

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

SOUTH EAST ASIA FIRE BRICKS SDN. BHD. Appellants

- and -

1. NON-METALLIC MINERAL PRODUCTS
MANUFACTURING EMPLOYEES UNION

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2. a) TAN LEN KEOW
b) YAP CHUK YOOK
c) LOO TOK HO
d) YAP AH KIAT
e) YAP CHOON HOO
f) TEH YOKE TOH
g) TAN YEW
h) ANURAR bin ABDUL
i) CHOON AH SOO
j) LEE KIM YAN
20 k) SITI ZAIBIDAH binte MOAN

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represented by the Union

Respondents

SUPPLEMENTAL CASE FOR RESPONDENTS

RECORD

1. This Supplemental Case is lodged pursuant to an Order made by the Privy Council on 31 October 1979 on the question as to whether by virtue of any Legislative provisions the Award is not open to challenge by way of certiorari

Award No.
39/74
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2. The relevant statutory provisions which confer jurisdiction upon an Industrial Court to make an award are as follows :-

Section 27 of the Industrial Relations Act 1967 (35 of 1967): /hereinafter referred to as the Act/

- "1) The Court shall have power in relation to a trade dispute referred to it, to make an award including an interim award relating to all or any of the issues in dispute.

- 2) Where the Court is not unanimous on any question or matter to be determined, a decision shall be taken by a majority of members and in the event of the votes being equal, by the President or Chairman.
- 3) The Court shall make its award without delay and where practicable within three days from the date of reference to it of the trade dispute
- 4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest the financial implications and the effect of such award on the economy of the country, and on the industry concerned and also to the probable effect in related or similar industries. 10
- 5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. 20
- 6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute. 30
- 7) As amended by Act A92 (Industrial Relations (Amendment) Act 1971) An award may specify the period during which it shall continue in force, and may be retrospective to such date as it is specified in the award provided that such retrospective date of the award may not, except in the case of a decision of the court under section 30 and an order of the court under paragraph (c) of subsection (4) of section 53, be earlier than six months from the date on which the dispute was referred to the court. 40
- 8) The award of the Court shall be signed by the President or the Chairman of any Division or in the event of the President or the Chairman for any reason being unable to sign the award by the remaining members." 50

3+ In this case recognition was ordered by the Minister on 21st February 1973 w.e.f. 5 September 1972: the Appellants refused to attend a meeting arranged by the Minister so that collective p.8/9 p.45-46

10 bargaining could ensure between the parties pursuant to recognition as ordered, the Respondents threatened strike action by letter dated 31 December 1973: the Respondents took strike action on 4 February 1974 and in the course of the strike on 12 February 1974 the Minister referred a Trade dispute to the Industrial Court, and subsequently on 6 March 1974 the Minister referred to the Industrial Court the question as to whether there was a "lock out". Such references having been made under Section 23(1) of the Act, and Section 23(2) of the Act /as amended by Act A92 - Industrial Relations (Amendment) Act 1971 w.e.f. 1 October 1971_7 conferred jurisdiction upon the Industrial Court.

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4. The relevant Statutory provisions which rendered the Award of the Industrial Court not open to challenge by Certiorari are as follows :

20 (A) Section 29(3) of the Act

"a) Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged,= appealed against, reviewed, quashed or called in question in any Court of law

30 b) No award of the Court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any Court of law."

It is submitted that the words "subject to this Act" in Section 29(3)(a) relate to the provisions of Section 30: as follows :

40 "1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by such award or agreement may apply, to the Court for a decision on such question.

2) The Court may, upon the application of any party, by order vary any of the terms of an award, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

50 3) The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard

4) The decision of the Court shall be binding in the same manner as the

original award or agreement.

- 5) The expression "Court" for the purpose of this section, means the Court by which the award was made or any other Court specially constituted under section 19 for the purpose."

(B) Section 53A of the Act (as amended) by Act A92: Industrial Relations (Amendment) Act 1971)

- "1) The Court may and shall, if so directed by the Attorney-General, refer a question of law arising in any proceeding before it to the Attorney-General for his opinion 10
- 2) Before referring a question of law to the Attorney-General in accordance with subsection (1) the Court shall inform the parties to the proceeding in relation to which the question arises of the question which it proposes to refer and allow the parties a reasonable opportunity to make written submissions relating to the question. 20
- 3) Submissions made in accordance with subsection (2) shall be referred to the Attorney General and the Attorney-General shall, after considering those submissions, furnish his opinion to the Court.
- 4) Notwithstanding a reference of a question of law to the Attorney-General (not being a question whether the Court may exercise powers under the Act in relation to a trade dispute or matter), the Court may make an award in relation to the proceeding in which the question arose. 30
- 5) Upon receiving the opinion of the Attorney-General the Court -
 - a) may, if it has not made an award with respect to the parties of the proceeding in which the question arose, make an award not inconsistent with the opinion, or 40
 - b) shall, if it has made an award as aforesaid vary the award in such a way as will make it consistent with the opinion."

