1967/6

No. 3 of 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N : TIO CHEE CHUAN Appellant

and

KHOO SIAK CHIEW
KWAN YUI MING
WONG CHUNG MAN
SEAH TEE SHU
CHOI WING
TAN SEI JOO
TAN TECK BAK
WU KWOK LIANG
CHAN YUEN YAN Respondents

CASE FOR THE APPELLANT

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1. This is an appeal from a judgment of the Federal Court of Malaysia (Wylie, C.J., Borneo, Tan Ah Tah, F.J. and Simpson, J.) dated the 8th October, 1964, which allowed the Respondents' appeal from a judgment of the High Court in Borneo (Harley, J.) dated the 14th May, 1964, in which judgment had been given for the Appellant, who had been awarded damages for wrongful dismissal. pp.43-47 pp.28-34

2. By his re-amended Writ and Statement of Claim, filed on the 11th March, 1964, the Appellant had claimed that he had been employed as a teacher at the Sandakan Chinese Secondary School by the Management Committee of that School, by virtue of a Letter of Appointment dated the 15th October, 1964; the term of employment had been for four years, commencing on the 1st January, 1961 and pp.18-21

expiring on the 31st December, 1964, at a salary of $310 a month. On the 8th October, 1962 the Appellant had received a notice from the Acting Supervisor and Chairman of the Education Sub-Committee (the members of which are Respondents in this Appeal) terminating his employment as a teacher as from the 8th January, 1963. The said Statement of Claim further alleged that this purported termination was not in accordance with Clause 4 of his Letter of Appointment, a translation of which from the original Chinese was set out (cf. paragraph 6 of this Case); accordingly the Appellant claimed that he had been wrongfully dismissed, and claimed a declaration to that effect and further and in the alternative damages for the premature termination of his contract without cause.

3. The Defence of the Respondents, filed on the 24th April, 1964, alleged that the Appellant had in fact been employed by the Educational Sub-Committee of the Sandakan Chinese Chamber of Commerce, but otherwise admitted the terms of employment alleged; it was further admitted that the Appellant had been given notice of termination of his appointment by the letter alleged in the Statement of Claim. The Defence contained a different translation of Clause 4 of the Appellants Letter of Appointment, and alleged that the appointment had been lawfully terminated in accordance with Clause 4; the Appellant was not entitled to any relief, and the Respondents further claimed that they should not have been made parties to the suit.

4. The action was heard in the High Court in Borneo (Harley, J.) on the 6th May, 1964. The
pp.24-26 Appellant gave evidence on his own behalf, and in stating the history of his engagement as a teacher at the Sandakan Chinese Secondary School he exhibited certain documents, including his
p.52 Letter of Appointment, which was in Chinese.

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He also exhibited two letters, one dated the 8th October, 1962 from the second Respondent, which had terminated his appointment, and a further letter dated the 10th October, 1962, in reply to a request from him as to the grounds upon which he was being dismissed, which stated that the Sub-Committee were of the opinion that payment of an additional subsidy which had been paid to him should not be continued and that it had been unanimously agreed that his contract should not be continued; a second reason was that the Appellant's permit was limited to teaching junior middle classes only, whereas he had in fact been teaching senior class for the past several months. Another teacher had to be found to teach Chinese in the senior classes and, as the School was limited by the quota of teachers, this was said to make the 'annulment' of the Appellant's contract 'inevitable'. The Appellant further gave evidence that he had worked until the 8th January, 1963, at which date he had given up his teaching and had not since been able to find any work. He had been willing to continue at the Sandakan School on the terms of the contract.

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5. Evidence was given for the Respondents by the fifth Respondent, who stated that he was a member of the Management Committee when the Appellant was engaged; his Letter of Appointment had been signed by the Supervisor of the Education Sub-Committee. The contract had been for four years, but on the 8th October, 1962 the Sub-Committee had terminated the Appellant's contract; before a new scheme had come into force the Appellant had been receiving over $400 per month, but under the new scheme the Appellant would only get $330/-; he had complained that his extra allowance should be continued, but the Sub-Committee could not keep him on at $330/- anyway because they had too large a ratio of junior teachers, and they had been informed that the Appellant was qualified to

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teach only in junior classes. In cross-examination, the witness agreed that all the Respondents had been on the 1962 list of the Educational Sub-Committee; when the senior class had been started in 1962 the Appellant did teach that class, but when the Sub-Committee discovered that he was not qualified, they dismissed him; the Appellant had said that he would continue at $330 provided that he was not called upon to teach the senior class.

