22, 1971

No. 27 of 1970

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

IN THE MATTER of CIVIL SUIT No. 615 of 1958

IN THE HIGH COURT IN MALAYSIA AT IPOH

B E T W E E N

SAW CHOO THENG and
KHYE SENG LIM alias
LIM KHYE SENG (Plaintiffs) Appellants

- and -

SUNGEI BIAK TIN MINES LIMITED (Defendant)
Respondents

~~The Federal Court of Malaysia~~

CASE FOR THE APPELLANTS

Record

1. This is an appeal by leave of the Federal Court of Malaysia (Appellate Jurisdiction) at Kuala Lumpur from an Order dated the 9th December 1969 of the said Federal Court (Ong Hock Thye C.J. Gill F.J. and Ali F.J.) allowing an appeal by the Respondents from a Judgment dated the 17th July 1969 of the High Court in Malaya at Ipoh (Chang Min Tat J.). pp 39-41 / 38 / 7-23

2. The proceedings were instituted by the Appellants as the registered lessees of Mining Certificates Nos. 40, 41, 42 and 43 under the Mining Enactment (F.M.S. Cap. 147) as amended (hereinafter called "the Enactment") for certain land (hereinafter called "the mining land") being Lots Nos. 2312 2311 3481 3482 3483 and 3489 in the Mukim of Sungei Tinggi in the District of Larut and Matang (totalling 188 acres or thereabouts in all) which

land by a Memorandum of Sub-lease Presentation No. 107 Volume 1 Folio 92 registered on the 21st day of August 1965 (hereinafter called "the Sublease") the Appellants subleased to the Respondents.

3. The Order sought by the Appellants and which was made in their favour in the said High Court in Malaya at Ipoh was an Order for the cancellation of the Sublease in accordance with provisions therein contained in that behalf consequent upon the contravention by the Respondents of the terms of the Sub-lease and of the Enactment. The Respondents did not challenge any finding of fact by the learned Judge of the said High Court in their appeal to the Federal Court and accordingly the principle point at issue is the construction of the relevant provisions of the Sublease and the Enactment for the purpose of determining whether the matters complained of by the Appellants were contraventions of the terms of the Sublease or the Mining Enactment such as to admit its cancellation therefor.

4. By virtue of Section 11 (vii) of the Enactment the Mining Certificates issued to the Appellants and referred to in paragraph 2 hereof conferred on the Appellants in relation to the mining land the same rights and privileges subject to the same covenants conditions agreements obligations and liabilities and other provisions of the Enactment as a mining lease for the same purposes under the Enactment.

5. Section 14 of the Enactment provides as follows :-

> "14. Every mining lease shall vest in the "lessee thereof in the absence of any express "condition to the contrary the following rights, "and such other rights, if any, as may be "expressly set forth therein:
>
> "(i) the right to win and get all metals "and minerals other than mineral oil and oil "shales found upon or beneath the land and, "subject to the provisions of sub-section (iv), "to remove, dispose of, and dress the same "during such term as may be mentioned in the "mining lease;
>
> "(ii) .....
>
> "(iii) .....

"(iv) the exclusive right, subject to the "provisions of Section 16, sub-section (x), to "all timber and other forest produce upon the "land, but no right to remove beyond the "boundaries of the land for any purpose "(excepting only for the extraction therefrom of "any metal or mineral ore) any timber or other "forest produce or any gravel, stone, coral, "shell, guano, sand, loam or clay obtained from "the said land, or any bricks, lime, cement or "other commodities manufactured from the "materials aforesaid except under licence "granted under the provisions of the Land Code "or the National Land Code or any Rules made "thereunder".

No express conditions were imposed in the said Mining Certificates limiting the rights of the Appellants under the said Section 14. Section 16, sub-section (x) referred to in Section 14 (iv) reserves to the State the right to remove material required by the State for public purposes and is not material hereto.

6. Section 16 of the Mining Enactment provides inter alia "There shall be implied in every mining lease in the absence of any express condition to the contrary the following covenants and conditions on the part of the lessee:.....

.....

"(vii) That the lessee will not use or permit to be used any portion of the land for any purposes other than those mentioned in Section 14 without the written authority of the Collector".

