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No. 27 of 1972

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

GOVERNMENT OF MALAYSIA Appellant

- and -

LEE HOCK NING Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an Appeal from a Judgment and Order of the Federal Court of Malaysia (Ong C.J., Gill and Ong Hock Sim F.J.J.) dated the 23rd day of March 1972 allowing the Appeal of the Respondent with costs against an Order dated the 2nd day of May 1970 and a Judgment dated the 31st day of July 1971 of the High Court in Malaysia at Ipoh (Pawan Ahmad bin Ibrahim Rashid J.).

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2. The principal questions raised in this Appeal are whether:-

20 (i) certain of the claims of the Respondent were barred by Section 2 of the Public Authorities Protection Ordinance, 1948 and if not, whether a trial should be ordered on the issue of damages.

(ii) whether the Respondent is bound by a concession upon a matter of law which was made by his counsel in the High Court.

30 3. On the 14th day of June 1965 the Respondent issued a specially indorsed writ in the High Court at Ipoh. The Respondent who was at all material times a registered Government contractor, claimed damages in respect of two building contracts made in writing and dated the 27th day of May 1963 and the 7th day of August 1963 and described as S/PK/214 and FED/PK/227 respectively. He claimed that under each contract the work was duly completed and accepted. Under the first contract he

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28 MAY 1974
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claimed retention moneys amounting to \$1,184.00 and under the second contract he claimed the sum of \$11,315.00 as the sum due to him together with the sum of \$565.75 which he had deposited with the Appellant as a security.

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4. The Defendant (present Appellant) served a Defence and Counterclaim in September 1965 but the precise date does not appear from the Record of Proceedings. The sum of \$1,184.00 claimed under the first contract was admitted but a set-off of \$15,000.00 was claimed as a result of defaults alleged to have been committed by the Respondent in respect of a third building contract described as FED/PK/232 entered into between the parties on the 7th day of August 1963. As regards the second contract, the Appellant admitted that both the sums claimed were due but claimed to deduct liquidated damages of \$370.00 as it was alleged that the Appellant had taken 37 extra days before the works and buildings were completed. The Appellant also claimed to set off the amount admitted, namely \$11,510.75 against the sum of \$15,000.00 referred to above. In respect of the third contract which was the subject at this time of separate proceedings referred to below, the Appellant admitted that credit had to be given for the sum of \$1,525.00 deposited by the Plaintiff and bringing all these items into account it was claimed that the Respondent was indebted to the Appellant in the sum of \$780.25.

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LL. 38-40

5. The Appellant also pleaded that the Respondent's claims were barred by Section 2 of the Public Authorities Protection Ordinance 1948 which very closely resembles Section 1 of the Public Authorities Protection Act 1893 and so far as is relevant to this Appeal, is in the following terms:-

"2. Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect -

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3.

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof;

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10 (b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client;"

20 6. The Respondent served a Reply and Defence to Counterclaim which was dated the 14th day of September 1965 which denied that he was indebted to the Appellant for the sum of \$15,000.00 or at all and averred that there was no entitlement to a set-off. It was further denied the Appellant's claim came within the types of claim which are set out in paragraph 2 of the Public Authorities Ordinance 1958.

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7. The Appellant issued a specially indorsed writ in the same Court on the 14th day of June 1965 (the same day as the other writ) in respect of the third contract which it was alleged he was prevented from performing by the unilateral and arbitrary action of the Appellant in December 1963 as a result of which he suffered damages amounting to \$6,500.00 for losses of materials and wages. He also claimed the return of the deposit of \$1,525.00.

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30 8. The Appellant served a Defence and Counterclaim in September 1965 but the precise date does not appear from the Record of Proceedings. The Defence alleged that the Appellant failed to proceed with the works with reasonable diligence and they were completed by another contractor which resulted in excess costs of \$15,000.00 being incurred. The Appellant also alleged that the Respondent's claims were barred by Section 2 of the Public Authorities Protection Ordinance 1948. The Appellant counterclaimed for damages in the sum of \$13,475.00 being the amount of the alleged excess costs less the deposit paid by the Respondent. In his Reply and Defence to Counterclaim which was dated the 14th day of September 1965, the Respondent denied that he had committed any default under the contract and alternatively he alleged that he had not received any notice of it. He had no knowledge of any excess costs and, as in the other action, he denied that Section 2

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of the Public Authorities Protection Ordinance, 1948 applied to this claim.

