TEGAS SEJATI SDN BHD

v.

PENTADBIR TANAH DAN DAERAH HULU LANGAT & ANOR AND ANOTHER APPEAL

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Nallini Pathmanathan, Mary Lim Thiam Suan FCJJ
[Civil Appeal Nos: 01(f)-46-11-2022(B) & 01(f)-47-11-2022(B)]
29 February 2024

Land Law: *Acquisition of land — Compensation, adequacy of — Whether there was failure to comply with s 40C of Land Acquisition Act 1960 — Opinions of assessors — Whether written opinions of assessors must be made available to relevant parties*

The present appeals by the appellant concerned two land reference proceedings pertaining to the compulsory acquisition of land and the compensation awarded for said acquisition. The appellant was the owner of the relevant land acquired while the 2nd respondent was the paymaster for the acquisition. This Court had heard submissions but had to adjourn proceedings for the single purpose of ascertaining if there was compliance of s 40C of the Land Acquisition Act 1960 ["Act 486"] as this was not clear from the records of appeal. Section 40C of Act 486 required the assessors to provide their opinion in writing and for the Judge to record those written opinions. Thus, the single issue herein was whether there was a failure to comply with s 40C of Act 486.

Held (allowing the appeals, the matter remitted to the High Court for a rehearing before another judge):

(1) Under art 13 of the Federal Constitution, the High Court in assessing the complaint of adequacy of compensation was bound to balance the competing interests of the appellant, the landowner and the 2nd respondent, the acquiring authority or paying master under Act 486. It was therefore necessary that all relevant material was placed before the Court for that assessment and determination. Otherwise, the rights of the appellant, as landowner, would not be properly redressed. Further, the question of adequacy of compensation could only be properly determined according to law if all concerned had the opportunity to address the reasons, factors or circumstances which were relevant and necessary when computing or calculating that compensation. The opinions of the assessors who attended Court and assisted the High Court Judge in determining the matter of compensation so as to ensure that it was, at the end of the day, adequate must thus be made known to the owners and those affected by the compulsory acquisition. The obligation to make known the reasons or factors extended to everyone who had any role to play in that decision, be it the Judge or the assessors. (paras 36-37)

(2) Thus, the availability of these written opinions of the assessors could never be a matter of an internal administrative arrangement. Land reference proceedings were open Court proceedings and it was integral to the rule of law that there was transparency and fairness not just in the conduct of those proceedings but in the manner any evidence, including opinion evidence, was received and treated by the Court. The presence of these written opinions must be recorded by the Judge hearing the land reference and should the Judge see fit, even incorporate the entire or parts of those opinions into the determination. It might even be attached to the Judge's grounds, should that be seen as appropriate. But, once available, the written opinions must be provided to the parties. These opinions must be included in any record of appeal, in the event there was one. Otherwise, these written opinions were part of the records of the land reference proceedings at the High Court. Since it was obvious that there was non-compliance of s 40C of Act 486 in these appeals, that the written opinions were never made available to the parties or even called for by the Court of Appeal, the appeals must be allowed and the orders of the Courts set aside. The matter was remitted to the High Court for a rehearing before another Judge. (paras 38-39)

Case(s) referred to:

Amitabha Guha & Anor v. Pentadbir Tanah Daerah Hulu Langat [2021] 2 MLRA 19 (refd)

Pentadbir Tanah Daerah Johor v. Nusantara Daya Sdn Bhd [2021] 4 MLRA 466 (refd)

Persatuan Pemandu-Pemandu Perempuan Malaysia v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur [2023] 1 MLRA 319 (refd)

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 1 MLRA 506 (refd)

Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 4 MLRH 718 (refd)

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 4 MLRA 554 (refd)

Spicon Products Sdn Bhd v. Tenaga Nasional Berhad & Anor [2022] 3 MLRA 307 (refd)

Legislation referred to:

Federal Constitution, art 13(1), (2)

Land Acquisition Act 1960, ss 36, 37(1), 40A(2), (4), (5), 40B, 40C, 40D, 45

Rules of Court 2012, O 18 r 19

Counsel:

For the appellant: Cecil Abraham (Sunil Abraham & Mohd Irwan Ismail); M/s Cecil Abraham & Partners

For the 1st respondent: Salim Soib @ Hamid (Etty Eliany Tesno & Amelia Masran with him); Selangor Legal Advisor Office

For the 2nd respondent: Kok Su Ann (Isabella Cheah Chooi Mun, Nur Afiqah Zainol & Pang Yi Qing with her); M/s Hisham, Sobri & Kadir

JUDGMENT

Mary Lim Thiam Suan FCJ:

[1] Although eight issues were identified for determination by this court, we allowed the appeals and remitted the matter to the High Court for a re-hearing after finding on the single issue of non-compliance of s 40C of the Land Acquisition Act 1960 [Act 486]. We found the non-compliance to be serious warranting us to intervene under the principles of appellate intervention.

