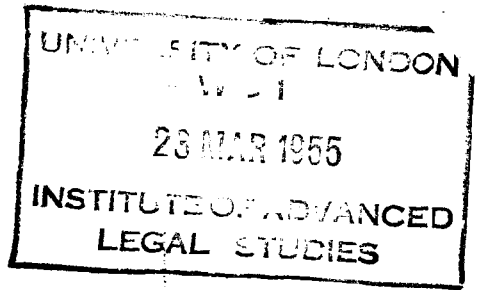


PC
G. H. G. S.

31, 1954



In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG.

38088

No. 45 of 1953.

Between

JUAN YSMAEL & COMPANY INCORPORATED (Plaintiffs) *Appellants*

and

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA
(Defendants) - - - - *Respondents.*

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No. 46 of 1953.

And Between

JUAN YSMAEL & COMPANY INCORPORATED (Defendants) *Appellants*

and

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA
(Defendants) and ANTHONY LOH (trading as A. W. King)
(Plaintiff) - - - - *Respondents.*

CASE FOR THE APPELLANTS.

1. These are consolidated appeals from a judgment given on 8th December 1952 by the Appeal Court of Hong Kong reversing a judgment of Mr. Justice Reece in the Supreme Court of Hong Kong (Admiralty Jurisdiction) dated 15th September 1952 and setting aside the writs and all subsequent proceedings in two actions, namely Action No. 6 and Action No. 8 in the Supreme Court of Hong Kong (Admiralty Jurisdiction).

Record "A"
(Appeal No. 45)
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2. The Appellants are a company incorporated under the laws of the Philippine Islands, and are the owners of a number of steamships and other vessels. One of such steamships is the S.S. Tasikmalaja, formerly Christobal, which the Appellants acquired by bill of sale in 1950. The vessel was and is registered upon the Panamanian registry. For various periods subsequent to

Record "A"
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1st January 1951 the vessel was chartered to the Government of Indonesia. The last of such periods commenced on 1st January 1952 and was due to terminate not later than 30th June 1952. Before that date however the Appellants learned that an attempt was being made by one Frank Starr who was employed by the Appellants as a Commission Agent with the Government of Indonesia fraudulently and without any authority from the Appellants to sell the vessel to the Government of Indonesia and the Appellants were apprehensive lest the Government should take possession of the vessel.

3. On 24th June 1952 the Tasikmalaja was lying in Hong Kong waters in a dock owned by the Hong Kong & Whampoa Dock Co. Ltd. undergoing certain repairs. The Master of the vessel was one Jose Maria Silos, and his crew, which acknowledged the authority of the Master, was partly Filipino and partly Indonesian. 10

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4. On 27th June 1952 the Appellants issued a writ in the Supreme Court of Hong Kong, Admiralty Jurisdiction, against the steamship Tasikmalaja of the port of Panama in the Republic of Panama. By the Statement of Claim endorsed on the writ the Appellants as sole owners of the vessel claimed to have legal possession decreed to them of the said vessel. The Action so instituted was designated Action No. 8 of 1952.

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Record "B"
(Appeal No. 46)

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Record "A"
(Appeal No. 45)

5. On 27th June 1952 the said vessel was arrested by process of the Court in this Action and at all material times thereafter remained in the legal custody of the Head Bailiff of the Supreme Court. The vessel had previously on 25th June 1952 been arrested in Admiralty Jurisdiction Action No. 6 of 1952 which was an action brought against the vessel by one Anthony Loh trading as A. W. King for ships necessities to which appeal No. 46 of 1953 relates. 20

PROCEEDINGS in ACTION No. 8.

p. 3

6. On 30th June 1952 an appearance under protest was entered by the Government of Indonesia without prejudice to an application to dismiss the action.