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9. The Respondent served an Amended Statement of Claim dated the 12th day of October 1968 in which he put his claim under the third contract on an alternative basis, namely, that after his tender for the work was accepted, he was requested to proceed by the Appellant and he ordered materials and employed workers. Subsequently, the Appellant refused to execute the formal contract so that the work did not commence. This alternative plea was

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denied by the Appellant who served an Amended Defence and Counterclaim dated the 13th day of February 1969. By an amendment dated the 19th day of May 1969, the Respondent included an alternative plea in respect of the action being statute barred, namely, that the claim was made within twelve months from the date when the cause of action arose which was the 21st day of November 1964 when the demand for payment was finally rejected. By another amendment, the Respondent alleged that as the Appellant had not executed the contract, he was not bound by its terms and conditions and therefore not liable upon the Counterclaim.

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10. By Order of the High Court dated the 11th day of October 1965, the two actions were ordered to be consolidated and the hearing of them commenced on the 23rd day of April 1970 and was concluded on the 2nd day of May 1970 when the Order of the Court was made allowing the claim in part and dismissing the counterclaim.

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11. The Grounds of Judgment were delivered on the 31st day of July 1971. After referring to the three contracts, the learned Judge stated that it was not disputed at the trial that Section 2 of the Public Authorities Protection Ordinance 1948 applied and it was agreed that the first and second contracts had been completed to the satisfaction of the Appellant on the 3rd and 5th days of February 1964 respectively and the Appellant conceded that the Respondent was entitled to the return of the retention money of \$1,184.00 on the first contract and the deposit of \$565.75 on the second contract. As to the amount due on the second contract less the deposit which amounted to \$10,749.25, the learned Judge held that as the cause of action accrued on the 5th day of February 1964 and proceedings were not commenced until the 14th day of June 1965, the

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plea of limitation succeeded. He rejected the contention that the period of limitation ran from the date of the last acknowledgment which was the 29th day of December 1964. As regards the third contract it was conceded on behalf of the Respondent that this was statute barred and accordingly it was dismissed. The counterclaim was also dismissed on the ground that the notice of termination had been withdrawn or at least waived and was of no effect.

10 No Notice of Appeal was filed by the Appellant. An application to cross-appeal which was made by the Appellant at the hearing of the Respondent's appeal was refused. Judgment was therefore given for the Respondent only for the two sums referred to above and admitted by the Appellant to be due, together with interest at 6% per annum from the date of the commencement of the proceedings.

12. The present Respondent filed a Notice of Appeal in the Federal Court of Malaysia on the 29th day of May 1970. The Memorandum of Appeal is dated

20 the 10th day of August 1971 and is in the following terms:-

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"1. With regard to the second contract and the third contract, your Petitioner submits with respect that his then Counsel was wrong in law in conceding that the Public Authorities Protection Ordinance, 1948 (hereinafter referred to as "the Ordinance") applied thereto and that therefore the instituting of

30 proceedings was governed by section 2 thereof and the learned trial Judge similarly erred in law in accepting the said concession.

2. Your Petitioner submits with respect that an erroneous admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel and the Court is not precluded from deciding the rights of the parties on a true view of the law.

3. With regard to the second contract, your

40 Petitioner submits with respect that the learned trial Judge having rightly found that there was a sum of \$11,315.00 due by the defendant (hereinafter referred to as "the Government") to your Petitioner in respect thereof:

(a) erred in law in holding that your

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Petitioner's claim was barred by section 2 of the Ordinance in respect of the sum of \$10,749.25; and

- (b) ought to have held that the entire sum of \$11,315.00 being due to your Petitioner for work and labour done, the Ordinance did not apply.