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6. Harley, J. gave judgment on the 14th May, 1964. He held a number of facts to be either admitted or proved to his satisfaction, including the following: the details of the Appellant's employment from the 1st January 1961 for four years at a salary which at the relevant time was $330; in 1962 the Appellant had been employed to teach a senior class for which he received an extra $100, which the Respondents denied was part of his teaching salary; on the 2nd October, 1962 there had appeared in the Borneo Times a statement that the Appellant and another teacher would be replaced, to which the Appellant had written an open letter to the newspaper complaining about his wrongful dismissal; that letter had not been relied upon as any reason for the Appellant's dismissal; the dismissal had been

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effected by the two letters of the 8th October and the 10th October, 1962; the Appellant had been at all times ready and willing to continue at a salary of $330, but the Respondents had chosen to consider the Appellant as surplus to establishment requirements; the Appellant had, since his dismissal, made diligent efforts to find work

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but without success. The learned Judge said that the Respondents had relied upon a clause in the Appellant's contract of employment, which had been translated by the Court interpreter as follows:-

> "4. The teachers and staff of the school must not during the validity of the agreement

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of appointment rescind the agreement of appointment except for very important matters. If, in case of special circumstances, release of or withdrawal from the appointment is necessary either party shall give three months' notice in advance."

The issue in the case was whether that clause justified the Appellant's dismissal. The learned Judge then referred to two English cases which set out the position at common law where a contract of employment did not contain express terms as to its termination. In his view the inclusion of clause 4 in the Appellant's contract had the effect of restricting the common law grounds for dismissal; if the contract was ambiguous, it should be construed against the Respondents. He did not consider it was a sufficient reason for the Respondents to dismiss the Appellant that the contract was becoming burdensome or inconvenient; the Appellant should have been approached and a termination of the contract negotiated; as it was, the dismissal had been wrongful. The Appellant should be awarded a sum equal to $330/- a month from the date of his ceasing his employment up to the date of judgment and a further $330/- a month from that date until his re-employment or the 31st December, 1964, whichever should be the earlier; any employment at a lower salary would entitle the Appellant to the difference between that sum and $330/-. The Respondents would pay the costs.

7. The Respondents appealed against that judgment to the Federal Court of Malaysia, and the appeal was heard by the Federal Court (Wylie, C.J., Borneo, Tan Ah Tah, F.J. and Simpson, J.) on the 8th October, 1964, when judgment was given allowing the appeal with costs. Wylie, C.J., began by summarizing the facts found by the learned trial Judge. After stating the reasons given in evidence by the fifth Respondent why

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the sub-Committee had dismissed the Appellant, the learned Chief Justice referred to the amending Regulation which had been made on the 1st January, 1963, in respect of Grant-in-Aid Schools, which had provided that the Director might fix the maximum number of teachers who might be employed at any time in a school receiving grants in aid; the defence had said that it was because of this regulation that notice was given to the Appellant. The learned Chief Justice then continued by referring to a translation of Clause 4 of the Appellant's contract of employment, but the translation so referred to was not that made by the Court interpreter, exhibited in evidence at the trial and accepted by the learned trial Judge, but another, and different, translation which had been pleaded in the Respondents' Defence. That translation was analysed by the learned Chief Justice, who said that it contained two parts, the first of which obviously imposed a restriction on the rights of teachers and staff, while the second gave either party a restricted right to give three months' notice to end the contract; such notice could only be given if, in the case of special circumstances, termination of the contract might be necessary. The learned Chief Justice again referred to the Central Education Fund Rules, 1961, and in particular Rule 6, which allowed the Director to reduce or cancel Grant-in-Aids, and Rule 5, which provided that there should be no grant-in-aid unless the school complied with certain conditions, the first of which was that the school must be conducted in accordance with any written law. One such written law was the new Rule, 5A, pursuant to which the Director might prescribe the maximum number of teachers in any school. That change in the rules was obviously contemplated at about the time the Appellant had been given notice, and it was to be inferred that the notice was given as a result of that change. The

