

1 of 1977

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 45 OF 1975

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
LEMBAGA PELABOAHAN KELANG Appellants
AND
SELANGOR PILOT ASSOCIATION
(Suing as a firm) Respondents

RECORD OF PROCEEDINGS

STEPHENSON HARWOOD & TATHAM
Saddlers Hall, Gutter Lane,
Cheapside, London, EC2V 6BS
Solicitors for the Appellants

BULCRAIG & DAVIS,
6, Henrietta Street,
Strand, London, WC2E 8QS.
Solicitors for the Respondents

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)
(suing as a firm)

Respondents

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

<u>No.</u>	<u>Description of Document</u>	<u>Date</u>	<u>Page</u>
	<u>IN THE HIGH COURT IN MALAYSIA</u> <u>AT KUALA LUMPUR</u>		
1.	Writ of Summons	9th December 1972	1.
2.	Statement of Claim	12th January 1973	3.
3.	Defence of First Defendant	21st February 1973	7.

(ii)

<u>No.</u>	<u>Description of Document</u>	<u>Date</u>	<u>Page</u>
4.	Defence of Second Defendant	6th March 1973	8.
5.	Notes of Proceedings	2nd May 1974	9.
6.	Defendants' Counsel's Written Submission		13.
7.	Plaintiffs' Counsel's Written Submission		22.
8.	Judgment of Abdul Hamid J.	17th July 1974	46.
9.	Order of Court	17th July 1974	53.
<u>IN THE FEDERAL COURT OF MALAYSIA</u>			
10.	Memorandum of Appeal	2nd September 1974	54.
11.	Notes of Suffian L.P.	7th January 1975	56.
12.	Notes of Lee Hun Hoe	7th January 1975	62.
13.	Notes of Ali F.J.	7th January 1975	71
14.	Judgment of Suffian L.P.	8th March 1975	75.
15.	Judgment of Lee Hun Hoe	8th March 1975	87.
16.	Order of Federal Court	8th March 1975	99.
17.	Order granting conditional Leave to Appeal to His Majesty the Yang di Pertuan Agong	12th May 1975	101.
18.	Order granting final Leave to Appeal to His Majesty the Yang di Pertuan Agong	18th August 1975	103.

E X H I B I T S

<u>Exhibit Mark</u>	<u>Description of Documents</u>	<u>Date</u>	<u>Page</u>
P.1.	Certificate of Registration		105.
P.2.	Certificate of Registration		106.

(iii)

<u>Exhibit Mark</u>	<u>Description of Documents</u>	<u>Date</u>	<u>Page</u>
P.3.	Certificate of Registration		107.
P.4.	Certificate of Registration		108.
P.5.	Agreement between Plaintiffs and Capt. Emmerson	1st July 1969	109.
P.6.	Partnership Agreement	12th September 1969	113.
P.7.	Certified Copy of Form B	12th September 1969	125.
	Letter Kelang Port Authority to Plaintiffs	31st March 1972	127.
	Letter Plaintiffs to Ketua Pengarah	27th March 1972	128.
	Letter Kementerian Pengang Kutan to Plaintiffs' Solicitors	7th July 1971	130.

DOCUMENTS TRANSMITTED TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL BUT NOT REPRODUCED

Notice of Appeal	22nd July 1974
Notice of Motion	19th April 1975
Affidavit of Mohamed bin Haji Abdul Hamid	17th April 1975

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 :-

1. THE GOVERNMENT OF MALAYSIA

2. PEMBAGA PELABOHAN KELANG

Appellants

- and -

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

Respondents

10

RECORD OF PROCEEDINGS

No.1

WRIT OF SUMMONS

In the High Court in Malaya

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT 1972 No. 1142

No.1
Writ of Summons
9th December
1972

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

20

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants

The Honourable Tan Sri Ong Hock Thye, P.S.M., D.P.M.A., Chief Justice of the High Court in Malaya, in the name and on behalf of His Majesty the Yang di-Pertuan Agong.

To:

- 1. The Attorney General Malaysia
- 2. The Secretary,
Lembaga Pelabohan Kelang,
Port Klang.

30

In the High Court in Malaya

No.1 Writ of Summons 9th December 1972 (continued)

WE COMMAND YOU, that within eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Selangor Pilot Association (1946), suing as a firm.

AND TAKE NOTICE that in default of your so doing the Plaintiffs may proceed therein and judgment may be given in your absence.

WITNESS Nadiah Salleh, Senior Assistant Registrar of the High Court in Malaya the 12th day of December, 1972.

10

SGD. K.Y. Foo & Co.

.....

Plaintiffs' Solicitors

Senior Assistant Registrar, High Court, Kuala Lumpur.

N.B.: This Writ is to be served within twelve months from the date thereof, or, if renewed, within six months from the date of last renewal, including the day of such date and not afterwards.

20

The defendant (or defendants) may appear hereto by entering an appearance (or appearances) wither personally or by Solicitor at the Registry of the High Court at

A defendant appearing personally, may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for \$3.00 with an addressed envelope to the Registrar of the High Court at

30

The Plaintiffs' claim is for:-

1. A declaration that the Plaintiffs are entitled to compensation for the goodwill of which they have been deprived of their business known as "Selangor Pilot Association (1946)" which has been compulsorily acquired by the First Defendant on behalf of the Second Defendant 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.

40

2. Alternatively for a declaration that the provisions of the said Section 35A of the Port

Authorities Act 1963 are unconstitutional and of no effect.

In the High Court in Malaya

3. Damages.

4. Such further or other relief as to the Court may seem fit.

5. Costs.

Dated this 9th day of December, 1972.

SGD: K.Y. Foo & Co.
Solicitors for the Plaintiffs

No.1

Writ of Summons
9th December 1972
(continued)

10 This Writ was issued by Messrs. K.Y. Foo & Co., whose address for service is No. Room 506, 5th Floor, Lee Yan Lian Building, Jalan Mountbatten, Kuala Lumpur. Solicitors for the said plaintiffs.

(Indorsement to be made within three days after service)

This Writ was served by me at
on the Defendant
on the day of ,19
at the hour of .

20 Indorsed the day of ,19 .

(Signed).....

(Address).....

No.2

No.2

STATEMENT OF CLAIM

Statement of Claim
12th January 1973

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO: 1142 OF 1972

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

30

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants

STATEMENT OF CLAIM

In the High
Court in
Malaya

No.2

Statement
of Claim
12th January
1973
(continued)

1. The Plaintiffs are a firm registered under the Registration of Businesses Ordinance, 1956 and sue as a firm.

2. Since 1946 and up to 30th April, 1972 the Plaintiffs carried on the business of providing pilotage services at Port Swettenham.

3. The Plaintiffs claim that by virtue of sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 the First Defendant on behalf of the Second Defendant compulsorily acquired the Plaintiffs' business known as Selangor Pilot Association (1946). 10

4. By the said sections 5 and 6 of the Port Authorities (Amendment) Act 1972 the following sections 29A and 35A were added to the Port Authorities Act, 1963 :-

S 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. 20

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

(3) Notwithstanding the provisions of the Merchant Shipping Ordinance, 1952 the provisions of this Port shall apply to any pilotage district declared under this section. 30

S 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 one thousand dollars.

(2) Any matter 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 40

5.

offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

In the High Court in Malaya

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

—
No.2

Statement of Claim
12th January 1973
(continued)

10

(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 or the best assistance that can be found at the time.

20

5. By a Gazette Notification No. 1215 appearing in the Government of Malaysia Gazette dated 13th April, 1972 and made under section 29A above referred to the Second Defendant declared certain areas to be the Port's pilotage district which areas included all the areas in which the Plaintiffs carried on their business.

30

6. The Plaintiffs were informed by the Defendants that the Second Defendant would take over the pilotage services with effect from 1st May, 1972 and the Second Defendant did take over such services as from that date.

7. The Second Defendant has taken over all the material assets of the Plaintiffs and compensated the Plaintiffs for the same but has refused to pay to the Plaintiffs any compensation for the goodwill of the Plaintiffs' business and for the loss of future profits incurred by the Plaintiffs. And the Plaintiffs claim such compensation.

40

8. Alternatively the Plaintiffs claim a declaration that the provision of the said section 35A of the Port Authorities Act, 1963 are unconstitutional and of no effect by virtue of Article 13 of the Constitution of Malaysia and the Plaintiffs claim damages.

In the High
Court in
Malaya

PARTICULARS OF DAMAGES

Loss of profits caused by the Plaintiffs
having to cease business as from 1st May, 1972.

No.2

The Plaintiffs pray for :-

Statement
of Claim
12th January
1973
(continued)

1. A declaration that the Plaintiffs are entitled to compensation for the goodwill of which they have been deprived of their business known as "Selangor Pilot Association (1946)" which has been compulsorily acquired by the First Defendant on behalf of the Second Defendant by virtue of the provisions of Section 5 and 6 of the Port Authorities (Amendment) Act, 1972 whereby new Sections 29A and 35A were added to the Port Authorities Act, 1963. 10

2. Alternatively for a declaration that the provisions of the said Section 35A of the Port Authorities Act 1963 are unconstitutional and of no effect.

3. Damages.

4. Such further or other relief as to the Court may seem fit. 20

5. Costs.

Dated this 12th day of January, 1973.

Sgd. K.Y. Foo & Co.

Solicitors for the Plaintiffs

This Statement of Claim is filed by Messrs. K.Y. Foo & Co., Solicitors for the Plaintiffs abovenamed whose address for service is Room 506, 5th Floor, Lee Yan Lian Building, Jalan Mountbatten, Kuala Lumpur. 30

No.3

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO: 1142 of 1972

In the High
Court of
Malaysia

No.3

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

Defence of
First
Defendant
21st February
1973

And

- 1. The Government of Malaysia
- 2. Lembaga Pelabohan Kelang Defendants

DEFENCE OF THE 1ST DEFENDANT

10

1. The First Defendant has no knowledge of paragraphs 1 and 2 of the Statement of Claim and hence makes no admissions thereof.

2. The First Defendant denies paragraph 3 of the Statement of Claim.

3. The First Defendant admits paragraph 4 of the Statement of Claim.

20

4. The First Defendant has no knowledge of paragraphs 5, 6 and 7 of the Statement of Claim and hence makes no admission thereof.

5. With regard to paragraph 8 of the Statement of Claim the First Defendant denies that the provision of section 35A of the Port Authorities Act, 1963 are unconstitutional and of no effect by virtue of Article 13 of the Constitution.

6. The First Defendant avers that this suit is wrong in law as against the First Defendant.

30

7. Save as hereinbefore expressly admitted the First Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set forth seriatim and specifically traversed.

8. Wherefore, the First Defendant prays that the claim of the Plaintiffs be dismissed with costs.

Dated this 21st day of February, 1973.

Sgd: Federal Counsel
for and on behalf of the 1st Defendant.

In the High Court of Malaysia

No.3

Defence of First Defendant
21st February 1973
(continued)

To:

Messrs. K.Y. Foo & Co.,
Room 506, 5th Floor,
Bangunan Lee Yan Lian,
Jalan Mountbatten,
Kuala Lumpur.

(Solicitors for the Plaintiffs).

No.4

Defence of 2nd Defendants
6th March 1973

No.4

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO: 1142 of 1972

10

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants

STATEMENT OF DEFENCE OF SECOND DEFENDANTS

1. Paragraph 2 of the Statement of Claim is admitted.

2. The Second Defendants deny that the Plaintiffs' business was compulsorily acquired or at all by them or on their behalf as alleged in Paragraph 3 of the Statement of Claim. 20

3. Paragraphs 4, 5 and 6 of the Statement of Claim are admitted.

4. In answer to Paragraph 7 of the Statement of Claim the Second Defendants state that the material assets of the Plaintiffs were purchased for consideration by the Second Defendants. The Second Defendants deny that any compensation is due and payable to the Plaintiffs in respect of the goodwill or loss of future profits as alleged by the Plaintiffs in Paragraph 8 of the Statement of Claim. 30

5. The Second Defendants deny that the provisions of Section 35A of the Port Authorities Act 1963 are unconstitutional or that damages claimed by the Plaintiffs under Article 13 of the Constitution of Malaysia is payable.

In the High
Court of
Malaysia

No.4

6. Except as hereinbefore expressly admitted or otherwise pleaded to no admissions are made as to any of the matters alleged in the Statement of Claim herein.

Defence of
2nd
Defendants
6th March
1973
(continued)

10 7. Wherefore the Second Defendants pray that the action be dismissed with costs.

Dated this 6th day of March, 1973.

Sgd: TUNKU ZUHRI,

MANAN & ABDULLAH

Second Defendants' Solicitors.

This Statement of Defence of Second Defendants is filed by Messrs. Tunku Zuhri, Manan & Abdullah, Advocates & Solicitors, whose address for service is at Room 602, 6th Floor, Asia Insurance Building, 2, Jalan Weld, Kuala Lumpur.

20

No.5

NOTES OF PROCEEDINGS

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

IN OPEN COURT,

BEFORE ABDUL HAMID, J.,

THIS 2ND DAY OF MAY, 1974

CIVIL SUIT NO. 1142/72.

No.5

Notes of
Proceedings
2nd May
1974

Mr. Sothi for plaintiff.

Encik Abdullah Ngah for first defendant.

30 Encik Abdullah Yusoff for second defendant.

Agreed Bundle - A.B.

Mr. Sothi says that by consent the Court

In the High
Court of
Malaysia

is to determine on two issues -

(1) whether act was constitutional;

and

(2) liability to pay compensation

- not on quantum.

No. 5
Notes of
Proceedings
2nd May
1974
(continued)

PW1: Kiang Pao Lian, affirmed and speaks in English. Senior partner of Selangor Pilot Association (1946) (S.P.A.).

The business commenced in 1946. In 1954 the firm was registered under the Registration of Businesses Ordinance, 1953. (Certificate of Registration produced and marked P1. Certificate of Registration - dated 10.7.71 to 9.7.74 - produced and marked P2, P3 and P4).

10

There is an agreement entered into between the firm and Captain R.W. Emerson - (produced and marked P5) - re retirement of Captain Emerson from the partnership.

I produce a partnership agreement dated 12.9.1969 - a partnership among myself and five others. (Marked P6). I produce certified true copy of Form B under Registration of Businesses Ordinance, 1953. (Marked 7). (P7 shows that on 12.9.69 there were 6 partners). There was no change in the partners.

20

When a new partner comes in, he pays a capital sum to the partnership. All partners are equal partners.

The firm rented the premises from the second defendant for the running of the business. There was no other assistance from the second defendant. All the material assets were purchased by the firm. For all launches and material assets we were already paid.

30

(Page 106 AB referred). This is a letter from the second defendant received by the firm.

We mentioned about the payment of compensation for goodwill and loss of future profits to the Port Authority.

We were refused compensation for goodwill and loss of future profits.

40

There is no correspondence on this question of compensation for goodwill and loss of future profits.

In the High
Court of
Malaysia

There was no written claim made. (Statement of Claim - paragraph 5 - not disputed).

—
No.5

The second defendant took over pilotage services as from 1.5.72. Before May 1972 as long as there was pilot licence anyone could operate the pilotage services.

Notes of
Proceedings
2nd May
1974
(continued)

10 Cross-examination by Encik Abdullah Ngah:

We have employees - pilots, office staff, launch crews and trainee pilots.

There was no other firm doing pilotage services. If a pilot was needed they will have to obtain one from the Selangor Pilot Association.

20 By reason of the declaration in the Government Gazette we had to dispose of the material assets and the launches and we agreed to sell them to the Port Authority. They paid for the material assets and the launches.

The Association still exists and the Association can still operate outside the area declared.

(Page 105 AB referred).

Cross-examination by Encik Abdullah Yusoff:

30 I have been a partner since 1960. I was a member of the Pilot Board from 1969 to 1972. The number of pilots for pilotage district was fixed by the Pilot Board. The number was changed from time to time.

All licensed pilots were either partners or employed by the Association. Amongst the pilots there were non-citizens - some were on work permits and some were permanent residents.

40 When the Port Authority took over the services all the pilots were offered employment including all the partners. All the partners were licensed pilots. Some accepted the offer and some rejected it. They were offered on the same terms. I accepted. All accepted except three.

In the High
Court of
Malaysia

—
No.5

Notes of
Proceedings
2nd May
1974
(continued)

Re-examination:

Launches: They were only for pilotage services. Two of the six partners were on work permits.

Not all the partners were offered employment.

(Plaintiff's case closed).

(First defendant is not adducing any evidence).

(Second defendant's case opens).

DW1: Mohamad bin Haji Abdul Hamis, affirmed and speaks in English. Secretary, Lembaga Pelabuhan Kelang.

10

One of the functions of the Port Authority generally is to provide service to ships to berth for the purpose of loading and unloading of cargo and storage of cargo. It has other functions as enumerated in the Act (s. 3 Port Authorities Act, 1963).

The Port was not providing all the facilities as provided. The Port was not providing pilotage services before 1.5.72. Also before 1971 the Port was not providing security service, stevedoring service and supply of water to ships etc.

20

As far as pilotage services was concerned the Selangor Pilot Association was providing the services before 1.5.72. Stevedoring service was provided by four private companies. Security service was provided by the Royal Malaysia Police.

It is part of rationalisation of port operation to provide these services.

30

Cross-examination:

The Port Authority now provides stevedoring service. The four private companies are no longer providing the service though they are in existence.

The stevedoring companies were paid compensation. The payment was approved by the Cabinet. Approximately not less than \$5,000,000.00 were paid to all the four stevedoring companies.

Re-examination:

The stevedoring companies were licensed by the Port yearly, their licences expiring on December 31 every year. The licences were not renewed in this case. This happened on 1.5.73. They were licensed up to April 30, 1973.

Court: I do not know what the payment to the stevedoring companies was for.

(Second defendant's case is closed).

In the High Court of Malaysia

—
No.5

Notes of Proceedings
2nd May
1974
(continued)

10

(First and second defendants indicate that they will put up a joint submission within two weeks and two weeks thereafter the plaintiff is to submit his submission).

(Both submissions to be filed in Court within one month.)

Sgd. ABDUL HAMID
Judge, High Court,
Malaya.

—
No.6

No.6

20

DEFENDANTS' COUNSEL'S WRITTEN SUBMISSION

Defendants' Counsel's Written Submission

LIST OF AUTHORITIES

STATUTES

1. The Federal Constitution
2. Merchant Shipping Ordinance 70 of 1952
3. Port Authorities Act 1963
4. Port Authorities (Amendment) Act 1972
5. Port (Selangor) Rule 1953 (L.N. 92/53)

CASE AUTHORITIES

30

1. Muller & Co's Margarine Ltd. (1901) A.C. 217
2. Northern Ireland Road Transport Board v. Benson 1940 N.I. 133

In the High Court of Malaysia

3. France Fenwick v. The King (1927) 1 K.B. 458

OTHERS

Halsbury's Laws of England 3rd Ed. Vol. 29 P.360

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO: 1142 of 1972

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

- 1. The Government of Malaysia
- 2. Lembaga Pelabuhan Kelang Defendants

10

FIRST AND SECOND DEFENDANTS' SUBMISSION

1. The Plaintiffs in this case pray 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 has been compulsorily acquired by the First Defendant on behalf of the Second Defendant 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 or Alternatively

20

for a declaration that the provisions of the said Section 35A of the Port Authorities Act 1963 are unconstitutional and of no effect. In addition the Plaintiffs claim damages and other relief as the Court may deem fit.

2. At the opening of the trial the parties agreed that the claim for damages or other consequential relief prayed for in this case will automatically fall if the Plaintiffs failed in their first prayer. Therefore with the consent of the Court it was agreed that at this stage the Plaintiffs need not adduce any evidence just yet on the question of damages until the Court has decided that the Plaintiffs are entitled to the declaration sought for.

30

3. In the Statement of Claim the Plaintiffs aver that the Second Defendant has taken over all the material assets of the Plaintiffs and

40

—
No.6
Defendants'
Counsel's
Written
Submission
(continued)

compensated for the same but refused to pay for compensation for goodwill of the Plaintiffs' business and for the loss of future profits. Alternatively it is averred by the Plaintiffs that Section 35A of the Port Authorities Act 1963 contravenes Article 13 of the Constitution of Malaysia. In respect of the former the Plaintiffs claim such compensation and in respect of the latter they claim damages.

In the High
Court of
Malaysia

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

10 4. The Defendants however aver that the Plaintiffs are not entitled to or any compensation and even if, as alleged by the Plaintiffs which is denied by the Defendants, that the business of the Plaintiffs known as "Selangor Pilot Association (1946)" was acquired by the Defendants there was no goodwill at all attached to the business. It is contended that the provisions of Sections 29A and 35A of the Port Authorities Act 1963, do not, either directly or indirectly, have the effect that 20 the Plaintiffs business had been compulsorily acquired although they resulted in the Plaintiffs having to cease carrying on business within that area as declared by the Second Defendant in the exercise of its powers under the said Section 29A. The Defendants also contend that the said Section 35A of the Port Authorities Act 1963 is not unconstitutional by reason of Article 13(2) of the Constitution of Malaysia.

30 5. The real issue to be determined by the Court is whether by virtue of Sections 29A and 35A of the Port Authorities Act 1963 the Plaintiffs' business consisting of material assets and goodwill if any has been compulsorily acquired by the Second Defendant within the meaning of Article 13(2) of the Federal Constitution or Alternatively

whether Section 35A of the Port Authorities Act 1963 contravenes Article 13(2) of the said Constitution.

40 6. The Plaintiffs called only one witness to testify namely Kiang Pao Lian. The testimony of this witness did not seem to put the Court in any better picture than what is already stated in the Statement of Claim and in the Agreed Bundle of Documents. However during the cross-examination of this witness by the Counsel for the Defendants the witness admitted that there was no other individual pilot or Association of pilots operating similar services as that of the Plaintiffs in the same area. Therefore if any pilotage services

In the High
Court of
Malaysia

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

were required in that area they would have to be obtained only from the Plaintiffs. The witness also admitted that all the pilots except one of the Plaintiffs were offered employment by the Second Defendant to be appointed as Authority pilots. As a matter of fact according to this witness all except three pilots had already accepted the offer.

7. It is true that as a result of the declaration made by the Second Defendant in Gazette Notification 1215 dated 13th April 1972 in exercise of its power under Section 29A of the Port Authorities Act 1963, as from the 1st May 1972 the Plaintiffs ceased to provide pilotage services and the Second Defendant as authorised by the said Act commenced to provide same. It is also true that the said area declared by the Second Defendant as aforesaid to be a pilotage district is the same as that declared under the Merchant Shipping Ordinance 1952 and in which the Plaintiffs were previously authorised to provide the pilotage services. The Defendants admit that the Plaintiffs have no alternative but to cease the business of providing pilotage services within the aforesaid pilotage district, otherwise they would be committing an offence under Section 35A of the Port Authorities Act 1963.

8. There is no difficulty at all to understand the requirement of the new provisions of the Port Authorities Act which are now being challenged by the Plaintiffs in this Suit. Sub-sections (1) and (2) of the Section 29A merely empowers the Second Defendant or any Port Authority to declare a pilotage district and to define the area. Sub-section (3) of the same Section renders the provisions of the Merchant Shipping Ordinance 1952, in so far as pilotage is concerned inapplicable to such pilotage district declared under sub-section (1) and (2). Section 35A of the Act on the other hand only makes it an offence for any person not being an authority pilot to provide pilotage services or for any master or owner of a ship to employ any person as a pilot who is not an authority pilot within the pilotage district declared under Section 29A except when the vessel is in distress.

9. It is submitted that the Port Authorities (Amendment) Act 1972 which introduces the aforesaid new provisions into the Port Authorities Act 1963

10

20

30

40

50

is an ordinary piece of legislation enacted by Parliament in the exercise of its powers conferred by Articles 44 and 74 (1) of the Federal Constitution (See Ninth Schedule List 1 - Federal List Item 9). The purpose of this piece of legislation is straight forward and self-explanatory as can be seen from the provisions themselves. Inter alia, it is to enable the Second Defendant to provide pilotage services within its own pilotage district as may be declared. It is also to prohibit any person who is not an authority pilot from providing pilotage services within the same district. Therefore there is nothing unconstitutional in this legislation.

In the High
Court of
Malaysia

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

10. It is admitted that the Plaintiffs were providing the pilotage services before the Second Defendant commenced the same pursuant to the above provisions. This fact should not alter or affect the constitutionality or validity of the said provisions even though the total effect may be to prohibit the Plaintiffs from providing the pilotage services which they have been carrying on. Indeed the prohibition is not specially directed to the Plaintiffs in particular but to all.

11. By reason of the aforesaid prohibition the Plaintiffs now allege that the Second Defendant has compulsorily acquired their business. Alternatively they allege that Section 35A is unconstitutional and of no effect by virtue of Article 13 of the Constitution which provides:-

- (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.

Clause (1) has no application for the purpose of the present Suit because the act of prohibiting the Plaintiffs from providing the pilotage services was done in accordance with law. In order to bring any claim within the ambit of Clause (2) above there must be -

- (a) compulsory acquisition or use
- (b) of property.