4. Alternatively, with regard to the second contract, your Petitioner submits with respect that if the Ordinance did apply, then the learned trial Judge was wrong in law in holding that the period of limitation began to run when the cause of action accrued and ought to have held that:-

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- (a) time ran from the "alleged neglect or default" of payment, and time for such payment was governed by Clause 15(e) of the said contract.
- (b) time ran from the last acknowledgment by the Government of the money due to your petitioner on the said contract i.e. to say from 29th December 1964.

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With regard to the third contract, your Petitioner submits with respect that the learned trial Judge ought to have found that the Ordinance did not apply:-

- (a) as the claim was for damages for breach of contract simpliciter, and not in substance one of tort, or
- (b) alternatively, as the Government in determining the contract was not acting in execution of a public duty but did it in the contractual exercise of its rights reserved to itself under Clause 13 of the said contract.

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Alternatively, as the learned trial Judge having rightly found that there was no valid notice of the termination of the contract ought to have held that section 2 of the Ordinance did not apply as there was no effective date of the termination of the contract."

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13. The Appeal was heard on the 3rd and 4th days of February 1972 and the unanimous Judgment of the Federal Court was delivered on the 23rd day of March 1972. In the course of his Judgment, Ong C.J. said that it was surprising that learned counsel in the High Court agreed that Section 2 of the Public Authorities Protection Ordinance, 1948 applied to the contracts made between the parties. The act of default complained of was non-payment of moneys due and the refusal to pay a just debt could not be said to be "an act or default in pursuance of or execution of a public duty". It did not come within the provisions of the Ordinance and counsel and the trial judge were in error. As this was an error of law it could be rectified and accordingly the appeal would be allowed with costs and Judgment given for the whole amount of the claim less the general damages alleged in respect of the third contract which had not been proved, with interest at 6% per annum from 1st January 1965. A concurring Judgment was delivered by Gill F.J. who stated that the only point taken by the present Appellant to support the Judgment of the High Court was that the contract was entered into in the performance of a public duty or was incidental thereto. The learned Judge continued:-

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pp. 56-62

p.56 L.35 -
p.57 L. 7

"I do not consider that point to be of any substance. A short answer to it is that it is immaterial that the contract may have been entered into for the purpose of performing a statutory duty. If the act complained of is the breach of a contract, the statutory protection of the Ordinance cannot be invoked on the ground that the contract was entered into for the purpose of carrying out duties imposed by the Statute (see Chartres on Public Authorities Protection Act, 1893, page 38)."

He cited with approval Sharpington v. Fulham Guardians [1904] 2 Ch. 449 at 444-5 and Midland Railways Company v. Wittington Local Board (1883) 11 Q.B.D. 788, 794 and then said:-

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LL. 8-26

"On the cases decided under the Public Authorities Protection Act, 1893 it would appear to be settled law that where the act complained of is purely a breach of agreement there is no right to protection. As far as this case is concerned, what was the only act complained of?"

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The non-payment of money under a series of contracts. How can it be said that such non-payment was an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or an alleged neglect or default of any such act, duty or authority? The fact is that the Ordinance, under which it is sought to deny liability on the ground of non-compliance with a provision of that Ordinance as regards the period within which the action should be brought, deals with cases of some wrong done by a public authority whereas in the present case the action is based on a contract to pay." 10

He concluded his Judgment by referring to and distinguishing the authorities relied upon by the present Appellant. A formal concurring Judgment was delivered on behalf of Ong Hock Sim F.J.

14. The Respondent respectfully submits that the reasoning and Judgments of the Federal Court were correct in law and that the said Court was entitled to overrule the agreed view of counsel in the High Court and of the Judge as regards the application of Section 2 of the Public Authorities Protection Ordinance, 1948, this being as Ong C.J. stated, a matter of law and could also be done without injustice to the present Appellant who was not relying on any point of merit but upon the relevant statute of limitation. Thus, the view taken by the Federal Court did not affect any of the evidence given in the trial and the criteria laid down in Doyle v. Olby (Ironmongers) Ltd. [1969] 2 Q.B. 158, 166 by Lord Denning M.R. and referred to by Ong C.J. were satisfied. 20 30