Relevant Factual Background

[2] On 11 December 1987, the appellant entered into a joint-venture agreement with Perbadanan Setiausaha Kerajaan Selangor [PSKS] to develop several lots of land located at s 15, Daerah Hulu Langat in the State of Selangor. PSKS, as registered proprietor received the entire consideration under that joint-venture agreement and relinquished its rights to the appellant in respect of those lands.

[3] Some of the land involved in that development was subdivided into Lots 35126, 35127 and 35129. These subdivided lots were initially acquired by the State Government on 23 July 2015 for the purpose of "Projek Lebuhraya Bertingkat Sungai Besi – Ulu Kelang (SUKE), Daerah Ulu Langat, Selangor". Lembaga Lebuhraya Malaysia [LLM], the 2nd respondent was the paymaster for this acquisition. On 9 December 2016, the declaration of acquisition was amended to involve only Lots 35126 and 35127.

[4] Arguments later arose over the assessment of compensation for the acquisition, including the date of valuation, whether it should be by reference to the first date of acquisition in 2015 or the later date in 2016; and whether development costs are compensable. If so, by reference to which of those two dates of acquisition.

[5] At the enquiry held on 16 May 2017, the 1st respondent, the Land Administrator found that it was difficult to divide or separate the development costs based on each lot. On the suggestion of the appellant, the Land Administrator considered these costs as part of the claim for compensation for Lot 35129 whereas the compensation for the remaining two lots would cover only claims for land value and injurious affection. Apparently, LLM's representatives did not object to that suggestion.

[6] On 16 May 2017, the 1st respondent handed down an award for compensation to which both LLM and the appellant, objected. The 1st respondent awarded compensation for market value, costs of preliminary works, costs of termination of the contractor and consultant agreements, costs of site replacement and loss of profit amounting to RM59,706,236.85.

[7] Both LLM and the appellant filed their respective objections *vide* Form N and this led to two land reference proceedings before the High Court, as prescribed under s 36 of the Land Acquisition Act 1960 [Act 486]. Both land reference proceedings were rightly consolidated and heard together.

[8] On 22 September 2020, the appellant filed an application seeking to strike out the 1st respondent's land reference proceedings under O 18 r 19 of the Rules of Court 2012 [enclosure 48]. This application was heard together with the merits of the land reference proceedings; the latter involved the assistance of two assessors, as provided under s 40A of Act 486.

[9] On 14 December 2020, the High Court delivered its decisions for both the striking out application as well as the land references [1st written grounds]. Full grounds were later released on 4 February 2021 [2nd written grounds]. By these decisions, the High Court dismissed encl 48, dismissed the appellant's land reference and allowed LLM's land reference.

[10] The appellant appealed against both decisions on 22 December 2020. LLM cross-appealed, seeking to vary part of the High Court's decision and a return or repayment of an excess sum of over RM31 million together with interest.

[11] On 4 October 2022, the Court of Appeal dismissed the appellant's appeals, allowed LLM's cross-appeal and directed a refund of the excess sum together with interest.

[12] The appellant appealed. Its principal grounds being:

i. Whether the full grounds released on 4 February 2021, that is, the 2nd written grounds, is null and void such that the 1st written grounds is the only final grounds of judgment to be given effect to *vis-a-vis* the present appeal or is the entire decision of the High Court a nullity?

ii. Whether there was a failure to comply with s 40C of the Land Acquisition Act 1960 [Act 486]?

iii. Whether LLM lacks the necessary *locus standi* to institute the land reference proceedings?

iv. Whether the decision of the High Court as upheld by the Court of Appeal failed to abide by the principle of *stare decisis*?

v. Whether the failure to abide by the principle of *Stare decisis* renders the entire land reference proceedings improper?

vi. Whether the payment of the refund can be made directly to LLM by reference to its cross-appeal?

vii. Whether the High Court and Court of Appeal misconstrued and/or mis-appreciated Forms N filed by the appellant and LLM?

viii. Whether the High Court and Court of Appeal erred in dismissing the appellant's heads of claim as a whole?