12. What then is the property here? The Plaintiffs

10

20

30

40

In the High
Court of
Malaysia

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

have disclosed that they are claiming compensation in respect of goodwill and loss of future profits. Can these be classified as property? Certainly the latter is not because it is only a factor to determine the quantum of compensation or damages as the case may be. Let us then examine what is goodwill. In *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.* (1901) A.C. 217 it was held that property was not confined to real property and may include the goodwill of a business. In the course of his judgment Lord Lindley at P.235 had this to say :-

"Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me."

There is also a passage in *Halsbury's Laws of England* 3rd Ed. Vol. 29 Page 360 at paragraph 715 :-

"The goodwill of a business is a whole advantage of the reputation and connexion formed with customers together with the circumstances, whether of habit or otherwise, which tend to make such connexion permanent. It represents in connexion with any business or business product the value of the attraction to customers which the name and reputation possesses."

13. Applying the above definitions of 'goodwill' to the Plaintiffs case can one say that the Plaintiffs had goodwill. All pilots were licensed under the Merchant Shipping Ordinance No. 70 of 1952. A Pilot Board appointed under Section 408 has the power to grant a pilotage licence under Section 410. Under Port (Selangor) Rules 1953 (See L.N. 92/53) made pursuant to Section 445 of the Merchant Shipping Ordinance 1952, it is provided by Rule 10 thereof as follows:-

"10. No vessel shall proceed to or depart from any wharf of bouy owned by the Government or Port Authority unless a licensed pilot is employed on board. A master of a vessel of less than 75 tons, may on the application of the Harbour Master, be granted an exemption

from this Rule. Such exemption, if granted, will be subject to annual renewal."

In the High
Court of
Malaysia

14. It would appear from the above that there is compulsory pilotage (unless exempted under Rule 10) for all vessels. In his evidence PW1 had said (See P 3 D):-

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

10 "There was no other firm doing pilotage services. If a pilot was needed they will have to obtain one from the Selangor Pilot Association."

Further (at P 4 C) PW 1 continued :-

"All licensed pilots were wither partners or employed by the Association."

20 It is quite clear from the above that the Plaintiffs were enjoying a monopoly. There was no competition and hence there was no question of attracting customers. To return to the interpretation of Lord Lindley hereinbefore mentioned the Plaintiffs had nothing which would add value to their business. Being the sole operator of pilotage services it did not matter where the business was situated or what the name or reputation of the Plaintiffs were. As there is no other operator of pilotage services the question of introduction to old customers does not arise at all in this case. It is submitted that the phrase "whatever adds value to a business" as opined by Lord Lindley must necessarily mean or presupposes there exists competition. The business carried on by the Plaintiffs in the manner and circumstances mentioned earlier had no goodwill attached to it whatsoever. In the circumstances the Plaintiffs claim that their goodwill had been acquired has not been established. As a matter of fact the Plaintiffs themselves have disproved the existence of any goodwill of the business when they admitted that there were no other persons providing similar pilotage services in competition with them. The Plaintiffs claim therefore must fail and should be dismissed with costs.

40 15. The other requirement of Article 13 (2) is that there must be compulsory acquisition. What is the precise meaning of the word "Acquisition". It implies a taking and a transfer from one to another. This is supported by the actual words of the Article. In Clause (1) the word used is "deprived" whereas Clause (2) refers to "acquisition". Acquisition includes deprivation. One can be

In the High
Court of
Malaysia

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

deprived of property without that property being acquired by or transferred to somebody else. If it were otherwise Parliament would have used the word "deprivation" instead of "acquisition" in Clause (2) of Article 13. In *France Fenwick v. The King* (1927) 1 K.B. 458 it was held that there was a distinction between taking property and the mere negative prohibition of its enjoyment. The taking of property necessarily implied its transfer as opposed to its being rendered valueless in the hands of the owner.

10

16. The above distinction was adopted in the case of *Northern Ireland Road Transport Board v. Benson* 1940 N.I. 133. In this case the Court of Appeal of Northern Ireland was considering the validity Section 15 (1) of the Road and Railway Transport Act (Northern Ireland) 1935. The Section reads :-

"A person other than the Board shall not use a motor vehicle on any public highway for the conveyance of their passengers or their luggage or the carriage of merchandise for hire or reward except with the consent in writing of the Board and approval of the Ministry of Home Affairs."

20

The respondent in that case challenged the Act as being ultra vires the Parliament of Northern Ireland. Section 5 of the Government of Ireland Act provided inter alia,

"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."

30

The question to be considered by the Court was whether Section 15(1) of the Act effected a "taking" of the goodwill of the Respondent's road motor undertaking without compensation. In the course of his Judgment Andrew C.J. at P 145 made the following observations :-

40

"there is in any Judgment a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely interferes with the owner's enjoyment of property.

This principle appears to me to be directly applicable to the present case. Section 15 (1) did not either expressly or impliedly transfer the possession or ownership of the goodwill of the undertaking from the Defendant to the Board. It did not effect a taking.

In the High
Court of
Malaysia

—
No.6

Defendants'
Counsel's
Written
Submission
(continued)

10 Section 15 (1) in my opinion amounted at most to a mere prohibition, or, as I would prefer to call it, in the words of marginal note, a "restriction" as to the user for certain purposes of motor vehicles for reward upon the public highway."

17. What is the effect of Section 35A. It places a prohibition on a person who is not 'an authority pilot' from engaging in any pilotage act. Viewed from the Plaintiffs they have lost something which is that they are no longer able to continue their business of providing pilotage services. The
20 Second Defendant by virtue of this Section has gained something in that others including the Plaintiffs are restrained from providing pilotage services. Can it be said that what the Plaintiffs have lost here have been transferred to or acquired by the Second Defendant. The loss that the Plaintiffs have suffered has turned into a benefit for the Second Defendant but they are not to same thing. This simply means that the Second
30 Defendant had not acquired what the Plaintiffs have lost and that there has been no acquisition of property within the meaning of Article 13 (2).

18. It is further submitted that the Plaintiffs have not by virtue of these provisions been completely restrained from pursuing their vocation. A pilot licensed under the Merchant Shipping Ordinance 1952 was before the coming into force of Section 35A allowed to provide pilotage services either by himself or through the Plaintiffs. Have the
40 Plaintiffs indeed lost this privilege? The evidence show that almost all the pilots, the partners and employees of the Selangor Pilot Association had been offered employment by the Second Defendant as authority pilots. The employment would be to enable them to provide pilotage services. Indeed under Section 29 H(2) of the Port Authorities Act 1963 a licensed pilot (which means every pilot whether a partner of or employed by the Plaintiffs) is deemed to be qualified for employment by the Second Defendant
50 as a pilot. Thus each pilot can continue to

In the High
Court of
Malaysia

No.6

Defendants'
Counsel's
Written
Submission
(continued)

provide pilotage services as before. The only difference is that whilst previously a pilot was working for the Plaintiffs he would under the new provisions be doing the same thing as an employee of the Second Defendant. There has been no loss at all.

19. In answer to the Plaintiffs prayer in the alternative it is submitted My Lord that what requires consideration is whether in fact Section 35A of the Port Authorities Act 1963 contravenes Article 13 (2) of the Federal Constitution. The Act on the face of it was not enacted for the purpose of conferring powers on the Second Defendant to acquire property but merely to restrict the pilotage activities by persons who are not authority pilots. The intention of Parliament is quite clear. In enacting the Act Parliament is only exercising its legislative authority conferred upon it by Article 44 of the Constitution to legislate on matters within its competence. Under Article 74 of the Constitution Parliament may make laws with respect to matters falling under item 9 of the First List of the Ninth Schedule pertaining to shipping and navigation.

10

20

20. By reason of matters aforesaid it is respectfully submitted that Sections 29A and 35A of the Port Authorities Act 1963 are constitutional and not ultra vires Article 13 of the Federal Constitution. In the circumstances we submit that the Plaintiffs' claim must fail and should be dismissed with costs.

30

Counsel for the First
Defendant

Counsel for the 2nd
Defendant

No.7

Plaintiffs'
Counsel's
Written
Submission

No.7

PLAINTIFFS' COUNSEL'S WRITTEN SUBMISSION

LIST OF AUTHORITIES

LEGISLATION

1. The Port Authorities (Amendment) Act, 1972
2. Gazette Notification No. 1215 appearing in the Government of Malaya Gazette dated 13th April, 1972

40

3. The Federal Constitution of Malaysia
4. The Government of Ireland Act, 1920
5. The Milk and Milk Products Act (Northern Ireland), 1934
6. The Government of India Act, 1935
7. The Constitution of India

In the High
Court of
Malaysia

No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

CASE AUTHORITIES

1. Gallagher vs. Lynn (1937) AC 863 P.C.
- 10 2. Govindan Sellappah Nayar Kodakan Pilai vs. Punchi Banda Mudanavake (1953) AC 514 P.C.
3. Ulster Transport Authority vs. James Brown & Sons Ltd. (1953) NI 79
4. Commissioner of Inland Revenue vs. Muller & Co's Margarine Ltd. (1901) AC217
5. Charanjit Lal Chowdhury vs. Union of India AIR 1951 SC 41
6. Ramdas vs. State of MP AIR 1959 Madhta Pradesh 353
7. Mahbab Begum vs. Hyderabad State AIR 1951 Hyd.1
- 20 8. State of West Bengal vs. Subohd Gopal Bose AIR 1954 SC 92
9. Dwarkadas Shrinvas vs. Sholapur Spinning & Weaving Co. Ltd. AIR 1954 SC 119
10. Saghir Ahmad vs. State of Uttar Pradesh AIR 1954 SC 728
11. Deep Chand vs. State of Uttar Pradesh AIR 1959 SC 648
12. Kannepalli China Venkata Chalamayya Sastri vs. State of Madras AIR 1958 AP 173

30

PLAINTIFFS' COUNSEL'S SUBMISSION

The method being used in this submission is to reply to the Defendants' submission point by point and then to add any further points that I wish to bring to the attention of this Honourable Court.

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

1. The Plaintiffs' prayer as stated in paragraph 1 of the Defendants' submission is correct. However, I would like to stress that the Plaintiffs are a partnership firm consisting of six (6) partners and not a society of pilots as the Plaintiffs' name may suggest. The Plaintiffs' business consisted of that of port pilots escorting ships into harbour.

2. With regard to paragraphs 2, 3, 4 and 5 of the Defendants' submission the position is that the Plaintiffs' claim will fail, if the Plaintiffs fail in both their first and second prayers. The Plaintiffs are asking for adequate compensation as required to be given by Article 13 (2) of the Federal Constitution of Malaysia or for damages for having been forced out of business by a law which is unconstitutional. What was agreed in Court was that at this stage the question of quantum of damages i.e. the value in money of the goodwill of the Plaintiffs' business will not be gone into. It was agreed with the consent of your Lordship that what was now in issue was whether :-

- (1) goodwill is property
- (2) this property has been acquired by virtue of the legislation complained against.

It was agreed that if the Plaintiffs' succeed on both the above points then the Plaintiffs are entitled to compensation/damages for loss of goodwill or loss of future profits but that the quantum of such compensation/damages would be left to a later stage.

3. With reference to paragraph 6 of the Defendants' submission it is true that the Plaintiffs called only one witness. This witness testified and adduced evidence :

- (a) That the Plaintiffs were at all material times a partnership firm carrying on the business of providing pilotage services in Port Swettenham.
- (b) That each partner had to purchase his share in the partnership and was entitled to sell his share on retiring from the partnership.
- (c) That the Plaintiffs' firm did not receive any assistance from the 2nd Defendants

10

20

30

40

in the running of the Plaintiffs' business.

In the High Court of Malaysia

—
No.7

Plaintiffs' Counsel's Written Submission (continued)

- 10 (d) That the 2nd Defendants did inform the Plaintiffs that they had been directed by the 1st Defendants to take over the pilotage services with effect from 1.5.72 and that the Defendants only offered to pay compensation for the material assets of the Plaintiffs' firm (Page 106 of the Agreed Bundle) but not for goodwill and loss of future profits. In this connection I will also refer to page 42 of the Agreed Bundle whereby the 1st Defendants categorically stated that "no compensation will be considered on the claim by the Association on the rights to carry on business".
- (e) That the 2nd Defendants did in fact take over the pilotage services as from 1.5.72.
- 20 (f) That before 1.5.72 anyone with a pilot's licence was entitled to operate pilotage services.

30 Further paragraph 5 of the Statement of Claim stated that the areas declared to be the Port's pilotage district wherein persons other than the 2nd Defendants could not operate pilotage services as from 1.5.72 included all the areas in which the Plaintiffs carried on their business. The contents of this paragraph are not disputed by either of the Defendants.

It is submitted that the fact that all but one of the partners of the Plaintiffs' firm were offered employment by the 2nd Defendants is immaterial except possibly when considering the quantum of damages.

40 4. By paragraph 7 of their submission the Defendants admit that the consequence of the legislation complained against (paragraphs 3 and 4 of the Statement of Claim) and the Gazette Notification made under that legislation (paragraph 5 of the Statement of Claim) was that the Plaintiffs had on 1.5.72 to cease business as operators of pilotage services and that the 2nd Defendants were on the same day by virtue of the said legislation enabled to commence pilotage services. This in effect means that as from 1.5.72 the 2nd Defendants were receiving the income from the provision of such services which income had prior to 1.5.72 been

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

received by the Plaintiffs' firm.

5. The Plaintiffs agree with the Defendants summary of the relevant parts of the legislation now being challenged as put forth in paragraph 8 of the Defendants' submission.

6. With reference to paragraph 9 of the Defendants' submission it is not agreed that the relevant parts of the Port Authorities (Amendment) Act 1972 is an ordinary piece of legislation. The "pith and substance" of the legislation has to be considered to decide whether it is legislation aimed at the acquisition or taking over of the Plaintiffs' business or whether it is legislation for a completely different purpose and that it's resulting in the Plaintiffs losing their whole business and the 2nd Defendants simultaneously commencing exactly the same business is merely an incidental effect subservient to the main purpose of the legislation. In short, is the legislation one of a nature subject to the provisions of Article 13 of the Federal Constitution of Malaysia? If the purpose had been merely to empower the 2nd Defendants to carry on the business of providing pilotage services then where was the necessity to prohibit other persons from carrying on the same business? The legislation was intended to allow the 2nd Defendants to carry on the business without any competition. The evidence has shown that the Plaintiffs' firm was the only competition at the time though there was then nothing to prevent any other person with a pilot's licence starting a business in competition with the Plaintiffs. The aim and effect of the legislation was directly or indirectly to take away the Plaintiffs' right to get an income from their business and at the same time to enable the 2nd Defendants (who are a statutory body under the control of the 1st Defendants - this submission will deal with this point at a later stage) to carry on the same business and to receive the income therefrom. As such the legislation is within the type of legislation contemplated by Article 13 of the Constitution.

The "pith and substance" doctrine has been raised in many cases :

(a) Gallagher vs. Lynn (1937) AC 863 P.C.

In this case the validity of The Milk and Milk Products Act (Northern Ireland) 1934

10

was challenged on the grounds that it was in violation of S 4 of the Government of Northern Ireland Act, 1920 which provided that "subject to the provisions of the Act the parliament of Northern Ireland shall have power to make laws for the peace order and good government of Northern Ireland, S 4 went on to say that, however, the parliament had no power to make laws in respect of various matters which included

"(7) Trade with any place out of the part of Ireland within their jurisdiction."

The Milk and Milk Products Act (Northern Ireland) 1934 regulated the supply of milk. It also incidentally precluded dairy farmers outside Northern Ireland from sending milk into Northern Ireland.

20

Lord Atkin stated (at page 870) : "It is well established that you are to look at the 'true nature and character or the legislation' the pith and substance of the legislation. If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.

30

In this case it was held that the legislation was an Act for the peace, order and good Government of Northern Ireland and not a statute in respect of trade within the meaning of sub-section (7) of S 4 of the Government of Northern Ireland Act, 1920.

(b) Govindan Sellappah Nayar Kodakan Pilai vs. Punchi Banda Mudanayake (1953) AC P.C. Section 29 of the Ceylon (Constitution & Independence) Order in Council, 1946 as amended read :

40

- (1) Parliament shall have power to make laws for the peace, order and good government of the Island.
- (2) No such law shall.....
 - (b) make persons of any community... liable to disabilities or restrictions to which persons of other communities are not made liable.

In the High Court of Malaysia

(3) Any law made in contravention of sub-section (2) of this section shall to the extent of such contravention be void.

No.7

Plaintiffs' Counsel's Written Submission (continued)

The contest in the case was as to the validity of the Citizenship Act of Ceylon and the Ceylon (Parliamentary Elections) Amendment Act, 1949 which regulated citizenship and franchise, it being alleged that they incidentally infringed one of the restrictions in Sec. 29 (2) by discriminating against the Indian Tamil community. In delivering the opinion of the Board, Lord Oakley said at page 527 :

10

"It was conceded for the appellant that these Acts do not upon their faces discriminate against the Indian Tamil community, but it was argued that they indirectly have that effect, and at page 528 :

"The principle that a legislature cannot do indirectly what it cannot do directly has always been recognised by their Lordships' Board, and a legislature must of course, be assumed to intend the necessary effect of its statutes....."

20

and at page 529 :

"But in their Lordships' opinion the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what is the true character of the legislation which is challenged Is it in the present case legislation on citizenship, or is it legislation intended to make and making Indian Tamils liable to disabilities to which other communities are not liable?". It was held that the Act was intravires as the infringement was incidental.

30

The intention of the 1st Defendants in enacting the legislation complained of was clearly to enable the 2nd Defendants to carry on the business of providing pilotage services without competition from any one else. No other purpose for the legislation has been suggested. If not for the legislation the 2nd Defendants would have had to negotiate with the Plaintiffs for the taking over of the Plaintiffs' business as a going concern in which event they would in the ordinary course of business practice have had to pay for goodwill and/or for loss of profits. Instead of which both

40

the Defendants chose the indirect method of acquiring the Plaintiffs' undertakings and goodwill by making it illegal for the Plaintiffs to carry on their business.

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

It is respectfully submitted that this is, in effect, a fraud on the Constitution.

10 Article 74 of the Constitution deals solely with the distribution of legislative powers between the Federal and State legislatures and it is respectfully submitted that this article is of no relevance in this suit.

7. With reference to paragraph 10 of the Defendants' submission it is submitted that the fact that the prohibition is not specially directed to the Plaintiffs' firm is immaterial.

If there had been other persons or firms carrying on a similar business in competition with the Plaintiffs then they too would be entitled to challenge the legislation.

20 8. With reference to paragraph 11 of the Defendants' submission clause (1) of Article 13 of the Constitution has an application because the question of whether the Plaintiffs have been deprived of property is relevant. If the Plaintiffs have been deprived of property then the question arises whether this has been done in accordance with law. The validity of the relevant law is then open to challenge on the ground that it does not provide adequate compensation as
30 required by clause (2) of Article 13.

9. With reference to paragraph 12 of the Defendants' submission, the question of whether "goodwill" is property has been discussed in many cases - both in connection with acquisition and consequent compensation and otherwise.

40 Article 160 (1) of The Federal Constitution of Malaysia provides that The Interpretation and General Clauses Ordinance, 1948 shall, to the extent specified in the 11th schedule apply for the interpretation of this Constitution. However, the definition of "property" is not included in the 11th Schedule.

Article 160 (2) assigns meanings to certain expressions. However, "property" is not included among the expressions contained therein.

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

Other reference to "property" in the
Constitution are :

- (a) Article 11 (3) Every religious group has the power to acquire and own property and hold and administer it in accordance with law.
- (b) Article 69 (1) The Federation has power to acquire, hold and dispose of property of any kind and to make contracts.
- (c) Article 166 (3) deals specifically with land previously vested in the State of Malacca or the State of Penang but Article 166 (8) states "Any property which was, immediately before Merdeka Day, liable to escheat to Her Majesty in respect of the Government of Malacca or the Government of Penang shall on that day be liable to escheat to the States of Malacca or the State of Penang, as the case may be".
- (d) 9th Schedule List 1 - Matters on which only the Federal Parliament can legislate
- Item 2 (e) includes enemy property.
- Item 4 (e) deals with, inter-alia, "property and its transfer and hypothecation, except land".
- Item 6 (h) Purchase, acquisition and holding of, and dealing with, property for federal purposes.
- Item 7 (f) Financial and accounting procedure, including for the purchase, custody and disposal of public property other than land of the Federation and of the States.

It is clear that wherever "property" is mentioned in the Constitution without any qualification as to the nature of the property referred to, the expression "property" is to be given an unlimited interpretation e.g. in Article 11 (3) it is inconceivable that a religious group has not the

10

20

30

40

power to acquire and own a business and pay for or sell the goodwill of any business it so acquires.

In the High
Court of
Malaysia

Comparison of Article 13 with section 299 of the
Government of India Act, 1935

—
No.7

S 299 (1) No person shall be deprived of his property in British India save by authority of law.

Plaintiffs'
Counsel's
Written
Submission
(continued)

10 (2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land or any commercial or industrial undertaking, or any interest in, or in any company owning any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired
.....

20 Clearly sub-section (2) refers to the deprivation of property dealt with by sub-section (1) but provides that compensation is payable only as regards certain kinds of property. These kinds of property include commercial undertakings. In the Federal Constitution of Malaysia where Article 13 (2) does not limit the property in respect of the acquisition of which compensation is payable "property" must be taken to mean all kinds of property including commercial undertakings.

Treatment in N. Ireland

The Government of Ireland Act, 1920 section 5 (1) (Halsbury's Statutes of England 2nd Ed. Vol. 17 page 62) provided that the Parliament was not to "take any property without compensation".

30 Section 18 (1) of the Transport Act (Northern Ireland) 1948 reads as follows:-

40 "Save as provided by the next succeeding section of this Act, a person other than the Authority shall not, except with the consent in writing of the Authority and the approval of the Ministry, use a motor vehicle on a public highway to carry for reward any passengers or any luggage or merchandise. A consent required for the purposes of this section may be granted for such period and subject to such conditions as the Authority with the approval of the Ministry, may determine".

The validity of section 18 (1) of the Transport Act (Northern Ireland) 1948 was challenged in the

In the High
Court of
Malaysia

case of Ulster Transport Authority vs. James Brown & Sons Ltd. (1953) NI 79 on the ground that it did not provide for payment of compensation for loss of goodwill.

No.7

Briefly, the facts in the case were as follows:

Plaintiffs'
Counsel's
Written
Submission
(continued)

Since 1898, James Brown & Sons Ltd. had been carrying on a certain transport business. The Transport Act (Northern Ireland) 1948 prohibited any person other than the Ulster Transport Authority carrying on that kind of business except with the consent of the Authority and approval of the Ministry. James Brown & Sons Ltd. carried goods in breach of the Act without the consent or approval aforesaid. 10

They were prosecuted for having committed an offence under the Act. They were convicted by the Resident Magistrate. On appeal the Divisional Court allowed the appeal on the ground that S 18 of the Act prohibiting the carrying of the goods was void because it infringed section 5 (1) of the Government of Ireland Act, 1920 in that it did not provide for compensation for loss of goodwill. The decision of the Divisional Court was unanimously upheld by the Court of Appeal. 20

At page 108 (Ulster Transport Authority vs. James Brown & Sons Ltd. (1953) NI 79) Lord MacDermott said "In considering the ambit of this expression (i.e. take any property) one must of course, construe its words in association, but, bearing this in mind, it will be convenient to commence the enquiry by asking whether on the facts as found and assuming the relevant prohibition to be valid and obeyed the (company) would lose "property" as that word is employed in section 5 (1)?" 30

The material assets of the company were irrelevant in this case as the company kept them for other business not prohibited by the Act.

The Court of Appeal unanimously decided that the company had lost the goodwill of the business they were no longer entitled to do and that this was "property" within the meaning of section 5 (1) of the Government of Ireland Act, 1920 and that section 18 (1) of the Transport Act (Northern Ireland) 1948 was invalid in that it contravened section 5 (1) by taking this property without compensation. 40

The case of Ulster Transport Authority vs. James Brown & Sons Ltd. is exhaustively discussed in Sheridan's "Constitutional Protection" at page 131 onwards.

In the High Court of Malaysia

No.7

Plaintiffs' Counsel's Written Submission (continued)

10 In Commissioner of Inland Revenue vs. Muller & Co's Margarine Ltd. (1901) AC 217, it was held that "property locally situate out of the United Kingdom" are not confined to realty and may include the goodwill of a business. At page 223 (2nd last para), Lord MacNaughton states : "It is very difficult as it seems to me, to say that goodwill is not property. Goodwill is bought and sold everyday. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may indicate his exclusive right to it if necessary by process of law. He may dispose of it if he will -- of course under the conditions attaching to property of that nature".
20

There are many cases on whether a particular asset or right is property under Article 19 (1) (f) and Article 31 of the Constitution of India.