.....

7. By Section 36 (i) of the Enactment it is provided as follows :-

"If any lessee wishes to sub-lease his land "such lessee and the intended sub-lessee shall "execute and present together with the mining "lease a memorandum of sub-lease in the Form in "Schedule X with such variations of the Form but "not of the substance as the Collector may permit, "and thereupon the Collector shall register the "same in the manner provided in Part Eighteen of "the National Land Code for the registration of "dealings."

8. In accordance with the said Section 36(i) the Sub-lease was in the Form set out in the said Schedule X to the Enactment with certain additions

thereto and was with such additions duly registered by the Collector. The Sub-lease contains the following provisions material to this appeal :-

"4. (a) That the Sub-lessee shall perform and "observe all the conditions in the said Mining "Certificates (Photostat copies of which have been "taken by the Sub-lessee as it hereby acknowledges) "or the Mining Leases to be issued in place thereof.

"(b) That the Sub-lessee shall work the said "land in an orderly skilful and workmanlike manner "and subject to the provisions of the "Mining "Enactment and shall be liable to indemnify the "Sub-lessors for any expenses which they may incur, "whether as fine inflicted on them or otherwise, "on account of any breach by the Sub-lessee of "this condition or any of the express conditions "contained in the said Mining Certificates or "Mining Leases to be issued in place thereof.

"12. That this Sub-lease shall be liable to "cancellation at any time at the discretion of the "Senior Inspector or the Court upon proof :-

"(a) .....

"(b) That the Sub-lessee has not worked the land " in accordance with Clause 4 of this Sub-lease " or has by its default rendered the land " liable to forfeiture under the Mining " Enactment.

"(c) .....

"(d) .....

"15. The Sub-lessors shall be entitled to tap "the rubber trees on the said land for their own "use until such time as the same shall be required "for mining".

9. Clause 4(b) of the Sub-lease effectively reproduces Clause 4 of the said Form in Schedule X and Clause 12(b) of the Sub-lease reproduces the provision of Section 97(ii)(b) of the Enactment whereby it is stated that

"The Senior Inspector shall have power in his "discretion to cancel a sub-lease upon proof to "his satisfaction that .....(b) the sub-lessee "has not worked the land in accordance with Clause

"4. of the sub-lease in Schedule X or has by his "default rendered the land liable to forfeiture "under this Enactment".

10. The facts on which the Appellants claimed that the Sub-lease was liable to cancellation were summarised in paragraph 3 of the Statement of Claim as follows :-

"3. In or about September 1967 the Defendants, "their servants or agents or persons with the "consent, permission or knowledge of the Defendants "cut down approximately 60 acres of the said mining "land which was then covered with budded rubber "planted in 1960/61 without the consent or "permission of the Plaintiffs and on or about "February 1968 planted tapioca on the said "approximately 60 acres again without the consent "or permission of the Plaintiffs".

The Appellants accordingly made an initial complaint to the Senior Inspector of Mines (North) at Ipoh on 17th June 1968 against the Respondents and subsequently at the instance of the Appellants their complaint and their claim for cancellation of the Sub-lease was transferred to the said High Court.

11. The defences relied on by the Respondents in their Defence were described by Chang Min Tat J. as "many and varied". They were as follows :-

(a) In paragraph 2 thereof the Respondents denied that they or their servants or agents had cut down rubber as alleged or that any other person had done so with their consent permission or knowledge. They furthermore asserted that "If any rubber was cut down it was for the purpose of mining and done with the consent express or implied of the plaintiffs".

(b) In paragraph 3 the Respondents denied that they their servants or agents planted tapioca on the mining land or that any other person had done so with their consent permission or knowledge. They further asserted that "If planting was done with their consent or permission the defendants say that such consent or permission was given subject to the approval of the Collector of Land Revenue and persons concerned".

(c) In paragraph 4 the Respondents asserted that "if any tapioca planting was done at all it was done with the oral permission of one Mr. Tan Cheng Hock one of the co-owners of the land and who was a representative or agent of the plaintiffs".

