LORD LANE
21, 1980

IN THE PRIVY COUNCIL No. 7 of 1977

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

BETWEEN:

SOUTH EAST ASIA FIRE BRICKS SDN. BHD.

Appellant

- and -

NON METALLIC MINERAL PRODUCTS
10 MANUFACTURING EMPLOYEES UNION

TAN LEN KEOW
YAP CHUK YOOK
LOO YOK HO
YAP AH KIST
YAP CHOON HOO
TEH YOKE TOH
TAN YEW
ANUAR BIN ABDUL
CHOON AH SOO
20 LEE KIM YAN
SITI ZAIBIDAH BINTE MOAN

/Represented by the Union/

Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal by leave granted by the Federal Court of Malaysia on 28 June 1976 from the Judgment and Order of the Federal Court of Malaysia dated 14 April 1976 whereby it was ordered that the Order of the High Court made in Originating Motion No. 73
30 of 1974 be set aside and that the award of the Industrial Court in Industrial Court Case No. 15 of 1974 made on 8 August 1974 he restored.

2. The main question of construction arising for determination in this appeal is whether by virtue of Sections 8 and 15(2) of the Employment Ordinance 1955 either:-

(a) absence from work when on strike in furtherance of a Trade Dispute constitutes "reasonable excuse" within the meaning of Section 15(2)(a)

or (b) the finding of fact that the Respondent Union informed, or attempted to inform, the Appellant Employer of the excuse for such absence within the meaning of Section 15(2)(b)

operates so as to avoid the commission of a breach of the Contract of Employment on the part of the Respondent Employees which can be treated as a ground for lawful termination by the Appellants.

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3. The relevant provisions of Sections 8 and 15 of the Employment Ordinance 1955 are as follows:-

Section 8

"Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract -

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(a) to join a registered trade union;

(b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or

(c) to associate with any other persons for the purpose of organising a trade union in accordance with the provisions of the Trade Union Ordinance, 1959."

Section 15(2) as amended by P.U. (A) 409/69.

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"A labourer shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days -

(a) without prior leave from his employer or without reasonable excuse; or

(b) without informing or attempting to inform his employer of the excuse for such absence."

4. In the Industrial Court the Appellants contended that the Respondents employees had wilfully terminated their respective contract of service: and in support of such contraction submitted that by operation of

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Law Section 15(2) of the Employment Ordinance 1955 had such affect. The Industrial Court rejected these submission. Section 8 of the Employment Ordinance provides in effect that no term in any Contract of Service shall restrict the right of the employee to participate in the activities of a Registered Trade Union. Section 15 of the Employment Ordinance provides in effect that a Contract of Service shall be deemed to have been broken if an employee continuously absents himself from work for more than 2 days without prior leave or reasonable excuse. The Industrial Court held that by going on strike the Respondent employees did not terminate their Contracts of employment with the Appellant. It was held that Section 15(2) of the Ordinance - as amended by P.U.(A) 409/69 - by inclusion of the new limb (b) meant that no absent workman is deemed to have broken his Contract of employment so long as he has informed, or attempted to inform, him employer of the excuse for his absence - and that the Appellant was informed of the excuse (which was the strike) by the Respondent Unions letter dated 31 December 1973. The High Court quashed the order of the Industrial Court as to re-instatement on the ground that absence from duty on account of participation in a strike can not be deemed to be reasonable excuse within the meaning of Section 15(2) of the Employment Ordinance. The learned Judge cited with approval and applied the decision in Gleneagles Hotel Ltd. v Wong Jue, Whee and Ors. (1956) 22 M.L.J. 37 which followed the judgment of William C.J. in Wong Mook v. Wong Yin and 3 Others (1948) M.L.J. 41. The Federal Court set aside the decision of the High Court and restored the Order of the Industrial Court as to reinstatement on the ground that the Contracts of Service are suspended but not terminated by a strike; and that the notices given by the Appellant to his Respondent employees by which he purported to treat the Contracts of employment as rescinded unless the employees returned to work within 48 hours were of no legal effect. The Federal Court further held that workmen involved in a strike are entitled to be put back to the Status Quo on the same terms and conditions.

5. The essential facts are as follows :-

In January 1973 a dispute arose between the Respondent Union and the Appellants. By letter dated 21 February 1973 the Minister of Labour directed the Appellants to

