

No.30 of 1980

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 :

WONG AH SUAN

Appellant

- and -

SARAWAK ELECTRICITY SUPPLY
CORPORATIONFirst
Respondent

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- and -

THE GOVERNMENT OF THE STATE
OF SARAWAKSecond
Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the judgment of the Federal Court of Malaysia holden at Kuching exercising appellate jurisdiction (Lee Hun Hoe C.J.Borneo, Chang Min Tat F.J. and Salleh Abbas F.J.) dated 6th July 1979, allowing the Respondents' appeal from the judgment of the High Court in Borneo (George K.S. Seah J.) dated 14th December 1978, exercising original jurisdiction, which granted declarations in favour of the Appellant that :-
- 171-186
- 119-157
- 157-159

- (i) the action of the Governor-in-Council purporting to dispense with the consent of the Plaintiff under the proviso to section 15(2) of the Sarawak Electricity Supply Corporation Ordinance was null and void;
- (ii) the act of the Governor of Sarawak in granting the Sixth Supplemental Electricity Licence dated May 10, 1974 to the Sarawak Electricity Supply Corporation to supply electric energy in that area within the territory of Sarawak bounded by a circle with a radius of ten miles and with its centre at the Sarawak

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Electricity Supply Corporation Power Station, Saratok was null and void insofar as it purported to cover the designated area in Saratok under the Licence granted to the Plaintiff dated January 20, 1961;

(iii) the Sarawak Electricity Supply Corporation is precluded by the terms of section 15 of the Sarawak Electricity Supply Corporation Ordinance 1962 from using, working or operating any installation for the supply of electrical energy to all that area of Saratok, Sarawak, delineated in the First Schedule to a licence dated January 20, 1961 granted by the Governor of Sarawak to the Plaintiff pursuant to section 4 of the Electricity Ordinance (Cap.137); 10

In allowing the appeal the Federal Court of Malaysia ordered the Appellant to pay the costs of the trial and of the appeal.

2. This case arises out of the decision dated 27th December 1973 of the Governor-in-Council of Sarawak made on the application of the First Respondent, that the Appellant's consent to the First Respondent supplying energy in an area forming part of the area of supply of the Appellant pursuant to the exclusive licence granted to the Appellant under the Electricity Ordinance (Sarawak Cap.137) (as amended) should be dispensed with, thereby enabling the First Respondent to supply energy in an area in which previously the Appellant had the monopoly. The issue in this appeal is whether the Governor-in-Council in coming to his decision satisfied the rules of natural justice and in particular the audi alteram partem rule. Both the learned trial judge and the Federal Court of Malaysia held that the rules of natural justice and in particular the audi alteram partem rule ought to have been observed in the present case by the Governor-in-Council in exercising his powers under section 15(2) of the Sarawak Electricity Supply Corporation Ordinance 1962 (Sarawak Ordinance 25 of 1962 (hereinafter referred to as "the SESCO Ordinance")). The learned trial judge held that the rules had not been satisfied but the Federal Court of Malaysia did not uphold that judgment. 20 30 40

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3. The Appellant will in this case set out the essential facts which it is necessary to know by way of background before considering the legal issues involved in this appeal.

4. On 20th January 1961 His Excellency the Governor and Commander-in-Chief of Sarawak granted to the Appellant, in consideration of an 50

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- annual fee of \$30 by the Appellant, a sole and exclusive licence under section 4 of the Electricity Ordinance (Sarawak Cap.137) (as amended) to use, work and operate a generating plant of 50 kilowatts capacity, and to supply electricity to or for the use of other persons within the area of Saratok specified in Schedule 1 of the licence ("the designated area"). The licence was to continue in force for a period of 25 years, expiring on 31st December 1985, whereafter there was an option to renew it for periods of 5 years. Clause 7 (a) of the licence empowered and entitled the Appellant to charge rates not exceeding those therein stated for the supply of electricity. The Appellant was thus granted a monopoly over the supply of electricity within the designated area.
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- 20 122-3
5. Following the granting of the licence the Appellant installed a generating plant, distribution lines and other apparatus for the supply of electricity to consumers within the designated area, and thereby began to supply electricity.
6. On 19th October 1971 the Governor of Sarawak granted to the Appellant a supplemental licence under Section 4 of the Electricity Ordinance (as amended) which empowered the Appellant to raise the charges for electricity supplied.
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- 30 7. By the SESCO Ordinance a State Corporation for the supply of electricity was established. The Corporation (the First Respondent) was charged with the supply of electricity to consumers who required such a supply, but was not to infringe the Appellant's monopoly within the designated area without his consent, or without the dispensing of the necessity for his consent by the Governor-in-Council. Section 15 of the SESCO Ordinance provides :
- 40 " (1) Subject to the provisions of subsection (2), in so far as it is able to do so, the Corporation shall supply energy to any person, other than a licensee, requiring a supply of energy (in this section referred to as a consumer) if such consumer undertakes to enter into a contract with the Corporation, giving such security as the Corporation may require, to take, or continue to receive, and to pay for a supply of energy upon such terms and conditions as the Corporation may determine.
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(2) The Corporation shall not supply energy to a consumer, other than the licensee, in any area which for the time being forms part of the area of supply of a licensee, except with the consent or such licensee;

