

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR

B E T W E E N :-

THE GOVERNMENT OF MALAYSIA

- and -

LEMBAGA PELABOHAN KELANG

Appellants

- and -

SELANGOR PILOT ASSOCIATION (1946)
(a firm)

Respondents

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C A S E FOR THE APPELLANTS

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1. This is an Appeal from the judgment of the Federal Court of Malaysia (Suffian L.P., Lee Hun Hoe C.J. Borneo, and Ali F.J.) allowing an appeal by the Respondent against an order made by Abdul Hamid J. on the 17th July 1974 dismissing a claim by the Respondents for a declaration that they are entitled to compensation for the goodwill of which they have been deprived of their business known as "Selangor Pilot Association (1946)" which they claimed had been compulsorily acquired by the First Appellant on behalf of the Second Appellant by virtue of the provisions of Sections 5 and 6 of the Port Authorities (Amendment) Act 1972 whereby new Sections 29(a) and 35(a) were added to the Port Authorities Act 1963; or alternatively for a declaration that the provisions of Section 35(a) of the Port Authorities Act 1963 as amended are unconstitutional and of no effect; and for damages.

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2. The facts are not in dispute. The Respondents are a firm registered under the Registration of Business Ordinance 1956. Their members were pilots licensed under the Merchant Shipping

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Ordinance for the specific area of Port Swettenham Harbour. From 1946 until 30th April 1972 the Respondents were the only firm providing pilotage services in the harbour, though there was no bar to others doing the same. The partners in the Respondent firm are bound by a written partnership agreement. This contains provisions for a repayment to a retiring partner (Clause 23) of his share of the capital and effects of the partnership by the remaining partners and purchase of such shares (Clause 31) by an incoming partner, but contains no mention of any sum in respect of goodwill being included in any such payment or purchase. In 1972 the Port operation was nationalised and by means of amendment to the Port Authorities Act 1963 enacted by the Port Authorities (Amendment) Act 1972 it was provided (Section 35 A(1)) that no-one other than a pilot employed by the Second Appellants, the Port Authority, should be entitled to act as a pilot in Port Swettenham Harbour, that harbour having on 13th April 1972 been declared by the Second Appellants by notice in the Federal Gazette to be a pilotage district within the meaning of the new Section 29 A. On 1st May 1972 the Second Appellants, pursuant to their letter of 27th March 1972 to the Respondents, began to provide pilotage services at Port Swettenham and took over the physical assets of the Respondents for which they paid compensation. They also took certain of the Respondents' members into their employ. But they refused to compensate the Respondents for loss of goodwill or for loss of future profits. From 1st May 1972 onwards only the Second Appellants have been providing pilotage services at Port Swettenham.

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3. (1) The issues which arise upon this Appeal are whether, having regard to article 13 of the Federal Constitution, the provisions of Section 29A and 35A of the Port Authorities Act 1963 (as amended)

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(a) were unconstitutional; or

(b) give rise to an obligation upon the Appellants or the Second Appellants to pay compensation to the Respondent for the loss of goodwill and loss of future profits.

(2) These issues comprise three elements

(a) whether the Respondents had any goodwill in their business.

(b) whether that goodwill was property.

(c) whether that property had been acquired by the Appellants.

It was agreed between the parties that the amount of compensation if any should be left to be determined hereafter.

10 4. The statutory provisions which have been considered to be relevant in the Courts below are as follows.

CONSTITUTION

Article 13 Rights to Property

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

Article 74 Subject Matter of Federal and State Laws

20 (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

Schedule 9 Legislative Lists

List (i) - Federal List

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30 (ix) Shipping, navigation and fisheries, including -

(a) shipping and navigation on the high seas and in tidal and inland waters;

(b) ports and harbours; foreshores;

(c) lighthouses and other provisions for the safety of navigation;

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(d) ...

Statutes

Port Authorities Act 1963 (as amended by
the Port Authorities (Amendments) Acts 1972

Section 29A

(1) The Authority may from time to time by
notification in the Gazette declare any area in
the port or the approaches to the port to be a
pilotage district.

(2) Every such declaration shall define the 10
limits of the pilotage district.

(3) Notwithstanding the provisions of the
Merchant Shipping Ordinance, 1952, the provisions
of this Part shall apply to any pilotage district
declared under this section.

35A. (1) Any person who, not being an Authority
pilot, engages in any pilotage act or attempts
to obtain employment as a pilot of a vessel
entering or being within any pilotage district
shall be guilty of an offence under this Act and 20
shall be liable on conviction to a fine not
exceeding 1,000 dollars.

(2) Any master or owner of a ship entering
or being within any pilotage district who
knowingly employs as pilot any person who is
not an Authority pilot shall be guilty of an
offence under this Act and shall be liable on
conviction to a fine not exceeding 1,000 dollars.

(3) For the purposes of this Section an
Authority pilot acting beyond the limits for 30
which he is licensed or in contravention of any
conditions imposed under the provisions of
Section 29 H, shall be deemed not to be an
Authority pilot.

(4) Any person may, without subjecting
himself or his employer to any penalty, act as
the pilot of a vessel entering or leaving any
pilotage district when such vessel is in distress
or under circumstances making it necessary for
the master to avail himself for the best 40
assistance that can be found at the time."

5. Abdul Hamid J. held that Section 29A, 29C, and 35A of the Port Authorities Act 1963, as amended, were validly enacted under Article 74 (1) of the Constitution; that Section 35A whereunder the Respondents were prohibited from providing pilotage services at Port Swettenham after 30th April 1972 amounted at most to a mere negative prohibition of the Respondents' enjoyment of certain property namely goodwill, if there was any, and could not be construed as constituting an acquisition or use of property by the Second Appellants as contemplated by Article 13(2) of the Constitution. In the circumstances the learned judge declined to determine whether property under Article 13 included goodwill and made no findings as to whether or not the Respondents had any such goodwill.