Article 19 (1) All citizens shall have the right

(f) to acquire, hold and dispose of property.

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

30 (2) No property shall be compulsorily acquired or requisitioned save for a public purpose pensionation for the property so acquired (sic) or requisitioned
.....

40 (i) Charanjit Lal Chowdbury vs. Union of India AIR 1951 SC 41 held that reduction of voting rights of shareholders was not a restriction on property because there was no restriction on the acquisition, holding or disposal of shares - this was decided on the ground that voting rights are not marketable.

(ii) Ramdas vs. State of MP AIR 1959 Madhya Pradesh 353, 355 held that the right to vote is not property. At para 8 "The

In the High
Court of
Malaysia

test of property lies in its being
capable of being acquired, held or
disposed of".

No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

10. It is clear from the authorities cited above that "property" in the wide sense used in Article 13 of the Federal Constitution of Malaysia includes "goodwill". In fact, it would appear from the Defendants' submission that they are not disputing that "property" includes "goodwill". However, both the Defendants by paragraphs 13 and 14 of their submission attempt to show that the Plaintiffs business had no goodwill attached to it. With respect, paragraph 13 of the Defendants' submission appears to have no relevance to this argument. Paragraph 14 of the Defendants' submission states in effect as follows :

10

- (a) The Plaintiffs were enjoying a monopoly in their business.
- (b) There was no competition and therefore there was no question of attracting customers.
- (c) Goodwill in the sense of "whatever adds value to a business" must necessarily mean or presuppose that competition exists.
- (d) The Plaintiffs business therefore had no goodwill.

20

As to (a) above, it is submitted that the Plaintiffs were not enjoying a monopoly in the sense that all competition was prohibited. The evidence given by the Plaintiffs' witness that "Before May 1972 as long as there was pilot licence anyone could operate the pilotage services" was neither challenged nor contradicted. The absence of competition was due solely to the fact the the Plaintiffs' business was so well established that those with pilots' licences preferred to join the Plaintiffs rather than compete with them. There is nothing in Lord Lindley's definition of goodwill to suggest that where there is no competition there cannot be goodwill. In fact Lord Lindley states that agreed absence from competition forms part of goodwill. The agreement by other licensed pilots not to compete with the Plaintiffs is part of the goodwill of the Plaintiffs' firm. The absence of competition merely makes the goodwill more valuable.

30

40

When one purchases a business one is purchasing the Vendor's undertaking not to compete.

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

10

If any other person wished to start a new business similar to that of the Plaintiffs what would their first consideration be? It would naturally be whether they could get sufficient business away from the Plaintiffs to make it worth their while to start a new business. The possession of an established clientele which makes it difficult for anyone else to compete with them is the goodwill that the Plaintiffs had.

If anyone wished to take over the Plaintiffs' business, they would have had to purchase the Plaintiffs' goodwill, that is to say, they would had to pay the Plaintiffs to agree not to compete by agreeing to go out of business altogether. Their ability to sell their undertaking not to compete is their goodwill.

20

This is precisely what the Plaintiffs are complaining of in this suit. That by their legislation the Defendants have wiped out the ability of the Plaintiffs to sell their agreement not to compete and acquired this inability to compete by making it illegal for the Plaintiffs to carry on business.

30

I submit that your Lordship should take judicial notice that any business or undertaking has a goodwill attached to it. The monetary value of this goodwill is not being gone into at this stage. Your Lordship has to decide whether any such goodwill has got to be paid for.

40

11. With reference to paragraph 15 of the Defendants' submission that Article 13 (1) refers to deprivation whereas Article 13 (2) refers to "acquisition" and that acquisition implies a taking from one and a transfer to another and that therefore there must be both a taking and a transfer before compensation is payable under Article 13 (2) I propose to deal with the Indian authorities on this point first as the provisions of the Government of India Act, 1935 and of the Constitution of India are very similar to the provisions of the Federal Constitution of Malaysia on this point.

It is necessary for a proper understanding of the Indian Authorities to quote in full the relevant laws that have been in force in India from time to time :

In the High Court of Malaysia

No.7

Plaintiffs' Counsel's Written Submission (continued)

S 299 Government of India Act, 1935

- (1) No person shall be deprived of his property in British India save by authority of law.
- (2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or in any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, it is to be determined.

10

Constitution of India, Article 21

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

20

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

(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.

30

Clause (2A) of Article 31 was added by the Constitution (Fourth Amendment) Act, 1955 sec. 2. This reversed a judicial tendency to regard "taken possession of or acquired" in the original clause (2) as exhaustive of "deprivation" in Clause 1, subject only to the exceptions listed in clause 5 (b). There is no provision corresponding to clause 2 (a) in the Federal Constitution of Malaysia.

40

Deprivation & Acquisition (Section 299 (1) of the Government of India Act, 1935 and Article 31 (1))

of the Indian Constitution refers to a person being "deprived of property" while S 299 (2) refers to a compulsory acquisition and Article 31 (2) (before the 1955 amendment) referred to property "being taken possession of or acquired" On the face of these two clauses it would appear that section 299 (2) and Article 31 (2) govern two species of a genus the whole of which is comprehended within section 299 (1) and Article 31 (1). That is to say that not all deprivation of property is to be regarded as "being taken possession of or acquired" This restricted interpretation has, however, not found favour universally: some have considered the words in clause (2) to be a paraphrase of that in clause (1) and have thus given clause (2) a wide interpretation as applying to all cases where a person is deprived of property. Generally the Courts in India have favoured the wide interpretation of Article 31 and held that all deprivation is to be regarded as "being taken possession of or acquired".

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

Mahbub Begum vs. Hyderabad State AIR 1951 Hyd. 1

There was an Act depriving persons of claims to an estate although they already had a judicial decree in their favour. The learned judges holding that Article 31 (2) covered all deprivation of property held that Article infringed by the absence of compensation.

In State of West Bengal vs. Subohd Gopal Bose AIR 1954 SC 92

Sastri CJ (with whom Mahajan and Hasan JJ concurred) said that under Article 31 (2) "acquisition" meant coming into possession of, obtaining, gaining or getting as one's own and did not imply any transfer or veeting of title. The learned Chief Justice said it included deprivation by destruction, otherwise Article 31 (5) (b) (ii) would have been unnecessary. The majority of the learned Judges agreed with the Chief Justice (see headnote (e) at page 93 of the report)

Dwarkadas Shrinvas vs. Sholapur Spinning & Weaving Co. Ltd. AIR 1954 SC 119

Mahajan J. with whom Sastri CJ and Hasan J agreed held that the only cases of deprivation outside Article 31 (2) were those expressly excluded by the rest of Article 31 itself acquisition and taking possession in clause (2) meant the same as

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

deprivation in clause (1).

The majority of the learned Judges agreed with the above. (see headnote (a) at page 120 of the report).

Saghir Ahmad vs. State of Uttar Pradesh AIR 1954
SC 728

Headnote: Article 31 - property - right to use highway for trade.

In this case, sometime after 1947, the Government of Uttar Pradesh conceived the idea of using their own buses. They first did this as competitors. They then decided on a monopoly. The Government did not require permits to use buses. The Government cancelled the permits to run buses which had been granted to all others and refused permits to people who would otherwise have been entitled to them.

10

All the learned judges concurred in holding that nationalisation of an industry was not possible by a mere executive order without appropriate legislation.

20

The Court directed that application for permits to run buses be dealt with.

The Government then passed the Uttar Pradesh Road Transport Act. S 3 of this Act made it possible that buses be run and operated exclusively by the State Government (see page 732 of the report).

At page 739 para 24 Mukherjea J says :

"If the effect of prohibition of the trade or business of the appellants by the impugned legislation amounts to deprivation of their property or interest in a commercial undertaking within the meaning of Article 31 (2) of the Constitution, does not the legislation offend against the provision of that clause in as much as no provision for compensation has been made in the Act?"

30

And at page 740 para 25 Mukherjea J goes on to state that the argument that compensation is payable only if the State had acquired or taken possession of a right of interest is not tenable.

40

The Supreme Court unanimously held that a write

in the nature of mandamus shall issue against the Government restraining them from enforcing the provisions of the Uttar Pradesh Road Transport Act.

In the High Court of Malaysia

By the above case (Saghir Ahmad vs. State of UP) the Supreme Court unanimously adopted the views of the majority in *The State of West Bengal vs. Subodh Gopal Bose* and in *Dwarkadas vs. Sholapur Spinning & Weaving Co. Ltd.* in that "deprivation" amounted to an "acquisition" or "taking possession of". The decision in this case was followed in *Deep Chand vs. State of Uttar Pradesh AIR 1959 SC 648*.

—
No.7
Plaintiffs'
Counsel's
Written
Submission
(continued)

The facts in this latter case were as follows:

By the Uttar Pradesh Service Development Act passed on 24.4.55 the State Government was authorised to frame a scheme of nationalisation of motor transport.

The Constitution (Fourth Amendment) Act, 1955 came into effect on 27.4.1955.

The State Government framed the nationalisation scheme after the amendment to the Constitution which introduced a new clause 2 (A) to Article 31 of the Constitution (see above at page 19 of this submission).

The validity of the Act was challenged. The question arose as to whether the test of validity should be under the original Article 31 (without sub-clause 2A) or under the new Article. If the amended Act applied, the question of compensation was an important factor in deciding the validity of the Uttar Pradesh Service Development Act.

Held: UP Transport Service (Dev.) Act which in effect prohibits the stage carriage operators from doing their motor transport business deprives them of their property and interest in a commercial undertaking within the meaning of Article 31 (2) of the Constitution. It follows that if the Act does not provide for compensation, the Act would be invalid being in conflict with Article 31 (2).

Saghir Ahmad vs. State of UP was followed.

At para 38 page 669, K. Subba Rao, J states:

"This leads up to the contention of the

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

learned Advocate General that even if the Constitution (Fourth Amendment) Act, 1955 could not be relied on to sustain the validity of the UP Act, there was no deprivation of property of the appellants within the meaning of the decisions of this Court in *The State of West Bengal vs. Subodh Gopal; Dwarkadas Shrinivas vs. Sholapur Spinning & Weaving Co. Ltd. and Saghir Adhad's case*. These cases have held that clause (1) and (2) of Article 31 relate to the same subject matter and that, though there is no actual transfer of property to the State, if by the Act of the State, an individual has been substantially dispossessed or where his right to use and enjoy his property has been seriously impaired or the value of the property has been materially reduced, it would be acquisition or taking possession within the meaning of clause (2) of the said Article. After a faint attempt to raise this question, the learned Advocate-General conceded that in view of the decision in *Saghir Ahmad's case*, he could not support his argument to the effect that the State did not deprive the petitioners of their interest in a commercial undertaking. In the said case, this Court held in express terms that the UP Transport Act, 1951, which in effect prohibited the petitioners therein from doing their motor transport business deprived them of their property or interest in a commercial undertaking within the meaning of Article 31 (2) of the Constitution". Mukherjea J. as he then was, observed.

"It is not seriously disputed on behalf of the respondents that the appellants' right to ply motor vehicles for gain is, in any event, an interest in a commercial undertaking. There is no doubt also that the appellants have been deprived of this interest".

The learned Judge proceeded to state:

"In view of that majority decision it must be taken to be settled now that clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition of taking possession of the property referred to in clause (2). The learned Advocate General conceded this to be the true legal position after the pronouncements of this Court referred to above. The fact

that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think therefore that in these circumstances the legislation does conflict with the provisions of Article 31 (2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground."

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

"The above observations are clear and unambiguous and they do not give scope for further argument on the subject. It follows that if the Act does not provide for compensation, the Act would be invalid being in conflict with the provisions of Article 31 (2) of the Constitution".

In Kannepalli China Venkata Chalamayya Sastri vs. State of Madras AIR 1958 AP 173 (Full Bench) also see State of Madras vs. Kannepallu etc. AIR 1962 SC 1687.

Considering the validity of an Act reducing rents and making them payable to the government who were then to deduct anything due to them and pay the balance to the Plaintiffs. The validity of this Act was under consideration with reference to the Government of India Act, 1935 section 299 (2) but the learned Judges thought that "acquisition" in that sub-section have the same meaning as in Article 31 (2) of the Constitution: Subba Rao CJ with whom Sastri and Rao JJ agreed said at page 180 that the result of the Supreme Court decisions was that they had "rejected the narrow meaning of the word "acquisition" i.e. transfer of the title from the owner and vesting the same in the State, and adopted the more comprehensive one, viz: the procuring of property or taking of it permanently or temporarily by the State. The State, by the process of acquisition, creates a title in itself rather than acquire it from the owner. The word is wide enough to take in property.

As shown by the above cases the Courts in India gave the wide interpretation to section 299 (2) and Article 31 (2) and held that all "deprivation" of property is to be regarded as taken "possession of or acquired".

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

The Indian Legislature has shown its disapproval of this wide interpretation of "taken possession of or acquired" in Article 31 (2) by amending Article 31 by the Constitution (Fourth Amendment) Act, 1955 which amended clause 2 and added a new clause (2A) to Article 31 of the Constitution of India.

The amendments to clause 2 are irrelevant to these proceedings.

The following is the new clause 2 (A). 10

Clause 2 (A) "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 or property notwithstanding that it deprives any person of his property".

However there is no equivalent to clause (2A) in the Federal Constitution of Malaysia.

Therefore the Constitutional provisions in force in this country are the same as those in India before the 1955 amendments. And these provisions have been interpreted by the Supreme Court in India to the effect that all deprivation is to be regarded as "being taken possession of or acquired". 20

France Fenwick and Company Limited vs. The King dealt with the common law right to compensation for interference with a subject's property. This case is not applicable in this suit which deals with the interpretation of a written constitution. 30

12. With reference to paragraph 16 of the Defendants' submission, the case of Northern Ireland Road Transport Board vs. Benson went on appeal to the House of Lords (1942) All E.R. 1 page 465 where it was held that since the case was of a criminal nature, no appeal lay from the decision of the court of summary jurisdiction dismissing the complaint, and the whole chain of these appeals was misconceived. In fact, the decision of the Northern Ireland appeal court in that case was given without jurisdiction. 40

The decision in the case has, in any event, been over-ruled by the decision in Ulster Transport

Authority vs. Brown & Sons Ltd. (1953) NI 79 which decided in similar circumstances that there was a taking which made the relevant sections of the Transport Act (Northern Ireland) 1948 invalid because compensation had not been provided for the "taking of the goodwill".

In the High
Court of
Malaysia

—
No.7

The decision in Northern Ireland Road Transport vs. Benson is no longer binding and, as stated, has been reversed.

Plaintiffs'
Counsel's
Written
Submission
(continued)

10 13. With reference to paragraph 17 of the Defendants' submission, I feel that the matters contained therein have been sufficiently dealt with in paragraphs 11 and 12 of this submission.

20 14. With reference to paragraph 18 of the Defendants' submission, it is submitted that by the legislature complained of the Plaintiffs have been completely restrained from pursuing the business they had been carrying on. Paragraph 5 of the Statement of Claim which is not in dispute stated that the areas declared to be the Port's pilotage district wherein persons other than the 2nd Defendants could not operate pilotage services as from 1.5.72 included all the areas in which the Plaintiffs carried on their business. The fact that all but one of the partners of the Plaintiffs' firm have been offered employment by the 2nd Defendants is irrelevant except possibly as to the quantum of damages. The Plaintiffs have been deprived of their right to carry on business on their own behalf. This loss of right and the goodwill which has become attached to the Plaintiffs business has to be compensated for. Possible there has been no loss for the Plaintiffs' employees. But the Plaintiffs' employees are not parties to this suit. The Plaintiffs to this suit are the partners of a firm who though themselves pilots with the necessary licences have built up a business to provide pilotage services in an organised manner. They have trained pilots and later employed them and some of them have become partners of the firm. All the results of the building up and organisation have now been taken over by the 2nd Defendants without compensation except for material assets which the Plaintiffs were forced to sell as they could no longer legally utilise such assets.

30

40

15. With reference to paragraph 19 of the Defendants' submission, here again the matters contained therein have been dealt with in

In the High
Court of
Malaysia

—
No.7

Plaintiffs'
Counsel's
Written
Submission
(continued)

paragraphs 11 and 12 of this submission.

It is respectfully submitted that the legislation complained of is colourable and a fraud on the constitution in that while purporting to do one thing or another it is in effect acquiring the Plaintiffs' business or goodwill or the right to carry on business without payment of compensation as required by Article 13 (2) of the Federal Constitution of Malaysia.

The power to legislate given by Article 44 in subject to the fundamental rights given by Article 13 (2). Article 74 is irrelevant in that it deals purely with the division of legislative powers as between the Federal and State Legislatures.

10

16. The Plaintiffs respectfully submit that they have shown that "goodwill" is property and that this property has been acquired by virtue of the legislation complained against and that by Article 13 (2) of the Constitution they are entitled to compensation.

20

In the alternative the Plaintiffs state that they have been forced to cease their business by an Act which is invalid since it contravenes Article 13 (2) and they claim damages.

17. While the quantum of damages is, by agreement, not being gone into at the present juncture, the Plaintiffs respectfully submit that it should be the amount that would on negotiation have been fairly payable on 1.5.72 by any person or company who bought over the Plaintiffs' business as on 1.5.72 (without any threats of "take over" by the Defendants) and with the Plaintiffs undertaking not to carry on a similar business in competition. In effect, it is submitted that there is an implied contract that the 2nd Defendants will pay to the Plaintiffs the market value of the Plaintiffs' business and undertaking including goodwill as on 1.5.72.

30

18. There is one other point which has to be dealt with before this submission is completed and that is the connection between the 1st and 2nd Defendants. In paragraph 6 of their Defence the 1st Defendants aver "that this suit is wrong in law as against the First Defendant". It is submitted that the 2nd Defendant is a body corporate established by the Port Authorities Act, 1963 and is controlled by the 1st Defendant though the

40

1st Defendant's appropriate Minister. The following sections of the Port Authorities Act, 1963 are relevant :

In the High Court of Malaysia

2 (4) The Authority shall consist of a chairman who shall be appointed by the Yang di-Pertuan Agong and

—
No.7

(a) the General Manager for the time being of the port and

Plaintiffs' Counsel's Written Submission (continued)

(b) not less than five nor more than nine members to be appointed by the Minister.

10

Provided that it shall be lawful for the Yang di Pertuan Agong to appoint the General Manager as the Chairman of the Authority.

S 2 (7) The Yang di Pertuan Agong may in the interest etc. remove from office all or any of the members of the Authority.

S 3 (2) (u) The Authority shall have power with the approval of the Minister of Finance..... to borrow money.

20

S 3 (4) The Minister may give to the Authority directions of a general nature, not inconsistent with the provisions of this Act as to the exercise of the functions of the Authority.

S 4 Lawful for land to be acquired by the Authority in accordance with the provisions of the Land Acquisition Act, 1960.

Provided that no such acquisition as aforesaid shall be made so long as the land may be acquired by agreement.

30

Sec. 5 The Minister may by order authorise transfer of movable or immovable property of Government to the Authority.

Sec. 6 The Authority may be provided with such funds as the Dewan Ra'ayat may determine.

Sec. 9 (1) A person authorised by the Minister has the right to inspect the accounts of the Authority.

(3) Auditors to be appointed by the Minister.

Sec. 10 Copy of accounts to be sent to the

In the High Court of Malaysia

Minister every year to be laid before each House of Parliament.

Sec. 11 Estimates for each year to be submitted for approval of the Minister.

No.7

Plaintiffs' Counsel's Written Submission (continued)

19. I have to finally point out that the protection given by Article 13 is not limited to citizens of Malaysia.

Sgd. S. Sothi

Plaintiffs' Counsel

No.8

Judgment of Abdul Hamid J 17th July 1974

No.8

10

JUDGMENT OF ABDUL HAMID, J.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 1142 of 1972

BETWEEN :

Selangor Pilot Association (1946) (suing as a firm) Plaintiffs

And

- 1. The Government of Malaysia and
- 2. Lembaga Pelabuhan Kelang Defendants

JUDGMENT OF ABDUL HAMID, J.

20

The Plaintiffs, Selangor Pilot Association (1946), claiming against the Government of Malaysia and Lembaga Pelabuhan Kelang, are asking for a declaration that they are entitled to compensation for the goodwill of their business which the first defendant on behalf of the second defendant, by virtue of sections 29A and 35A of the Port Authorities Act, 1963 [sections 5 and 6 of the Port Authorities (Amendment) Act, 1972], deprived them by compulsorily acquiring the same.

30

Alternatively, the plaintiffs are asking for a declaration that section 35A of the Port Authorities Act, 1963 (hereinafter referred to as "the Act") is unconstitutional and of no effect.

The material facts insofar as they are not in

dispute are as follows -

In the High
Court of
Malaysia

—
No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

10 The plaintiffs carried on business of pilotage services within certain areas at the port. In exercise of the powers under section 29A of the Act the second defendant declared certain areas to be port's pilotage district [G.N. 1215 Government of Malaysia Gazette dated 13.4.1972]. The areas declared cover all the areas within which the plaintiffs operated their business. By reason of the declaration the plaintiffs had to cease pilotage services within the area declared. The plaintiffs were informed of the taking over of and the second defendant did take over the pilotage services with effect from May 1, 1972.

The plaintiffs' material assets and launches were purchased by the second defendant. It is the plaintiffs' allegation that the defendants refused to pay them compensation for the goodwill of their business and for their loss of future profits.

20 The defendants deny that any compensation was due and payable to the plaintiffs in respect of goodwill and/or loss of future profits.

Section 29A and 35A of the Act [Section 5 and 6 Port Authorities (Amendment) Act, 1972] are as follows -

"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.

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

"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 one thousand dollars.

40 (2) Any person 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 one

In the High
Court of
Malaysia

—
No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

thousand dollars.

(3) For the purposes of this section on authority pilot acting beyond the limits for which he is licensed or in contravention of any conditions imposed under the provisions of section 29H, 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 of the best assistance that can be found at the time."

10

I shall first of all deal with the alternative allegation. In support of their contention the plaintiffs argued that by reason of section 35A of the Act and the declaration made in the gazette notification, they had to cease business to make way for the second defendant to exclusively perform the pilotage services. They also argued that this provision offends Article 13 of the Federal Constitution as it not only empowered the second defendant to carry on business in the area declared but also prohibited others from carrying on the same business. The aim and effect of the legislation was therefore directly or indirectly, to take away the right of the plaintiffs to secure income from their business.

20

30

The plaintiffs further argued that they have been deprived of their property and that the law under which such deprivation was effected had not made provision for adequate compensation as required by Clause (2) of Article 13. They submitted that the legislation complained of is colourable and a fraud on the Constitution in that, while purporting to do one thing or another, it is in effect acquiring the plaintiffs' business or goodwill or the right to carry on business without payment of compensation.

40

The question at issue here is whether section 35A of the Act is ultra vires and of no effect. This section provides penalties as to employment of pilot other than authority pilot. The object is to prohibit other persons other than authority pilots to perform any form of pilotage services within pilotage district declared under section 29A.

By virtue of section 29C the authority is empowered to employ pilots for pilotage services. To determine whether a statutory provision is ultra vires and of no effect it is incumbent upon this Court to consider the relevant law which purports to confer power upon the law-making body to enact such provision. Clause (1) of Article 74 of the Federal Constitution which deals with the power of Parliament to legislate refers to the Ninth Schedule where under item 9 Parliament is empowered to legislate in regard to shipping and navigation and that includes matters relating to ports and harbours. The Act which provides for the establishment of port authorities, the functions of such authorities and matters connected herewith was in fact enacted pursuant to those provisions in the Constitution. The function of the authority is to operate and otherwise maintain the port in respect of which it is established and the authority is given the power amongst other things to construct and maintain and operate vehicles for the purpose of towing and rendering assistance to any vessel whether in territorial waters or high seas and whether entering or leaving the port bound elsewhere. One of the specific duties of the authority in discharge of its functions, is to maintain and provide maintenance of adequate and efficient port service consistent with best public interest.

In the High
Court of
Malaysia

No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

A port is vital to the economy of any country. It is an important gateway where international ships may call to load and unload their cargo. There is therefore a necessity to vest with a port authority the necessary power to enable it to provide and maintain not only efficient handling of cargoes but also to provide and maintain efficient services to ships calling at the port.

In the light of the object of the Act and by reason of the nature of the duties imposed upon the port authority under the Act, it is abundantly clear that the amendment was aimed at providing further and better facilities consistent with best public interest. The power conferred upon the authority to employ pilots was to enable it to promote more efficient services. It is plainly spelt out in section 29C that "The authority may employ such number of pilots as it deems necessary or expedient for the purpose of providing an adequate and efficient pilotage service."