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circumstances so outlined were, in the opinion of the learned Chief Justice, special circumstances, within the meaning of the Appellant's contract of employment; as a matter of law, therefore, the school was at liberty to dismiss the Appellant in those circumstances. The appeal would be upheld on this ground, and it followed that it was not necessary to consider the other five grounds of appeal, including the question whether the proper parties were sued. The appeal would therefore be allowed with costs.

8. Tan, F.J. and Simpson, J. concurred in this judgment.

9. On the 1st November, 1965 the Appellant was granted final leave to appeal to His Majesty the Yang di-Pertuan Agong. P.50

10. The Appellant respectfully submits that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed. It is submitted that the Appellant was employed for a fixed term of four years, and that the effect of his contract with the Respondents was not to give the Respondents any greater right of terminating that contract within four years than would have existed at common law. On the contrary, as decided by Harley, J., Clause 4 of the contract in fact cut down what rights the Respondents would have had at common law. Clause 4, on its proper interpretation, did not permit the Respondents to terminate the contract in the circumstances put forward by them in this case. The reasons relied upon by the learned Chief Justice in the Federal Court were not originally put forward by the Respondents, or relied upon by them, and in any event cannot be supported, since they are based on mere supposition, not established by the evidence at the trial. On the findings of fact made by the learned trial Judge, which were not challenged on appeal, it is submitted that the continued employment of the

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Appellant was not rendered impossible or illegal; accordingly his dismissal was not "necessary" within the meaning of Clause 4 of his contract of employment. Further, the circumstances which then existed could in no sense be found to be "special circumstances" within the meaning of the same clause. Accordingly it is respectfully submitted that the reasoning of Harley, J. was correct, and that the Appellant's dismissal was wrongful. It is submitted that, even if new regulations required the Respondents to limit the number of teachers in the school, or even in a part of the school, such regulations were not a justification for the termination of the Appellant's contract. It has never been suggested that there was a frustration of his contract, and in the circumstances, there had been no absolute obligation upon the Respondents to terminate the contract.

11. The Appellant further respectfully submits that the Respondents were properly made Defendants to the suit. The Rules of Court current at the relevant time were the English Rules of the Supreme Court, 1957. Under Order 16 Rule 9 of those Rules, there is a discretion to make a representation order where a number of parties are sued in the same interest; however, the fact that such discretion has not been sought, or exercised by the Court, cannot, it is submitted, have the effect that all the Defendants involved in such proceedings are not properly made parties to the action. In the present case, the pleadings were twice amended to take account of objections made as to the parties sued by the Appellant, but no attempt was made by the Respondents to seek a representation order, and accordingly, it is submitted, it is not now open at the present stage of the proceedings to the Respondents to object on the ground that they were not properly sued. The learned trial Judge

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found as a fact that the Appellant had been employed by the Respondents as a teacher, and the letters of dismissal that he received were sent on behalf of the Respondents. It is respectfully submitted that the Appellant was entitled to seek relief against the present Respondents, and that he was properly found entitled to such relief against those Respondents.

12. The Appellant respectfully submits that his appeal should be allowed and the judgment of the Federal Court of Malaysia should be set aside with costs, and the judgment of the High Court in Borneo be restored, for the following (among other)

REASONS

1. BECAUSE the Appellant was wrongfully dismissed by the Respondents;

2. BECAUSE no circumstances existed in which the Respondents were entitled to dismiss the Appellant;

3. BECAUSE the Appellant's dismissal was contrary to Clause 4 of his contract of employment;

4. BECAUSE the reasoning of Wylie, C.J. is not supported by any evidence;

5. BECAUSE of the facts concurrently found by the Courts below;

6. BECAUSE the Respondents were properly made parties to the action and were liable to the Appellant;

7. BECAUSE of the other reasons given in the judgment of Harley, J.

J.G. Le Quesne.

Mervyn Heald.

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CASE FOR THE APPELLANT

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