Provided that where the consent of a licensee is required under this subsection and such licensee refuses or withholds such consent, the Corporation may appeal to the Governor-in-Council, and the Governor-in-Council, if satisfied that the consent of such licensee is unreasonably refused or withheld, may dispense with such consent. 10

(3) For the purposes of the proviso to subsection (2), consent shall be deemed to be unreasonably refused or withheld if the licensee is not willing and able to supply the requisite energy upon reasonable terms and within a reasonable time, having regard, amongst other things, to the terms upon, and the time within, which the Corporation is willing and able to supply such energy. " 20

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138 et seq
174-176

8. From 1970 onwards consumer discontent arose concerning the Appellant's supply of electricity within the designated area. This discontent was mainly about the prices charged by the Appellant (i) for the installation of an electricity supply and (ii) for electricity supplied. (The rates charged by the Appellant for electricity supplied were the maximum permitted under the licence and supplemental licence.) As a result of this discontent attempts were made by the First and Second Respondents to persuade the Appellant to relinquish his monopoly on the supply of electricity in the designated area :- 30

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(i) On 2nd May 1972 the Chief Electrical Inspector of Sarawak on behalf of the Second Respondent, enquired whether the Appellant would be prepared voluntarily to surrender his licence before its expiry date. The Appellant indicated on 24th May 1972 that he would be so prepared, in consideration of a payment of \$400,000 to him; but by letter of 19th June 1972 the Chief Electrical Inspector indicated that the Second Respondent did not propose to accept this offer or to take over the supply of electricity within the designated area. 40 50

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	(ii) A meeting was held in December 1972 between the Appellant and William Tang Tieng Kee (Permanent Secretary to the Ministry of Communications and Works, Sarawak) to attempt to persuade the Appellant to lower his installation charges. The Appellant refused.	<u>RECORD</u> 142-3
10	(iii) A meeting was held between the Appellant and Lye Fah Yew (General Manager of the First Respondent) in March 1973 to discuss the possibility of the Appellant relinquishing his licence to enable the First Respondent to supply electricity within the designated area. The Appellant refused to give his consent to enable the First Respondent to supply electricity.	141-2
20	(iv) A further meeting was held in the middle of 1973 between the Appellant and the Minister of Communications and Works, at which the main topic of discussion was the possible surrender by the Appellant of his licence before its expiry date. The Appellant repeated his request for compensation of \$400,000, which was refused.	140-1
30	(v) On 23rd July 1973 the Ministry of Communications and Works, on behalf of the Second Respondent, informed the Appellant that the Second Respondent had put forward new tariff rates for the supply of electricity by suppliers other than the First Respondent. The said new tariff rates were lower than those charged by the Appellant, who consequently by his advocate's letter of 7th August 1973 refused to accept them. The Second Respondent thereafter by letter of 13th August 1973 sought the co-operation of the Appellant in implementing the new tariff rates. It is clear from the evidence of William Tang Tieng Kee, Permanent Secretary to the Ministry of Communications and Works, that the said new tariff rates were sent only to the Appellant, and not to other private suppliers of electricity.	127 143, 215-6
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50	9. On 1st August 1973 the First Respondent requested the Appellant to consent to the supply of electricity within the designated area by the First Respondent. The Appellant, by his advocates, on 8th August 1973 refused to accede to this request. The First	77 144 223 144, 224

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144, 225

Respondent thereafter indicated to the Appellant on 8th September 1973 that the First Respondent would nonetheless supply electricity within the designated area.