Our Determination

[13] On 18 August 2023, we heard submissions but had to adjourn proceedings for the single purpose of ascertaining if there was compliance of s 40C of Act 486 as this was not clear from the records of appeal. Section 40C which reads as follows, requires the assessors to provide their opinion in writing:

> 40C. Opinion of assessors
>
> The opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the Judge.

[14] Aside from requiring written opinions from the assessors, the learned Judge is required to record those written opinions.

[15] We were of the opinion that until the actual status of s 40C was established one way or another, we would be hampered in hearing and dealing with the issues posed. We therefore directed the registry of the Federal Court to request from the registry of the High Court for sight of the written opinions of the two assessors. This direction was duly carried out and as soon as the written opinions were procured, the registry of the Federal Court sent them to the parties *vide* email dated 7 September 2023. On 5 October 2023, the appellant filed a supplementary record of appeal containing these opinions. On 6 October 2023, softcopies of the written opinions were filed by the appellant *vide* a second supplemental record of appeal.

[16] Further submissions were then filed by the respective parties, addressing these written opinions.

[17] The appellant questioned the validity of these written opinions, going as far as to suggest that these opinions may not have been prepared at the material time or even authored by the assessors who attended the land reference proceedings as a different name appeared on the opinion that was made available. According to the appellant, the copies which were made available were also not scanned copies of a physical copy but were in fact conversions from word format to PDF format, suggesting that soft copies instead of physical copies were prepared.

[18] In any case, there were contradictions between the views expressed in these opinions and what was attributed to the assessors in the grounds of decision of the learned Judge, especially in the matter of costs of preliminary works. It was also argued that these written opinions ought to have been available to the parties, at the very least, for subsequent inclusion in the records of appeal.

[19] In response, the learned State Legal Advisor appearing for the 1st respondent submitted that there was compliance of s 40C as seen from para 67 of the grounds of decision of the learned Judge. This is despite his office, admittedly, having never had sight of the opinions until provided for as directed by this Court.

[20] Learned counsel for LLM argued extensively on the construction of s 40C. First, there are no provisions in Act 486 requiring the written opinions to be provided to the parties and/or to be filed in Court. These opinions are, therefore, furnished to the appellate courts by way of 'internal administration'. Even, then, it is 'if necessary'. As such, the opinions "ought not to form part of the record of proceedings which parties are given access to", following the Court of Appeal decision in *Persatuan Pemandu-Pemandu Perempuan Malaysia v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur* [2023] 1 MLRA 319 which is said to have held that those opinions are solely for the perusal, consideration and records of the High Court Judge. Should the appellant or any party want sight of those opinions, an application will then have to be made. No such application was made in these appeals in which case there was no merit in the complaint.

[21] It was also suggested that these written opinions "ought to only be open to scrutiny of the appellate courts ... only insofar as it is to determine the question of law of whether s 40C of LAA 1960 is met". Learned counsel argued that "it is not for the appellate courts ... to scrutinise the merits of the assessors' written opinions and/or differences or inconsistences between the substantive merits of the said opinions and that of the learned JC's findings, as they solely pertain to issues of fact, evaluation of evidence, computation of compensation and/or application of the principles of valuation to facts, which are merely subjective 'questions of facts' and not appealable".

[22] Lastly, it was submitted by learned counsel for LLM that the opinions of the assessors are not binding. Since their role is merely to "assist" the High Court in the valuation process, that it is ultimately for the judge alone to exercise judicial power and decide whether to accept that opinion in relation to the matter of compensation, it would be erroneous to 'elevate' the status of such opinion to that of 'decision', thereby undermining the sanctity of judicial power as envisaged in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554. All that was required under Act 486 was for the opinions to be given in writing and recorded by the learned Judge; and, nothing more should be read into the Act which was not intended by Parliament.

[23] As for the format of the opinions, that too, is a matter of administrative discretion, prerogative or convenience of the High Court. Nothing should be made out of the form that the opinions were prepared.