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7. On 8th July 1952 the Appellants gave notice of motion for an order that six members of the crew be committed for contempt in excluding or attempting to exclude the acting Captain Jose Maria Silos from boarding or remaining on board the ship. The motion was supported by an affidavit from Captain Silos in which he deposed that he had remained on the ship as acting Captain in full charge until 30th June 1952 when he received a letter from the Consul General of Indonesia at Hong Kong purporting to dismiss him, which dismissal he rejected. On the same day he was compelled by the threatening attitude of Indonesian members of the crew to go on shore for the night. On 3rd July 1952, after a protest had been sent by the Appellants Solicitors against the exclusion of Captain Silos, the Solicitors for the Government of Indonesia wrote to the Appellants Solicitors that the Government were allowing Captain Silos to go on board and were confirming his present appointment as Master approved by the Government. 30 40

8. Judgment in the contempt proceedings was delivered by Reece J. on 14th July 1952. After referring to the letter of 3rd July 1952 and to assurances given by Counsel on behalf of the Government of Indonesia, the learned Judge stated that he felt satisfied that he need not say more than that he trusted that the Consul-General would be advised to refrain from doing anything which would imperil the status quo on the ship pending the determination of the actions. He thought it sufficient to warn the respondent members of the crew not to interfere with the custody of the ship in the hands of the bailiff nor in any way with Captain Silos while on the ship nor to hinder him from freely coming to and going from the ship and to obey any orders he might give in connection with the ship while on the ship and to order them to pay the costs of the Motion. Record "A"
p. 18
p. 21
9. Meanwhile on 9th July 1952 the Government of Indonesia had given notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a Foreign Sovereign State and that the Government of Indonesia was the owner or was in possession or control or entitled to possession of the vessel. p. 22
10. Affidavits were sworn in support of the motion by various persons including in particular Kwee Djie Hoo, described as Consul General for the Government of Indonesia at Hong Kong and Pamoe Rahardjo described as a Major in the Army of the Republic of Indonesia. On 25th July 1952 the Appellants gave notice of their intention to cross-examine these deponents, and applied for leave so to do. On 25th August 1952 Reece J. granted leave to cross-examine. Thereupon the Government of Indonesia claimed diplomatic privilege for the deponents but on 27th August 1952 Reece J. ruled that the deponents were not entitled to diplomatic privilege. Summonses were accordingly issued to the deponents to attend for cross-examination and further interlocutory proceedings took place, but on 15th September 1952, the deponents not having attended and it appearing that Major Pamoe Rahardjo had left Hong Kong on 6th September 1952, Reece J. ordered the affidavits of Kwee Djie Hoo and Major Pamoe Rahardjo to be removed from the files. p. 86
p. 88, p. 92
p. 123
11. The only other affidavits filed by the Government of Indonesia in support of their motion were:—
- (A) An affidavit filed on behalf of the Hong Kong and Whampoa Dock Co. Ltd. in which it was said that repairs to the Tasikmalaja had been ordered by the Indonesian Consul General in April 1952 and that work on the vessel had been proceeded with since that date. p. 24
- (B) An affidavit by a partner in the firm of solicitors acting for the Government in answer to an affidavit as to Philippines law sworn on behalf of the Appellants (see paragraphs 12 (d) and 15 below). p. 25
- (C) An affidavit by one Mandagi filed 9th July 1952 that he had been since 30th June 1952 Captain of the vessel and appointed by the Consul General and that the members of the crew had been obeying his orders. He p. 23

Record "A"

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claimed to be in possession of the vessel subject to the arrest by the Court. The learned judge did not accept that this was the position.

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(D) An affidavit sworn by one Walandouaw which was not read at the hearing before Reece J.

12. Affidavits were filed on behalf of the Appellants on the motion by (inter alios) the following persons:—

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(A) Khalil Khodr the duly authorised attorney of the Appellants.

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(B) Jose Maria Silos the acting Captain of the vessel.

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(C) Jose Briones who was employed as secretary by Frank Starr the Appellants' agent with the Government of Indonesia. 10

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(D) Augusto Revillia an expert in Philippines law.

