

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 CORP

First Respondent

- and -

THE GOVERNMENT OF THE STATE OF SARAWAK

Second Respondent

CASE FOR THE FIRST RESPONDENT

Record

1. This is an appeal from a judgment of the Federal Court of Malaysia (Lee Hun Hoe, CJ, Borneo, and Chang Min Tat and Salleh Abbas, FJJ) dated 6 July 1979, allowing with costs the Respondents' appeal from a judgment of Seah J in the High Court in Borneo dated 14 December 1978, whereby it was adjudged and declared that certain acts of the Governor-in-Council in relation to an area covered by an electrical supply licence granted to the Appellant were null and void as being taken in breach of the rules of natural justice and that the first Respondent ("the Corporation") was precluded from providing electricity in that area.

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p. 120
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THE ISSUES

2. The question for decision involves the construction and application of the Sarawak Electricity Supply Corporation Ordinance (1962). That Ordinance provides for the establishment of the Corporation, for its functions and for matters connected with and incidental thereto. The provisions of section 15 of the Ordinance, which are directly relevant to this case, are :

15. (1) Subject to the provisions of Subsection (2), insofar 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.

(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 of 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.

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(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.

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3. By a licence in writing granted on 20 January 1961 by the Governor of Sarawak to the Appellant the Appellant was given the exclusive right to provide electric energy in a specified part of Saratok until 1985, with an opportunity for renewal for further periods of five years.

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4. On 10 May 1974 the Governor granted to the Corporation a licence to supply electricity in the area covered by the Appellant's licence and the corporation has since been supplying electricity in that area. The Appellant had refused his consent to this but the Governor, purporting to exercise his powers under section 15(2) of the Ordinance, dispensed with the Appellant's consent on 27 December 1973.

5. The issues raised on this Appeal are:-

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- (i) Was the Governor bound by the rules of natural justice to afford the Appellant a hearing, or the opportunity to be heard, before dispensing with his consent and, if so
- (ii) Did the Governor comply with the rules of natural justice in this respect?
- (iii) Is the Appellant in any event entitled to recover damages from the Corporation?

The Appellant contends that the answer to the first question is 'yes', the answer to the second question is 'no', the answer to the third question is 'yes' and that accordingly the Corporation is acting unlawfully in the area of his licence and is liable to pay damages. The Corporation contends that the answer to the first question is 'no', that the answer to the second is 'yes' and that accordingly the Appeal should be dismissed. The Corporation further contends that the answer to the third question is 'no'.

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THE FACTS

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6. In the course of a lengthy judgment Seah J made detailed findings of fact. For the purposes of this Appeal the Corporation wishes to emphasise the following:-

- (i) Ever since the Appellant started supplying electricity in his licence area there was complaints about voltage

fluctuations.

- (ii) In 1970 when most of the Saratok bazaar was destroyed by fire the Appellant increased his charges for connecting electricity to the temporary buildings replacing those destroyed by over 40 percent. By a letter dated 22 August 1970 the consumers of Saratok Town complained of this to the government.
- (iii) The Appellant demanded a charge of \$380.15 per shopowner for connecting electricity to the new Saratok bazaar and refused to contemplate a reduction despite widespread protest. p. 125
- (iv) On 2 January 1972 the Appellant announced that he would be raising his tariff rates to the maximum permitted by a Supplementary Electricity Licence granted on 19 October 1971. p. 125
- (v) On 2 May 1972 the Chief Electrical Inspector Sarawak inquired of the Appellant by letter whether in view of the Government Rural Electrification programme he would be willing to surrender the licence voluntarily before its expiry date on 31 December 1985. The Appellant replied on 24 May 1972 stating that he would be prepared to do so on payment by the Government of \$400,000 as compensation. On 19 June 1972 the Chief Electrical Inspector replied that "the Government does not propose to take over the electrical installations in Saratok at present." p. 125
- (vi) On 30 December 1972 the shopowners of Saratok bazaar sent a petition to the Deputy Chief Minister and the Minister for Communications & Works urging the Government to take over the role of supplying electricity to the township and giving seven reasons for taking this course. p. 125
p. 139
- (vii) On 23 January 1973 most of the shopowners addressed a letter to the Appellant informing him that they would cease using the electric energy from his generating plant as from 1 March 1973. Copies of the letter were sent to the Corporation and Government. The 'Strike' took effect as threatened. p. 125
p. 140
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- (viii) In early 1973 there was a discussion between the Corporation and the Ministry of Communications & Works about the possibility of the Corporation moving into Saratok Town. A feasibility study was carried out by the Corporation towards the end of March 1973 and in May 1973 the Corporation's General Manager was informed that the Corporation could supply electric energy to the consumers in Saratok, but would suffer an estimated loss of approximately \$6,000 each month. This was communicated to the Minister of Communications & Works. p. 140
- (ix) In early 1973 the Supreme Council of the Government of Sarawak was made aware of the problem regarding Saratok electricity and deliberated on the matter on at least four subsequent meetings. p. 145
- (x) On 5 March 1973 the elected representatives of the Saratok p. 140 -