[24] We start our deliberations from art 13(1) of the Federal Constitution. It guarantees that no person shall be deprived of property save in accordance with law. In *Spicon Products Sdn Bhd v. Tenaga Nasional Berhad & Anor* [2022] 3 MLRA 307 where the principal issue was whether the legal proprietor of land which had been acquired was entitled to attend and participate in reference proceedings even though the compensation awarded had been accepted without protest, this Court held that in relation to art 13, "the reading and application of this guarantee, there must be a propensity to safeguard as opposed to

denying that guarantee. Unless and until there are clear provisions restricting a right of participation in any exercise to deprive property, any relevant law must be read to allow if not encourage such participation. The adequacy of any compensation paid for the deprivation may otherwise be compromised".

[25] Specifically, and in relation to compulsory acquisition, art 13(2) provides that "No law shall provide for the compulsory acquisition or use of property without adequate compensation". In the interpretation and construction of s 40C and the attendant provisions here, the same approach must be adopted. While these provisions may not provide for every detail of how a land reference proceeding is to be conducted, a construction which serves to preserve and realise that guarantee must be adopted and applied. The Courts, the judges, must give real meaning and sense to these provisions through a purposive approach so that these rights are not rendered illusory, as repeatedly cautioned by this Court. See *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 1 MLRA 506.

[26] Parliament has seen it fit to reinsert the inclusion of assessors through ss 40A to 40D after removing these provisions in 1984 − see discussions on this at paras [54] and [55] in *Spicon Products*. Section 40D, however, has since been struck down − see *Semenyih Jaya* and discussions on this in *Pentadbir Tanah Daerah Johor v. Nusantara Daya Sdn Bhd* [2021] 4 MLRA 466. The role of the assessors is thus first and last, to assist the Court in the matter of compensation. This would mean that where the objection which is referred to Court does not concern compensation, assessors will not be required. Indeed, the law does provide for persons concerned with any acquisition to object on the basis of identities of claimants or even just the matter of apportionment between such persons − see s 37(1). It is not always about the computation of compensation.

[27] Under s 40A(2), where the land reference is in respect of an objection over the adequacy of compensation, the Court shall appoint two assessors for the purpose of aiding the Court in determining the objection and in arriving at a fair and reasonable amount of compensation. Where s 40A(2) applies, the two assessors are appointed from the list of names submitted to the Court in accordance with s 40A(4) and (5). These two assessors sit with the Judge in hearing the objections over the amount of compensation, as was the case in these appeals.

[28] The question that arises is where there is an objection over the award of compensation and assessors are appointed, and the law requires them to give written opinions which are then to be recorded by the judge hearing the land reference, are these opinions necessarily for the eyes of that judge alone? That even the Court of Appeal which may hear an appeal emanating from the decision of the High Court over that matter of compensation will have to request administratively for sight of such opinions? That, again, when furnished, these written reports are only for the eyes of the three judges at the Court of Appeal whilst the parties are left entirely in the dark?

[29] Repeating that process finally at the Federal Court, assuming that there is some question of law arising from that compensation, is the Federal Court expected to request for those opinions "internally and administratively" and once again, when secured from the High Court, the opinions are for the eyes of the panel of the Federal Court only and not the parties?

[30] Going back to where we started, that it is the constitutional right to property which is under scrutiny, the answers to these posers should become quite obvious. While s 40C may not spell out in detail how the written opinions of the two assessors are to be handled other than to require the opinions to be written and to be recorded by the learned Judge, it cannot be denied that the written opinions form part of the proceedings.

[31] Section 45 of Act 486 requires all land reference proceedings to be conducted in open Court:

> Proceedings to be in open Court
>
> 45.(1) Every proceeding under this Part shall take place in open Court.

[32] In these appeals, the two assessors who were appointed sat throughout the reference proceedings. This is as required under s 40B. They would have had access to the valuation reports prepared, exchanged and tendered by the rivalling parties. They would have heard the testimonies of the witnesses called. Not only that, the High Court as well as the assessors would have had the opportunity to clarify. Upon conclusion of hearing evidence and submissions on the question of adequacy of compensation, in particular whether and if so, how compensation for costs of preliminary works, costs of termination of the contractor and consultant agreements should be computed, the assessors would have given their views on these various items, not merely on the principle or the right but also on quantum. These are all matters relevant in determining the matter of adequacy of compensation. That determination of compensation however, remains entirely with the learned Judge.