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13. The evidence of Khalil Khodr was that the Appellants were at all material times the sole owners of the vessel, which was registered on the Panamanian Registry, having acquired it on 16th September 1950 by Bill of Sale. He produced the original documents of title. He stated that on 17th March 1952 Frank Starr purported to sell the vessel to Pamoe Rahardjo, but that the said Starr had no authority to do so, and that the Government of Indonesia knew he had no authority; that the purported sale was a fraudulent conspiracy; that no money had been paid to the Appellants and that the purported sale was based on a photostatic copy of the documents of title. Further he deposed that after the purported sale the Government of Indonesia had dealt with the Appellants as though they were still the owners of the vessel. The vessel was at all material times in the physical custody and control and possession of the Appellants through their servants the Master, Captain Aguado, or the acting Captain Jose Maria Silos, and specified members of the crew including the Radio Operator and Boatswain. The wages of the crew had been paid by the Appellants. He referred to various charters of the vessel by the Indonesian Government including a charter for six months from 1st January 1952. He exhibited a copy of the first of such charters from the terms of which it appears that the charter was a usual form of time charter, but he did not put in evidence or testify to the terms of any charter covering the period up to and including June 1952. He stated that, before the vessel was sent from Indonesia to Hong Kong for repairs, instructions were given to keep its arrival secret from the Appellants. He stated that he had been informed by Captain Silos that a representative of the Indonesian Ministry of Defence had been attempting to obtain possession of the vessel and expressed the apprehension that unless the vessel were arrested and taken into the protective custody of the Court, control and custody might be forcibly taken and the vessel removed from the jurisdiction of the Court. 20 30

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14. The evidence of Captain Silos was that he was appointed acting Captain of the vessel in the absence of Captain Aguado on 9th May 1952 by Frank Starr acting on behalf of the Appellants and that he was still acting Captain on 27th June 1952. At all material times up to the date of commencement of 40

p. 325 to ask, additionally, that the writ and all subsequent proceedings in Action No- 8 be set aside on the ground that the said Action impleads a foreign Sovereign State and that in consequence it might be declared that the judgment of Reece J. dated 24th October 1952 was null and void for want of jurisdiction and that the S.S. Tasikamalaja be released from arrest in the action. The Court also had before it appeals from the orders of Reece J. refusing diplomatic immunity to Kwee Djie Hoo and Major Pamoe Rahardjo and granting the order to cross examine those deponents, but only heard argument on the question whether the Government of Indonesia was impleaded. The Court also had before it an appeal relating to Admiralty Action No. 6 which forms the subject 10 of Appeal No. 46.

p. 367 21. On 13th December 1952 verbal judgment was given by the Appeal Court allowing the appeal and judgment was given in the terms of the notice of motion.

p. 378 22. On 8th January 1953 the Appeal Court delivered written reasons for judgment which related also to the appeal in Action No. 6. The Court based its judgment upon the evidence filed on behalf of the Appellants and did not read or consider the affidavits which Reece J. had struck off the files.

p. 385 The Court found that the Tasikmalaja was brought into Hong Kong under the direction and control of the Government of Indonesia which had 20 throughout claimed ownership by reason of the purported sale. From the wording of the writ the inference was open that the intention was to challenge the purported sale to the Government of Indonesia. In these circumstances the Court was of opinion that the issue of the writ in rem directly impleaded the Government of Indonesia. No importance should be attached to the sides taken by the mixed crew after the dispute as to ownership became general knowledge but, in the opinion of the Court, the ship was under the control of the Government of Indonesia until the ship was arrested. The Government had more than a bare claim or assertion of ownership; by the admitted pur-ported sale the Government had acquired a proprietary right sufficient within 30 the authorities to maintain a plea of impleading; the proprietary right stemmed from the purported sale and the issue whether the sale was valid was not one for the Courts.

Record "B
(Appeal
No. 46)
p. 3

PROCEEDINGS in ACTION No. 6.

p. 3 23. On 27th June 1952 appearance was entered to the writ issued by Anthony Loh by the Appellants as sole owners of the ship Tasikmalaja.

p. 4 24. On 30th June 1952 an appearance under protest was entered by the Government of Indonesia without prejudice to an application to dismiss the action.

p. 4 25. On 9th July 1952 the Government of Indonesia gave notice of motion 40 for an order that the writ and all subsequent proceedings be set aside on the