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10. By letter of 11th August 1973 the First Respondent requested that the Governor-in-Council should dispense with the consent of the Appellant to a supply of electricity by the First Respondent within the designated area under the proviso to section 15(2) of the SESCO Ordinance. In its application for dispensation of the Appellant's consent SESCO annexed to it copies of petitions received from the people of Saratok for the supply of electrical energy. Petitions had been received by the Deputy Chief Minister, the Minister of Communications and Works and SESCO, in which the petitioners' made a number of serious allegations, complaints and charges of inefficiency against the Appellant. This application was not communicated to the Appellant.

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11. On 27th December 1973 the Governor-in-Council dispensed with the Consent of the Appellant under Section 15(2) of the SESCO Ordinance. The Appellant was not informed of the decision of the Governor-in-Council of 27th December 1973 by either of the Respondents until he received a letter from the advocates of the First Respondent dated 19th November 1975.

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12. Following the dispensing of the Appellant's consent under section 15(2) of the SESCO Ordinance, a supplemental licence, dated 10th May 1974, was granted to the First Respondent under Section 4 of the Electricity Ordinance (Cap.137) to supply electricity, inter alia, in the designated area. In 1975 the First Respondent commenced to supply electricity within the designated area, infringing the Appellant's monopoly.

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13. The Appellant commenced proceedings against the First Respondent on 24th August 1976 and against the Second Respondent on 20th September 1976 (Civil Suits No.K.341 of 1976 and No.K.380 of 1976 respectively); in which actions the Appellant sought inter alia declarations that (i) the action of the Governor-in-Council in purporting to dispense with the Appellant's consent under the proviso to section 15(2) of the SESCO Ordinance was ultra vires and void; (ii) that the granting of a licence dated 10th May 1974 to SESCO to supply energy and light within the exclusive area

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- granted to the Appellant under licence dated 20th January 1961 was ultra vires and void; and (iii) that the First Respondent was precluded from using, working or operating any installation for the supply of electrical energy to that area. On 13th March 1978, after the close of pleadings in both actions, it was ordered that action No.K.380 of 1976 be consolidated with Action No.K.341 of 1976. 21-23
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14. In Civil Suit No.K. 341 of 1976 the Appellant also claimed an injunction restraining the First Respondent from acting contrary to the declaration sought against him, and damages. The learned trial judge in the exercise of his discretion declined to grant the injunction sought. By consent of the parties the question of damages was postponed until after the main issue in the consolidated action had been decided. 3 155-6 122
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15. The learned trial judge, with whom the Federal Court of Malaysia agreed, concluded that the audi alteram partem rule applied to this case. It is therefore unnecessary in this case to set out the reasons why that rule should apply to the subject matter of this action, save to say that the Appellant will rely, if necessary, on the authorities cited in the judgments of the trial judge and of the Federal Court of Malaysia to support this finding. 130-150 176-177
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16. The issues in this Appeal are :
- (a) whether the requirements of the audi alteram partem rule were satisfied by the Governor-in-Council in deciding to dispense with the Appellant's consent under Section 15(2) of the SESCO Ordinance;
- (b) irrespective of whether or not the requirements of that rule were satisfied, whether it was open to the Federal Court of Malaysia to refuse the relief sought on the basis that the Governor-in-Council could have come to no other conclusion than that the licensee's consent had been unreasonably withheld or refused according to the test laid down in Section 15(3) of the SESCO Ordinance.
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17. The Appellant respectfully submits that the learned trial judge was right in concluding that the principles of natural justice 150-156
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and in particular the requirements of the audi alteram partem rule had not been observed by the Governor-in-Council in making his determination. It is a cardinal principle of justice that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard and to meet statements made to his prejudice.

Board of Education v. Rice /1911/ A.C.179

De Verteuil v. Knaggs /1918/ A.C. 557 10

Ridge v. Baldwin /1964/ A.C. 40

Durayappah v. Fernando /1967/ 2 A.C.337

S.A. De Smith Judicial Review of Administrative Action, (4th ed.) pages 195 et seq.