(d) Lastly in paragraph 5 the Respondents denied that they were in breach of Clause 4 of the Sub-lease or that they had contravened any of the provisions of the Enactment.

12. Notwithstanding the matters contained in the Defence the following findings of fact were made by the learned Trial Judge :-

8.26 (i) that the Respondents had permitted one Gooi Bak Yeow to come on the mining land and cultivate it by the planting of tapioca;

11 1.47-49 (ii) that the Appellants did not know of or acquiesce in the planting of the tapioca;

9 1.43-45 (iii) that the tapioca planting was not authorised by the said Tan Cheng Hock;

13 1.28 (iv) that the planting of the tapioca was a commercial project in which the said Gooi Bak
16 1.25-27 Yeow was not a planter in his own rights but a contractor who did the planting for and on behalf of the Respondents;

17 1.24-34 (v) that although the Respondents' mining operations could not be carried on without first clearing the land required therefor the primary purpose of the felling of rubber trees on the area in question was to prepare the land for tapioca planting;

7 1.13-17 (vi) that the Respondents knew that the planting of the tapioca without due authorisation from the Government involved a breach of the provisions of the Enactment.

13. As far as concerns the Respondents' assertion in paragraph 3 of their Defence that their consent or permission to planting was given "subject to the approval of the Collector of Land Revenue and persons concerned" the learned Trial Judge stated

"In my view it does not afford any justification to the defendant company vis-a-vis

the lessees, or even the Government, since planting without the prior permission of the Government is a breach of the Mining Enactment ... ... it could not be legalised without the consent of the lessees." 18 1.12-19

14. On the basis of the findings of fact made by him the learned Trial Judge (Chang Min Tat J.) proceeded to make the following analysis of the relevant provisions of the Sub-lease and the Enactment :-

(i) Clause 4(b) of the Sub-lease must "eliminate any doubt" that the implied conditions to be observed by the lessee contained in Section 16 of the Enactment were made applicable to the Respondents as sub-lessees 20 1.19-24

(ii) Agricultural user of mining land other than under Section 14(iii) of the Enactment is a breach of the implied condition in Section 16(viii) of the Enactment and the growing of sixty acres of tapioca could not come within Section 14(iii) aforesaid 21 1.4-10

(iii) Section 97(ii)(b) of the Enactment is in two limbs which are not together cumulative but disjunctive; where a sub-lessee has not worked the land in accordance with Clause 4 of the form of the sub-lease in Schedule X of the Enactment he renders himself liable to a cancellation of his sub-lease even though his breach did not render the land liable to forfeiture under the Enactment 21 1.35 21 1.38

(iv) Where, therefore, a sub-lessee has not worked the land in an orderly skilful and workmanlike manner and subject to the provisions of the Enactment he renders himself liable to cancellation of his sub-lease on the application of the sub-lessor even though his breach has not rendered the land liable to forfeiture under the Enactment. 21 1.41

(v) He rejected the argument by Counsel for the Respondents that the references in Clause 4 of Schedule X and in the first limb of Section 97(ii)(b) to "the land" must be construed as references to "the mine" and that accordingly a sub-lessor is only entitled to apply for cancellation if the sub-lessee has not worked the mine "in an orderly skilful and workmanlike manner and subject to the provisions of the Mining Enactment" upon the ground that "a lessee has no

rights whatsoever to the surface, except insofar as is necessary for his mining purposes and as is
22 1.30 permitted by Section 14(iii). It follows therefore that a user not otherwise permitted could not be said to be in accordance with the provisions of the Mining Enactment. It further follows that the sub-lessees, whether they had planted the tapioca or had permitted the planting, were in breach of Section 16(vii) and therefore caught by the first limb of Section 97(ii)(b) ...". 10

15. Chang Min Tat J. went on to consider whether or not he should exercise his discretion so to cancel the Sub-lease. He gave the following reasons for refusing to exercise his discretion in favour of the Respondents and ordering that the Sub-lease be cancelled :-