It might be convenient at this point to state

In the High
Court of
Malaysia

—
No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

that the plaintiffs had at no time challenged the validity of the provisions that conferred additional function upon the authority to provide pilotage services within limits of and the approaches to the port [Section 3 (3) of the Act as amended by Act 99/72 w.e.f. 1.4.72]. Furthermore they have not challenged Parliament's legislative competency to enact section 29A of the Act. After careful analysis I am satisfied that in view of Article 74 of the Federal Constitution and in consideration of the matters in respect of which Parliament is empowered to legislate there is no validity in the plaintiffs' allegation that Parliament was incompetent to enact these provisions. I am also satisfied that Parliament, in enacting section 35A of the Act, had acted within the power conferred by the Constitution when it imposed a prohibition, directed to all persons other than the authority, against engaging in any pilotage act within the pilotage district.

10

20

I shall now turn to consider whether there was expressly or impliedly, any compulsory acquisition of the plaintiffs' property. It is submitted by counsel for the defendants and indeed I agree, that the plaintiffs have not by virtue of these provisions been completely restrained from pursuing their vocation. They were only prevented from carrying on their business operation within the area declared. Pilots employed by or partners of the Association are not prevented from engaging in pilotage services in other areas by virtue of the licences granted to them under the Merchant Shipping Ordinance, 1952. It would seem to me that, in short, the plaintiffs' complaint, if any, is essentially in regard to the prohibition imposed by law. The question therefore is whether, on a proper construction, such prohibition would constitute an acquisition under Article 13 of the Federal Constitution. In my judgment such prohibition cannot be construed to constitute acquisition or use of property as contemplated by Clause (2) of Article 13 of the Constitution.

30

40

Counsel for the defendants cited to me the case of France Fenwick v. The King (1927) 1 K.B. p. 458 at p. 467. In that case the question of the Crown's common law right to interfere with a subject's property without paying compensation was considered and Wright J. in his judgment said -

"In the cases cited in argument the matter has been discussed by high judicial authority

50

In the High
Court of
Malaysia

—
No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

10

and I do not think it necessary to express any opinion of my own, but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. I think, however, that the rule can only apply (if it does apply) to a case where a property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

20

Although the right to compensation has, in the instant case, to be considered in the light of Article 13 of the Federal Constitution a distinction ought, I think, to be drawn between a mere negative prohibition of the enjoyment of property and actual taking of owner's property for Government or Semi-Government purposes. In the case of the former the question of compensation cannot be said to arise. As for the present case I am of the opinion that the law in imposing a prohibition against any person engaging in a pilotage act not being an authority pilot within certain area in the port and the approaches to the port would at most interfere with the plaintiffs' enjoyment of certain property, e.g. goodwill, if there is any, but cannot in any way be said to constitute any actual taking-away of such property.

30

40

It might be very useful to refer to the case of Northern Ireland Road Transport Board v. Benson (1940 N.I. 133 at p. 145 and at p. 147 which, to my mind, seems to further fortify the defendants' contention that there had been no acquisition of property within the meaning of Article 13. In that case the Court of Appeal of Northern Ireland considered the validity of section 15 (1) of the Road and Railway Transport Act (Northern Ireland) 1935. This section reads -

50

"A person other than the Board shall not use a motor vehicle on any public highway for the conveyance of their passengers or their luggage or the carriage of merchandise for hire or reward except with the consent in writing of

In the High
Court of
Malaysia

—
No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

the Board and approval of the Ministry of
Home Affairs."

The Act was challenged as being ultra vires the
Parliament of Northern Ireland having offended
section 5 of the Government of Ireland Act which
reads :-

"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."

10

Andrew, C.J. in the course of his judgment
said -

"There is in my judgment a fundamental and
well recognised distinction between taking or
authorising property to be taken without
paying compensation, this involving an actual
use or taking of property into possession,
and a negative or restrictive provision which
merely involves interference with the owner's
enjoyment of property."

20

"This principle appears to me to be directly
applicable to the present case. Section 15
(1) did not either expressly or impliedly
transfer the possession or ownership of the
goodwill of the undertaking from the
defendant to the Board. It did not effect
a 'taking' of the goodwill."

"Section 15 (1) in my opinion amounted at
most to a mere prohibition, or, as I would
prefer to call it, in the words of the
marginal note, a 'restriction' as to the user
for certain purposes of motor vehicles for
reward upon the public highway - an inter-
ference with the full enjoyment of property."

30

In the light of my findings I do not find
any further necessity to determine whether
"property" under Article 13 includes "goodwill".

For these reasons I would once more emphasize
that there are no grounds to support the plaintiffs'
contention that section 35A of the Act is
unconstitutional and of no effect. I would also
hold that in the instant case there was no
acquisition of property within the meaning of
Article 13 of the Federal Constitution.

40

It is my judgment that there is no liability on the part of the defendants to meet the claim made by the plaintiffs. The claim is therefore dismissed. The plaintiffs shall pay costs to both defendants.

Sgd. ABDUL HAMID
JUDGE
HIGH COURT, MALAYA

In the High
Court of
Malaysia

—
No.8

Judgment of
Abdul Hamid J
17th July
1974
(continued)

Kuala Lumpur,

10 Dated this 17th day of July, 1974.

Mr. S. Sothi of K.Y. Foo & Co., Kuala Lumpur for the plaintiffs.

Encik Abdullah Ngah, Senior Federal Counsel of Attorney General's Chambers, Kuala Lumpur for the first defendant.

Encik Abdullah Yusoff of Tengku Zuri, Manan and Abdullah, Kuala Lumpur for the second defendants.

—
No.9

ORDER OF COURT

20 IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO: 1142 of 1972

BETWEEN :

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants

BEFORE THE HONOURABLE MR. JUSTICE ABDUL HAMID

THIS 17th DAY OF JULY, 1974

30

IN OPEN COURT

ORDER

This suit coming on for hearing on 2nd and 3rd

In the High
Court of
Malaysia

No.8

Order of
Court
17th July
1974
(continued)

day of May, 1974 in the presence of Mr. S. Sothi of Counsel for the Plaintiffs, Encik Abdullah Ngah, Senior Federal Counsel for the 1st Defendant and Encik Abdullah Yusof of Counsel for the 2nd Defendant AND UPON READING the Pleadings AND UPON HEARING evidence and submission by Counsel as aforesaid IT WAS ORDERED that this action do stand adjourned for judgment AND the same coming on for judgment this day in the presence of Mr. S. Sothi of Counsel for the Plaintiffs, Encik Ariffin Jaka, Federal Counsel for the 1st Defendant and Encik Abdullah Yusof of Counsel for the 2nd Defendant IT IS ORDERED that the Plaintiffs' suit herein be and is hereby dismissed AND IT IS FURTHER ORDERED that the Plaintiffs do pay to the Defendants the costs of this suit to be taxed by the proper officer of this Court.

10

Given under my hand and the Seal of the Court this 17th day of July, 1974.

Senior Assistant Registrar,
High Court, Kuala Lumpur.

20

In the
Federal
Court

No.10

MEMORANDUM OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA

FEDERAL COURT CIVIL APPEAL NO: 105 of 1974

BETWEEN :

Selangor Pilot Association (1946)
(suing as a firm) Appellants

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Respondents

30

(In the Matter of Kuala Lumpur High
Court Civil Suit No. 1142 of 1972

BETWEEN :

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

1. The Government of Malaysia
2. Lembaga Pelabuhan Kelang Defendants)

In the
Federal
Court

MEMORANDUM OF APPEAL

We, SELANGOR PILOT ASSOCIATION of care of Messrs. K.Y. Foo & Co., 5th Floor, Bangunan U.M.B.C., No. 42, Jalan Tun Perak, Kuala Lumpur being dissatisfied with the decision of the Honourable Mr. Justice Abdul Hamid given at Kuala Lumpur on the 17th day of July 1974 appeal to the Federal Court against the whole of the aforesaid decision on the following grounds:-

No.10
Memorandum
of Appeal
2nd September
1974
(continued)

1. The learned trial Judge erred in law and/or fact in holding that sections 29A and 35A of the Port Authorities Act, 1963 introduced by sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 were aimed at providing further and better facilities and to promote more efficient service.

2. The learned trial Judge erred in fact in holding that the Plaintiffs had not by virtue of section 35A been completely restrained from pursuing their vocation.

3. The learned trial Judge erred in law in holding that Parliament, in enacting section 35A of the Port Authorities Act, 1963, had acted within the power conferred by the Constitution.

4. The learned trial Judge erred in law in holding that the prohibition imposed by section 35A of the Port Authorities Act 1963 did not constitute an acquisition or use of property as contemplated by clause 2 of Article 13 of the Constitution.

The Appellants therefore pray :-

- (1) That this appeal may be allowed.
- (2) That the Judgment of the learned trial Judge dated the 17th day of July, 1974 may be set aside.
- (3) That such further order be made as this Court deems just.

Dated this 2nd day of September, 1974

Sgd. K.Y. FOO & Co.

Solicitors for the Appellants

In the
Federal
Court

to:

No.10

Memorandum
of Appeal
2nd September
1974
(continued)

The Chief Registrar,
Federal Court, Malaysia,
Kuala Lumpur.

The Senior Assistant Registrar,
High Court, Kuala Lumpur.

The Senior Federal Counsel,
Attorney General's Department
on behalf of the 1st Respondents.

The abovenamed 2nd Respondents
and/or their solicitors Messrs.
Tunku Zuhri, Manan & Abdullah,
Tingkat 11, Bangunan Ming,
Jalan Bukit Nanas,
Kuala Lumpur.

10

This Memorandum of Appeal is filed on behalf
of the Appellants abovenamed Messrs. K.Y. Foo & Co.
of Tingkat 5, Bangunan UMBC, Jalan Tun Perak,
Kuala Lumpur, Solicitors for the Appellants.

No.11

No.11

20

Notes of
Suffian, L.P.
7th January
1975

NOTES OF SUFFIAN, L.P.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 105 of 1974

(Kuala Lumpur High Court Civil Suit No. 1142/1972)

BETWEEN :

Selangor Pilot Association (1946)
(suing as a firm)) Appellants/
Plaintiffs

30

And

1. The Government of Malaysia)
2. Lembaga Pelabohan Kelang) Respondents/
Defendants

Coram: Suffian, L.P.;
Lee Hun Hoe, C.J. Borneo; and
Ali Hassan, F.J.

In the
Federal
Court

No.11

NOTES OF SUFFIAN L.P.

Notes of
Suffian L.P.
7th January
1975
(continued)

Tuesday, 7th January, 1975.

S. Sothi for Appellants.
Talib for Respondent 1.
Abdullah for Respondent 2.

Sothi Addresses

10 Statement of Claim, p.6 onwards.
Two issues agreed, p.15.
Evidence for plaintiffs summarised at
p.37.
P.17 F.
P.112. Defendants deny liability.
P.110-111 - takeover of pilotage service.
Statement of Claim, para. 5.
Plaintiffs submitted written submission
p.36, so did defendants at p.21.
20 Judgment in favour of defendants, p.69.
Grounds of appeal, pp. 1-3.

First ground

No evidence for this finding by judge at p.73.
Explanatory note to bill makes no mention of
intention to provide more efficient service.

Second ground

Judge wrong in holding that plaintiffs had not
been completely restrained from pursuing their
vocation.

30 P.24C-E.

In the
Federal
Court

S.417, Merchant Shipping Ordinance. Sub-
section (1). Licence for area only.

Third ground

No.11
Notes of
Suffian L.P.
7th January
1975
(continued)

Judge wrong in holding at p.74F that s.35A of
Port Authorities Act 1963 intra vires Parliament.

P.72G - 73

P.74C.

Submit s.35A is unconstitutional because it
does not provide for compensation as required by
article 13. 10

I rely on article 13, both clauses.

11th Schedule defines person to include
plaintiffs.

1937 A.C. 860 Gallagher.

1953 A.C. 514 Govindan, 529 (last few lines),
528 (last para.). Pith and substance.

S.35A has legislated plaintiffs out of
business. Before the new law plaintiffs has
business only in this area, after new law
plaintiffs have no business anywhere. 20

Fourth ground

France 1927 1 K.B. 458.

Benson 1940 N.I. 133, 145, 147 - p.77 appeal
record.

Halsbury's Statutes, 2nd edition, 17 vol.
p.62.

Benson 1942 1 A.E.R. 465.

James Brown 1953 N.I. 79 disagrees with
Benson.

Both Benson and Brown say goodwill is property, 30
A pity judge here did not deal with this.

Appeal record, p. 29, para. 15.

Appeal record, para. 17, p.32.

Appeal record, p.53. S.299, Government of

India Act, 1935.

Mahbub A.I.R. 1951 Hyd. 1.

State of West Bengal A.I.R. 1954 S.C. 92, para. 15, p.99.

Dwarkadas A.I.R. 1954 S.C. 199, headnote (d), para. 23.

Saghir A.I.R. 1954 S.C. 728.

Deep Chand A.I.R. 1959 S.C. 648.

Constitution of Asian countries, p.202-6.

In the
Federal
Court

No.11

Notes of
Suffian L.P.
7th January
1975
(continued)

10 New clause 2A of Indian article 31 does not exist here - negatives previous Indian law as in Deep Chand's case, p.669, para. 38.

Indian decisions before insertion of clause 2A show that plaintiff here has been deprived of property.

Property. Appeal record, p.44, para. 9 onwards. Submit property includes goodwill.

S.299, Government India Act, 1935.

20 James Brown (supra). Goodwill is property, p.108.

Appeal record, p.47.

I.R.C. v. Mulla 1901 A.C. 217. Lindley on goodwill, p.235.

Not true no competition no goodwill.

Govinden (supra). 1953 A.C. 514, 528 on directly and indirectly. If Government can't do something directly, it cannot do so indirectly.

Talib for Respondent 1

Facts, p. 69-70 not disputed.

30 S.35A does not have effect of compulsorily acquiring property within article 13.

No goodwill in plaintiffs' business.

I first answer ground of appeal 3.

In the
Federal
Court

Schedule 9, item 9 - Parliament has power to enact S.35A.

P.41, appeal record. Pith and substance.

No.11

Court not competent to declare S.35A invalid - in view of Atkin's remark at p.41, appeal record.

Notes of
Suffian L.P.
7th January
1975
(continued)

Philip (1974) 2 MLJ 100.

In reply to ground 1

S3 (3)(aa), Port Authorities Act, 1963, and s.29C show intent to provide efficient pilotage service.

10

S.35A.

S.29A.

P.73, judge right.

Thakore A.I.R. 1946 P.C. 127.

In reply to grounds 2 and 4

S.35A.

P.72.

P.17, plaintiffs say pilots can continue outside this Port area.

P.75A, judge right.

20

Parliament competent to enact s.35A.

Plaintiffs licensed under Merchant Shipping Ordinance.

France (1927) 1 KB 458, 467.

S.35A not directed at plaintiffs alone, but but at all persons - not intended to capture plaintiffs' business without expense.

S.3(3)(aa).

S.35A not ultra vires.

30

Article 13. (a) Prohibition is not deprivation.

(b) Privilege given to plaintiffs to provide pilotage service is not property.

Appeal record, p.29, para. 15, on "deprivation" and "acquisition".

In the Federal Court

Clause (1) of article 13 refers to executive,

Clause (2) " " " " " legislative action.

A.I.R. 1944 Federal Court 62, 65 on "acquisition". No transfer, no acquisition.

No.11

Notes of Suffian L.P. 7th January 1975 (continued)

10 Here plaintiffs' business not transferred to defendants. After new law plaintiffs can carry on business elsewhere.

P.101 - "take over" used there by an administrator, not to be construed in legal or technical sense.

Plaintiffs adequately compensated for material assets.

All pilots offered employment, all accepted the offer except one.

20 S.29H(2). These pilots can go on working, but for the Port Authority, and they will be paid properly.

Submit Parliament has taken nothing from the plaintiffs.

P.29, appeal record.

Benson (supra) not overruled.

Submit privilege given to plaintiffs to conduct pilotage service was not property - intangible, not capable of transfer.

30 On the evidence here, there is no goodwill, though I agree goodwill can be property.

I adopt arguments in appeal record at pp.26-29.

Abdullah addresses

I adopt Talib's arguments.

P.18 is evidence that A99 is to provide better facilities.

S13(a), Port Authorities Act, 1963, also

In the
Federal
Court

provides security service - taken over from the
police.

Benson (supra)

No.11

James Brown (Supra)

Notes of
Suffian L.P.
7th January
1975
(continued)

Indian laws dealt with confiscatory law.
Here we are dealing with law giving better service.

Gopal A.I.R. 1954 S.C. 92, 94.

Dwarkadas (supra) p.122. Positive act of
taking over of mill by Government.

Saghir (supra) p.731 - cancelled permits
already issued.

10

Plaintiffs' goodwill? See their submission,
pp.48-9, appeal record, and defendants' at p.26
onwards.

Plaintiffs had no goodwill within meaning
given by Lindley - p.27, appeal record.

Plaintiffs had a monopoly - they had no
goodwill - they had no property.

Sothi replies

Act A99 within Parliament's power but must
comply with article 13.

20

C.A.V.

(Signed) M. Suffian
7.1.1975.

No.12

No.12

Notes of
Lee Hun Hoe
7th January
1975

NOTES OF LEE HUN HOE

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL No.105 of 1974

30

BETWEEN :

Selangor Pilot Association (1946)
(suing as a firm) Appellants

In the
Federal
Court

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Respondents

No.12

(In the Matter of Kuala Lumpur
High Court Civil Suit No.1142 of
1972

Notes of
Lee Hun Hoe
7th January
1975
(continued)

BETWEEN :

10

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants).

Coram:

Suffian, L.P. Malaysia
Lee Hun Hoe, C.J. Borneo
Ali, F.J.

NOTES OF SUBMISSION

20

Tuesday, 7th January, 1975

9.30 a.m. Encik S. Sothi for appellants

Encik Abu Talib bin Othman for 1st
respondent

Encik Abdullah bin Mohamed Yusof for 2nd
respondent.

Sothi

Referred to Statement of Claim in High Court.

Whether new s.35A was constitutional or not.

30

Whether compensation payable in quantum to be
left at later stage.

Page 37 is summary of plaintiffs' evidence.

Paragraph 3 facts not in dispute.

In the
Federal
Court

No.12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

Page 17 - No other firm doing pilotage services, etc.

Page 112 - letter from Ministry of Transport. "To take over pilotage services."

Para 5 of Statement of Claim not in dispute by 2nd respondent.

21 - 34 - Joint submission by respondents.

36 - 68 Appellants' submission.

1 - 3 Memorandum of Appeal.

1st Ground

10

Page 73 - Judgment para. H.

2.5.74 came up for hearing.

2nd Ground

Page 75 - Judgment para. A.

Page 24 para C, D & E.

Section 417 of Merchant Shipping Ordinance.

3rd Ground

Page 74 Judgment para. F.

Page 72.

Submit Article 74 deals purely with what law should be enacted by State and Federation.

20

Article 13 - depriving of property then legislation must provide compensation.

Page 74 para. C.

These were not challenged as they did not affect compensation.

Section 35A only becomes unconstitutional because it does not provide for compensation.

Requirement of Article 13 must be complied.

30

Rely on both clauses of Article 13.

"No person."

Ail. Does it apply to association?

Association consists of partners.

Page 221 - Pocket Edition.

Submit pith and substance.

Gallagher v. Lynn (1937) A.C. 863 & 870.

Lord Atkin "It is well established forbidden field."

In the
Federal
Court

No. 12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

10

Page 41 Govindan Sellappah Nayar Kodakan Pillai vs. Punchi Banda Mudanayake & Ors. (1953) A.C. 514 & 524

529 "But in their Lordships.....challenged."

528 "With much.....statutes."

Page 43 - para. B.

Business only in the area. After legislation they were legislated out of business.

Ground 4

Page 75 para D & E.

20

France Fenwick v. The King (1927) 1 K.B. p. 458 & 467.

Judge dealt with common law position irrelevant.

We are dealing with constitution.

Page 76 para. E.

Page 47 Halsbury's Statutes of England 2nd Edn. Vol. 17 page 62.

Learned Judge failed to consider.

Benson v. Northern Ireland Road Transport Board (1942) 1 A.E.R. 465.

30

Learned Judge relied on a Court which has no jurisdiction to hear case.

Ulster Transport Authority v. James Brown &

In the
Federal
Court

No.12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

Sons Ltd. (1953) N.I. 79.

11.00 a.m. Adjourned.

11.30 a.m. Resumed.

Sothi.

Unfortunate learned Judge did not decide whether "goodwill" was property or not.

Page 29 Defendants' submission Para. 15 F.

Page 32 Para. 17.

Page 53 & page 46 - Para. 11 onwards.

Section 299(1) of Government of India Act, 1935 similar to Article 31(1) of Constitution of India.

10

Page 55 Mahbab Begum v. Hyderabad State A.I.R. (1951) Hyd. 1.

State of West Bengal v. Subohd Gopal Bose A.I.R. (1954) Para. 15.

Dwarkadas Shrinvas vs. Sholapur Spinning & Weaving Co. Ltd. A.I.R. (1954) S.C. 119. Para 24.

Saghir Ahmad vs. State of Uttar Pradesh A.I.R. (1954) S.C. 728.

20

Page 57 Deep Chand vs. State of Uttar Pradesh A.I.R. (1959) S.C. 648.

Page 61 Kannepalli China Venkata Chalamayya Sastri vs. State of Madras A.I.R. (1958) AP 173.

Page 44 "Goodwill" - Para. 9, etc.

Submit wide interpretation should be given - Submit "goodwill" is property.

Ulster Transport Authority v. James Brown & Sons Ltd. (1953) N.I. 79.

Facts are similar to facts of case under appeal. 30

Page 49 Commissioner of Inland Revenue vs. Muller & Co's Margarine Ltd. (1901) A.C. 217 & 235.

Page 26 Para. 12 Defendants' submission.

Page 22 Para. 4 F Defendants' submission.

Page 28 Para. 14.

Not monopoly. Any person qualified to obtain licence can do such business.

(1953) A.C. 514 & 528.

Principle - cannot do indirectly what it cannot do directly.

Talib

Facts 69 and 70 not disputed.

10

Section 35A has the effect of acquisition of property.

No goodwill attached to plaintiffs' business.

Will deal with Ground 3 first.

Judge right in his approach.

Page 72.

Schedule 9.

Substance within Parliament to legislate.

Page 41 Lord Atking "it is well....forbidden."

20

Submit competent for Court to declare section 35A valid.

(1974) 2 M.L.J. 100 and 103.

Ground 1

Section 33A of Port Authority Act.

Section 29C.

"Adequate and efficient service."

Section 33A,A, provides functions, etc.

Section 29A provides pilot area.

Section 29C provides duties to appoint pilot and adequate and efficient service.

30

Page 73 "In the light.....services."

In the
Federal
Court

No.12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

In the
Federal
Court

Submit learned Judge right.

Thakur Janannath Baksh Singh vs. The United Provinces (1946) A.I.R. 127 P.C.

No. 12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

1.00 p.m. Adjourned.

2.30 p.m. Resumed.

2nd and 4th Grounds

Page 72 "The object is to prohibit services."

Page 17 "The Association still exists and the Association can still operate outside the area declared." 10

Page 75 Para. A.

Licence granted to plaintiffs is a privilege under Act of Parliament Merchant Shipping.

France Fenwick v. The King (1927) 1 K.B. 453.

Aim of section 35A is reflected in section 3AA not as plaintiffs said at page 40.

Plaintiffs cannot be said to say that section 35A ultra vires.

Whether privilege granted to plaintiffs was property under Article 13(2). 20

Page 29. Para. 15.

No reason Parliament uses two different words in Article 13(1) and (2).

13 (1) "deprived."

13 (2) "acquisition."

Kunwar Lal Singh vs. Central Provinces & Berar A.I.R. (1944) P.C. 62 & 65.

No transfer there can be no acquisition.

In this case no transfer of their business. Plaintiffs can still carry on business outside the area. 30

Page 110 "to take over" used by layman not in legal sense.

Section 29H (2).

Offer of employment accepted by all except one.

Submit Parliament has taken nothing from the pilots.

They are entitled to work but for Government.

Compensation by private treaty no legislation.

Adopt submission page 29 onwards.

Urge Court to adopt reasoning in Benson's Case.

10 Privilege given to plaintiffs to do business in affected area is property or not.

This is not capable of transfer.

Confess that authorities seem to suggest "goodwill" is property.

But submit on evidence in this case there is no goodwill.

Sum up - (1) Judge right - section 35A and 29A.

20 (2) Section 35 merely prohibits pilots from areas but does not prohibit plaintiffs from carrying on business outside area.

Plaintiffs amply compensated for assets.

Jobs offered. No loss.

Submit dismiss with costs.

Suffian.

How about Singapore lawyers now not permitted to practise business closed say in Johore.

Sothi.

But Government has not taken other business.

Abdullah.

30 Would adopt what my learned friend Abu Talib said plus some addition.

In the
Federal
Court

No.12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

In the
Federal
Court

Page 18 D to G.

Intention of legislation to provide better facilities by Port Authority.

No.12

Section 13A - Security. Before provided by police.

Notes of
Lee Hun Hoe
7th January
1975
(continued)

4th Ground

My learned friend cited Indian authorities.

