

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA (Appellate Jurisdiction)

B E T W E E N :-

THE GOVERNMENT OF MALAYSIA

- and -

LEMBAGA PELABOHAN KELANG

Appellants

- and -

10 SELANGOR PILOT ASSOCIATION (1946)
(Suing as a firm)

Respondents

C A S E FOR THE RESPONDENTS

- | | <u>Record</u> |
|--|----------------------------|
| <p>1. This is an appeal from an order of the Federal Court of Malaysia (Suffian L.P., Lee C.J. Borneo, Ali F.J.) dated the 8th of March 1975 allowing an appeal by the present Respondents against a decision Abdul Hamid J. dated 17th July, 1974 in the High Court of Malaya at Kuala Lumpur dismissing the Respondents' claim for:-</p> <p>20</p> | <p>p.100</p> <p>p.53-4</p> |
| <p>(i) a declaration that they were entitled to compensation for the goodwill of which they have been deprived of their business known as "Selangor Pilot Association (1946)", which was compulsorily acquired by the First Defendants on behalf of the Second Defendants by virtue of the provisions of Sections 5 and 6 of the Port Authorities (Amendment) Act, 1972, whereby new sections 29A and 35A were added to the Port Authorities Act, 1963</p> <p>30</p> | <p>p.2</p> |
| <p>(ii) Alternatively a declaration that the provisions of the said section 35A of the Port Authorities Act, 1965 were unconstitutional and of no effect</p> | |

Record

p.103-4

This appeal from the said judgment of the Federal Court is presented in pursuance of Final Leave to appeal to His Majesty the Yang di Pertuan Agong, which was granted to the Appellants by the order of the Federal Court dated 18th August, 1975

2. The material facts insofar as they are not in dispute are as follows:-

p.47 l 1-13
p.47 l 25-31
p.90 l 28-32

(i) The Respondents are a firm who had from 1946 and until 30th April, 1972 provided pilotage services at Port Swettenham. 10

p.75 l 30
p.79 l 18-34
p.91 l 36-37
l 46

(ii) Though others (if properly qualified and licenced for the harbour) were free to compete with the Respondents in the provision of such services, at all material times the Respondents alone provided such services at the said Port.

p.47 l 4-12
l 22

(iii) In the exercise of powers newly granted to them by the Port Authorities (Amendment) Act, 1972, the Second named Appellants by Gazette Notification No. 1215 of 13th April, 1972 and made under Section 29A of the Ports Authorities Act, 1963 (as amended) declared the areas in Port Swettenham where the Respondents carried on their business to be the Port's pilotage district. 20

p.76 l 39-43

p.47 l 2-12
p.77 l 4-29

(iv) The combined effect of that declaration and Section 35A of the said Act as amended was that the Respondents had to cease their business of providing pilotage services in Port Swettenham, and as from the 1st May, 1972 the second named Appellants took over from the Respondents the provision of the said pilotage services. Since that date only the Second named Appellants have been providing and are permitted to provide those services at Port Swettenham. 30

p.77 l 19-25

(v) On the said take-over, the Second named Appellants paid the Respondents compensation for physical assets such as launches, but have refused to pay any compensation for goodwill or loss of future profits. 40

3. Consequently the Respondents commenced these proceedings for the recovery of

compensation for that goodwill, and it was agreed between the parties at first instance that the issue of the quantum of compensation should be deferred until it was established whether or not the Respondents were entitled to compensation.

4. The issues which arise upon this appeal are as follows:-

- 10 (i) Whether there was any goodwill attaching to the Respondents' business,
- (ii) Whether, if there was such goodwill, that goodwill was "property" within the meaning of Article 13 of the Federal Constitution of Malaysia,
- (iii) Whether, if such goodwill was property, the Respondents were deprived thereof, or it was compulsorily acquired or used in circumstances entitling the Respondents to compensation for its loss.

20 5. The statutory provisions which were considered to be relevant in the courts below are as follows:-

- (i) The Federal Constitution of Malaysia Article 13 (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.
- 30 (ii) The Port Authorities Act, 1963 as amended by the Port Authorities (Amendment) Act, 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 limits of the pilotage district.

40 (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.

Record

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 shall be liable on conviction to a fine not exceeding \$1,000.

(2) Any master or owner of a ship entering or being within any pilotage district who knowingly employs as a 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.

10

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

20

(4) Any person may, without subjecting himself or his employer to any penalty, acts 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 of the best assistance that can be found at the time.

(iii) Constitution of India (as it stood before the amendment set out in (iv)

30

Article 31 (1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of the law which provides for compensation.....

(iv) The amendment to Article 31 of the Constitution of India provided for by the Constitution (4th Amendment) Act, 1955, and effective from 27th April, 1955.