- the proceedings he had been in full physical possession and control of the vessel on behalf of the Appellants and of no other party. He confirmed the evidence of Khalil Khodr regarding payment of the crew. On 30th June 1952 he received a letter from the Indonesian Consul-General at Hong Kong purporting to dismiss him. On the same day he (the deponent) replied rejecting the order. He referred to a ceremony which took place on board the vessel on 16th April 1952 when the Indonesian flag was hoisted on the vessel in the presence of the Indonesian Consul-General. He said that the owners were not consulted on this matter and that no instructions were given to him regarding the status of the vessel. He continued to use exclusively the Panamanian log and no entries were made in the Indonesian log. As to the movements of the vessel, it left Tanjong Priok Indonesia on 6th March 1952 on instructions from Frank Starr, and Starr sailed with the vessel which arrived on 13th March 1952. On 9th May 1952 the vessel was moved to the dock of the Hong Kong & Whampoa Dock Co. for repairs but he and the crew remained on board in possession of the vessel.
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15. The evidence of Augusto Revillia was that a power of attorney given by the Appellants to Frank Starr was wholly invalid under Philippines law and conferred no authority whatever to sell the Tasikmalaja.
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16. In this state of the evidence, on the hearing of the motion of the Government of Indonesia to set aside the writ, Reece J. on 15th September 1952 decided that there was no evidence to support the Government's case and dismissed the motion with costs.
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17. Action No. 8 then came on for hearing on the Appellants claim on 2nd October 1952. After an intervention by the Attorney General oral evidence was given on behalf of the Appellants by Khalil Khodr who proved the Appellants' title to the ship. Reece J. reserved judgment.
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18. On 24th October 1952 Reece J. delivered judgment in Action No. 8. After rejecting the intervention of the Attorney General, the learned judge stated that he was satisfied on the evidence that the Appellants were the owners of the vessel and entitled to the possession of the vessel. He made an order for possession of the vessel subject to the ship not being released from the claim of the Hong Kong & Whampoa Dock Company or further order.
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19. Meanwhile, the Government of Indonesia had given notice of appeal against the order of Reece J. dated 15th September 1952. This notice was dated 15th September 1952 and asked that the judgment of Reece J. dated 15th September 1952 dismissing the notice of motion of the Government of Indonesia dated 9th July 1952 should be rescinded.
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20. The appeal came on before the Appeal Court (Sir Gerard L. Howe, President and Williams J.) on 8th December 1952. In the course of the hearing the Government of Indonesia, by leave, amended their notice of motion so as
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grounds that the writ impleaded a Foreign Sovereign State and that the Government of Indonesia was the owner or was in possession or control or entitled to possession of the vessel.

26. Affidavits were sworn in support of the motion in substantially the same terms as those referred to above in paragraphs 10 and 11 of this Case in connection with Action No. 8, and affidavits were filed on behalf of the Appellants by Khalil Khodr, Jose Maria Silos, Jose Briones and Augusto Revillia referring to and incorporating the evidence filed by these deponents in Action No. 8.

pp. 5-19
pp. 21-26

27. Similar proceedings to those in Action No. 8 took place with regard to cross-examination on their affidavits of Kwee Djie Hoo and Pamoe Rahardjo and to their diplomatic privilege and the deponents not having attended for cross-examination a similar order was made on 15th September 1952 for their affidavits to be removed from the files, and Reece J., deciding that there was no evidence to support the case of the Government of Indonesia, dismissed the motion with costs.

pp. 27-49

28. The Government of Indonesia appealed against the order of Reece J. dated 15th September 1952 to the Appeal Court and the appeal was heard together with the appeal relating to Action No. 8 on 8th December 1952. The notice of motion of the Government of Indonesia was amended in the course of the hearing of the appeal to ask that the writ and all subsequent proceedings in orders in Action No. 6 be set aside on the ground that the said action impleaded a foreign Sovereign State and that the S.S. Tasikmalaja be released from arrest in Action No. 6. The judgment and reasons for judgment given by the Appeal Court in relation to Action No. 8 (as set out in paragraph 22 of this Case) related also to Action No. 6.

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As to Action No. 8 and Action No. 6.

29. On 12th January 1953 leave to appeal to Her Majesty in Council in both actions was granted to the Appellants upon terms which have been complied with. By Order dated 4th February 1954 the two appeals were consolidated.

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(Appeal No. 45)
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Record "B"
(Appeal No. 46)
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30. The Appellants respectfully submit that the judgment of the Appeal Court cannot be sustained. In the first place, the writ in Action No. 8 did not and was not intended to implead the Government of Indonesia. The purpose of the writ, as was stated in his evidence by Khalil Khodr was to have the vessel taken into the protective custody of the Court in order to prevent its forcible removal from the jurisdiction. It was not to test a claim by the Government of Indonesia to ownership of the ship, since the Appellants, the registered owners of the ship and in possession of valid documents of title, do not admit that the Government of Indonesia has any such claim. The writ in neither action impleaded the Government of Indonesia as a "party interested" in the vessel since the Government of Indonesia had no interest in the vessel and there was no evidence before the Court that the Government had any interest in the vessel.

