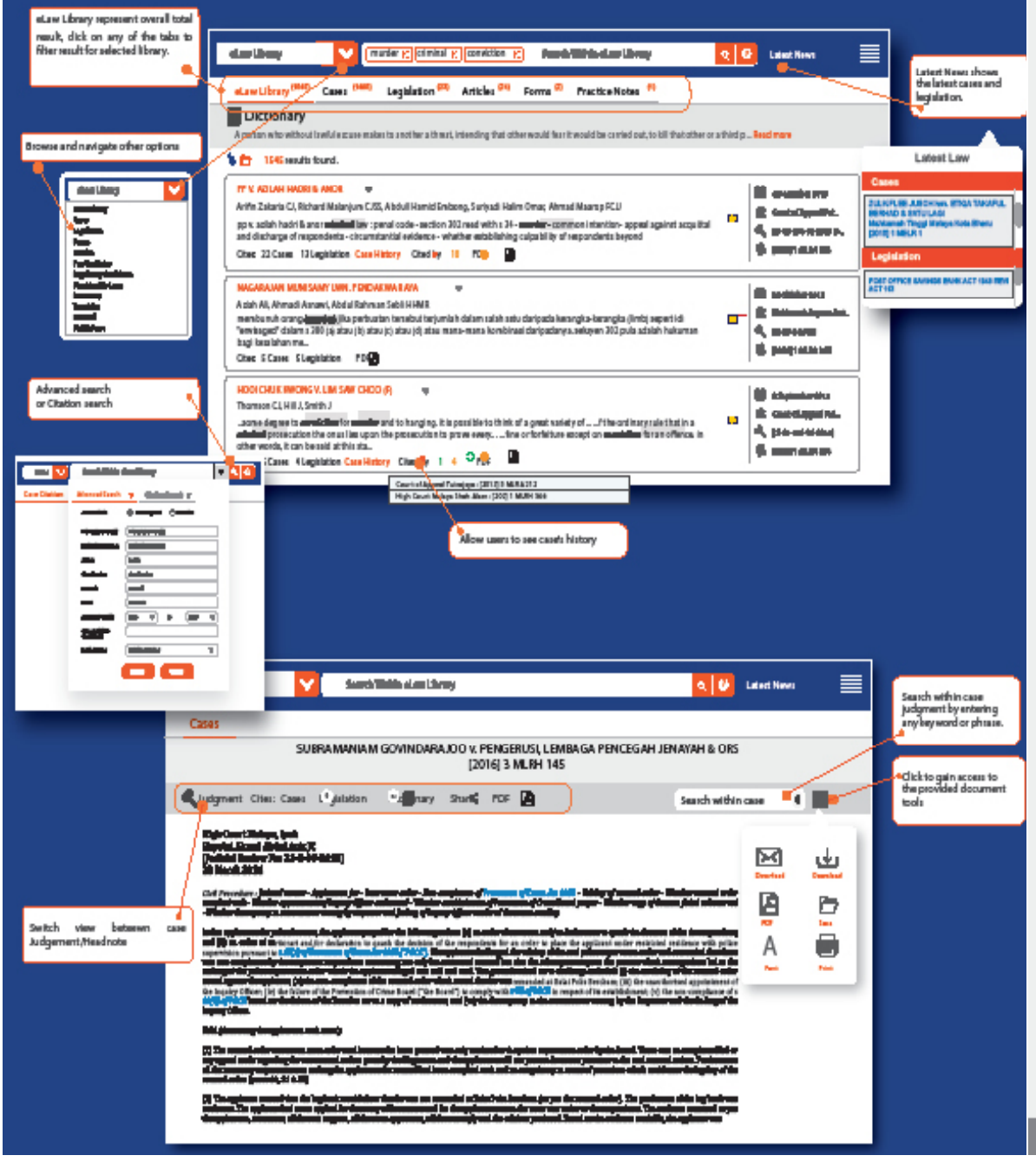

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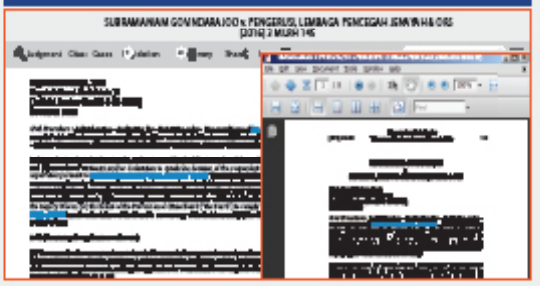

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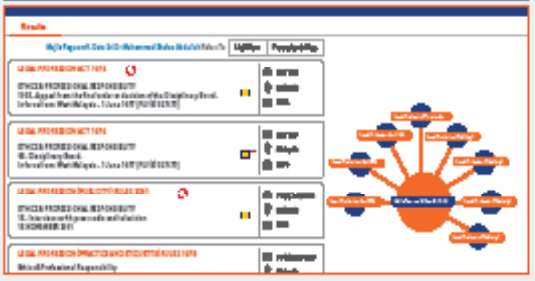

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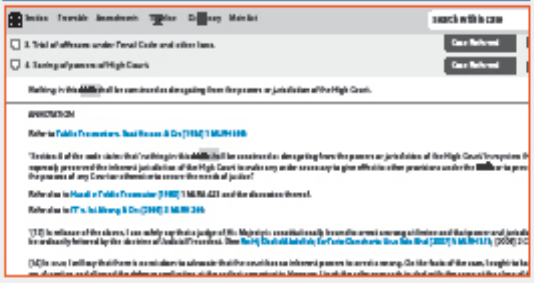

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