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5. Although consideration was given to the provision of section 29(3) of the Act in the High Court; and although consideration was given to the provisions of Section 53A of the Act in Award 50

10 (12/74) when the Industrial Court was concerned
with the Appellants challenge to Award (39/74)
as an excuse for non-compliance with the Award;
and although the Federal Court ruled that "the
Act was intended to be "self contained" it is
conceded that the issue of want of jurisdiction
to grant an order of Certiorari to quash the
Award on the assumption (which is denied) that
there was an error of law on the face of the
Award was first raised before your Lordship
at the outset of submissions by Respondents
Counsel on 30 October 1979. However, as this
was an issue going to jurisdiction it is
respectfully submitted that any Court of its
own notion could have raised such issue at any
stage of the revisory proceedings which it is
submitted were misconceived in Law as the
High Court had no jurisdiction to entertain the
Appellants application for an Order for
20 Certiorari having due regard to the provisions
of Section 29(3) and 53A of the Act.

6. The jurisdiction of the High Court to
grant an Order of Certiorari is confirmed by
Statute under Section 25(2) of the Courts of
Judicature Act 1964 under which paragraph 1 of
the Schedule empowers the High Court to issue
Orders of Certiorari.

30 7. There was no agreement between the parties
to seek to waive the incidence of Sections 29
or 53A of the Act (as amended) at any time up
to and including 31 October 1979. It is respect-
fully submitted that it would not have been
open to the parties to confer jurisdiction by
agreement where no such jurisdiction exists,
that it is settled law that Estoppel can not
cure want of jurisdiction.

40 8. It is further respectfully submitted that
the words "reviewed, quashed or called in
question in any Court of Law" in Section 29(3)(a)
of the Act as a matter of construction must
relate to the Additional Powers of the High
Court set out in Schedule 1 of Courts of
Judicature Act 1964 so as to exclude the
exercise of such powers as regards an Award of
the Industrial Court. The provisions of
paragraph 1 of the Schedule provides as follows:

"Additional Powers of High Court

Prerogative Writs

50 1. Power to issue to any person or authority
directions, Orders or writs, including
writs of the nature of habeus corpus,
mandamus, prohibition, quo warranto and
certiorari, or any others - for the
enforcement of rights conferred by Part II
of the Constitution, or any of them, or
for any purpose."

9. It is further respectfully submitted that the provision of special machinery for the resolution of points of law under Section 53A of the Act (as amended), renders it plain by such amendment that all questions of law arising in the Industrial Court in connection with an award are matters which shall be decided by the Attorney-General if he so wishes and directs, or which shall be decided by the Attorney-General if the Industrial Courts refers such question to him; and that the Award shall implement the opinion of the Attorney-General on matters of law. It is submitted that it is neither practical nor possible to challenge the opinion of the Attorney-General in such circumstances, and that resort to Certiorari is precluded as contrary to the intendment of the Statute construed as a whole. 10

10. It is further respectfully submitted that as the award was apparently valid; that as the Industrial Court was entitled to enter into the enquiry; that as there was no failure to comply with the requirements of natural justice; that as there was no question of bad faith; that as there is no question of the Industrial Court having done or having failed to do something in the course of the enquiry of such a nature as to render the award a nullity; that as the Industrial Court did not base its decision on some matter which was not prescribed for their adjudication; that as no challenge was raised to the jurisdiction of the Court - and as no question of want of jurisdiction or excess of jurisdiction on the part of the Industrial Court has arisen in these proceedings (the only point taken being alleged error of law): the Award may not be called in question and is unassailable be it right or wrong. 20 30

p.51 to 58
(p.53)

11. It is further respectfully submitted that the provisions of Section 29 and 53A of the Act are apt to protect the Award there being no question of nullity arising: and as the Industrial Court kept within its jurisdiction under Section 27 of the Act as regards the conduct of the hearing and in making its award no appeal on alleged error of law may be entertained. 40

12. The Respondents humbly submit that the Award of the Industrial Court should be restored for the following amongst other

R E A S O N S

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1) BECAUSE the Appellants resort to proceedings by way of Certiorari to seek to quash the Award was misconceived as the High Court lacked jurisdiction to quash the Award on the alleged ground of error of law

2) BECAUSE the Federal Court of its own motion ought to have restored the Award on the ground that the High Court lacked jurisdiction to quash the Award

10 3) BECAUSE the provisions of Section 29 and 53A of the Industrial Relations Act 1967 are apt to protect the Award: no question having arisen as to nullity of the Award or want or excess of jurisdiction on the part of the Industrial Court in the conduct of the hearing or in making the award pursuant to Section 27 of the Act.

4) BECAUSE Section 53A of the Industrial Relations Act 1967 provides special machinery for resolution of points of law which precludes resort to certiorari to challenge an Award of the Industrial Court on the ground of alleged error of law.

20 5) BECAUSE by virtue of such legislative provisions the Award of the Industrial Court is not open to challenge

6) BECAUSE want of Jurisdiction is not affected by Estoppel.

ALAN CAMPBELL

D.P. XAVIER

No. 7 of 1977

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SUPPLEMENTAL CASE FOR
RESPONDENTS

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