15. Further, if, contrary to the opinions expressed in the Federal Court and to the Respondent's submissions herein, Section 2 of the Public Authorities Protection Ordinance, 1948 did apply to the three contracts made between the parties, it is respectfully submitted that the learned trial Judge erred in holding that time ran against the appellant from the date of completion of the second contract and from the date of termination of the third contract. With regard to the second contract, there was an agreed finding of fact in the High Court, that the work was completed on the 5th day of February 1964. According to 40

Clause 5 of this contract as read with the Appendix, there was a Defects Liability Period of six months after completion during which, after receipt of written notice from the Appellant, the Respondent was liable to make good any defect or faults at his own cost. It is thus submitted that time did not begin to run against the Respondent for the purpose of the Public Authorities Protection Ordinance, 1948 until the expiration of the above Defects Liability Period because it was not until such time that the Appellant was able to ascertain that he had a cause of action for the amount of the contract.

16. In the further alternative, the Respondent submits that "the act, neglect or default complained of" for the purpose of section 2 of the Public Authorities Protection Ordinance, 1948 was the refusal of the Appellant to pay the sum due to the Respondent. The Appellant never denied the justness of the claim concerning the second contract but wished to set it off against an amount alleged to be due to him under the contract. This attitude was communicated to the Respondent in a letter dated the 29th day of December 1964 which is not reproduced in the Record of Proceedings but which is annexed hereto as Annexure "A". It is thus submitted that time did not begin to run against the Respondent for the purpose of the Public Authorities Protection Ordinance, 1948 until either the date of the said letter or the date when it would be received in the ordinary course of post.

17. Since the proceedings were issued on the 14th day of June 1965 if either of the alternative submissions above is correct, that time had not expired against the Respondent.

18. With regard to the third contract, if, as the Federal Court found, it is submitted correctly, that section 2 of the Public Authorities Protection Ordinance, 1948 did not apply, then the Court should have granted, instead of refusing, the Appellant's application for a new trial on the matter of damages particularly as the claim had not been proceeded with as a result of a mistake of law. The learned Chief Justice is recorded by Gill F.J. as saying in answer to the application which was made at the hearing of the Appeal on the 4th day of February 1972:-

"(C.J. no damages were proved, much too late to repair omission)"

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In his Judgment, after dealing with the dismissal of the counterclaim, the learned Chief Justice stated:-

p.55 LL.12-16

"On the other hand, counsel for the appellant" (present Respondent) "had also neglected and failed to prove the general damages claimed in Civil Action No. 222/65. On that score such damages cannot be allowed either".

These passages would appear, with respect to the learned Chief Justice, to overlook the position that arose in the High Court thereby the Respondent had no opportunity to prove his claim.

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19. An Order granting Conditional Leave to Appeal to His Majesty the Yang Di-Pertuan Agong was made by the Federal Court of Malaysia on the 12th day of June 1972 which Order was made Final on the 4th day of September 1972.

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20. The Respondent humbly submits that this Appeal should be dismissed with costs and a trial ordered on the issue of the amount of damages to be awarded to the Respondent in respect of the third contract for the following among other

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R E A S O N S

1. That the Federal Court of Malaysia was correct in holding:-

(a) that the concession made on behalf of the Respondent that section 2 of the Public Authorities Protection Ordinance, 1948 was a matter of law which the Federal Court was entitled to review and, as was the case, to come to the conclusion that it had been wrongly made and be held to be not binding upon the Respondent.

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(b) that section 2 of the Public Authorities Ordinance did not apply to the contracts made between the parties.

2. Alternatively, if the said Ordinance did apply, the proceedings were issued by the Respondent before he was statute barred.

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3. In assessing the amount due to the Respondent pursuant to the said contracts, the Federal Court erred in disallowing the damages claimed in the third contract with the exception of the deposit, on the ground that the Respondent had not proved such damage, because he had not been given any opportunity in the High Court of proving such damage as it had been conceded (wrongly as the Federal Court found) that this claim was statute barred.

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JOHN A. BAKER.

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Appellant

- and -

LEE HOCK NING
Respondent

CASE FOR THE RESPONDENT

GRAHAM PAGE & CO.,
51 Victoria Street,
London, S.W.1.

Solicitors for the Respondent.