148-149

18. The learned trial judge found:

"a) that the Ministry of Communications & Works and SESCO did not inform the plaintiff, either orally or in writing about these petitions and the charges contained therein; 20

b) that SESCO did not inform the plaintiff, either orally or in writing that an appeal would be or had been lodged to the Governor-in-Council asking for dispensation of the plaintiff's consent pursuant to the proviso of subsection 2 of section 15 of the SESCO Ordinance;

c) that the Ministry of Communications & Works did not inform the plaintiff, either orally or in writing, about the appeal lodged by SESCO; 30

d) that neither the Ministry of Communications & Works and/or SESCO gave to the plaintiff proper opportunity to present his case in defence of the charges contained in the said petitions;

e) that the Clerk to the Governor-in-Council did not inform the plaintiff, either orally or in writing, when the appeal lodged by SESCO was being heard by the Governor-in-Council and no opportunity was given to the plaintiff to be heard about the charges made against him by the applicants residing in Saratok district or the reasons why he refused to give his consent to SESCO; 40

f) that the Ministry of Communications & Works had taken an active part in

attempting to settle the dispute between the plaintiff and his consumers of Saratok Town and had an interest in seeing that the appeal by SESCO should succeed;

10 g) that the Governor-in-Council, according to the Permanent Secretary to the Ministry of Communications & Works, confirmed the decision of the Supreme Council of Sarawak that consent of the Plaintiff should be dispensed with;

h) that the plaintiff was not informed of the decision of the Governor-in-Council dated December 27, 1975 by the Clerk to the Governor-in-Council but the plaintiff came to know of the dispensation by way of a letter from the advocates of SESCO only on November 19, 1975.

20 In short, the appeal to the Governor-in-Council was determined, if I may be permitted to use a layman expression, behind the back of the plaintiff and without his knowledge. "

19. In the Appellant's respectful submission the Federal Court of Malaysia failed to take any or any proper account of the findings of the learned trial judge as set out in paragraph 18 above, and/or failed to analyse properly or at all the evidence given at the trial in reaching their decision that the principles of natural justice had been satisfied by the Governor-in-Council. The Federal Court of Malaysia stated in their judgment that "the question for the trial Court is whether there has been such an enquiry to enable the Governor-in-Council to feel satisfied that the consent of the licensee has been unreasonably refused and with respect, the learned trial judge should therefore have considered whether at the proceeding before the Governor-in-Council, there had been a refusal of his consent by the licensee put before the Governor-in-Council, with his reasons for so refusing, if such was the case, and whether opportunities for making any representations that the licensee might want to make were adequately afforded him and such representations had been considered fairly and in good faith and without bias."

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20. The Appellant respectfully submits that the Federal Court of Malaysia were wrong in concluding that the learned trial judge had

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failed to consider the correct questions. The learned trial judge had considered the evidence and found that no opportunity had been given to the Appellant to make any representations to the Governor-in-Council. The Appellant had not been given notice of the Application to the Governor-in-Council to dispense with the Appellant's consent and it was nearly two years after the decision had been taken by the Governor-in-Council that the Appellant first became aware that such application had been made and such proceedings had taken place. 10

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21. In the Appellant's respectful submission the Federal Court of Malaysia, in considering whether the Appellant had been given an opportunity to be heard wrongly took account of evidence as to the events which took place prior to SESCO applying to the Governor-in-Council to dispense with the Appellant's consent. 20

148 et seq

This evidence is in the Appellant's respectful submission and as the learned trial judge rightly held, entirely otiose to the question of whether the Appellant was given an opportunity to be heard on the application to the Governor-in-Council, and should not have been entertained by the Federal Court of Malaysia. The only material question is whether the Appellant had been given notice of the application to the Governor-in-Council and an opportunity to make representations in relation to that application. The only answer to that question is in the Appellant's respectful submission 'NO'. The principles of natural justice not being satisfied, the Appellant respectfully submits that the learned trial judge was correct in holding that the purported decision of the Governor-in-Council was null and void. Ridge v. Baldwin [1964] A.C.40. 30

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22. In the Appellant's respectful submission, the Federal Court of Malaysia misconceived the case being brought by the Appellant and failed to take any or any proper account of the Appellant's claim. In their judgment the Federal Court of Malaysia recorded that it was not the Appellant's case "that a charge has been made against him or evidence in support of such a charge has been adduced against him in his absence: and he has been denied adequately the means to meet such a charge or answer such evidence..... Neither was it the case of a fair opportunity of correcting or contradicting any statement prejudicial to him." 40 50