accord recognition to the Respondent Union with effect from 5 September 1972. On 2 October 1973 the Respondent Union submitted proposals to the Appellants for a collective agreement and invited the Appellants to commence negotiations. There was no acknowledgement. A reminder was sent. There was still no acknowledgement. On 12 December 1973 The Respondent Union by letter addressed to the Minister of Labour and Man power sought this by intervention to get the Appellants to the negotiating table. By letter dated 31 December 1973 the Respondent Union informed the Appellants that unless the Appellants wrote officially to the Respondent Union to accord recognition and commence negotiations by 14 January 1974 the Respondent Union would take industrial action which would involve complete cessation of work. On 22 January 1974 the Appellants' representatives failed to attend a conciliation meeting arranged by the Minister. Again on 31 January 1974 the Appellants representative failed to attend a conciliation meeting arranged by the Minister. On 3 February 1974 the Respondent Union arranged for a secret ballot to be taken according to the Rules of the Respondent Union and the provisions of the Trade Union Ordinance 1959, as to whether there should be a strike: the result of the ballot unanimously supported strike action on 4 February 1974. On 4 February 1974 73 workmen in the employ of the Appellants withdrew their labour: this figure includes the 11 Respondent employees who were then not members of the Respondent Union but who joined the Respondent Union during the strike. The remainder of the Appellants 73 workmen were members of the Respondent Union at the time when strike action was taken. On 4 February 1974 the Appellant Employers through their solicitors issued notices to their employees - including the 11 Respondent Employees - who were on strike to the effect that unless there was a resumption of work within 48 hours as from the time when work should have started on 4 February 1974 their contract of employment would be deemed to have been terminated. The effect of this notice was repeated in a further notice issued by the Appellant Employer on 5 February 1974. On 12 February 1974 /during the strike/ the Minister referred the Trade dispute (i.e. the proposals for a collective Agreement) to the Industrial Court pursuant to the provisions of Section 23(2) of the Industrial Relations Act 1967 (un revised). On 16 February 1974 the members of the Respondent Union together with the 11 Respondent employees sought to return to work on the advice of the Respondent Union but the Appellants refused to allow them to return to work

and locked them out. Thereafter the Respondent Union reported the lockout to the Minister who in turn referred this second dispute (i.e. whether there was a lockout or not) on 6th March, 1974 to the Industrial Court pursuant to Section 23(2) of the Industrial Relations Act, 1967 (unrevised). The Industrial Court found as a fact that there was a lockout by the Appellant against its employees. It also found as a fact that the party at fault was the Appellant management and that the Respondent union had no other recourse but to call out the workers on strike on 4th February, 1974. On 8th August, 1974 the Industrial Court ordered the Appellant Employer to reinstate the 73 workmen (including the 11 Respondent employees) to their former positions not later than 15th August, 1974 on the same terms and conditions of service and pay them wages and allowances without loss of benefits or privileges as from 16th February, 1974 (i.e. the date of lockout) with retroactive effect. The Appellant did not comply with this award. The Respondent union reported the non-compliance of the award to the Minister who referred this non-compliance to the Industrial Court for disposal pursuant to Section 53(3) of the Industrial Relations Act, 1967 (unrevised). On 24th March, 1975 the Industrial Court ordered compliance with the award by handing down another award (Award 12/75 - Industrial Court Case No: 64 of 1974). The Appellant did not comply with this order. The Appellant challenged the award (39/74) in the High Court where it was quashed but the award (39/74) was restored by the Federal Court on further appeal. The amount of wages involved was of the order of Malaysian dollars $200,00/- or £40,000.00.

6. The judgment of the Federal Court proceeded on the basis that the High Court had failed to give proper consideration to the provisions of Section 8 of the Employment Ordinance 1955 which it held operated as a saving clause for workmen in the exercise of a right to strike. At pages 7/8 of the Judgment the Federal Court held that "this is a fundamental right enshrined in our Constitution and which expresses the aspirations of workmen ..." "there can be no equilibrium in industrial relations today without freedom to strike. If workers would not, in the last resort, collectively withhold their labour they could not bargain collectively." On this basis it was further held that Section 8 of the Employment Ordinance 1955 removed the

provisions of Section 15(2) of the Employment Ordinance from the scene of industrial disputes in so far as the activities of a registered Trade Union are concerned with a strike in contemplation or furtherance of a Trade Dispute. It was further held (at page 10 of the Judgment) that "when the workmen absented themselves from work because they had gone on strike with the specific object of enforcing acceptance of their demands they could not be deemed to have terminated their contract of service. By going on strike they clearly indicated that theywanted to continue in their service but were only demanding without bargaining. Such an attitude far from evidencing termination of service, emphasises the fact that the services continued as far as they were concerned."

7. In support of this reasoning, for which the Federal Court concluded that there was a preponderance of supporting authority, reliance was placed in particular on a passage in Rookes v Barnard (1964) A.C. 1129 at p. 1180 per Lord Evershed: "It has long been recognised that strike action or the threats of strike action [however these terms be interpreted - and I have in mind what fell from Donovan L.J. in his judgment in the Court of Appeal] in the case of a Trade dispute do not involve any wrongful action on the part of workmen, whose service contract are not regarded as being or intended to be thereby terminated."