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- p. 141 Bazaar shopowners appealed to the Deputy Chief Minister and the Minister of Communications & Works to permit them to present their case and express their views on their dispute with the Appellant. The Minister met the delegation in March 1973 and he met the Appellant sometime in the middle of 1973. The main topic discussed at the meeting with the Appellant was whether he was prepared to surrender his licence before 31 December 1985 and on what terms. The Appellant referred to his letter of 24 May 1972 which set out his willingness to surrender the licence for \$400,000 and the reply dated 19 June 1972. 10
- p. 126 (xi) On 14 March 1973 a joint application was made by the Chinese and
p. 141 Malay community leaders to the Corporation's General Manager
p. 147 requesting them to operate a generating plant in Saratok Town. Another letter supporting the joint application was signed by a number of people and sent on 5 May 1973.
- p. 148 (xii) The petitioners referred to were well supported by the peoples living in Saratok bazaar and the Kampong folks.
- p. 126 (xiii) On 17 March 1973 the Corporation mistakenly addressed a letter
p. 141 intended for the Appellant to Swan Electrical Works Sdn. Bhd. The letter was received by the Appellant who was asked whether he would be prepared to allow the Corporation to take over all the Appellant's consumers so that the project of starting a generating plant by the Corporation could be made economically viable. The letter ended by inviting the Appellant to discuss the question of the Corporation taking over the supply of electricity for Saratok. 20
- p. 141 (xiv) The Appellant visited the Corporation's General Manager at his office and they discussed the possibility of the Appellant relinquishing his licence to enable the Corporation to go into Saratok. The Appellant refused to give his consent for this. 30
- p. 142 The General Manager must have conveyed the outcome of his meeting with the Appellant to the Ministry of Communications & Works.
- p. 127 (xv) On 23 July 1973 the Ministry of Communications & Works sent a letter
p. 143 to the Appellant informing him that the Corporation proposed to introduce new electricity tariff rates for adoption by all suppliers of public electricity other than the Corporation. The rates were much lower than those previously approved by the Governor and by a letter dated 7 August 1973 the Appellant replied that the Government was acting in contravention of the Licence granted to the Appellant by successive Governors. By their letter
p. 143 dated 13 August 1973 the Ministry of Communications & Works refused to withdraw the tariff. 40
- p. 126 (xvi) On 1 August 1973 the Corporation's General Manager sent a
p. 144 letter to the Appellant requesting him to give his consent in order to allow the Corporation to move into Saratok and to supply electrical energy to the people living in the town. On 8 August 1973 the Appellant replied through his advocates that -
- "he is, and has been, able and willing to supply the requisite energy upon reasonable terms and within reasonable time and that therefore he is not prepared to give the consent you seek." 50

On 8 September 1973 the Corporation replied to the Appellant as follows -

"In reply to your letter dated 8th August 1973 this is to inform you that the electrical supply application from the Saratok people have been considered by the Corporation and the Saratok applicants have been informed regarding the rate, terms and conditions upon which SESCO will supply the energy. We would like to add that SESCO is under a legal obligation to provide electricity to such applicants".