> "It is of course axiomatic that this
> 22 1.44 discretion must be exercised judicially. And judicially, I cannot but regard the action of the defendants as being reprehensibly high- 20 handed. They had, in full knowledge, set out to commit a deliberate breach of the agreement and the Mining Enactment and used the land without the permission of the proper landowners or of the Government to acquire considerable profits for themselves. Even if I am wrong in finding as a fact that Gooi Bak Yeow was a contractor and not a licensee, a breach was nevertheless deliberately committed by them for permitting an illegal user. Further they had 30 ignored the rights of the plaintiffs to the rubber trees reserved under Clause 15 of the sub-lease. The fact that until the trees matured the rights were only prospective, in my opinion, did not detract from the seriousness of their breach of agreement. The defence was a tissue of lies and whatever sympathy I had at the commencement of the case for the defendants evaporated with the evidence they led. If the defendants would ask the Court to exercise its 40 equitable jurisdiction in their favour they must come with clean hands and this they had patently not done . . . . . .
> 23 1.36 When it comes to asking the Court to exercise its discretion in their favour, the entire defence must be seen to be regrettable but in view of this defence and the evidence, I cannot find, search as I have done, any ground, in law or equity, to relieve the defendants from the claim against them". 50

16. Against the said Judgment and Order of the learned Trial Judge the Respondents appealed to the Federal Court of Malaysia by Notice of Appeal dated the 17th July 1969 on grounds set out in a Memorandum of Appeal dated the 26th August 1969. The principal grounds of the appeal were first that the learned Trial Judge erred in law in holding that a breach of Section 16(vii) of the Enactment rendered the Sub-lease liable to cancellation and secondly that the learned Trial Judge erred in ordering cancellation of the Sub-lease without considering whether damages were a sufficient remedy or giving the Respondents an opportunity to remedy their breach of the terms of the Sub-lease. 25 26

17. The Appeal was heard on the 13th and 14th November 1969 by a Bench consisting of Ong Hock Thye C.J. Gill F.J. and Ali F.J. and the Judgment of the Court was given by Ong Hock Thye C.J. on the 9th December 1969. In his judgment Ong Hock Thye C.J. having summarised the facts and having considered the analysis of the Sub-lease and the Enactment made by the learned Trial Judge and in particular having set out in full that passage in the Judgment in which the learned Trial Judge described Section 97(ii)(b) as being "in two limbs which are not together cumulative but disjunctive" went on to state as follows :- 28-37 30-31

> "The two limbs of Section 97(ii)(b) which are said to be disjunctive lie within the first half of paragraph (b) since the latter half concerns liability to forfeiture which admittedly has no application. The dichotomy therefore requires that Clause 4 be paraphrased thus: 32 1.27
>
> (a) that the sub-lessee shall work the said land in an orderly skilful and workmanlike manner and
>
> (b) that he shall work the said land subject to the provisions of the Mining Enactment. The common factor in both parts is nevertheless the working of the said land.
>
> "We have thus approached the crux of the matter involving an exercise in semantics. What does "working the land" mean?".

18. The learned Chief Justice then considered the dictionary meaning of the word "work" and discussed 33

certain authorities on the meanings to be ascribed in statutes to words of general usage. He then proceeded to draw a distinction between the prohibition by Section 16(vii) of unauthorised "user" of mining land and the remedy of cancellation provided by Section 97(ii)(b) "where the sub-lessee has not worked the land in accordance with Clause 4 of the sub-lease in Schedule X" and stated that

35 1.42
36 1.2

> "in common parlance 'user' of land means its user in general terms .... whereas again in common parlance working mining land should be given a more restricted meaning as confined to mining operations and ancillary activities.

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> "If this is the true view as I think it is it follows that Clause 4 of Schedule X - whether dichotomous as the learned judge construed it or otherwise - confers cancellation powers on the Senior Inspector of Mines or the Court in his place only where the sub-lessee's liability thereto arises by reason of his default in working the land either "in an orderly skilful and workmanlike manner" or default in working it "subject to the provisions of the Mining Enactment". In either case "work" relates primarily to mining - certainly not agricultural user".

19. The learned Chief Justice accordingly held that the Respondents' breach of Section 16 (vii) did not involve any breach of Clause 4 of Schedule X and that there was no ground for the cancellation of the Sub-lease and no call for the exercise of discretion, stating that as regards the exercise of the learned Trial Judge's discretion "any expression of my views would be supererogatory".