6. Upon appeal by the Respondents to the Federal Court of Malaysia (Suffian L.P., Lee Hun Hoe C.J. Borneo, and Ali F.J.) Suffian L.P. with whose judgment Ali F.J. concurred held that Parliament had power to enact Section 35A of the 1963 Act as amended subject to the question whether it was valid in view of Article 13 of the Constitution. He directed himself that this depended upon the answers to three questions; whether the Plaintiffs had any goodwill in their business, whether that goodwill was property, and whether that property had been acquired by the Defendants. He held that the learned judge could reasonably have found that there was goodwill in the business and that the Plaintiffs de facto monopoly only affected the value of that goodwill; that property within the meaning of Article 13 of the Constitution should be given the meaning assigned to it by Ghulam Hassan J. in Dwarkadas Shriniva v. The Sholapur Spinning and Weaving Co. Limited and others 1954 A.I.R.S

Section 119 namely "... a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights .."; that the Defendants had rightly conceded that goodwill constituted property; and that in Malaysian law a person might be deprived of his property and his property acquired by or on behalf of the State by a mere negative or restrictive prohibition interfering with his enjoyment of the property even if there had been no transfer of the ownership of that property to the State or a corporation owned or controlled by the State. He therefore held that the Plaintiff

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had been "legislated out of business" and since Section 35A omitted to provide for adequate compensation it contravened Article 13 of the Constitution though it was within Parliament's competence to enact it. Accordingly he granted a declaration that the Plaintiffs are entitled to compensation for the goodwill of their business of which they had been deprived and that the matter be remitted to the trial court for quantum to be assessed. Since compensation was all the Plaintiffs were interested in he made no further order.

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7. Lee Hun Hoe C.J. Borneo in the judgment with which Ali F.J. also concurred held that Parliament was competent to enact Section 35A, but that it did not merely prohibit the Respondents from carrying on their business. That business, he found, was in fact taken over by the Appellants. He held that the learned judge at first instance should have found that the Respondents had goodwill in their business and, following the judgment in

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Ulster Transport Authority v. James Brown & Son Limited 1953 N.I.79 that such goodwill had been acquired by the Appellants. He distinguished between the right of the subject under the Constitution and his common law right and following the Indian cases referred to in his judgment which were based on the similar but not identical wording of Article 31 of the Indian Constitution until amended in 1955 held that under Article 13 of the Malaysian Constitution a person might be deprived of his property if a mere negative or restricted provision resulted in interfering with the enjoyment of his property without any actual acquisition or taking over of property by the State or bodies under State control. He therefore held that since Section 35A did not provide for adequate compensation it was in conflict with Article 13 of the Constitution and that the Respondents were entitled to compensation for the goodwill of their business which had been compulsorily acquired by the Second Appellants.

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8. The Appellants first submit that the provisions of Section 29A and 35A of the Port Authorities Act 1963 were lawfully enacted by Parliament pursuant to Article 74(1) and Schedule 9 of the Federal Constitution. Thus, if the Respondents' former right to provide pilotage services at Port Swettenham constituted "property"

they were deprived of such property by the Second Respondents declaration under Section 29A and the provisions of Section 35A "in accordance with law" but, the Appellants submit that in any event the right of the Respondents to provide pilotage services prior to 1st May 1972 was not their property but merely a privilege accorded at that time to any licensed pilot who chose to do so. The Appellants further submit that there was no goodwill attaching to the Respondents' business at Port Swettenham; but if they did have goodwill such goodwill was not property within the meaning of Article 13; and that in any event such goodwill was not compulsorily acquired or made use of by the Second Respondents.

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9. The learned judge at first instance made no finding as to whether the Respondents had any goodwill or not. The Appellants submit that there was no evidence to support the finding of the Federal Court that goodwill did attach to the Respondents' business and no justification for drawing such an inference. The only relevant evidence namely the terms of the Respondents' partnership agreement, the terms of their agreement with Captain R.W. Emmerson, and the fact that no-one except the Respondents and their employees provided such services, a de facto monopoly, were all to the contrary effect. The partnership agreement (Clause 23) provides for the repayment by the remaining partners to a retiring partner of his share of the capital and effects of the partnership and for the purchase (Clause 31) by an incoming partner of such shares; but contains no mention of any payment for goodwill being included in any such payment or purchase.

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10. The Appellants finally submit that if any goodwill did attach to the Respondent's business such goodwill consisted of value arising from the Respondents' name and trading reputation which was personal to that business and incapable of being transferred to the Second Appellants in the circumstances in which they subsequently provided pilotage services. Such goodwill either continues to attach to the Respondents insofar as they are able to operate outside Port Swettenham and pilotage district or cease to exist at latest on 30th April 1972. Neither Section 29A nor Section 35A provided for its compulsory acquisition nor was it in fact every required by the Second Respondent. The Second

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Respondents acquired their right to provide pilotage services by operation of law duly enacted in accordance with Article 74 and Schedule 9 of the Federal Constitution.

11. The Appellants submit that the judgment of the Federal Court should be reversed and the Order of Abdul Hamid J. restored for the following among other

R E A S O N S

- (1) BECAUSE the Port Authorities Act 1963 as Amended by the Port Authorities (Amendment) Act 1972 was lawfully enacted pursuant to Article 74 and in accordance with Article 13 of the Federal Constitution. 10
- (2) BECAUSE no goodwill attaches to the Respondent's business.
- (3) BECAUSE no such goodwill if any was ever acquired by the Second Respondent.

ROBERT ALEXANDER

NICHOLAS LYELL

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