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31. The fact, if it were so, that the Government of Indonesia brought the vessel into Hong Kong waters is in the submission of the Appellants irrelevant. The true test is whether the Government of Indonesia (a) had the ownership or any lesser proprietary interest in the vessel or (b) was in possession or control of the vessel. There was no evidence that the Government had ownership of the vessel, on the contrary there was the clearest evidence that the Appellants had the ownership. The Government had not requisitioned the vessel. The only possible interest which the Government could claim was as charterers of the vessel.

32. With regard to the possible rights of the Government of Indonesia as charterers of the vessel, it is first submitted that the onus lay upon the Government of Indonesia to show that there was a charter and that such charter was effective at the relevant date. No charter party was however put in evidence and if there was a charter, the terms of it are not known. In particular it was not established that the terms of any such charter were such as to deprive the owners of possession of the vessel or to vest such possession in the Government. There were certain statements by the Appellants witnesses that a six months' charter had been entered into from 1st January 1952 but in the absence of evidence of the terms of the charter such evidence was wholly insufficient to found a claim for immunity. In any event there was no evidence or suggestion that the charter continued in effect beyond 30th June 1952 and consequently by the date when immunity was claimed—namely 9th July 1952—the Government of Indonesia had not even any interest as charterers in the vessel. The relevant date for the purposes of a claim to sovereign immunity is, in the Appellants' submission, the date when such immunity is claimed or alternatively the date when the claim comes before the Court.

33. With regard to possession and control of the vessel, the Appellants submit that on the evidence of the Appellants' witnesses, the Appellants were at all material times in effective possession and control of the vessel through their servants, the Acting Master and crew, who at all times, up to the date of arrest of the vessel, and in the case of the Acting Master and the Filipino members of the crew beyond that date, acknowledged the ownership of the Appellants. With regard to events subsequent to the arrest of the ship, so far as they may be material, the Appellants rely upon and adopt the finding of Reece J. in the contempt proceedings in the action in which judgment was given on 14th July 1952 and not appealed from, that the Government of Indonesia, by their Consul-General, recognised Captain J. M. Silos as Master of the ship subsequent to his purported dismissal and did not recognise Mandagi as Captain, upon the the evidence which supported that finding and upon the decision of Reece J. which in effect recognised the continuing possession of Captain Silos on behalf of the Appellants. There was no time when the Government of Indonesia had any possession of the vessel or any control beyond such as they were entitled to under any subsisting charter.

34. The Appellants submit that the judgment of the Appeal Court ought to be set aside and the judgment of the Honourable Mr. Justice Reece restored for the following amongst other

REASONS.

1. Because the issue of the writs in rem did not implead the Government of Indonesia since there was no evidence to show that that Government had any interest in the vessel.

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2. Because the Government of Indonesia were not on the dates of the issue of the writs, or alternatively were not on 9th July 1952, the date when immunity was claimed, or alternatively on 15th September 1952 when the claim for immunity case before the Court, either in possession or in control of the vessel.

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3. Because the Government of Indonesia were not at any material time the owners of the vessel and had not at any material time any proprietary or lesser right in the vessel. If, which was not proved by any sufficient evidence, the Government of Indonesia had an interest in the ship under a charter, such interest did not confer possession of the ship and moreover had determined before the date of the issue of the writs, or alternatively before the date on which immunity was claimed.

4. Because on the evidence before the Court the Appellants were the owners of the vessel and were also at the material dates in possession and control of the vessel.

5. Because the judgment of Reece J. was right and ought to be restored, and the judgment of the Appeal Court was wrong and ought to be reversed.

KENNETH DIPLOCK.

R. O. WILBERFORCE.

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG.

No. 45 of 1953.

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JUAN YSMAEL & COMPANY INCORPORATED
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THE GOVERNMENT OF THE REPUBLIC OF
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(trading as A. W. King) (Plaintiff) *Respondents.*

Case for the Appellants.

REID, SHARMAN & CO.,

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