Irish authorities decided differently.

Here we are aiming at legislation to provide better facilities.

10

State of West Bengal vs. Subohd Gopal Bhowe
A.I.R. (1954) S.C. 92.

A.I.R. (1954) S.C. 119 and 122.

"Thereupon the Governor-General
Government."

A.I.R. (1954) S.C. 731.

To take over transport services.

All cases dealt with legislation designed to take over services.

"Goodwill."

20

Page 48) Appellants' submission.

Page 49)

Page 26 onwards Respondents' submission.

Plaintiffs only people running the business. All vessels entering port must have pilot. Must go to plaintiffs. Does not matter where plaintiffs are situated.

Everyone knows Robinson.

Connection - Say you go to Crown Agents. They have connection.

30

Competition. Lord Lindley must have foreseen this. Plaintiffs are running a monopoly.

Submit no goodwill shown.

Sothi

Port Authority could not take over unless section 3AA and section 29A are also promulgated.

Not saying Parliament cannot pass such law but we are saying Parliament must provide compensation as envisaged by Article 13.

Claiming for goodwill only.

10 Indian cases to support my argument that "deprived" and "acquisition" in Clauses (1) and (2) of Article 13 are synonymous.

Cur Adv. Vult.

(sgd) Lee Hun Hoe,
Chief Justice,
Borneo.

In the
Federal
Court

No.12

Notes of
Lee Hun Hoe
7th January
1975
(continued)

No.13

NOTES OF ALI F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

20 FEDERAL COURT CIVIL APPEAL NO. 105 of 1974

(Kuala Lumpur High Court Civil Suit No. 1142/1972)

BETWEEN

SELANGOR PILOT ASSOCIATION (1946)
(suing as a firm) Appellants/
Plaintiffs

And

1. The Government of Malaysia }
2. Lembaga Pelabohan Kelang }
Respondents/
Defendants.

30

Coram : Suffian, L.P.
Lee, C.J. Borneo, and
Ali, F.J.

No.13

Notes of
Ali F.J.
7th January
1975

In the
Federal
Court

NOTES OF ALI, J.F.

7th January, 1975.

No.13

Notes of
Ali F.J.
7th January
1975
(continued)

S. Sothi for appellants.

Abu Talib for respondent 1.

Abdullah for respondent 2.

Sothi addresses -

Refers to statement of claim - paras 2, 3 & 4.

Sec. 35A of Port Authorities Act, 1963 -
unconstitutional and of no effect. Reads Article
13 of the Constitution. Refers to defence claim.
Sec. 35A unconstitutional. Para 15. 2 issues. 10
Refers to evidence, p. 47 - no other business.
Page 112 - letter. Pilot service taken over by
the respondent.

Gr.2 - Judge erred in saying that appellants
were not deprived of the vocation. Sec. 417 of
Merchant Shipping Ordinance, 1952. Refers to
Article 31 and Article 13 of the Constitution.
Person is defined. My case rests on both clauses
of Article 13. Pilot Association has no 20
competitors. Refers to Gallagher v. Lynn (1937)
A.C. 863 P.C. (See submission p.40). Refers to
Govindan Sellappah Nayar Kodakan Pillai v. Runchi
Banda Mudanayake (1953) A.C. 514 P.C.

4th Gr. of appeal - Trial Judge's citation of
case passage, p. 76, not relevant to present
situation. Refers to Northern Ireland Road
Transport Board v. Benson (1940) N.I. 133.
Benson (1942) 1 A.E.R. 465. Submits trial Judge 30
erred in not holding that there was goodwill.
Refers to Saghir Ahmad v. State of Uttar Pradesh
- A.I.R. (1954) 728 S.C.

Also refers to Deep Chand v. State of Uttar
Pradesh (1959) A.I.R. 648.

New Clause 2A to the Indian Constitution was
to restrict the meaning of "deprive" only to
requirement to transfer properties. Submits
Malaysia has not got Clause 2A.

No definition of property.

Refers to Ulster Transport Authority v. James 40

Brown & Sons Ltd. (1953) N.I. 79.

Goodwill is property.

Refers to Govindan (1953) A.C. 514 - 528.

Abu Talib for 1st respondent.

Facts found by trial Court not in dispute.

Sec. 35A does not have the effect of depriving a person of property.

On ground 3 - Parliament has power to legislate - Sch. 9.

In the
Federal
Court

No.13

Notes of
Ali F.J.
7th January
1975
(continued)

10

Port Authorities Act 1963, Sec. 29A - an ordinary piece of legislation under Article 74. Purpose of 35A to prohibit any person not an authority pilot.

Refers to Philip Hoalim Jr. & Anor v. State Commissioner, Penang (1974) 2 M.L.J. 100, 103, - refers to my judgment. Supports judgment - p.74.

20

On 1st Ground - Sec. 29C. Not challenged that this is valid. Not possible to provide adequate and efficient service with private pilot service in the same area.

Question whether or not there is efficient service is a matter for Port Authority. Port Authority is under a duty to provide efficient pilot service.

Submits trial Judge was right.

Refers to Thakur Jagannath Baksh Singh v. United Provinces A.I.R. (1946) P.C. 127, 130.

Submits legislation within competence.

30

Grounds 2 & 4.

Adjourned to 2.30 p.m.

Resumes at 2.30 p.m.

Parties as before.

Grounds 2 & 4 : Sec. 35A provides for employment of pilots. Section does not have the

In the
Federal
Court

No.13

Notes of
Ali F.J.
7th January
1975
(continued)

effect of preventing appellant to carry on pilot service outside the area.

Submits trial Judge right in saying that appellant not completely restrained - Gr. 2. Section 35A creates an offence. Licence granted to pilot is a privilege. Refers to France Fenwick v. The King (1927) 1 K.B. 458. (See page 121 James Brown case per Potter L.J.)

Article 13 - whether prohibition in this case amounts to deprivation. (2) whether privilege to operate pilot service is property for purpose of Article 13. 10

Submits there is a distinction. Refers to page 29 para 15. Clause (2) - refers to AIR (1944) 31 Fed. Court 62, 65 - last paragraph. Works 'take over' not to be construed as 'transfer' as it is understood in law.

Offer of employment accepted except one.

Sec. 29H (2) - provides that pilots could carry on as pilots. Submits there is no evidence Parliament has taken over anything from the pilots. 20

Submits Benson was not overruled.

(2) Whether privilege given to Association to operate is same as property. Submits it is not property - intangible - not capable of transferring.

Abdullah - I adopt Abu Talib's arguments.

Submits that on evidence it is clear that Port Authority is gradually providing the services required. 30

Appellants have a monopoly. There was no competition. It follows there was no goodwill to speak of.

Sothi - Submits even though section 35A had not been enforced to give rise to this action the provision is unenforceable. I can raise the question.

C.A.V.

Sd. Ali.

Certified copy.
Sd.
Secretary to Judge.

40

JUDGMENT OF SUFFIAN, L.P.

In the
Federal
Court

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 105 OF 1974

(Kuala Lumpur High Court Civil Suit No. 1142/1972)

No.14

Judgment of
Suffian L.P.
8th March
1975

BETWEEN :

Selangor Pilot Association (1946)
(suing as a firm) Appellants/
Plaintiffs

10

And

1. The Government of Malaysia)
2. Lembaga Pelabohan Kelang)
Respondents/
Defendants

Coram: Suffian, L.P.;
Lee Hun Hoe, C.J. Borneo; and
Ali Hassan, F.J.

JUDGMENT OF SUFFIAN, L.P.

20

At the outset I would like to say that Ali Hassan, F.J., concurs with both judgments which I am about to read.

The plaintiffs are a firm registered under the Registration of Businesses Ordinance, 1956.

30

Members of the firm were licensed as pilots under the Merchant Shipping Ordinance. They were licensed for the specific area of Port Swettenham harbour. Between 1946 and 30th April, 1956, only the plaintiff firm provided pilotage services in that harbour, though there was no bar to others doing the same.

In 1972 Parliament added a new section 29A and a new section 35A to the Port Authorities Act, 1963, by the enactment of The Port Authorities (Amendment) Act, 1972, Act A 99.

These two new sections read as follows:

In the
Federal
Court

No. 14

Judgment of
Suffian L.P.
8th March
1975
(continued)

"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.

(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.

10

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 one thousand dollars.

(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 one thousand dollars.

20

(3) For the purposes of this section an authority pilot acting beyond the limits for which he is licensed or in contravention of any conditions imposed under the provisions of section 29H, 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 of the best assistance that can be found at the time."

30

The Lembaga Pelabuhan Kelang (the Port Klang Authority), the second defendant, is an authority within the meaning of subsection (1) of section 29A.

On 13th April, 1972, the second defendant by notification in the Federal Gazette declared the port Swettenham harbour area to be a pilotage district. This area included all the areas in which the plaintiff firm had been carrying on their business.

40

The plaintiffs wrote to the Port Klang

Authority, the second defendant, and received a reply dated 31st March, 1972, as follows:

"Take-Over of Pilotage Service

No. 14

Judgment of
Suffian L.P.
8th March
1975
(continued)

In reply to your letter dated 27.3.72 in regard to the taking over of pilotage assets, I am directed to advise you that this Authority has been directed by the Ministry of Communication to take over the Pilotage Services with effect from 1st May, 1972.

10

Therefore, in so far as the date for taking over of assets is concerned, this will be a few days before 1st May, but in so far as the payment is concerned, this will be subject to further correspondence."

It is clear from the above that the plaintiffs were informed that the second defendant would take over the pilotage service within Port Swettenham with effect from 1st May, 1972.

20

It is clear that from that date the plaintiffs ceased to carry on their pilotage business in the port, that the second defendant took over the physical assets of the plaintiffs such as launches and so on and paid compensation for the same but refused to compensate the plaintiffs for the loss of their goodwill and for loss of future profits.

It is clear that after 1st May, 1972, only the second defendant has been providing pilotage service in Port Swettenham.

30

The plaintiffs sued the Government of Malaysia, as the first defendant, and also the second defendant, for compensation for loss of goodwill.

Alternatively the plaintiffs claim a declaration that section 35A is unconstitutional as being inconsistent with article 13 of the federal constitution which reads:

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

40

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

The defendants deny liability.

At the commencement of the trial two issues

In the
Federal
Court

No.14

Judgment of
Suffian L.P.
8th March
1975
(continued)

were agreed:

- (1) whether the act of the defendants was unconstitutional; and
- (2) whether the defendants were liable to pay compensation.

The quantum, it was agreed, should be left to be determined later.

The learned trial Judge decided in favour of the defendants, and the plaintiffs appeal to us.

There are four grounds of appeal.

10

First, it is argued that the learned judge was wrong in holding that sections 29A and 35A were aimed at providing further and better facilities and to promote a more efficient service.

Second, it is argued that the learned judge was wrong in holding that the plaintiffs had not by virtue of section 35A been completely restrained from pursuing their vocation.

Third, it is argued that the learned judge was wrong in holding that Parliament was acting within their powers under the constitution when they enacted section 35A.

20

Fourth, it is argued that the learned judge was wrong in holding that the prohibition imposed by section 35A was not an acquisition or use of property within the meaning of clause (2) of article 13.

I think that I can dispose of the third argument first. In my view, as clause (1) of article 74 provides that Parliament may make laws with respect to any matter in the federal list and as the federal list includes shipping and navigation (see item 9 of schedule 9), it is quite plain that Parliament has power to enact section 35A. But that still leaves open the question whether or not that section is valid in view of article 13. I shall return to this question in a moment.

30

The main issues in this appeal are first whether the plaintiffs had any goodwill in their business, second whether that goodwill was property and third whether that property had been acquired by the defendants. If the answer to all

40

three questions is in the affirmative, then it is clear that the plaintiffs are entitled to compensation, which is what the plaintiffs are mainly interested in.

In the
Federal
Court

—
No.14

Judgment of
Suffian L.P.
8th March
1975
(continued)

10 The defendants argue before us that the licences issued to members of the plaintiffs' firm were a privilege, not property, that the firm had a monopoly and without competition there would be no goodwill (the defendants agree that goodwill is property), and that the plaintiffs have not been deprived of property if they had any property in their business which is denied.

20 I shall deal first with the question whether or not the plaintiffs had any goodwill, regarding which the learned judge unfortunately made no finding. The uncontroverted evidence is to this effect : that the plaintiffs' business commenced in 1946, that nobody else but only the plaintiffs provided pilotage services in this harbour area, that the plaintiffs are a partnership, that the partnership employed partners and non-partners as pilots, that when a new partner came in he paid a capital sum to the partnership, and that the partnership owned launches and things of that kind. The defendants content that as the plaintiffs enjoyed a monopoly they could not have had any goodwill. With respect I do not agree. In view of the uncontroverted evidence, I think that it would have been reasonable if the learned judge had found as a fact that there was goodwill in the business. The fact that the plaintiffs enjoyed a monopoly only affects the value of the goodwill, about which we are not at this stage concerned.

30

I therefore proceed on the basis that there was goodwill in the business run by the plaintiffs.

40 Next I should deal with the question whether goodwill is property, but before doing so I should deal with the question what property in article 13 means. It is nowhere defined in the constitution, though the word is used elsewhere, for instance, in article 19. With respect I agree with Ghulam Hassan J. who said at page 139 in Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. and Others 1954 A.I.R. S.C. 119 when discussing article 31 of the Indian constitution which approximates to our article 13.

"Having regard to the setting in which Article 31 is placed, the word 'property' used in the article

In the
Federal
Court

No. 14

Judgment of
Suffian L.P.
8th March
1975
(continued)

must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights. The word 'property' is not defined in the constitution and there is no good reason why to restrict its meaning."

In view of the above passage, I think that the defendants are right when they concede before us that goodwill constitutes property. For as was stated by Lord MacDermott L.C.J. at page 110 in Ulster Transport Authority v. James Brown & Sons Ltd. Northern Ireland Law Reports Q.B.D. '79 where the plaintiffs claim to have been legislated out of their business by a law attacked for un-constitutionality,

10

"loss [there, assuming that only goodwill was lost] is a loss of property because it is or includes a loss of goodwill."

I now turn to the next question whether or not any loss has been suffered by the plaintiffs. The learned judge answered this question in the negative, on the ground that a distinction should be drawn between on the one hand a mere negative prohibition of the enjoyment of property and on the other actual taking of the owner's property. He relied on this passage from the judgment at page 467 of Wright J. in Frances Fenwick v. The King. (1927) 1 K.B. 458 :

20

"In the cases cited in argument the matter has been discussed by high judicial authority, and I do not think it necessary to express any opinion of my own, but I shall assume that the Crown has no right at common law to take a subject's property for reasons of State without paying compensation. I think, however, that the rule can only apply (if it does apply) to a case where a property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it any common law right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

30

40

The learned judge also relied on Northern Road Transport Board v. Benson (1940) N.I. 133 where Andrew C.J. said at page 147 :

In the
Federal
Court

10 "There is in my judgment a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely involves interference with the owner's enjoyment of property."

No. 14
Judgment of
Suffian L.P.
8th March
1975
(continued)

20 With respect to the learned judge in the instant case, I do not think that Benson's case (supra) (4) can be relied on. There the question was the constitutionality of a law enacted by the Northern Ireland Parliament, namely section 15 (1) of the Road and Railway Transport Act (Northern Ireland) 1935. Its validity was attacked on the ground that it was ultra vires section 5 (1) of the Government of Ireland Act, 1920, which restricts the legislative power of the Northern Ireland Parliament. That section provides:

"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."

30 Eventually that case went up on appeal to the House of Lords, see 1942 A.C. 520, where it was held that the judgment had been pronounced without jurisdiction; so it may be considered that whatever was said in that judgment was not binding, see Lord MacDermott L.C.J. at page 111 in James Brown (supra) (2).

40 In James Brown's case the validity of section 18 (1) of the Transport Act (Northern Ireland), 1948, was attacked on the ground that it contravened the same section 5 (1) of the Government of Ireland Act, 1920, referred to in Benson's case (supra) (4). Section 18 (1) prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on a public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. Section 19 (1) excepts from the restrictions imposed by section 18 (1) the use by furniture removers of motor vehicles "to move

In the
Federal
Court

No.14

Judgment of
Suffian L.P.
8th March
1975
(continued)

furniture or effects, not being part of the stock in trade of the owner thereof, from or to premises occupied by such owner to or from the other premises occupied by such owner or to or from a store." Furniture which had been purchased as stock in trade by a dealer at an auction was carried by the respondents, a firm of furniture removers, from the auction to the dealer's premises without the consent of the Authority and without the approval of the Ministry. The respondents were charged with an offence under section 18 (1). The contended that that section was ultra vires the Parliament of Northern Ireland in that it provided for a taking of property without compensation contrary to section 5 (1) of the Government of Ireland Act, 1920. This contention was upheld by the Court of Appeal of Northern Ireland.

10

Be it noted that in that case there was no question of using or taking the physical assets of the respondents, and that there was only a negative or restrictive provision merely interfering with the owner's enjoyment of his property, the property there being the goodwill of their furniture removal business which they had been carrying on since 1898; and yet it was held that the respondents' property had been taken, and taken without compensation within the meaning of section 5 (1) of the Government of Ireland Act, 1920. This is contrary to the view expressed by Andrew C.J. in the earlier case of Benson (supra).

20

30

I now leave Northern Ireland to go over to India, as it is well known that our constitution is modelled on the Indian constitution.

The nearest Indian provision is article 31 which before 27th April, 1955, read:

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

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be

40

determined and given."

The construction of that provision came up before the Indian Supreme Court in four cases:

In the
Federal
Court

No.14

Judgment of
Suffian L.P.
8th March
1975
(continued)

1. State of West Bengal v. Subodh Gopal Bose and Others A.I.R. 1954 S.C. 92;
2. Dwarkadas Shrinivas v. The Sholapur Spinning and Weaving Co. Ltd. and Others (supra);
3. Saghir Ahmad and Another v. State of U.P. and Others A.I.R. 1956 S.C. 728; and
- 10 4. Deep Chand and Others v. The State of Uttar Pradesh and Others A.I.R. 1959 S.C. 648.

In the third case Saghir Ahmad (supra) certain private bus operators were deprived of their right to run buses on certain routes, but their physical assets were not taken over and the State of Uttar Pradesh itself decided to provide bus services on these routes under the Authority of the Uttar Pradesh Road Transport Act (Act II of 1951). The Act provided for no compensation. Its validity was attacked on the ground that it offended against article 31 (2). The High Court held that it was valid. On appeal the Supreme Court held that it was void as it offended against article 31 (2). Delivering the judgment of the Court, Mukherjea J. said at page 740:

"(25) According to the High Court therefore, mere deprivation of the petitioners' right to run buses or their interest in a commercial undertaking is not sufficient to attract the operation of Article 31 (2) of the Constitution as the deprivation has been by the authority of law within the meaning of Clause (1) of that article. Clause (2) could be attracted only if the State had acquired or taken possession of this very right or interest of the petitioners or in other words if the right of the petitioners to run buses had been acquired by or had become vested in the Government. That State, it is pointed out, has an undoubted right to run buses of its own on the public thoroughfares and they do not stand on the rights of the petitioners.

This argument, we think, is not tenable having regard to the majority decision of this Court in the case of - 'State of West Bengal v. Subodh Gopal Bose A.I.R. 1954 S.C. 92 and 'Dwarkadas Shrinivas v. Sholapur Spinning

In the
Federal
Court

No. 14

Judgment of
Suffian L.P.
8th March
1975
(continued)

and Weaving Co. Ltd. (supra).

In view of that majority decision it must be taken to be settled now that Clauses (1) and (2) of Article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in Clause (1) being no other than acquisition or taking possession of the property referred to in Clause (2). The learned Advocate-General conceded this to be the true legal position after the pronouncements of this court referred to above. The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive this appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think therefore that in these circumstances the legislation does conflict with the provision of Article 31 (2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground." (My italics.)

10

20

In the second of the Supreme Court decision cited above Sastri C.J. said at page 99 that the expression "shall be taken possession of or acquired" in clause (2) of article 31:

30

"implies such an appropriation of the property or abridgement of the incidents of its ownership as would amount to a deprivation of the owner."

From the above it is clear that in India at any rate before 27th April, 1955, a person may be deprived of property or his property may be taken possession of or acquired even if there has been no transfer of the ownership or right to possession of that property to the State or to a corporation owned or controlled by the State.

40

That construction did not appeal to the Indian Government who desired to nationalise certain economic activities, and so article 31 was amended by the Constitution (Fourth Amendment) Act, 1955. Here it is necessary to notice only the new clause (2A) added to article 31 effective from 27th April, 1955, which reads -

"(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."

In the
Federal
Court

No. 14

Judgment of
Suffian L.P.
8th March
1975
(continued)

Basu in his Commentary on the Constitution of India, 5th Edition, 2nd volume, states at page 183:

10 "Clause (2A). This clause has been inserted with a view to supersede the decisions in the cases of Subodh Gopal [supra (5)] Dwarkadas [supra (1)] and Saghir Ahmad [supra (6)]. It will no longer be possible for the Courts to take any extended view of 'acquisition' as was taken in the above cases."

K. Subba Rao J. in the fourth Supreme Court case cited above said at page 654:

20 "The effect of the amendment is that unless the law provides for the transfer of 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 requisition of property within the meaning of [Article 31] and therefore where there is no such transfer the condition imposed by Clause (2)..... is not attracted."

30 Having examined the authorities cited from Northern Ireland and from India, it is now time for me to state my conclusion. With respect to the judges in those countries, I would agree that on the construction of our article 13, in Malaysia too a person may be deprived of his property or his property may be acquired by or on behalf of the State by a mere negative or restrictive provision interfering with his enjoyment of the property, even if there has been no transfer of the ownership or right to possession of that property to the State or to a corporation owned or controlled by
40 the State.

The language of our article 13 is not identical with, but it certainly approximates to, the language of the Indian article 31 before the 1955 amendment which added the new clause (2A). The absence of a similar clause from our article 13 persuades me to adopt the construction placed on the Indian article by the Indian Supreme Court on

In the
Federal
Court

the unamended article 31.

—
No.14
Judgment of
Suffian L.P.
8th March
1975
(continued)

Applying the law as understood by me, I would therefore allow this appeal. The plaintiffs have been legislated out of business; while it is true that they were not deprived of the physical assets of their business, nevertheless they have suffered an abridgement of the incidents of its ownership, they have been deprived of the business of supplying pilotage service in Port Swettenham though only be a negative or restrictive provision interfering with the enjoyment of their property. As the impugned section 35A omits to provide for adequate compensation, it contravenes article 13 of our constitution, though it is within Parliament's competence to enact that law.

10

Accordingly there shall be a declaration in terms of prayer 1, namely that the plaintiffs are entitled to compensation for the goodwill of their business of which they have been deprived. During the course of arguments before us, it was stated that that is all that the plaintiffs are now interested in, and so we make no further order, except that the defendants shall pay the costs of this appeal, and costs below, and that this matter be remitted to the trial court so that the quantum may be ascertained.

20

SGD: M Suffian

Judgment delivered in Kuala Lumpur on 8th March, 1975. (Tan Sri Mohamed Suffian)

LORD PRESIDENT,
MALAYSIA.

30

Notes

1. Argument in Kuala Lumpur on 7.1.1975.

2. Counsel:

For appellants - Mr. S. Sothi of M/s. K.Y. Foo & Co., Kuala Lumpur.

For respondents -

No.1 - Encik A. Talib Othman, Senior Federal Counsel;

No.2 - Encik Abdullah bin Mohd. Yusof of M/s. Tunku Zuhri, Manan & Abdullah, Kuala Lumpur. 40

3. Authorities Cited:

In the
Federal
Court

- (1) Gallagher (1937) A.C. 860.
- (2) Govindan (1953) A.C. 514, 529.
- (3) France (1927) 1 K.B. 458.
- (4) Benson (1940) N.I. 133, 145, 147.
- (5) Benson (1942) 1 A.E.R. 465.
- (6) James Brown (1953) N.I. 79.
- (7) Mahbub A.I.R. 1951 Hyd. 1.
- (8) State of West Bengal A.I.R. 1954 S.C. 92.
- 10 (9) Dwarkadas A.I.R. 1954 S.C. 119, headnote
(d), para. 23.
- (10) Saghir A.I.R. 1954 S.C. 728.
- (11) Deep Chand A.I.R. 1959 S.C. 648.
- (12) I.R.C. v. Mulla 1901 A.C. 217.
- (13) Philip 1974 M.L.J. 100.

—————
No.14
Judgment of
Suffian L.P.
8th March
1975
(continued)

—————
No.15

JUDGMENT OF LEE HUN HOEIN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

No.15

Judgment of
Lee Hun Hoe
8th March
1975

20 (Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 105 of 1974

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Appellants

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Respondents

In the
Federal
Court

(In the Matter of Kuala Lumpur High Court
Civil Suit No. 1142 of 1972)

BETWEEN

No.15
Judgment of
Lee Hun Hoe
8th March
1975
(continued)

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants).