40

Article 31 (2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the

State it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(v) Government of Ireland Act, 1920

10 Section 5 (1) In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to take any property without compensation.

6. At first instant Abdul Hamid J., in finding for the Appellants, held (i) that the said Section 35A was properly enacted in accordance with the constitution and was valid,

p.501 15-20

20 (ii) that the Respondents were not entitled to compensation, since the take-over of the Pilotage services by the Second named Appellants was at the most an interference with the Respondents' enjoyment of certain property e.g. goodwill, if any, and if goodwill is property, but was not an actual taking away of such property.

p.511 19-34

30 7. From this decision the Respondents appealed. The Federal Court of Malaysia allowed such appeal on point (ii) above. The Court were unanimous. Two judgments were delivered, one by Suffian L.P., and one by Lee C.J. Borneo, with both of which Ali F.J. agreed. The reasons of the Court are as follows:-

(i) On uncontroverted evidence, the Respondents enjoyed goodwill in their business.

p.791 17-35
p.921 30-31

(ii) "Property" as used in Article 13 of the Constitution includes such goodwill (which point was conceded or in any event not apparently disputed by the Appellants).

p.801 9-11
p.951 30-31

(iii) Legislation which prevented the Respondents enjoyment or realisation of such goodwill deprived them of their property.

p.861 2-14
p.951 45-48

40 (iv) The fact that the ownership of such goodwill was not actually transferred to the State or to its chosen instrument does not mean that the State has not acquired that property

p.851 30-40
p.981 33-38

Record

and is not liable to pay compensation therefor.

8. The Respondents in this appeal will contend that the Federal Court were right on each of the points set out above.

G R O U N D S

(i) One of the saleable assets of the Respondents' business in providing pilotage services in the Port of Swettenham was the goodwill of that business.

10

(ii) The fact that at all material times the Respondents had no competition in the provision of those services enhanced the value of that goodwill, rather than demonstrating that they had no goodwill.

(iii) Article 13 of the Constitution is designed to protect the subject from confiscation of his property by the State, and so should be construed liberally (and as a whole) to achieve that end, and properly so construed leads on the facts of this case to the conclusions set out in (iv), (v), (vi), and (vii) below.

20

(iv) Goodwill such as that enjoyed by the Respondents in their pilotage business is property within the meaning of Article 13.

(v) Section 29A and 35A of the Ports Authorities Act, 1963 as amended prevented the Respondents from enjoying or realising that goodwill, thereby depriving them of their property within the meaning of Article 13.

30

(vi) Where the direct consequence of such deprivation is (as it was in this case) that the State (or its chosen instrument) acquires the benefits of the property rights of which the Subject has been deprived, the State has, within the meaning of Article 13, acquired such property whether or not such acquisition was achieved by formal transfer of any such property right. In such situation the Subject's right to compensation does not depend on the method of deprivation the State chooses to adopt, because " a legislature cannot do indirectly what it cannot do *directly* (Pillai v. Mudanayake 1953 AC 519 per Lord Oaksey at p.528)

40

(vii) Alternatively to (vi), where, as here, the conditions under which the Subject was deprived of his property admitted of that property being acquired by contract and of being used for the benefit of the State or its chosen instrument, the property is regarded as having been acquired under an implied contract, and the obligation to pay compensation attaches.

10 (viii) The method and results of the construction contended for above obtain strong persuasive support from

(a) the Indian authorities on comparable Articles in their Constitution as it stood before 27th April, 1955 referred to in the Judgments of the Federal Court herein, p.82 l 30
p.84 l 42
p.96 ll-
p.98 l 10

(b) the need felt by India to amend her Constitution to add Article 31(2A) p.84 l 92-
p.85 l 28
p.98 l 11-39

20 (c) the fact that, though the Malaysian Constitution is modelled on the Indian Constitution, and came into effect after the date of the amendment to the Indian Constitution referred to in (b) above, that amendment was not incorporated into the Malaysian Constitution, p.85 l 44-48
p.98 l 20-24

30 (d) the Northern Ireland's Courts interpretation of a section comparable to Article 13 of the Constitution in the Government of Ireland Act, 1920, in the case of Ulster Transport Authority V. James Brown & Sons Limited (1953) N.I.79.

9. The Respondents submit that the decision of Federal Court was right and should be upheld for the following among other reasons.

R E A S O N S

(i) BECAUSE there was goodwill in the Respondents' business at the time that the Second named Appellants took over the pilotage services at Port Swettenham.

40 (ii) BECAUSE that goodwill constituted property within the meaning of Article 13 of the Constitution.

(iii) BECAUSE that action of the Second named Appellants in taking over the pilotage services

Record

amounted to the compulsory acquisition of the Respondents' property, namely the goodwill of their business.

(iv) BECAUSE on these grounds the Respondents are entitled to compensation for the goodwill of their business by virtue of the provisions of Article 13 of the Constitution.

(v) BECAUSE the judgments of the Federal Courts are right.

10

DENIS HENRY

No. 45 of 1975

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

B E T W E E N :-

THE GOVERNMENT OF MALAYSIA

- and -

LEMBAGA PELABOHAN KELANG

Appellants

- and -

SELANGOR PILOT ASSOCIATION (1946)
(Suing as a firm)

Respondents

CASE FOR THE RESPONDENTS

MESSRS. BULCRAIG & DAVIS
Solicitors,
6 Henrietta Street,
London W.C.2.

Solicitors for the Respondents