The preponderance of authority to which the Federal Court referred also includes observations of Lord Denning M.R. in Stratford v Lindley [1965] A.C. 269 at 295; and in Morgan v Fry [1968] 2 Q.B. 724 at 725 and 728. The Respondents rely in particular on the passage at page 728 as follows :

"The truth is that neither employer nor workmen wish to take the drastic action of termination if it can be avoided. The men do not wish to leave their work for ever. The employers do not wish to scatter their labour force to the four winds. Each side is, therefore, content to accept a 'strike notice' of proper length as lawful. It is an implication read into the contract by the modern law as to trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike; and revives again when the strike is over."

It is submitted that when a union submits its proposals for terms and conditions of its members and invite the employer to commence negotiations with a view to conclude a Collective Agreement and the employer refused to do so, strike action taken infurtherance of such a claim constitutes action take in furtherance of a genuine trade dispute which does not as such terminate the contract of employment or amount to fundamental breach of contract and that the reasoning of the Federal Court is correct.

8. Subsequentto the decision of the Federal Court the Employment Appeal Tribunal considered the question of "suspension" in "Simmons v Hoover Ltd. /1977/ I.C.R. 61. It was held /by the Majority of the Tribunal/ that the effect of a strike is not to prevent the Employer from exercising his Common Law remedy to dismiss the Employee for refusing to work and that the Contract of employment is not suspended. In that decision the strike had started on 10 October 1974 when the employee was off work. He returned to work inNovember 1974 failed to work and joined the strike. He was dismissed while on strike by his Employer. It is submitted that the decision of the Majority was wrong. Leave to Appeal was granted.

9. The Federal Court rightly concluded that it was not open to the Appellant/Employer to terminate the Contract: that the Contracts of Employment subsisted: and that the Appellant/Employer "could not by imposing a new term of service /by giving the Notices on 4/5 February 1974/ unilaterally convert absence from work of the workmen who had gone on strike into abandonment of their contracts of service" see paragraph 14 of the Judgment.

10. In Wong Mook v Wong Yin and 3 Others (1948) M.L.J. 41 Willan C.J. held that workers who had absented themselves from work continuously for 3 days for the purposes of participating in a strike were not entitled to demand re employment as going on strike implied an absence for an indefinite period and was not a reasonable excuse. This decision was based upon Sections 20 and 54(2) of the Trade Union Enactment 1940 which are in pari materia with the provisions of Section 21 and 66(b) of the Trade Union Ordinance 1959, and upon Section 53(iv)(a) of the F.M.S. Labour Code (Cap 154) which are substantially the same as Section 15(2) (a) of the Employment Ordinance 1955

as amended which is now in force. The Federal Court concluded that Section 8 of the Employment Ordinance 1955 by the addition of this new Section had altered the law - and that the High Court had failed to give proper consideration to the provisions of this Section. The learned High Court Judge had wrongly held that the provisions of Section 8 did not in any way affect the validity of the judgment of Willan C.J. as the effect of Section 8 was only to prohibit the inclusion of any clause in an agreement of employment restraining the rights of workers to participate in the activities of a Registered Trade Union. The provisions of Section 54 of the Trade Union Enactment 1940 which were in force when the judgment of Willan C.J. was handed down are in pari materia to the provisions of Section 66(b) of the Trade Union Ordinance 1959. It is expressly provided that the statutory right of strike shall not affect any agreement between an employer and those employed by him as to such employment. It is submitted that the judgment of the Federal Court gave proper effect to the provisions of both Ordinances.

11. It is further submitted that as all relevant findings of fact by the Industrial Court were justified on the evidence adduced and in no sense "perverse", and that as there was no error of Law on the fact of the award, there was no jurisdiction in the High Court to quash the award by resort to certiorari.

12. The relevant orders as to costs are that the Appellants do pay the Respondents costs in the High Court and in the Federal Court save that costs of the application for leave to appeal be costs in cause.

13. The Respondents humbly submit that this appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the findings of fact by the Industrial Court are not open to challenge and as there was no error of Law on the fact of the award resort to certiorari was misconceived.

(2) BECAUSE absence from work on account of participation in a lawful strike consitutes

reasonable excuse of which the Appellants were informed within the meaning of Section 15(2)(a) and/or (b) of the Ordinance.

(3) BECAUSE absence from work for 2 days can not constitute a breach of the Contract of Employment within the meaning of Section 15(2) of the Ordinance when strike action has been taken on notice in furtherance of a Trade Dispute.

10 (4) BECAUSE it was not open to the Appellants to purport to give anticipatory notice of termination prior to the elapse of the 2 days period of absence from work as no breach can be deemed to have arisen until after the expiration of such period of continuous absence.

(5) BECAUSE in the absence of a "Non-Strike action Clause" in a contract of employment the withholding of labour in order to seek to compel the Employers to negotiate as to
20 terms and conditions of service cannot give rise to termination of the contract at the election of the Employer on the ground of fundamental breach of the Employee.

(6) BECAUSE the judgment of the Federal Court of Malaysia gave propereffect to the construction of the Ordinance; and is in accordance with authority; and is correct.

ALAN CAMPBELL

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