Coram: Suffian L.P. Malaysia
Lee Hun Hoe, C.J. Borneo
Ali, F.J.

10

JUDGMENT OF LEE HUN HOE, CHIEF JUSTICE, BORNEO

Appellants/plaintiffs are a firm which carried on the only kind of business in this country, that is, by providing pilotage services at Port Swettenham. The firm started business in 1946 and was registered in 1954 under the Registration of Businesses Ordinance, 1953. Since 12th September, 1969 it was run by six partners who were licensed pilots. Business was conducted from premises rented from 2nd respondent/2nd defendant. The firm owned launches and other material assets. 20

The functions of Port Authorities are laid down in the Port Authorities Act, 1963. As part of the nationalisation of the port operation, it became necessary for the 2nd respondent to provide various services of their own such as security, stevedoring, supply and pilotage which were previously provided by others. In order to enable the port to provide the requisite facilities certain legislations were promulgated. These resulted in the 2nd respondent taking over all the services. For instance, the stevedoring services which were provided by four private companies were taken over and the company received \$5 million as compensation. In the case of pilotage services, 2nd respondent took over such services as from 1st May, 1972 and compensation was paid for the launches and other material assets belonging to appellants. However, appellants asked 2nd respondent to pay them for goodwill and loss of future profits but 2nd respondent refused. Consequently, appellants sued respondents by seeking for a declaration that they are entitled to compensation for goodwill of their business which were compulsorily acquired by 2nd respondent 40

by virtue of sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 resulting in section 29A and 35A being added to the Port Authorities Act, 1963. Alternatively, they seek a declaration that the provision of section 29A and 35A of the Port Authorities Act, 1963 are unconstitutional and of no effect. They also claim damages and other reliefs.

In the
Federal
Court

—
No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

10 During the trial in the High Court the parties agreed that quantum of damages should be deferred until two issues were decided. First, whether the property compulsorily acquired by 2nd respondent was constitutional or not. Secondly, whether compensation was payable or not. The learned Judge held that section 35A was not unconstitutional and that as there was no acquisition of property within the meaning of Article 13 of the Federal Constitution, appellants' claim, therefore, failed. Appellants appealed.

20 In the exercise of its powers under Article 44 and 74 (1) of the Federal Constitution, Parliament, by enacting sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 added new sections 29A and 35A to the Port Authorities Act, 1963. These two new sections read as follows:-

"S 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.

30 (2) Every such declaration shall define the 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.

40 S 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 one thousand dollars.

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

In the
Federal
Court

No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

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 one thousand dollars.

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

10

(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 of the best assistance that can be found at the time."

Clearly the purposes of these provisions are (a) to enable 2nd respondent to provide pilotage services within certain district as may be declared and (b) to prohibit any person who is not an authority pilot from providing pilotage services within the said district. In fact, on 13th April, 1972, 2nd respondent by notification in the Federal Gazette declared the Port Swettenham harbour area to be a pilotage district. It was not in dispute that prior to 1st May, 1972 before the above provisions came into existence pilotage services were solely provided by appellants in the said district. To be blunt, they were legislated out of business. However, respondents contended that this did not affect the constitutional or validity of the provisions.

20

30

The total effect of the provisions was to prohibit not only appellants but also others from carrying on business of pilotage services in the said business. So, they were alone affected. The result is that appellants contended that 2nd respondent had compulsorily acquired their property and since no compensation had been paid for the acquisition of their property section 35A is unconstitutional being in breach of Article 13 of the Federal Constitution. Article 13 reads:-

40

"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."

In the
Federal
Court

10 Take for instance, section 35A is such a law as envisaged under Clause 2 of Article 13. But, it makes no provisions for adequate compensation. In which case persons like appellants would say they have been deprived of property but that such deprivation is not in accordance with law because compensation was not paid. Therefore, they say that section 35A is unconstitutional.

—
No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

As to the validity of section 35A the learned Judge said this in his judgment at page 74 of the Appeal Record:-

20 "After careful analysis I am satisfied that in view of Article 74 of the Federal Constitution and in consideration of the matters in respect of which Parliament is empowered to legislate there is no validity in the plaintiffs' allegation that Parliament was incompetent to enact these provisions. I am also satisfied that Parliament, in enacting section 35A of the Act, had acted within the power conferred by the Constitution when it imposed a prohibition, directed to all persons other than the authority, against engaging in any pilotage act within the pilotage district."

30 I think the learned Judge was right in holding that Parliament was competent to make such law. However, with respect, I am not so certain that he was right in saying that it merely imposed a general prohibition to prevent anyone from carrying on pilotage services in the pilotage district. First, the only person carrying on such business at the time was the appellant firm. Their firm monopolised such business. Their business was in fact taken over by the 2nd respondent. Compensation was paid for their launches and other material assets. They
40 asked how about compensation for goodwill and future profit since they were put out of business. So, the question arises whether appellants are entitled to compensation for goodwill in their business.

I was contended that appellants could not do business unless their pilots were licensed and that the licences issued to their pilots were privileges which were not property. Further, appellants firm

In the
Federal
Court

No. 15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

had a monopoly as there was no competition there was, therefore, no goodwill. The result is that appellants were not deprived of property. Respondents denied that appellants had property in their business.

The learned Judge was of the view that prohibition could not be construed as acquisition or use of property as contemplated by Article 13. From this finding he held that there was in fact no acquisition of property within the meaning of Article 13. Because of this he did not consider it necessary to decide whether property included goodwill. This is of course unfortunate. With respect, I think he was wrong.

10

There is evidence to show that there were six partners and that the partnership employed partners and non-partners as pilots. Whenever a new partner joined the partnership he had to contribute a capital sum to the partnership. They owned launches and other material assets which were necessary for their kind of business. These launches and materials were acquired by 2nd respondent who also managed to engage some of the pilots of the partnership when they took over the pilotage business.

20

A person enjoying a monopoly in business is commercially in a better position since there is no competition and he gets all the business and makes all the money. It is, nevertheless, business. Providing pilotage service may be considered as a specialised business and not many people are interested unless they are qualified. These would naturally affect the value of goodwill since very few people would be interested in a business of such limited scope. In the light of the undisputed evidence, I think the learned judge should have found that there was goodwill in the business.

30

The next question is to decide whether goodwill is property. What meaning should be given to property in Article 13? But, nowhere in the Constitution is the word "property" defined. Although Article 160(1) states that the Interpretation and General Clauses Ordinance 1948 shall, to the extent specified in the 11th Schedule apply for the interpretation of the Constitution, the definition of "property" is not, however, included in that Schedule.

40

In Ulster Transport Authority v. James Brown

50

10 & Sons Ltd. (1953) N.I. 79 the validity of section 18(1) of the Transport Act (Northern Ireland) 1948 was challenged on the ground that it did not provide for payment of compensation. Section 5 (i) of the Government of Northern Ireland Act 1920 provides that Parliament shall not "take any property without compensation." In that case respondents had since 1898 been carrying on a transport business. The 1948 Act prohibited any other person than appellant authority from carrying that kind of business except with the consent of the authority and approval of the Ministry. Respondents transported furniture for a dealer who purchased the furniture at an auction without obtaining consent from the authority or approval of the Ministry. Respondents were prosecuted for committing an offence under the 1948 Act and convicted by the resident magistrate. The Divisional Court allowed the appeal on the ground that section 18 of the 1948 Act prohibiting the carrying of the goods was void because it infringed section 56 of the 1920 Act in that it did not provide for the loss of goodwill. The decision was unanimously upheld by the Court of Appeal. It is interesting to note that the prohibition there does not involve using or taking over physical assets of the respondent. The prohibition merely interfered with respondent's enjoyment of his property which was the goodwill of their furniture removal business which had been established since 1898. The Court of Appeal regarded the goodwill of the business to be property within the meaning of section 5(1) of the Government of Ireland Act, 1920.

40 The learned Judge considered that appellants had not suffered any loss. He distinguished between mere negative prohibition of the employment of property and actual taking over of property. Since there was merely a negative prohibition and no actual taking of property he held that the question of compensation did not arise. He conceded to the extent that the prohibition at most interfered with appellants' enjoyment of certain property, i.e. goodwill, if any, but that could not be said to constitute actual taking over of such property. He based his view on France Fenwick v. The King (1927) 1 K.B. 458 and Northern Ireland Road Transport Board v. Benson (1940) N.I. 133, 144 and 147.

50 Fenwick's case is concerned with the Crown's common law right to interfere with a subject's property without paying compensation. Wright, J.

In the
Federal
Court

—
No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

In the
Federal
Court

—
No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

said that a mere negative prohibition, though it involved the interference with an owner's enjoyment of property, did not carry with it common law right to compensation. Where property had been taken or used by the Government then would an owner be entitled to compensation under common law.

In this case we are dealing with the constitutional right of an owner not his common law right. Unless we can equate the constitutional right with the common right we must tread with care when applying English authorities. It is Article 13 that we have to construe. For this we are entitled to compare with similar statutory provision in other Commonwealth countries. Since our Constitution was modelled on the Indian Constitution what is more natural than to look into Indian authorities for assistance.

10

The Court of Appeal in Benson's case had to consider the validity of section 15(1) of the Road and Railway Transport Act (Northern Ireland) 1935. The learned Judge seemed to place reliance on what was said by Andrew, C.J. who made a distinction between actual use or taking of property and negative or restrictive prohibition merely involving interference with an owner's enjoyment of property. The learned Chief Justice considered that section 15(1) resulted in a mere prohibition. Thus, on the basis of those two cases the learned Judge held that there was no acquisition of property within the meaning of Article 13.

20

30

All I need say is that Benson's case eventually went to the House of Lords (1942) A.C. 520 where it was held that since the case was of a criminal nature no appeal lay from the decision of the Court of Summary jurisdiction dismissing the complaint and the whole chain of these appeals was misconceived. Viscount Simon, L.C. said at page 525:-

"It cannot be disputed that the alleged breach of s.15 of the Transport Act, for contravention of which a fine of 1001. may be imposed, does not constitute a case "of a civil nature": it is a criminal matter."

40

Then he went on at page 528:-

"The conclusion that the dismissal of the complaint is final necessarily leads to the

view that the whole of the proceedings from the moment that the resident magistrate discharged the appellant are misconceived. Neither the deputy recorder nor the Court of Appeal in Northern Ireland had any jurisdiction to deal with the matter, and this also applies to the House itself."

In the
Federal
Court

No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

10 The result is that the learned Judge relied on a case which has been reversed by the House of Lords. Since the Court of Appeal had no jurisdiction in the matter the judgment was, therefore, not binding.

In Commissioners of Inland Revenue v. Muller & Co.'s Margarine Ltd. (1901) A.C. 217 @ 223 the phrase "property locally situate out of the United Kingdom" was held not to confine to realty only but might include the goodwill of a business. Lord Macnaghten made these observations:-

20 "It is very difficult, as it seems to me to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will - of course under the conditions attaching to property of that nature."

30 Respondents did not seem to dispute that goodwill was property. Their contention is that appellants' business has no goodwill attached to it. The reasons given by respondents for saying that no goodwill exists are not supported by any authority. The fact that appellants have a monopoly in the business with no one to compete does not necessarily mean that the business has no goodwill at all.

40 The fact that all but one partner have been offered employment by 2nd respondent is no ground for refusing compensation if it is established that their property has been compulsorily acquired. Whether this fact would reflect on the quantum of damages is of no concern to this Court at the moment. There can be no doubt that respondents were legislated out of business. They had been deprived of the right to carry on their business which was established since 1946.

In the
Federal
Court

Before 27th April, 1955 Article 31 of the
Indian Constitution reads:-

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

No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

(2) No property, movable or immovable,
including any interest in, or in any company
owing, any commercial or industrial under-
taking, shall be taken possession of or
acquired for public purposes under any law
authorising the taking of such possession or
such acquisition, unless the law provides for
compensation for the property taken possession
of or acquired and either fixes the amount of
the compensation, or specified the principles
on which, and the manner in which, the
compensation is to be determined and given." 10

In Mahbub Begum v. Hyderabad State (1951)
A.I.R. Hyd.1. an Act was passed depriving persons
of claims to an estate although they already had
a judicial decree in their favour. The learned
Judge considered that Article 31(2) covered all
deprivation of property and held that the Act was
infringed by the absence of compensation. 20

In State of West Bengal vs. Subohd Gopal Bose
(1954) A.I.R. S.C. 92 Sastri, C.J. with whom the
other two judges agreed, said with reference to
Article 31(2) that acquisition meant coming into
possession of, obtaining, giving or getting as
one's own and did not imply any transfer or
vesting of title. He further said that it
included deprivation by destruction, otherwise
Article 31 (5)(b)(ii) would have been unnecessary. 30

In Dwarkadas Shrinvas v. Sholapur Spinning &
Weaving Co. (1954) A.I.R. S.C. 119 Mahagan, J.
with whom Sastri, C.J. and Hasan, J. concurred,
said that the only cases of deprivation outside
Article 31(2) were those expressly excluded by
the rest of Article 31 itself. Acquisition and
taking possession in clause (2) meant the same as
deprivation in Clause (1). 40

In Saghir Ahmad vs. State of Uttar Pradesh
(1954) A.I.R. S.C. 728 sometime in 1947 the
Government of U.P, conceived the idea of operating
their own bus services in competition with others.
Later, they decided on a monopoly. They, there-
fore, used the U.P. Road Transport Act (Act II of
1951) to deprive certain private bus operators of

10 their right to run buses on certain routes. They did not take over their physical assets. The Act did not provide for compensation. As a result the validity of the Act was attacked as being contrary to Article 31(2). The High Court held that it was valid. On appeal the Supreme Court held that it was void as it contravened Article 31(2). The Supreme Court did not think that the argument that compensation would only be payable if the State had acquired or taken possession of a right or interest was tenable. The Supreme Court unanimously adopted the views expressed by the majority in the State of West Bengal vs. Subohd Gopal Bose and Dwarkadas Shrinvas v. Sholapur Spinning & Weaving Co. that "clauses (1) and (2) of Article 31 are mutually exclusive in scope but should be read together as dealing with the subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2)." In other words "deprivation" includes "acquisition or taking possession of property."

In the
Federal
Court

No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

20 Saghir Ahmad's case was followed by Deep Chand vs. State of Uttar Pradesh. (1959) A.I.R. S.C. 648. On 24th April, 1955 the Uttar Pradesh Service Development Act was passed authorising the State Government to frame a scheme of nationalisation of motor transport. The validity of the Act was challenged. Held that the Act in effect prohibits carriage operators from doing their motor transport business and deprives them of their property and interest in a commercial undertaking within the meaning of Article 31(2) of the Constitution. It follows that if the Act does not provide for compensation, the Act must be invalid being in conflict with Article 31(2).

30 It is interesting to note that in that case question arose as to whether the test of validity should be under the original Article 31 or under the new Article (with clause 2(A)). The amendment to the Constitution by the introduction of a new clause 2(A) to Article 31 by the Constitution (Fourth Amendment) Act, 1955 came into effect on 27th April, 1955. It came three days too late to affect the decision of the court in that case.

40 The cases in India show quite clearly that persons may be considered to have been deprived of his property as a result of his property having been

50

In the
Federal
Court

No. 15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

acquired or taken into possession by the State. This is so even though there has been no actual acquisition or taking over of property by transfer of ownership of that property to the State or other statutory bodies controlled by the State. In order to overcome the difficulty created by concensus of judicial decisions the Constitution was amended by the Indian Government who at that time intended to nationalise certain economic activities.

10

Clause 2(A) was added to Article 13 of the Constitution by the Constitution (Fourth Amendment) Act, 1955. It reads:-

"Where a law does not provide for the transfer of the ownership or right 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 it deprives any person of property."

20

There is no equivalent to clause 2(A) in our Constitution. We must, therefore, compare our constitutional provisions to similar provisions in India before the Constitution (Fourth Amendment) Act, 1955. That is to the position of India before 27th April, 1955.

Although our Article 13 is not word for word similar to Article 31 of the Indian Constitution, the substance is parallel. There is no reason why the construction based on Article 31 before clause 2(A) was added, by the Supreme Court of India should not be adopted in respect of our Article 13. Accordingly, under Article 13 a person may be deprived of his property if a mere negative or restrictive provision results in interfering with the enjoyment of his property without any actual acquisition or taking over of property by the State or statutory bodies under the control of the State.

30

In the light of the authorities, I would hold that as section 35A does not provide adequate compensation for depriving appellants of property it is in conflict with Article 13 of the Constitution. The appellants shall be entitled to the declaration to the effect that appellants are entitled to compensation for the goodwill of their business which had been compulsorily acquired by the 2nd respondent.

40

The appeal is allowed with costs.

(Sgd:) Lee Hun Hoe
CHIEF JUSTICE,
BORNEO.

In the
Federal
Court

No.15

Judgment of
Lee Hun Hoe
8th March
1975
(continued)

Kuala Lumpur:

Date: 8th March, 1975.

Counsel:

Encik S. Sothi for appellants
Solicitors: M/s. K.Y. Foo & Co.

10

Encik Abu Talib bin Othman for 1st respondent
Senior Federal Counsel.

Encik Abdullah bin Mohamed Yusof for 2nd
respondent
Solicitors: M/s. Tunku Zuhri, Manan &
Abdullah.

Ali, F.J. concurred.

No.16

ORDER OF FEDERAL COURT

No.16

Order of
Federal Court
8th March
1975

20

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 105 of 1974

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Appellants

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Respondents

30

(In the Matter of Civil Suit No. 1142 of 1972
in the High Court in Malaya at Kuala Lumpur

BETWEEN:

In the
Federal
Court

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

No.16
Order of
Federal Court
8th March
1975
(continued)

- 1. The Government of Malaysia
- 2. Lembaga Pelabohan Kelang Defendants)

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT,
MALAYSIA:

LEE HUN FOE, CHIEF JUSTICE, HIGH COURT IN BORNEO;

ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

10

THIS 8TH DAY OF MARCH, 1975

ORDER

THIS APPEAL coming on for hearing on the 7th day of January, 1975 in the presence of Mr. S. Sothi of Counsel for the abovenamed Appellants and Encik Abu Talib Otham, Senior Federal Counsel, for the 1st Respondent abovenamed and Encik Abdullah bin Mohd. Yusoff of Counsel for the 2nd Respondent abovenamed AND UPON READING the Record of Appeal filed herein AND UPON HEARING Counsel fa aforesaid IT WAS ORDERED that this Appeal do stand adjourned for Judgment AND the same coming on for Judgment this day at Kuala Lumpur in the presence of Mr. S. Sothi of Counsel for the Appellants and Encik Abu Talib Othman of Counsel for the 1st Respondent and Encik Abdullah bin Mohd. Yusoff of Counsel for the 2nd Respondent IT IS ORDERED that this Appeal be and is hereby allowed with costs to the Appellants both in the Federal Court and in the Court below AND IT IS ORDERED that the case be remitted to the trial Court so that the quantum of damages payable to the Appellants by the Respondents may be ascertained AND IT IS FURTHER ORDERED that the deposit of \$500.00 (Ringgit Five Hundred Only) paid by the Appellants into Court by way of security of costs be refunded to the Appellants.

20

30

GIVEN under my hand and the seal of the Court this 8th day of March, 1975.

Sgd. E.E.SIM
CHIEF REGISTRAR

40

This Order is filed by M/s. K.Y Foo & Co., Solicitors for the Appellants whose address for service is 5th Floor, UMBC Building, No. 42, Jalan Tun Perak, Kuala Lumpur.

No.17

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL
TO HIS MAJESTY THE YANG DI PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 105 OF 1974

B E T W E E N :

Selangor Pilot Association (1946)
(suing as a firm) Appellants

10

And

- 1. The Government of Malaysia
- 2. Lembaga Pelabohan Kelang Respondents

(In the Matter of Civil Suit No. 1142 of 1972
in the High Court in Malaya at Kuala Lumpur

BETWEEN:

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

20

And

- 1. The Government of Malaysia
- 2. Lembaga Pelabohan Kelang Defendants)

CORAM: GILL, CHIEF JUSTICE, HIGH COURT MALAYA;

ONG HOCK SIM, JUDGE, FEDERAL COURT,
MALAYSIA;

RAJA AZLAN SHAH, JUDGE, FEDERAL COURT,
MALAYSIA;

IN OPEN COURT

THIS 12th DAY OF MAY, 1975

ORDER

30

UPON MOTION made unto Court this day by Encik
Abdullah bin Mohd. Yusof of Counsel for the 2nd
Respondent abovenamed and Mr. S. Sothi of Counsel for

In the
Federal
Court

No.17

Order granting
conditional
Leave to
Appeal to His
Majesty the
Yang di
Pertuan Agong
12th May 1975

In the
Federal
Court

No.17

Order granting
conditional
Leave to
Appeal to His
Majesty the
Yang di
Pertuan Agong
12th May 1975
(continued)

the Appellants above named AND UPON READING the Notice of Motion dated the 19th day of April, 1975 and the Affidavit of Mohamed bin Haji Abdul Hamid affirmed on the 17th day of April, 1975 both filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that conditional leave be and is hereby granted to the 2nd Respondent abovenamed to appeal to His Majesty the Yang di-Pertuan Agong against the Order of the Federal Court of Malaysia dated the 8th day of March, 1975 upon the following conditions:-

(i) that the 2nd Respondent abovenamed do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar, Federal Court, Malaysia in the sum of \$5,000/- (Ringgit Five thousand) for the due prosecution of the Appeal and the payment of all costs as may become payable to the Appellants abovenamed in the event of the 2nd Respondent abovenamed not obtaining an Order granting them final leave to appeal or of the Appeal being dismissed for non-prosecution, or of His Majesty the Yang di Pertuan Agong ordering the 2nd Respondent abovenamed to pay to the Appellants' costs of the Appeal as the case may be;

(ii) that the 2nd Respondent abovenamed do within the said period of three (3) months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Record and for the despatch thereof to England.

IT IS FURTHER ORDERED that all execution be and is hereby stayed pending the Appeal to His Majesty the Yang di Pertuan Agong AND IT IS LASTLY ORDERED that the costs of this motion be costs in the cause.

GIVEN under my hand and the Seal of the Court this 12th day of May, 1975.

SGD: E.E. SIM

CHIEF REGISTRAR

10

20

30

40

No.18

ORDER GRANTING FINAL LEAVE TO APPEAL
TO HIS MAJESTY THE YANG DI PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 105 OF 1974

BETWEEN

Selangor Pilot Association (1946)
(suing as a firm) Appellants

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Respondents

(In the Matter of Civil Suit No. 1142 of 1972
in the High Court in Malaya at Kuala Lumpur

BETWEEN

Selangor Pilot Association (1946)
(suing as a firm) Plaintiffs

And

1. The Government of Malaysia
2. Lembaga Pelabohan Kelang Defendants)

CORAM: GILL, CHIEF JUSTICE, HIGH COURT MALAYA;

ALI, JUDGE, FEDERAL COURT, MALAYSIA.

RAJA AZLAN SHAH, JUDGE, FEDERAL COURT
MALAYSIA.

IN OPEN COURT

THIS 18TH DAY OF AUGUST, 1975.

ORDER

UPON MOTION made unto this Court this day by
Ancik Abu Talib bin Othman, the Senior Federal
Counsel for the above-named 1st Respondent and on
behalf of Messrs. Tunku Zuhri, Manan and Abdullah

In the
Federal
Court

No.18

Order granting
Final Leave to
Appeal to His
Majesty the
Yang di Pertuan
Agong
18th August
1975

10

20

30

In the
Federal
Court

No.18

Order granting
Final Leave to
Appeal to His
Majesty the
Yang di Pertuan
Agong
18th August
1975
(continued)

for the above-named 2nd Respondent in the presence of Encik S. Sothi of Counsel for the above-named Appellants AND UPON READING the Notice of Motion dated the 11th day of August, 1975, the Affidavit of Encik Lim Beng Choon affirmed on the 5th day of August, 1975 and the Affidavit of Encik Mohamed bin Haji Abdul Hamid affirmed on the 8th day of August, 1975 and filed herein AND UPON HEARING Counsel as aforesaid for the parties IT IS ORDERED that final leave be and is hereby granted to the 1st and 2nd Respondents to appeal to His Majesty the Yang di-Pertuan Agong against the Order of the Federal Court of Malaysia dated the 8th day of March, 1975 AND IT IS ORDERED that the costs of this application be costs in the cause.

10

GIVEN under my hand and the Seal of the Court this 18th day of August, 1975.

Sgd.

DEPUTY REGISTRAR,
FEDERAL COURT,
MALAYSIA.

20

EXHIBITS

P.1. CERTIFICATE OF REGISTRATION.

Exhibits

P.1.
Certificate
of
Registration

CERTIFICATE OF REGISTRATION

(B.R. 29)

LICENCE

REGISTRY COPY

FORM 1 (RULE 11)

THE REGISTRATION AND LICENSING OF BUSINESSES ORDINANCE, 1953.