- 10 (xvii) On 11 August 1973 the Corporation wrote to the Permanent Secretary of the Ministry of Communications & Works requesting that a dispensation of consent from the Appellant be obtained from the Governor-in-Council under section 15(2) of the SESCO Ordinance. P. 127 p. 144
- (xviii) On 6 October 1973 the Ministry of Communications & Works wrote to the Corporation suggesting the supply of electricity to Saratok as a joint venture with the Appellant. This proposal had been decided upon by the Supreme Council and conveyed to the Ministry by the Clerk of Council on 27 September 1973. The Board of the Corporation considered these proposals and turned them down; the Board decided to take over the exclusive supply of electric energy in the Saratok district and conveyed its decision to the Ministry. p. 127 p. 145 p. 146
- 20 (xix) On 22 November 1973 the Supreme Council decided that if the proposed joint venture was unworkable the Corporation should take steps in accordance with section 15 of the SESCO Ordinance. On 13 December 1973 the Supreme Council was informed that the Corporation considered the joint venture unworkable and allowed their request to proceed under section 15. The decision was confirmed by a meeting of the Supreme Council held on 24 December 1973. That decision was referred to the Governor-in-Council for confirmation. p. 127 p. 145
- 30 (xx) On 27 December 1973 the Governor-in-Council was satisfied that the Appellant had unreasonably refused or withheld his consent to the supply to the area of electric energy by the Corporation and dispensed with that consent. p. 127 p. 145 p. 146
- (xxi) On 10 May 1974 the Governor of Sarawak granted to the Corporation the Sixth Supplemental Electricity Licence extending, inter alia, the area of operation to include the district of Saratok. p. 127
- 40 (xxii) Relying on the Sixth Supplemental Electricity Licence the Corporation moved into Saratok Town and began to supply electric energy to the consumers in the district of Saratok in November 1975. p. 128

THE DECISION OF SEAH J

7. On 14 December 1978, Seah J gave judgment for the Appellant and made an order : p. 119
- (a) declaring that the action of the Governor-in-Council purporting to dispense with the consent of the Appellant under the proviso p. 155

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to section 15(2) of the Sarawak Electricity Supply Ordinance was null and void;

p. 155 (b) declaring that the act of the Governor in Sarawak in granting the Sixth Supplemental Electricity Licence dated 10 May 1974, to SESCO 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 SESCO Power station, Saratok, was null and void insofar as it purported to cover the designated area in Saratok under the Licence granted to the Appellant dated 20 January 1961;

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p. 155 (c) declaring that the first Respondent was 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 20 January 1961, granted by the Governor of Sarawak to the Appellant pursuant to section 4 of the Electricity Ordinance (cap. 137).

p. 155 In the exercise of his discretion, Seah J considered an injunction
p. 156 against the first Respondent would be inappropriate, and that damages were an adequate remedy.

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p. 156 Costs were reserved.

THE REASONS FOR THE DECISION OF SEAH J.

8. Seah J gave the following among other reasons for his judgment.

p. 148 (a) He found that on the evidence neither the first nor the second Respondents informed the Appellant either orally or in writing about the petitions and the charges in the petitions of the Saratok Bazaar shopkeepers.

p. 148 (b) Further, he found that neither the first nor the second Respondents
p. 149 informed the Appellant that an appeal for dispensation would be made.

p. 149 (c) Further, that neither the first nor the second Respondents gave to to the Appellant a proper opportunity to present his case in defence of the charges contained in the petitions.

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p. 149 (d) Further, that the Clerk to the Governor did not inform the Appellant of the hearing: no opportunity was given to the Appellant to be heard about charges made against him by applicants for electricity residing in Saratok or to give reasons why the Appellant refused to give his consent to the Corporation.

p. 149 (e) Further, that the Government took an active part in trying to settle the dispute between the Appellant and the Saratok Bazaar shopowners and had an interest in seeing that the appeal for dispensation by the Corporation should succeed.

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p. 149 (f) Further, that the Governor-in-Council decided to dispense with consent.

p. 149 (g) Further, that the Appellant was not informed of this and did not known of this from the Corporation until two years later.

(h) Seah J summarized the position thus :-

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

(i) Seah J considered that the principle of audi alteram partem applied.

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(j) The Appellant was entitled to a notice of appeal to be given a fair opportunity of being heard. He should have been given a reasonable opportunity to know the charges he had to meet and a reasonable opportunity to meet them.

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(k) The Governor-in-Council had to hear both sides and might not hear one side in the absence of the other. This was not done.

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(l) The Appellant was not given the opportunity by the Governor-in-Council to defend himself against the allegations and complaints made against him by the peoples of Saratok district.

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(m) There was, the learned judge considered, no emergency or other factor justifying the non-application of the principle of audi alteram partem. There was no evidence showing oppressive or obstructive conduct of the Appellant preventing proper investigation.