[33] Although assessors attend reference proceedings, they do not determine the matters complained about, not even the amount of compensation — see s 40D and the deliberations of this Court in *Semenyih Jaya (supra)* and *Amitabha Guha & Anor v. Pentadbir Tanah Daerah Hulu Langat* [2021] 2 MLRA 19, para [49]-[58]. They are merely there to aid the Court in that limited respect, that is, to offer their opinions on the heads of compensation. The Court consists of only the judge, sitting alone. This is evident from s 40A which must be read in the light of *Semenyih Jaya*:

> 40A. (1) Except as provided in this section the Court shall consist of a Judge sitting alone.

[34] If judges are required to provide their reasons for arriving at any decision, all the more, the opinion of the assessors, which the law mandates must be in writing must be made available to the parties. Although these opinions

are intended to assist the Court in arriving at a decision on the amount of compensation, it is imperative that parties have the opportunity to consider them and to respond, if necessary. At its most basic level, these opinions form and must be part of the records of the land reference proceedings, aside from the learned judge recording the fact that the written opinions were provided.

[35] As part of the records of the proceedings, these opinions become part of the records of appeal, should there be an appeal. The parties can then adequately prepare their appeals and the appellate courts will similarly be able to properly scrutinise these opinions and evaluate the complaints and concerns of the parties and how the same were addressed by the learned Judge. See for instance *Rohana Ariffin & Anor v. Universiti Sains Malaysia* [1989] 4 MLRH 718. If these written opinions are not made available, worse not form part of the records of appeal until and unless specifically sought for by any party, how is the question of adequacy of compensation to be properly addressed. How is the right enshrined in art 13(2) to be upheld?

[36] Under art 13 of the Federal Constitution, the High Court in assessing the complaint of adequacy of compensation is bound to balance competing interests of the appellant, the landowner and the 2nd respondent, the acquiring authority or paying master under Act 486. It is therefore necessary that all relevant material is placed before the Court for that assessment and determination. Otherwise, the rights of the appellant, as landowner, will not be properly redressed.

[37] Further, the question of adequacy of compensation can only be properly determined according to law if all concerned have had the opportunity to address the reasons, factors or circumstances which are relevant and necessary when computing or calculating that compensation. The opinions of the assessors who attend Court and assist the High Court Judge in determining the matter of compensation so as to ensure that it is at the end of the day, adequate must thus be made known to the owners and those affected by the compulsory acquisition. The obligation to make known the reasons or factors extends to everyone who has any role to play in that decision, be it the judge or the assessors.

[38] Thus, the availability of these written opinions of the assessors can never be a matter of internal administrative arrangement. Land reference proceedings are open Court proceedings and it is integral to the rule of law that there is transparency and fairness not just in the conduct of those proceedings but in the manner any evidence, including opinion evidence is received and treated by the Court. The presence of these written opinions must be recorded by the judge hearing the land reference and should the judge see fit, even incorporate the entire or parts of those opinions into the determination. It may even be attached to the learned Judge's grounds, should that be seen as appropriate. But, once available, the written opinions must be provided to the parties. These opinions must be included into any record of appeal, in the event there is one.

Otherwise, these written opinions are part of the records of the land reference proceedings at the High Court.

[39] Since it is obvious that there was non-compliance of s 40C in these appeals, that the written opinions were never made available to the parties or even called for by the Court of Appeal, the appeals must be allowed and the orders of the Courts below are set aside. The matter is remitted to the High Court for a rehearing before another judge.