Selangor Pilot Association (1943)
Port Swettenham

change of address see next page

Registration No. 02081

This is to certify that the business carried on under the name

(b) Selangor Pilot Association (1946)

has this day been Registered and Licensed until the 31st day of December 1954 in accordance with the provisions of the Registration and Licensing of Businesses Ordinance, 1953, under the number shown hereon.

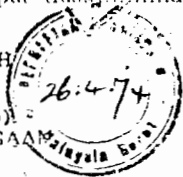
Fee paid \$ 300/- (Dollars three hundred) on Receipt No. 01263

Dated at Kuala Lumpur this 26th day of April 1954

SALINAN YANG SAH

(AYOB BEN HJ AHMAD)

SEKRETAR PERNIAGAAN
MALAYSIA BARU



[Handwritten signature]

Exhibits

P.2.
Certificate
of
Registration

P.2. CERTIFICATE OF REGISTRATION

(P.A. 30)
(F.M. 4/68)

BORANG D

MALAYSIA
BORANG D (KAEDAH 13)
FORM D (RULE 13)

Pendaftaran No. / Registration No.
2081

**PERAKUAN PENDAFTARAN
CERTIFICATE OF REGISTRATION**

ORDINANCE PENDAFTARAN PERNIAGAAN, 1956
THE REGISTRATION OF BUSINESSES ORDINANCE, 1956

*The Selangor Pilot Association (1946)
Chartered Bank Building
P.O. Box 51, P. Swettenham.*

Ada-lah dengan ini di-perakul bahawa Perniagaan yang di-jalankan dengan nama.....
This is to certify that the Business carried on under the name
The Selangor Pilot Association (1946)
telah di-daftarkan pada hari ini sa-hingga.....*7*.....*7*.....*19*.....*71*
has this day been registered until the

menurut peruntukan² Ordinance Pendaftaran Perniagaan, 1956, dengan nombor yang di-tunjuk-
in accordance with the provisions of the Registration of Businesses Ordinance, 1956, under the
kan di-sini dan dengan *tempat/tempat utama perniagaan-nya di-.....
*number shown hereon and with its *place/principal place of business at*

*dan cawangan² di-.....
**and branches at*

Bertarikh di-Kuala Lumpur, pada.....*10*.....*7*.....*71*
Dated at Kuala Lumpur, this.....*day of*.....*19*.....*71*

LIM LEONG SENGA
Pendaftar Perniagaan, Malaysia Barat
Registrar of Businesses, West Malaysia

PERAKUAN INI HANYA SAH JIKA TELAH DI-RESITKAN DI-BAWAH INI
THIS CERTIFICATE IS VALID ONLY WHEN RECEIPTED BELOW

Tarikh / Date: *10-JUL-71* Resit No. / Receipt No.: *346777* Pendaftaran No. / Registration No.: *2081* Jumlah / Amount: *— Ft 3 \$*** *25.00*

P.3. CERTIFICATE OF REGISTRATION

Exhibits

P.3.
Certificate
of
Registration

(P.N.A. 30)
(Pin. 4/68)

BORANG D

MALAYSIA
BORANG D (KAEDAH 13)
FORM D (RULE 13)

Pendaftaran No. / Registration No.
2081

**PERAKUAN PENDAFTARAN
CERTIFICATE OF REGISTRATION**

ORDINANCE PENDAFTARAN PERNIAGAAN, 1956
THE REGISTRATION OF BUSINESSES ORDINANCE, 1956

The Selangor Pilot Association
(1946)
Chartered Bank Bldg.
P.O. Box 51
Road Selayang

Adalah dengan ini di peraku bahawa Perniagaan yang dijalankan dengan nama
This is to certify that the business carried on under the name
The Selangor Pilot Association,

telah di-daftarkan pada hari ini sa-hingga
has this day been registered until the 9-7-1973

menurut peruntukan Ordinance Pendaftaran Perniagaan, 1956, dengan nombor yang di-tunjuk-
in accordance with the provisions of the Registration of Businesses Ordinance, 1956, under the
kan di-sini dan dengan *tempat/tempat utama perniagaannya di-
*number shown hereon and with its *place/principal place of business at*

*dan chawangan di-
**and branches at*

Bertarikh di-Kuala Lumpur, pada 9 hari bulan 6-1972
Dated at Kuala Lumpur, this day of

M S SUNIDAPAM
LIM LEONG SENG

Pendafatar Perniagaan -
Received the sum in printed figures given below
Pendafatar Perniagaan, Malaysia Barat
Registrar of Businesses, West Malaysia

PERAKUAN INI HANYA SAH JIKA TELAH DIRESITKAN DEBAWAH INI
THIS CERTIFICATE IS VALID ONLY WHEN RECEIPTED BELOW

Tarikh / Date: 9-JUL-72
Resit No. / Receipt No.: 442430
Pendaftaran No. / Registration No.: 2081
Jumlah / Amount: Pt 3 \$***25.00

Exhibits

P.4.
Certificate
of
Registration

P.4. CERTIFICATE OF REGISTRATION

(P.N.A. 30 Pin. 10/71)

**PERAKUAN PENDAFTARAN
CERTIFICATE OF REGISTRATION**

**BORANG
FORM D**

**(KAEDAH 13)
(RULE 13)**

SURAT INGATAN
TIDAK AKAN DI-KE-
LUARKAN UNTUK
MEMBARUKAN
SURAT AKUAN

NO REMINDER WILL
BE ISSUED FOR
RENEWAL OF
CERTIFICATE OF
REGISTRATION

Pendaftaran No./Registration No.
2081

ORDINAN PENDAFTARAN PERNIAGAAN, 1956
THE REGISTRATION OF BUSINESSES ORDINANCE, 1956

Selangor Pilot Association (1946)
Chartered Bank Building
P.O. Box 57
P. Ipoh

Ada-lah dengan ini di-perakui bahawa Perniagaan yang di-jalankan dengan nama

Selangor Pilot Association (1946)

telah di-daftarkan pada hari ini sa-bingga *9* *7* 19 *70*

menurut peruntokan² Ordinan Pendaftaran Perniagaan, 1956, dengan nombor yang di-lunjok-
in accordance with the provisions of the Registration of Businesses Ordinance, 1956, under the
kan di-sini dan dengan tempat utama perniagaan-nya di-
number shown hereon and, with its principal place of business, at

*dan chawangan? di-
*and branches at

Bertarikh di-Kuala Lumpur, pada *6* haribulan *7* 19 *73*
Dated at Kuala Lumpur, this day of

NIK HUSAINI BIN NIK ALI

Pendaftar Perniagaan, Malaysia Barat
Registrar of Businesses, West Malaysia

PERAKUAN INI HANYA SAH JIKA TELAH DI-RESITKAN DI-BAWAH INI
THIS CERTIFICATE IS VALID ONLY WHEN RECEIPTED BELOW

Tarikh Date Resit No. Receipt No. Pendaftaran No. Registration No. Jumlah Amount

-6-JUL-73 111170 2081 --PSK 3 S***25.00

P.5. AGREEMENT BETWEEN PLAINTIFFS AND CAPT.EMMERSON

THIS AGREEMENT is made the 1st day of July, 1969 Between THE SELANGOR PILOT ASSOCIATION (1946) of P.O. Box No. 51 Port Swettenham (hereinafter called "the Association") of the one part and Captain R.W. Emmerson of 163-A Telok Gadong Road, Klang (hereinafter called "the Retiring Partner") of the other part.

Exhibits
P.5.
Agreement
between
Plaintiffs
and Captain
Emmerson.
1st July
1969.

10 WHEREAS the Retiring Partner had been a partner of the Association governed by the Agreement dated the 12th day of December 1968 entered between all the then existing partners of the Association (hereinafter referred to as "the said Agreement").

AND WHEREAS in accordance with Clause 22 of the said Agreement the Retiring Partner gave the requisite notice of his intention to retire from his partnership in the Association.

20 AND WHEREAS the said notice expires on the 30th day of June 1969 when the Retiring Partner shall cease to be a partner of the Association.

AND WHEREAS it has been agreed between the parties hereto that the Retiring Partner shall be repaid a sum of Dollars Thirty-five thousand (\$35,000/-) being refund of the capital.

30 AND WHEREAS at the request of the Retiring Partner the Association has agreed to accept the Retiring Partner as a pilot for the period of one (1) year commencing from the 1st day of July 1969 subject to the terms and conditions hereinafter set forth and subject to the Retiring Partner holding a valid pilotage licence and being medically fit during the period of this contract.

40 AND WHEREAS the Association has consented to the Retiring Partner taking in addition to the local leave, to which he is entitled to hereunder, the forty six (46) days' leave due to him under the Partnership Agreement (the financial and/or all other benefits of which leave the Retiring Partner hereby acknowledge as having been already enjoyed by him during the term of his partnership in the Association) during and under the terms of this Agreement.

N O W THIS AGREEMENT WITNESSETH :-

1. The Association agrees to employ the Retiring Partner and the Retiring Partner agrees to serve the Association as a pilot for the term of one (1) year from the 1st day of July 1969 unless the said term shall be

Exhibits

P.5.

Agreement
between
Plaintiffs
and Captain
Emmerson.
1st July
1969.
(Continued)

previously determined as hereinafter provided.

2. During the Retiring Partner's employment hereunder he shall only be entitled to the following monthly emoluments :-

- (a) \$3,000/- being the fixed salary.
- (b) \$125/- being car and telephone allowance.

3. The Retiring Partner shall be entitled to either

- (a) continue to reside at the premises he is presently residing in known as 163-A Telok Gadong Road, Klang; or
- (b) take up residence in a private house.

10

In either case the rental, which shall not in any event exceed \$300/- shall be paid by the Association.

4. The Retiring Partner shall during the continuance of his employment hereunder :-

- (a) Faithfully and diligently serve the Association and perform his duties and act in accordance with the instructions and directions and rules which may from time to time be set down by the Association.
- (b) Observe the duty roster system and other established practices of the Association.
- (c) Not act or do anything which in the opinion of the Association is likely to injure its good name.

20

30

5. The Retiring Partner shall be entitled to two (2) days' local leave in each completed month of service such leave being accumulative up to a maximum of twenty-four (24) days at the expiry of this contract of service.

6. Absence from duty on account of sickness shall be supported by a medical certificate from a qualified doctor to that effect. During such period of absence the Retiring Partner shall be entitled to his full salary for the

40

first two (2) weeks of such illness and half salary for the next two (2) weeks of such illness. And if he shall continue to be absent for a longer period than four (4) consecutive weeks or be absent at different times for more than four (4) weeks during his period of service with the Association under this Agreement then in either of such cases his employment hereunder shall at the option of the Association forthwith determine and he shall not be entitled to claim any compensation from the Association in respect of such determination.

Exhibits
P.5.
Agreement
between
Plaintiffs
and Captain
Emmerson
1st July
1969.
(Continued)

10

7. If the Retiring Partner shall on any date during the term of this contract -

- (a) cease to be a licensed pilot for any reason whatsoever; or
- (b) cease to be medically fit to carry on with his duties under the contract;

then in any such event this Agreement shall absolutely determine and cease to have effect from that date.

20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written

SIGNED by P.L. Kiang for)
and on behalf of THE)
SELANGOR PILOT ASSOCIATION)
(1946) in the presence)
of :-

30

HARRY ELIAS,
Advocate & Solicitor,
Kuala Lumpur.

Exhibits
P.5.
Agreement
between
Plaintiffs
and Captain
Emmerson
1st July
1969.
(Continued).

SIGNED by the said R.W.)
EMMERSON in the)
presence of :-)

Advocate & Solicitor,
Klang.

P.6 Partnership Agreement

Exhibits
P.6
Partnership
Agreement.
12th
September
1969

THIS AGREEMENT OF PARTNERSHIP made the 12th day of September 1969 Between PAO LIEN KIANG of the first part, RYSZARD PIECHOCKI of the second part, COLIN PHILLIP DAVY of the third part, MAHAMED NOOR BIN ISMAIL of the fourth part, ABDUL RAZAK BIN ARSHAD of the fifth part and ABDUL LATIFF BIN HAJI HASSAN of the sixth part, all Masters Mariners and Pilots in the Port of Port Swettenham in the State of Selangor.

10 WHEREAS the parties hereto are duly licensed pilots for the pilotage district of Port Swettenham and have for sometime past constituted an Association under the style or name of "THE SELANGOR PILOT ASSOCIATION (1946)".

 AND WHEREAS the parties hereto are desirous of entering into an Agreement to govern the said Association.

20 NOW THIS AGREEMENT WITNESSETH that in pursuance of such mutual desire and in consideration of the mutual confidence of the parties hereto and of the premises the said parties hereto and each of them for himself and his executors and administrators DO HEREBY COVENANT AND AGREE with the others and each of them and their and each of their executors and administrators as follows :-

30 1. This Agreement shall be deemed to have commenced on the 1st day of July 1969 and shall continue until determined under the provisions hereinafter contained or by virtue of the laws relating to partnership and the death or retirement under Clause 22 of this Agreement or the resignation or expulsion of any partner shall not determine the same so far as regards the other partners of the said Association parties hereto or duly admitted as partners subsequently to the date hereof.

40 2. The partnership business shall be carried on under the style or firm of "THE SELANGOR PILOT ASSOCIATION (1946)" at Port Swettenham and/or at such other place or places as the partners shall from time to time mutually determine.

 3. The capital of the partnership shall consist of such sum or sums of money as shall from time to time be required for carrying on the said business with advantage and shall be contributed by and credited in the books of the partnership as

Exhibits

P.6
Partnership
Agreement
12th
September
1969
(Continued)

belonging to the partners in equal shares. The capital amount of the partnership shall only be altered from time to time by the unanimous consent of the partners.

4. The Bankers of the partnership shall be The Chartered Bank at their Port Swettenham Branch, or such other bankers or branch of the said Bank as the majority of the partners shall determine and all moneys received on account of the partnership shall be paid forthwith into the partnership account at the said Bank without deduction. 10

5. (a) Such sums, as a majority of the partners may from time to time determine, shall either be contributed equally by all partners from their own resources or retained by the partnership from partners' nett profits and shall be kept in the Bank to form a Reserve Fund (No.2 Account) which may be used as a majority of the partners may determine for paying any of those expenses in respect of which all partners shall have an equal liability. 20

(b) Any part or the whole of such Reserve Fund (No.2 Account) may be invested in Bank Deposits or other form of liquid or easily realisable securities which investments shall be an asset distributable upon termination of the partnership, and on the retirement or death of any partner such partner's share in the Reserve Fund (No.2 Account) shall be paid forth to him or to his personal representatives as the case may be. 30

6. All cheques, bills of exchange and promissory notes drawn endorsed or accepted by any partner on account of the partnership shall be drawn or accepted in the name of the Association. All cheques drawn on the Current Account shall be signed by any one partner and cheques drawn on the Reserve Fund (No.2 Account) shall be signed by any two partners, unless otherwise authorised in writing to the Bank by all partners still living. 40

7. No partner shall without the prior consent of the other partners in the States of Malaya contract compound or discharge any loan or debt on account of the partnership except in the usual and regular course of business.

8. The proceeds of all Pilots' dues shall be pooled together with all other moneys received on account of the partnership and the partners shall respectively be interested in and entitled to the profits of the partnership business in equal shares subject to such provisions as are hereinafter mentioned.

10 9. No partner, who may act as the agent of the partnership in any business agreements or transactions whatever, shall benefit personally either directly or indirectly to a greater extent than any other partner whether by discount, rebate, cash commission, or any consideration in kind which may be paid or conceded in respect of such business.

20 10. No partner shall demand or receive any other rate in respect of pilotage services, whether greater or less, than the rate which may be demanded by law. But any payment made to or any consideration received by any partner in respect of services rendered by him to vessels then being within a radius of fifty nautical miles from Port Swettenham and in respect of which there shall be no rate fixed by law shall be dealt with as follows. From such payment or consideration shall be deducted all expenses or losses incurred directly or indirectly by the partnership in connection therewith, one-sixth of the balance shall belong to the partner who rendered the said services and the residue shall belong to the partnership.

30 11. Such new or additional launches boats and stores of all kinds as shall, by majority agreement of the partners hereafter be required and all working and other expenses whatever which shall become payable on behalf of the partnership, shall in balancing the accounts of the Association be charged against Revenue, and should the balance Revenue be at any time insufficient for these purposes, any requisite additional sum shall be drawn from the Reserve Fund (No. 2 Account) or be contributed in equal shares by all partners as and when decided by
40 the majority.

12. Any loss or expense to the Association which shall be caused by the wilful neglect or default of any partner shall be made good by that same partner, and his liability in such respect shall not be limited in any way by the fact or date of his subsequent retirement.

13. No partner shall engage in any other occupation or business which may prevent him from being readily

Exhibits

P.6
Partnership
Agreement
12th
September
1969
(Continued)

available at all times to undertake the duties of a pilot nor shall he at any time hold any other salaried office or appointment without the prior consent in writing of the other partners.

14. (a) Proper books shall be kept by the partners in the States of Malaya, in which shall be entered a true and complete statement of all moneys received and paid and of all other usual or necessary particulars including the periods of all leave taken by each partner. The partner from time to time responsible for keeping such books is hereinafter referred to as "the Accounting Partner". The said books together with all connected documents shall be kept in safe custody and shall at all reasonable times be open to inspection by all partners. 10

(b) At the end of each calendar month the Accounting Partner with the assistance of the clerk employed for such purpose shall prepare a statement of account showing the total receipts and total expenditure of the Association for the month including any allocation to or withdrawals from the Reserve Fund (No. 2 Account) and the balance being the Nett Profits showing the share thereof due to the respective partners to which they are apparently entitled for such calendar month. Such statement to be signed by the Clerk and countersigned by the Accounting Partner. 20 30

15. On 31st December in every year or as soon as practicable thereafter, a general account for the past year and balance sheet shall be drawn up and audited, and shall thereafter be signed by all partners to the correction within three calendar months after the completion of such balance sheet of any manifest error which may be discovered and notified to the other partners.

In the event of the death or retirement of any partner, an interim account and balance sheet shall be drawn up as at the date of such event and shall be signed by all the surviving partners. 40

16. The partners shall be true and just to each other in all their dealings, they shall employ themselves to the utmost benefit of the partnership and in all respects in accordance

with the provisions of the Merchant Shipping Ordinance 1952 and all rules made thereunder and with the provisions of all other laws for the time being in force relating to the duties of Pilots at Port Swettenham.

17. Each partner shall without delay inform the others of all letters proposals and matters which shall have come to his hands or knowledge touching the welfare or business of the partnership.

10 18. Partners shall pilot ships in rotation as far as may be practicable and except when it is mutually agreed to exchange or vary normal turns in interests of economy, private affairs, etc.

19. If at any time less than 4 (four) partners remain partners in the Association the partnership shall automatically be dissolved unless such remaining partners all signify in writing their desire to continue in the partnership.

20 20. (a) In the event of the partnership receiving notification of Nationalisation of the Pilot Service, the capital assets of the partnership, including all stock, launches and equipment, shall be frozen from the date of such notification, pending the outcome of settlement, and any partner ceasing on any date subsequent to the date of such notification, from any cause whatsoever to be a partner, shall not relieve him or his executors and administrators from being equally liable in respect of the division of any capital return or liabilities that may be agreed
30 Upon between the partnership on the one hand, and Government or other competent authority on the other.

(b) In the event of any partner ceasing on any date from any cause whatsoever to be a licensed pilot, the partnership in respect of such partner be dissolved forthwith and he shall be deemed to have retired with effect from the same date, but shall not be relieved of his interests in respect of para. 20(a).

40 21. In the event of any partner being suspended from piloting duty by a competent authority from whatsoever cause he shall not be entitled to any share of the profits during such period of suspension, subject to such modification as may be made by agreement between the other partners.

22. Any partner may retire from the partnership by giving to the other partners at least three months' notice in writing of his intention so to do, and on

Exhibits

P.6

Partnership

Agreement

12th

September

1969.

(Continued).

the day of his said notice expires he shall thereupon cease to be a partner, unless such expiry date be deferred by mutual agreement.

23. If any partner shall die or voluntarily retire an account and statement shall be taken and made of his share of the capital and effect of the partnership and of all unpaid moneys and profits plus such monies in respect of leave due as may have accumulated belonging to him up to the time of his death or retirement and the amount so ascertained to be due and owing to the deceased or retiring partner shall be paid by the remaining partners or partner to him or his personal representatives within 12 months from the date of such retirement or death together with interest thereon at the rate of 10 per cent per annum calculated from six months subsequent to the date of death or retirement of the outgoing partner until the date of payment.

10

20

24. If a second partner shall die or retire before payment has been fully made of all sums payable to a partner who has died or retired previously to such second partner then the amount to which the estate of such second deceased partner or retiring partner shall become entitled under Clause 23 hereof shall remain as a loan to the remaining partners bearing interest at the rate of 10 per cent per annum calculated from six months subsequent to the date of death or retirement of the second outgoing partner until (a) all sums due have first been paid to the partner who retired before or predeceased such second partner or to his personal representatives of such first partner and (b) the introduction has taken place of an incoming partner to take over the share in the partnership of the partner who first died or retired. Thereupon the provisions of Clause 23 shall apply to such second partner.

30

40

25. If a third partner shall die or retire before payment has been fully made of all sums payable to such partners who have died or retired previously to such third partner then the amount to which the estate of such deceased partner or retiring partner shall become entitled under Clause 23 hereof shall remain as a loan to the remaining partners bearing interest of 10 per cent per annum calculated from six months subsequent to the date of death or retirement of such third outgoing partner until (a) all

sums due have first been paid to the partners who first and secondly retired before or who predeceased such third partner or to their personal representatives and (b) the introduction has taken place of incoming partners to take over the respective shares in the partnership of the partners who have first and secondly died or retired. Thereupon the provisions of Clause 23 shall apply to such third partner.

10 26. If a fourth partner shall die or retire before payment has been fully made of all sums payable to such partners who have died or retired previously to such fourth partner then the amount to which the estate of such deceased partner or retiring partner shall become entitled under Clause 23 hereof shall remain as a loan to the remaining partners bearing interest of 10 per cent per annum calculated from six months subsequent to the date of death or retirement of such fourth outgoing partner until (a) all sums due have first been paid to the partners who
20 firstly, secondly and thirdly retired before or who predeceased such fourth partner or to their personal representatives and (b) the introduction has taken place of incoming partners to take over the respective shares in the partnership of the partners who have firstly, secondly and thirdly died or retired. Thereupon the provisions of Clause 23 shall apply to such fourth partner.

30 27. If a fifth partner shall die or retire before payment has been fully made of all sums payable to such partners who have died or retired previously to such fifth partner then the amount to which the estate of such deceased partner or retiring partner shall become entitled under Clause 23 hereof shall remain as a loan to the remaining partners bearing interest of 10 per cent per annum calculated from six months subsequent to the date of death or retirement of such fifth outgoing partner until (a) all sums due have first been paid to the partners who firstly,
40 secondly, thirdly and fourthly retired before or who predeceased such fifth partner or to their personal representatives and (b) the introduction has taken place of incoming partners to take over the respective shares in the partnership of the partners who have firstly, secondly, thirdly and fourthly died or retired. Thereupon the provisions of Clause 23 shall apply to such fifth partner.

50 28. If a sixth partner shall die or retire before payment has been fully made of all sums payable to such partners who have died or retired previously to such sixth partner then the amount to which the estate of such deceased partner or retiring partner shall

Exhibits

P.6
Partnership
Agreement
12th
September
1969.
(Continued).

become entitled under Clause 23 hereof shall remain as a loan to the remaining partners bearing interest of 10 per cent per annum calculated from six months subsequent to the date of death or retirement of such sixth outgoing partner until (a) all sums due have first been paid to the partners, who firstly, secondly, thirdly, fourthly and fifthly retired before or who predeceased such sixth partner or to their personal representatives and (b) the introduction has taken place of incoming partners to take over the respective shares in the partnership of the partners who have firstly, secondly, thirdly, fourthly and fifthly died or retired. Thereupon the provisions of Clause 23 shall apply to such sixth partner.

10

29. In the event of the simultaneous decease of two or more of the partners the senior in service shall be deemed to have predeceased the other partner or partners.

20

30. Every partner hereto who retired for any cause from this partnership hereby covenants with all partners present and future that for a period of five years subsequent to the date of such retirement he will have no part or association whatever with the business of piloting at Port Swettenham, nor within a radius thereof 40 nautical miles.

31. A Unanimous decision of the partners must take place for the introduction of a new partner on equal terms and a new partner must have served a minimum of two years as a salaried fully licensed pilot at Port Swettenham, and upon such partner entering into a covenant to abide by the terms of this partnership and upon paying his proportion of capital in cash to the Reserve Fund (No. 2 Account) of the partnership, he shall be accepted as a partner by all other partners.

30

40

32. A majority of the partners present in the States of Malaya may engage an assisting pilot or substitute for any period on salaried terms, but subject to the sanction of the Pilot Board of Port Swettenham.