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(n) Further, there was no state of affairs demanding drastic and immediate action, the test being whether an emergency existed in the district of Saratok at the material time.

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THE APPEAL TO THE FEDERAL COURT OF MALAYSIA

9. The first and second Respondents appealed to the Federal Court of Malaysia (Federal Court Civil Appeals Nos. 11 & 18 of 1979).

THE DECISION OF THE FEDERAL COURT

10. On 6 July 1979 the Federal Court of Malaysia (Lee Hun Hoe CJ, Borneo, and Chang Min Tat and Salleh Abbas, FJJ) allowed the appeal with costs in both Courts. The judgment of the Court was delivered by Lee Hun Hoe, CJ.

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THE REASONS FOR THE DECISION OF THE FEDERAL COURT

11. (a) The Court was of the view that the principle audi alteram partem applied.

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(b) The question was whether this principle had been "in substance" observed by the Governor-in-Council.

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(c) There was no need as a matter of law for an oral hearing. Lee Hun Hoe CJ said :-

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"The question for the trial court is whether there had been such an enquiry to enable the Governor-in-Council to feel satisfied that the consent of the Licensee had been

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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 without bias. Since he did not, we now have to examine such of the evidence as is relevant and to consider whether what had been done, accords with the requirements of a fair and adequate hearing, bearing in mind what Raja Azlan Shah FJ said in *Ketua Penkarah Kastam v. Ho Kwan Seng* (1977) 2 M.L.J. 153 F.O. that the hearing may take many forms and strict insistence upon an inexorable right to the traditional court room procedure can lead to a virtual administrative breakdown." 10

(d) The Federal Court then turned to consider the evidence, which may be summarized as follows:-

p. 180 (i) That in May 1972, the Chief Electrical Inspector for Sarawak sent to the Appellant a letter asking for the Appellant's consent to surrender of his licence. After hearing the Appellant's proposals nothing further was done. 20

p. 180 (ii) In July 1973, in a letter from the Ministry of Communications
p. 182 & Works, Sarawak, a new tariff was sent to the Appellant, involving
p. 215 lower rates. In a letter from the Appellant on 7 August 1973, the licensee had indicated clearly that he was not willing to supply electricity upon the terms with which the Corporation was willing and able to supply such energy.

p. 182 (iii) In August 1973, the Corporation formally sought the
p. 183 Appellant's consent and the Appellant refused this in a letter of 8 August 1973. 30

p. 183 (iv) It appears that the Appellant felt the maximum rates he was able to charge under his tariff were reasonable rates and that the Appellant could have operated at the rates charged by the Corporation without similar loss.

p. 184 (v) The refusal of the Appellant to give his consent for the reasons so clearly and fully set out in his solicitor's letters was communicated to the Governor before making his decision.

p. 184 (e) The Federal Court considered that there was nothing that the
p. 185 Appellant could have added to what he had already said. 40

p. 185 (f) The objective test of section 15(3) of the 1962 Ordinance was applied:

p. 185 If the evidence is, as it clearly was in this case, that the Licensee is, among other things, not willing to supply the energy required upon the terms which SESCO is willing and able to offer, then the Licensee's consent, however he may in his own mind think it reasonable to refuse or withhold, is deemed to be and is unreasonably refused or withheld.

FINAL LEAVE TO APPEAL

12. On 4 March 1980 the Federal Court of Malaysia gave final leave to appeal to His Majesty the Yang di-Petuan Ajong.

SUBMISSIONS

13. The Corporation will, if necessary, submit that the audi alteram partem rule did not have to be observed by the Governor-in-Council when making his decision. The statutory requirement was simply that the Governor-in-Council should be satisfied that the Appellant's consent was unreasonably refused or withheld. The decision was purely administrative and falls within the principles set out in Nakkuda Ali v. Jayaratne (1951) A.C. 66 as well as R v. Metropolitan Police Commissioner ex parte Parker (1953) 1 W.L.R. 1150. The word "appeal" as used in section 15(2) of the Ordinance means to request or apply.

14. The Corporation further submits that the Administrative appeals Rules did not govern the matter. The Appellant did not fall within the definition of Respondent set out in section 2 of the Rules.