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Such statement was entirely contrary to the claim being maintained by the Appellant and

	inconsistent with a passage earlier in the judgment of the Federal Court of Malaysia that, "The entire burden of the <u>[Appellants]</u> complaint is that the Government had taken this view without giving him an opportunity to be heard". The Appellant refers to paragraph 9 of the Amended Statement of Claim in Suit No. K 380 of 1976 and the findings of the trial judge set out in paragraph 18 above.	<u>RECORD</u> 176 17 148-149
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20	23. In the Appellant's respectful submission, the learned trial judge rightly rejected the attempt by the Assistant Attorney General to justify the decision of the Governor-in-Council to dispense with the Appellant's consent by calling evidence in support of some or all of the charges contained in the petitions adduced in evidence. The learned trial judge correctly stated the position when he said "In short, the proceeding before the Governor-in-Council was vitiated when his Excellency completely failed to observe the rules of audi alteram partem and that there existed no emergency in the district of Saratok to justify a departure from the principles of natural justice".	156 156
30	24. In the Appellant's respectful submission the Federal Court of Malaysia was wrong to take any account of such evidence and of section 15(3) of the SESCO Ordinance. By so doing the Federal Court of Malaysia wrongly substituted themselves for the Governor-in-Council and wrongly concluded that they had all the material evidence before them and that had the Appellant been given an opportunity to make representations, he could have added nothing to that evidence.	 185
40	25. In the Appellant's respectful submission the Federal Court of Malaysia misconstrued Section 15(3) of the SESCO Ordinance, in holding that the same laid down a strictly objective test and in holding that if the Appellant was not willing to supply the energy on comparable terms to SESCO, then the consent was unreasonably refused. On a true construction of this section the Governor-in-Council is required to consider whether the terms on which and time within which the licensee is willing and able to supply energy are reasonable	 185
50	"having regard, <u>amongst other things</u> , to the terms upon, and time within, which the Corporation is willing and able to supply energy". Thus it is not sufficient merely to determine that the licensee is not willing to supply energy on comparable terms to the	

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- 148-149, 185 Corporation; and the Governor-in-Council must consider all the evidence adduced before him as to the terms of supply of energy by the licensee and by SESCO and the reasonableness of such terms. For this purpose the rules of natural justice require that the licensee is given an opportunity to be heard and to answer any evidence prejudicial to him. The Appellant was not given such opportunity before the Governor-in-Council or the Federal Court of Malaysia. The Appellant respectfully submits that the Federal Court of Malaysia was not entitled to and, not knowing what submissions would have been made by the Appellant had he been given the opportunity to make them, could not rightly conclude that it was inevitable that the Governor-in-Council would have reached the same decision had he heard the Appellant. 10
- 185 26. In the Appellant's submission it was not open to the Federal Court in any event to decide the case before it on its merits. The role of the Court is supervisory and the Court should only concern itself with ensuring that the procedure followed by the Governor-in-Council complied with the requirements of natural justice. If the principles of natural justice are violated in respect of any decision, it is immaterial that the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice: 20
- 185 General Medical Council v. Spackman [1943] A.C.627 per Lord Wright at p.644. 30
- Annamunthado v. Oilfields Workers' Trade [1961] A.C. 94 at p. 956.
- R. v. Registrar of Building Societies [1960] 1 W.L.R. 669 per Hodson L.J. at p.684
- Ridge v. Baldwin [1964] A.C. 40 per Lord Reid at p.68, per Lord Morris of Borth-y-Gest at p.126 and 7, per Lord Hodson at p.128. 40
- 190 27. On 4th March 1980 the Federal Court of Malaysia (Raja Azlan Shah, Chief Justice, High Court Malaysia, Chang Mun Tat, Judge, Federal Court Malaysia, Syed Othman, Judge Federal Court Malaysia) made an order granting the Appellant leave to appeal to His Majesty the Yang Di-Pertuan Agong.
28. The Appellant respectfully submits that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed, that this 50

appeal ought to be allowed with costs both here and below and that the declarations granted by the learned trial judge ought to be restored.

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R E A S O N S

- 10 (1) BECAUSE the decision of the Governor-in-Council made on 27th December 1973 was made in contravention of a rule of natural justice, namely the "audi alteram partem" rule.
- (2) BECAUSE it is not open to a Court to determine the merits of the decision reached by the Governor-in-Council.
- (3) BECAUSE it was not inevitable that the Governor-in-Council could have come to no decision other than that of 27th December 1973.
- (4) BECAUSE the judgment of the Federal Court of Malaysia was wrong.
- 20 (5) BECAUSE the judgment of the learned trial judge was correct.

MARION SIMMONS

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

B E T W E E N :

- and -

- and -

CASE FOR THE APPELLANT

Solicitors for the Appellant