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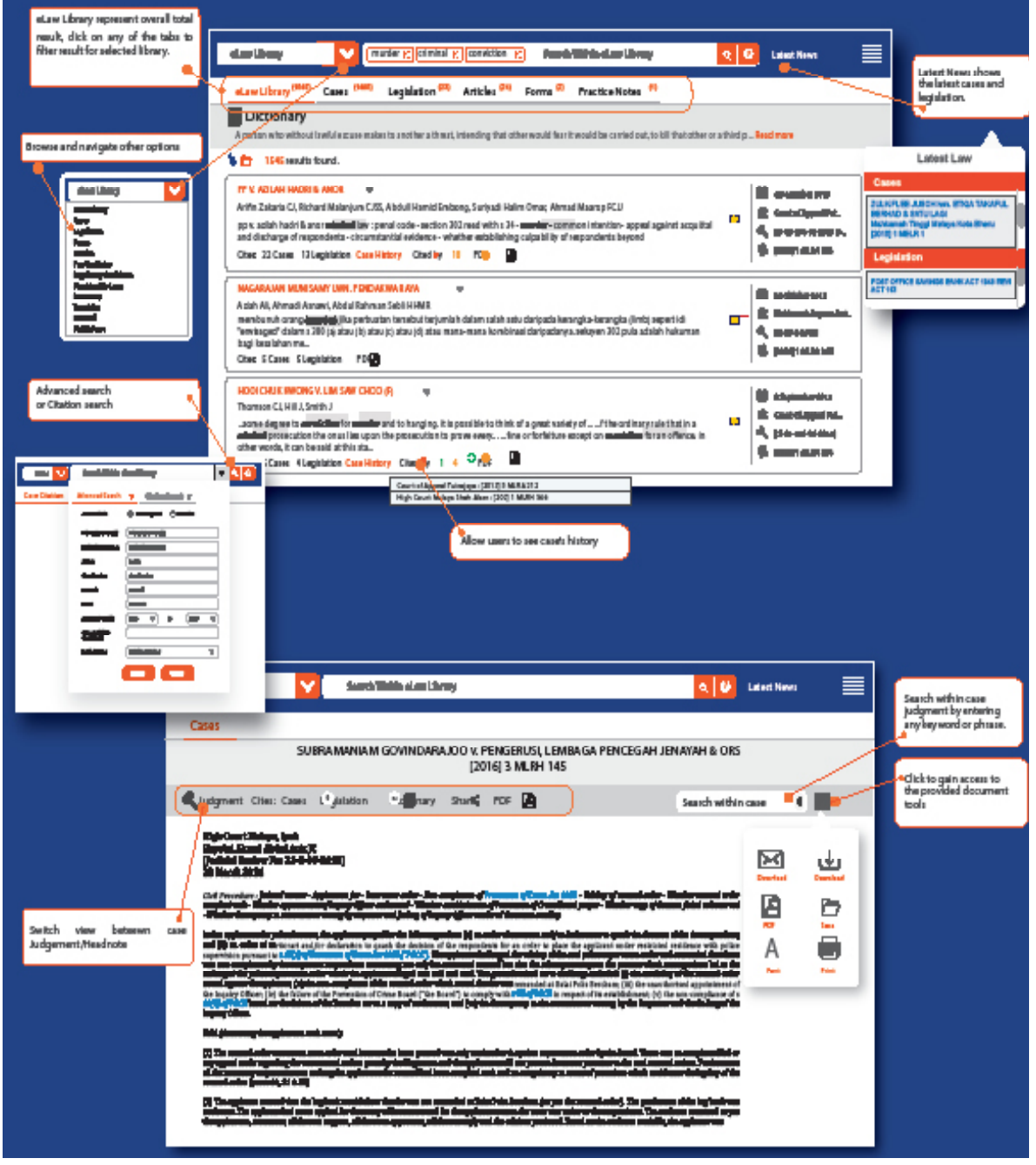

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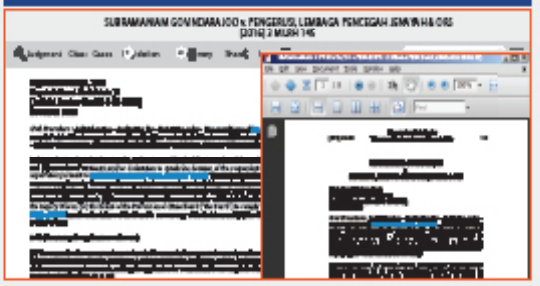

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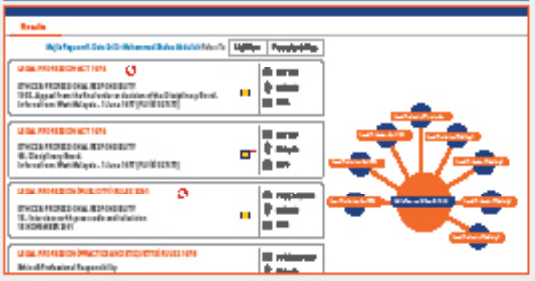

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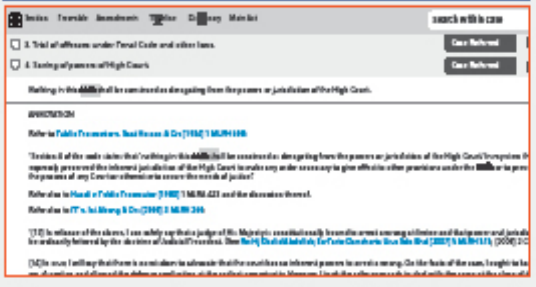

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