15. If it be that the rule audi alteram partem did apply, the Corporation submits that the requirements of the rule were satisfied in the prevailing circumstances. The Appellant was well aware of the complaints concerning the prices charged by him. He received the letter of complaint from the shop owners dated 23 January 1973. The threatened boycott began on 1 March 1973 and lasted until 31 August 1973 when the new shops came into use. These remained without electricity until it was supplied by the Corporation. In the meantime the Appellant discussed the position with the Minister of Communications & Works; but adhered to his statement in May 1972 that he would surrender his licence for \$400,000. The Appellant also saw the Corporation's General Manager. The Appellant refused to adopt the rates set out in the letter to him dated 23 July 1973 from the Ministry of Communications & Works. In the letter dated 8 August 1973 from his Advocates to the Corporation, the Appellant demonstrated his familiarity with the criteria set out in section 15(3) of the Ordinance. Thus at all relevant times the Appellant was aware of the case against him and had the opportunity of making representations to persons reporting back, whether directly or indirectly, to the Supreme Council. There was evidence of overcharging which became overwhelming with the imposition of the tariff set out in the letter of 23 July 1973. It was apparent that the Appellant had no intention of revising his charges with the effect that he was depriving users within the licence area of electrical energy.

16. The Corporation will further submit that if any test of fairness is to be applied, it should accord with the general circumstances of the case and considerations of broad policy. The policy of the Government was to supply electricity to rural areas. The condition of those within the licence area was such that they were willing to deprive themselves of the benefit of electricity if it was to be supplied by the Appellant who had demonstrated a consistently intransigent attitude. If the situation was not an emergency, it was at least one requiring early and decisive action.

17. The Corporation further relies upon the events set out above as showing that whatever the nature of any hearing that the Appellant might have had, nothing that he might have said could reasonably have affected the result. (Glynn v. Keele University (1971) 1 W.L.R. 487; Malloch v. Aberdeen University (1971) 1 W.L.R. 1578 at p. 1595 and Wislang v. Medical Practitioners Disciplinary Committee (1974) 1 NZLR 29). It is also submitted that these grounds are sufficient to support the discretion exercised by the Federal Court against the Appellant. (Hoffman - La Roche & Co. v. Secretary of State for Trade and Industry (1975) A.C. 295 at p. 320).

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18. Finally, the acts of which the Appellant complains against the Corporation were committed pursuant to the Sixth Supplementary Licence granted by the Governor on 10 May 1974 and after the revocation of the Appellant's licence. It is submitted that whether or not the Governor acted wrongly in disregarding the rules of natural justice, the Corporation has at all times acted lawfully and can be under no liability to the Appellant.

19. The Corporation submits that this Appeal should be dismissed with costs for the following among other

R E A S O N S

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- (1) BECAUSE, on the true construction of section 15 of the Sarawak Electricity Supply Corporation Ordinance 1962, the principle audi alteram partem was not applicable to the decision of the Governor-in-Council as to whether or not to dispose with the need for the consent of the holder of a licence.
- (2) BECAUSE, in the alternative, if the said principle was applicable it was duly observed.
- (3) BECAUSE, as the Federal Court has rightly held, the test to be applied was whether there had been such an inquiry as to enable the Governor-in-Council to feel satisfied that the consent of the licensee had been unreasonably refused.
- (4) BECAUSE, as the Federal Court has rightly held, there was no need for an oral hearing.
- (5) BECAUSE, in applying the principle the Governor was entitled to have regard to all the prevailing circumstances.
- (6) BECAUSE, evidence shows that an inquiry took place which was such as to enable the Governor-in-Council to feel satisfied that the consent of the licensee had been unreasonably refused, and that inquiry satisfied the principle audi alteram partem and gave the Appellant a fair and adequate opportunity to justify his refusal of consent.
- (7) BECAUSE, the evidence showed that there was nothing the Appellant could say before the Governor-in-Council which would have materially added to what he had already said.
- (8) BECAUSE, as the Federal Court has rightly held, the

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objective test of section 15(3) of the Sarawak Electricity Supply Corporation Ordinance 1962, was applicable.

(9) BECAUSE, as the Federal Court has rightly held, the facts justified the application of section 15(3) of the said Ordinance.

(10) BECAUSE, in any event, the Corporation has at all times acted lawfully and is not in breach of any duty owed by it to the Appellant.

10 (11) BECAUSE, in the result the Federal Court was right.

NICHOLAS PHILLIPS

NICHOLAS CHAMBERS

IN THE JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL

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CASE FOR THE FIRST RESPONDENT

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the First Respondent