33. (a) As from 1st January, 1967, subject to the approval of the Pilot Board, each partner shall be entitled to leave at the rate of five days per month, such leave being accumulative

up to a maximum of 60 days per year in any one year or not more than 120 days in any two years.

(b) This leave may be accumulated subject to the limits aforesaid and any leave so accumulated may be taken all at once or at different times but so that a partner shall not take more than two periods of leave in any one year. All leave taken must have been earned, i.e. five days per month of completed service which for the purposes of this clause shall include any period or periods of leave.

(c) Three months notice may be given and only one partner on leave at a time. The order of leave to be by seniority, i.e. senior pilot has first choice etc. but by mutual consent periods of leave can be changed.

(d) Each partner while on leave shall be paid his proportionate share of the nett profits.

34. Any partner who without adequate cause or without consent of the other partners exceeds by more than ten days the agreed period of his leave shall not be entitled to his share of profits during such excess over ten days, provided always that such excess shall not be deemed a breach of the covenants herein to attend to duty unless it exceeds one calendar month.

35. (a) Salaried pilots leave to be granted at any time within the current year. Such leave will be at the rate of two days per month of actual service, i.e. twelve months service merits 24 days leave.

(b) Trainee pilots leave as prescribed by the Malayanisation plan, i.e. 14 days per annum.

36. A partner shall always share under Clause 5 or 11 equal liability with the other partners for all the other partnership expenditure incurred during his absence.

37. Absence from duty on account of sickness shall not be a breach of any conditions herein, provided it is supported by a Medical Certificate from a qualified Doctor to the effect that the partner concerned is unable to follow his vacation owing to accident or sickness caused, in the case of accident, whilst proceeding to or from, or in the course of duty, and in the case of sickness, from normal causes. Subject to the furnishing of such Medical Certificate aforesaid, a partner who is absent from duty on account of accident or sickness as defined above, is entitled to

Exhibits
P.6
Partnership
Agreement
12th
September
1969.
(Continued)

Exhibits

P.6
Partnership
Agreement
12th
September
1969.
(Continued).

receive his share of profits at the following rates :-

For the first 30 days accumulated within the two years period as specified and as from 1st January 1970 within every calendar year as defined below :-

His full share of Profits.

For the second 30 days accumulated within the specified two years period and as from the 1st January 1970 within every calendar year as defined :-

10

50% of his share of his profits. The balance of share of profits to be assessed and the amounts due to be deducted from the months earning in which, the Medical Leave in excess of 30 days occurs within the aforesaid periods.

For the third 30 days accumulated within the specified two years period and from 1st January 1970 within every calendar year as defined :-

20

25% of his share of profits. The remaining balance of share of profits to be assessed and the amounts due, to be deducted from the months earning in which the Medical Leave in excess of 60 days, occurs within the aforesaid period.

After the third 30 accumulated days :-

30

Thereafter, i.e. in excess of 90 days within the specified two years period and from 1st January 1970 within every calendar year as defined, any further sick leave on reduced pay, to be considered by the remaining Partners, on the circumstances relating to the case and to decide whether or not, any further payment should be made. A majority of Partners may so decide. Such monies as are due in respect of the above, shall be divided equally between the remaining Partners.

40

The expression "two years period" wherever

referred to in this Clause shall mean the period of two years commencing on the 1st day of January 1968 and terminating on the 31st day of December 1969. The expression "calendar year" wherever referred to in this Clause shall mean the 1st of January as from 1970 and terminating on the 31st day of December for every calendar year.

Exhibits
P.6
Partnership
Agreement
12th
September
1969.
(Continued).

10 The Pilot Board of Port Swettenham are to be advised of all cases of accident or sickness, duly substantiated by Medical Certificate, without delay by the Selangor Pilot Association (1946).

20 38. Except when absent under the provisions of Clauses 33 and 34, partners shall ordinarily reside at Port Swettenham or Klang and shall occupy and rent the respective houses allotted by the Association for Pilots. The said houses and any other house or houses occupied by a pilot shall be deemed to be held on partnership account, provided that the rent for each house shall not exceed
30 \$300/- per month, and each partner agrees at any time at the request and expense of the partnership to assign or otherwise assure to the partnership all his rights and such tenant, and upon retirement from the partnership and upon going on leave, to do all acts, matters and things within his power to render such houses available for his successor or substitutes as the case may be.

30 39. All notices authorised or required to be given to any partner hereunder shall be deemed to be duly served if personally delivered to such partner or sent to him by registered post.

40 40. Save as is herein provided, if at any time any dispute, doubt, or question shall arise between the said partners, including new partners as herein provided, or their respective executors or administrators, either on the construction meaning or effect of these presents, or respecting the accounts, transactions, profits or losses of the business or otherwise in relation to his partnership or the
40 dissolution or winding up thereof, then every dispute doubt or question shall be referred to two arbitrators one to be appointed by each party, or other umpire, pursuant to the Arbitration Ordinance 1950, or any statutory modification thereof for the time being subsisting.

41. Periodical partnership meeting between all partners in the States of Malaya shall be held whenever it becomes necessary to discuss any business question or matters involving the welfare of the

Exhibits
P.6.
Partnership
Agreement
12th
September
1969.
(Continued).

partnership. It is hereby agreed that in any such question or matters where unanimous agreement is not reached votes shall be taken and the vote of the majority shall become effective and all decisions made shall be signed and recorded in a Minute Book kept for that purpose. Provided always that should any decision be made otherwise than by unanimous agreement a minimum of fourteen days shall elapse before such decision shall become effective

10

Provided further that nothing in this clause contained shall enable any of the other provisions or stipulations of this Agreement to be varied without the unanimous consent of all the partners.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written

SIGNED by the said PAO LIEN)
KIANG in the presence of :-)

20

SIGNED by the said RYSZARD)
PIECHOCKI in the presence)
of :-)

SIGNED by the said COLIN)
PHILLIP DAVY in the)
presence of :-)

SIGNED by the said MOHAMED)
NOOR BIN ISMAIL in the)
presence of :-)

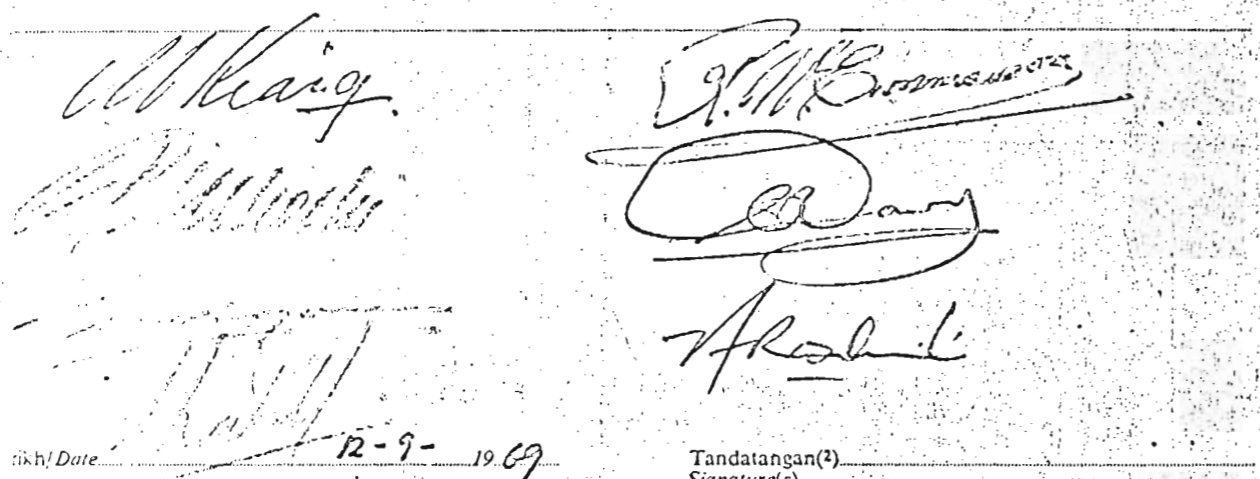
SIGNED by the said ABDUL)
RAZAK BIN ARSHAD in the)
presence of :-)

30

SIGNED by the said ABDUL)
LATIFF BIN HAJI HASSAN in)
the presence of :-)

Saya/Kami yang bertandatangan di-bawah ini mengesahkan bahawa segala kenyataan yang di-buat dalam borang ini ada-lah tepat dan mengaku bahawa saya/kami ada-lah sekutu dalam perniagaan yang bernama

I/We the undersigned confirm the accuracy of all the statements made in the form and declare that I/we am/an/are associate(s) of the business the name of which is The Selangor Pilot Association (1946)



 Tandatangan(2) Signature(s)

Tandatangan(2) Signature(s) 12-9-1969

Saya mengaku bahawa tandatangan(chap) itu jari kanan

ini di-turunkan pada akuan di-atas ini di-hadapan saya sa-telah saya berpuashati bahawa orang yang menurunkan tandatangan(chap) itu ada-lah sa-benar-nya orang yang nama-nya tersebut dalam akuan itu dan ia/mereka faham maksud akuan

I certify that the signature(s)/right thumb print(s) of Pao Lien Kiang, Roy Walker Emerson,

Nyszard Piechocki, Colin Phillip Davy, Mohamad Noor bin Ismail

Abdul Wazak bin Arshad and Abdul Latiff bin Hj. Hassan

were affixed to the above declaration in my presence after I had satisfied myself that the person(s) so affixing such signature(s)/right thumb print(s) was/were in fact the person(s) named in such declaration and understood the purport of such declaration.

Bertandatangan pada 12th haribulan September 1969
 at Port Swettenham

155
 ATTENTION—Pengesahan di-atas hendaklah di-saksikan dengan tandatangan—
 a) DI-DALAM MALAYSIA oleh Hakim, Yang Di-Pertua Mahkamah Seshen, Mejiseter, Penyaksi 'Awam, Jaksa Pendamai (J.P.), Peguambela atau Pegawai Daerah, Ahli Parlimen atau Ahli Dewan Perundangan Negeri atau Ahli Majlis Mesuarat Kerajaan Negeri, Pesuruhjaya Sunpah, Pesuruhjaya Buroh, Pegawai Urusan Cina, mana² Pegawai yang di-beri kuasa oleh Pesuruhjaya Buroh, Pegawai Daerah, Pegawai Pentadbir dalam Negeri Johor, Penolong Pegawai Daerah atau Penghulu atau Penggawa yang di-beri kuasa oleh Pegawai Daerah.
 b) DI-DALAM MANA² WILAYAH DALAM KOMANWEL, oleh Hakim, Yang Di-Pertua Mahkamah Seshen, Mejiseter, Penyaksi 'Awam, Jaksa Pendamai, (J.P.), Peguambela atau Peguambela yang berhak menjalankan amal-nya dalam mahkamah² wilayah itu atau Pegawai Konsol dalam mana² wilayah dalam Komanwel.
 c) DI-DALAM MANA² WILAYAH DI-LUAR KOMANWEL, oleh Penyaksi 'Awam, Pegawai Konsol atau Pegawai Diplomat yang menjalankan tugas² konsol dalam mana² wilayah dalam Komanwel.
 NOTE—The above verification must be attested—
 a) WITHIN MALAYSIA, by a Judge, President of a Sessions Court, Magistrate, Notary Public, Justice of Peace, an Advocate or Solicitor, a Member of the Houses of Parliament or a State Legislative Assembly or of a State Executive Council, a Commissioner for Oaths, Commissioner for Labour, a Chinese Affairs Officer, any Officer authorised by the Commissioner for Labour, a District Officer, an Administrative Officer in the State of Johore, an Assistant District Officer, or a Penghulu or Penggawa authorised by the District Officer.
 b) WITHIN ANY TERRITORY IN THE COMMONWEALTH, by a Judge, President of a Sessions Court, Magistrate, Notary Public, Justice of Peace, an Advocate or Solicitor who is entitled to practice in the Courts of such territory or a Consular Officer of any territory in the Commonwealth.
 c) WITHIN ANY TERRITORY OUTSIDE THE COMMONWEALTH, by a Notary Public, a Consular Officer or Diplomatic Officer performing consular functions of any territory of the Commonwealth.

PENDAFTARAN PERUBAHAN² DALAM PERNIAGAAN
REGISTRATION OF CHANGES IN BUSINESS

BORANG B (Kaedah 6) / FORM B (Rule 6)

ORDINANCE PENDAFTARAN PERNIAGAAN, 1956
THE REGISTRATION OF BUSINESSES ORDINANCE, 1956

BORANG B

PENDAFTAR PERNIAGAAN,
JABATAN HASIL DALAM NEGERI,
BANGUNAN SULEIMAN,
KUALA LUMPUR,

Perakuan No./No. of Certificate

Saya/Kami yang bertanggung-jawab menyerahkan untuk perubahan² pendaftaran berikut mengenai perniagaan yang tersebut di-bawah ini yang telah di-daftarkan di-bawah Ordinance di-atas.

Saya/Kami menyerahkan Chek/Wang Kiriman/Wang Tunai sa-banyak \$5 sa-bagai pembayaran bayaran pendaftaran itu. (Lihat Chatitan 1).

I/We the person(s) responsible submit for registration the following changes in the under-mentioned business registered under the above Ordinance.

I/We submit Cheque/Money Order/Cash for \$5 in payment of registration fee. (See Note 1).

1. Nama perniagaan Business name	The Selangor Pilot Association (1946)		
2. Jika nama China tuliskan dengan huruf China If such name is Chinese give name in Chinese characters	-----	3. Bentuk perniagaan. Constitution of business	Partnership
		4. Tarikh permulaan Date of commencement	1-10-1946
5. Jenis² am perniagaan General nature of the business	Pilot Ships	6. Nombor Perakuan No. of Certificate	02051
7. Tempat utama perniagaan Principal place of the business	Port Swettenham	Chartered Bank Building, P.O. Box 51, Port Swettenham.	
8. Alamat, jika lain daripada yang di-atas, di-mana surat² rasmi atau surat² perintah di-sisi undang² boleh di-kirim atau di-sampaikan Address, if different from the above, to which any official communication or legal process may be addressed or delivered	Nil		
9. Chawangan² perniagaan Branches of the business	Nil	HIGH COURT	No.
		Exhibit No.	11
10. Sebutkan jika ada suatu perjanjian bertulis berkenaan dengan syarat² perkongsian itu. Jika ada, nyatakan tarikh-nya dan kembarkan sa-keping salinan-nya yang telah di-sahkan dengan di-tandatangan State whether there is a written agreement as to the term of the partnership. If so, give date and attach a copy of the agreement verified by signatures	Date <u>12/9/69</u> Yes. 12th December, 1968.		

Bertarikh pada 12th haribulan September 1969.
 Dated this 12th day of September 1969.
 Ditandatangan² (Lihat Chatitan 2) Pao Lien Kiang
 Signatures (See Note 2)

CHATITAN—Butiran² 1 hingga 10 mesti di-penuhi untuk menunjukkan keadaan perniagaan sekarang, ia-itu, sa-lepas perubahan² itu.
 1. Kena di-bayar berkenaan dengan pendaftaran perubahan bulir² (termasuk apa² perubahan² alamat perniagaan itu) \$5.
 2. Hendak-lah di-tandatangan oleh tuan punya tunggal atau sa-orang kongsi utama dalam perniagaan itu.
 NOTE—Items 1 to 10 must be completed to show the present state of the business, i.e., after the changes.
 1. Payable in respect of registration of changes of particulars (including any change in any address of the business) \$5.
 2. Should be signed by the sole proprietor or principal partner of the business.

P.7. CERTIFIED COPY OF FORM B

Pengenalan bagi orang yang akan atau yang akan berhenti menjadi sekutu (Lihat Catatan 1) Full name and Identity Card number of person becoming or ceasing to be an associate (See Note 1)	Di-sini tulis semua nama China dengan huruf China Here give all Chinese names in Chinese characters	Di-sini tulis nama yang dahulu dan nama lain, bertentangan dengan nama di-ruang pertama (Lihat Catatan 2) Here state any previous names and any aliases, opposite each name in the first column (See Note 2)	Di-sini tulis nama China dengan huruf China Here give Chinese names in Chinese characters	Actual date of birth	Sex Male or female	Nationality and Race	Date of entry into business	Tarikh menarek diri Date of withdrawal	Jawatan tertentu yang di-pegang atau chara perkaitan dengan perniagaan (Lihat Catatan 3) Particular office held in or nature of association with the business (See Note 3)	Tempat kediaman biasa Usual residence
Leo Lion Kiang	-	Nil	-	1.8.14	Male	Malaysian	1.8.60	-	Managing Partner	12 Jalan Kelapa, Off Telok Gadong Road, Klang.
Roy Walker Emerson	-	Nil	-	2.10.08	Male	British Subject	1.8.52	30.6.69	Partner	9 Jalan Kelapa, Off Telok Gadong Road, Klang.
Byazard Piechocki	-	Nil	-	19.9.21	Male	-do-	1.8.62	-	-do-	7 Jalan Kelapa, Off Telok Gadong Road, Klang.
Colin Phillip Davy	-	Nil	-	19.9.28	Male	-do-	1.3.63	-	-do-	16 Jalan Kilat, Klang.
Mohamed Noor bin Ismail	-	Nil	-	31.8.20	Male	Malaysian	1.9.64	-	-do-	25 Jalan Kelapa, Off Telok Gadong Road, Klang.
Abdul Razak bin Arshad	-	Nil	-	1923	Male	-do-	1.6.68	-	-do-	13H, Telok Gadong Road, Klang.
Abdul Latiff bin Hj. Hassan	-	Nil	-	19.3.19	Male	Singaporean	1.7.69	-	-do-	5 Jalan Borrowman, Port Swettenham.

CATATAN

Jika mana sekutu itu ia-lah sekutu dalam mana perniagaan yang lain, butir mengenai nama ada-lah dikehendaki di-daftarkan juga, dan nama perniagaan itu atau perniagaan itu mesti-lah di-tunjukkan sama ada di-kaki muka borang ini atau dalam satu jadual yang mesti di-kepikan dengan borang ini.

(1) Nama yang di-beri mesti-lah nama yang dengan-nya sekutu itu biasa-nya di-kenali. Bagi orang Kristian atau orang yang bukan orang Asia berikan kesemua nama pertama atau nama Kristian-nya dan nama keluarga-nya; bagi orang China beri nama "Ch" nya dan nama yang lain; bagi orang Melayu, orang India atau orang Asia yang lain, beri nama sekutu-nya dan nama bapa-nya termasuk apa nama "Vijayan" nya sendiri, dsb.

(2) Jika mana sekutu itu di-kenali dalam perniagaan atau dalam kehidupan biasa dengan nama yang lebih daripada satu atau dengan nama timangan, gelaran, dsb, semua nama itu mesti di-tunjukkan sebagai nama lain.

(3) Mithal-nya "Kongsi", "Ahi Keluarga Bersatu", "Ingurui", "Kongsi Tidak Chergas", dsb.

NOTE

If any associate is an associate of any other business, particulars of which also require registration, the name of such business or businesses must be shown either on the foot of the above page or on a schedule which should be attached to this form.

(1) The name given must be the name by which the associate is commonly known. In the case of a Christian or non-Asian give all first or Christian name and surname. In the case of a Chinese give "Ch" and other names, in the case of a Malay, Indian or other Asian give name of the associate and name of his father and include any personal "Vijayan", etc.

(2) When any associate is known in business or in ordinary life by more than one name or by a "milk" name, nickname, etc., all these must be shown as aliases.

(3) e.g. "Partner", "Member of Joint Family", "Manager", "Sleeping Partner", etc.

P.7.
Certified
copy of
Form B
12th
September
1969
(continued)

LETTER KELANG PORT AUTHORITY - PLAINTIFFS

LEMBAGA PELABOHAN SWETTENHAM

No. Talipon: P.S. 6791-5. Surat Bil:68 dlm
P.01-1/12 Pt. I

LEMBAGA PELABOHAN KELANG,
(LEMBAGA PELABOHAN SWETTENHAM) LEMBAGA PELABOHAN,
MALAYSIA KELANG,
(LEMBAGA PELABOHAN
SWETTENHAM)
MALAYSIA.

Letter
Kelang
Port
Authority
to
Plaintiffs.
31st March
1972.

31st March, 1972.

The Selangor Pilot Association (1946),
P.O. Box 51,
PORT SWETTENHAM.

Dear Sirs,

TAKE-OVER OF PILOTAGE SERVICE

In reply to your letter dated 27.3.72 in regard to the taking over of pilotage assets, I am directed to advise you that this Authority has been directed by the Ministry of Communication to take over the Pilotage Services with effect from 1st May, 1972. Therefore, in so far as the date for taking over of assets is concerned, this will be a few days before 1st May, but in so far as the payment is concerned, this will be subject to further correspondence.

Yours faithfully,

SGD.

(Ismail Abdullah)

Director (Administration)

for Director-General,
Kelang PORT AUTHORITY

Sln: Ketua Setia Usaha,
Kementerian Perhubungan, KL.

Penarah Laut,
Malaysia Barat,
Port Kelang.

Shahbandar,
Port Kelang.

LETTER PLAINTIFFS TO KETUA PENGARAH

Letter
Plaintiffs
to Ketua
Pengarah
27th
March 1972.

PERSATUAN MALIM SELANGOR (1946)
SELANGOR PILOT ASSOCIATION (1946)
Pilot Office P.S. 6106
Accounts Office P.S. 6164

Capt. P.L. Kiang	Phone 31500
R. Piechocki	" 32365
" C.P. Davy	" 32406
" I. Mohd. Noor	" 31678
" Abdul Razak Arshad	" 32298
" Abdul Latiff Hj.Hassan	" 6694

10

P.O. Box
No.51
Port Swettenham.

27th March, 1972.

Ketua Pengarah,
Lembaga Pelabohan Swettenham,
PORT KLANG.

Tuan,

Take-over of Pilotage Service

In compliance with instructions contained in recent communications, particularly Letter Bil.(86) dlm.KP/L/19 Jld.III of 24th instant from the Ministry of Communications, copies of which were all provided you, this Association would like to inform you that all the material assets in the Association which were already been valued by your valuer are now ready for your take-over with your full payment on the 1st April, 1972, the date fixed by the Government for the take-over of the pilotage service by your Authority from this Association. This is without prejudice to any claims by the Association for compensation otherwise than for the material assets referred to above.

20

30

As to the services of the pilots at present still serving with the Association, it is beyond the Association's jurisdiction or

ability to deal with; for your offer of employment as your Authority's pilots were all done on individual basis, not through the Association.

Letter
Plaintiffs
to Ketua
Pengarah
27th March
1972.
(Continued).

Yang benar,

Selangor Pilot Association (1946)

(Capt. P.L. Kiang)
Senior Pilot

s.k. Ketua Setia Usaha,
Kementerian Perbubongan,
K.L.

Pengarah Laut, Malaysia Barat,
Port Klang.

Shahbandar,
Port Klang.

LETTER KEMENTERIAN PENGANGKUTAN TO
PLAINTIFFS SOLICITORS

Letter
Kementerian
Pengangkutan
to
Plaintiffs
Solicitors.
7th July
1971.

KEMENTERIAN PENANGKUTAN
MALAYSIA

Talipon: 82982
Kawat: Transport Kuala Lumpur
Bil.Surat Kita: (22)d/m.kP/L/250
Bil.Surat Tuan: P.O.Box 515
Jalan Young,
Kuala Lumpur.

MINISTRY OF TRANSPORT
MALAYSIA.

7th July, 1971

10

Messrs.Shearn, Delamore & Co.,
Advocates & Solicitors,
Notaries Public and
Commissioner for Oaths,
P.O. Box 138,
The Eastern Bank Building,
2 Benteng,
Kuala Lumpur.

Tuan2,

Selangor Pilot Association.

20

Saya rojokkan tuan kepada surat
bertarikh 28hb June, 1971, bil. S.D.23937
(W) 16 berkenaan dengan perkara yang
tersebut diatas.

We reiterate the following:-

- (i) Each pilot has the option to enter
into a contract of employment with
the Authority.
- (ii) Compensation will be considered for
the acquisition by the Authority of
any physical assets belonging to the
pilots but no compensation will be
considered on the claim alleged by the
Association on the rights to carry on
business.

30

Saya yang menurut perintah.
(Heliliah Yusof)
Pegawai Undang2,

b.p. Ketua Setia Usaha,
Kementerian Pengangkutan.

s.k.
Pengurus Besar,
Lembaga Pelabohan Swettenham,
Port Swettenham.

40

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 45 OF 1975

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
LEMBAGA PELABOHAN KELANG Appellants
AND
SELANGOR PILOT ASSOCIATION
(Suing as a firm) Respondents

RECORD OF PROCEEDINGS

STEPHENSON HARWOOD & TATHAM
Saddlers Hall, Gutter Lane,
Cheapside, London, EC2V 6BS

Solicitors for the Appellants

BULCRAIG & DAVIS,
6, Henrietta Street,
Strand, London, WC2E 8QS.

Solicitors for the Respondents