20. Accordingly by the Order of the Federal Court dated the 9th December 1969 the appeal was allowed and the judgment of Chang Min Tat J. was set aside. The Appellants were ordered to pay the Respondents their taxed costs of the appeal and one half their taxed costs in the Court below.

21. The Appellants submit that there is no ground in the Enactment or elsewhere for giving the references in Clause 4 of Schedule X and Clause 4(b) of the Sub-lease and in Section 97(ii)(b) to "working the land" the restrictive interpretation placed on those words by Ong Hock Thye C.J. On

the contrary there are many contexts in the Enactment where a distinction is drawn between "working the mine" on the one hand and "working the land" on the other hand and between "the mine" and "the land" - in particular Sections 3, 79, 80(i), 80(vii), 83, 108, 110, 114, 116, 118, 119, 126 and 128 - and the references in Clause 4 and Section 97(ii)(b) to "working the land" ought therefore to be given a wider significance than "working the mine" or "carrying on mining operations on the land". In cutting down rubber and planting tapioca the Respondents were "working the land" comprised in the Sub-lease according to the ordinary and natural usage of those words and inasmuch as such working involved a breach of the condition in Section 16(vii) of the Enactment the Respondents were in breach of their obligation under Clause 4(b) of the Sub-lease to work the mining land subject to the provisions of the Enactment.

22. The Appellants further submit that even if the said references to "working the land" are given the restrictive meaning attributed thereto by Ong Hock Thye C.J. the act of the Respondents in cutting down rubber for the purposes of planting tapioca constituted a breach of their obligation under Clause 4(b) of the Sub-lease to "work the said land in an orderly skilful and workmanlike manner". The proper conduct of mining operations by the Respondents required the part of the mining land on which such operations were to be carried out to be cleared of rubber and the clearing of rubber for a reasonable distance in advance of such workings was therefore an essential and integral part of getting and winning ore from the land. It follows that in cutting down rubber over an area as large as 60 acres which was not immediately required for mining operations with the result (as pointed out by Chang Min Tat J.) that they would have to clear the new vegetation that would have grown before mining operations commenced the Respondents were working the land and were doing so otherwise than in an orderly skilful and workmanlike manner.

23. The Appellants also submit that the conclusion of Ong Hock Thye C.J. that the breach by the Respondents of the conditions in Section 16(vii) of the Enactment did not involve any breach of Clause 4(b) of the Sub-lease leads to the absurd result that while the Appellants would be liable

to a fine (under the joint effect of Section 18 and Section 120 of the Enactment) they would have no right to an indemnity from the Respondents nor any other remedy against the Respondents. For under Clause 4(b) of the Sub-lease the Respondents are liable to indemnify the Appellants only against "any expenses which they may incur, whether as a fine or otherwise, on account of any breach by the sub-lessee of this condition or of any of the express conditions contained in the said Mining Certificates or Mining Leases to be issued in place thereof". The conditions in Section 16(vii) are not "express" conditions in the Mining Certificates and on the construction of Clause 4(b) adopted by Ong Hock Thye C.J. the breach by the Respondents of that condition did not involve any breach of the conditions in Clause 4(b) of the Sub-lease.

24. The Appellants therefore submit that the judgment and Order of the Federal Court ought to be set aside.

41 25. The Appellants were granted Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong by an Order of the said Federal Court dated the 20th April 1970.

26. The Appellants humbly submit that this appeal should be allowed, that the judgment and Order of the Federal Court of Malaysia should be set aside, that the Order of the High Court should be restored and that the Respondents should be ordered to pay the Appellants their costs of this appeal, of the appeal in the Federal Court and of the proceedings in the High Court for the following among other

REASONS

1. BECAUSE the construction placed by the Federal Court on the references to the working of mining land in Clause 4(b) of the Sub-lease and in Section 97(ii)(b) of the Enactment is a restrictive construction not in accordance with the ordinary and natural usage of the language of Clause 4(b) and Section 97(ii)(b) and not justified by the context of the Sub-lease and the Enactment.

2. BECAUSE the Respondents in cutting down rubber trees and planting tapioca on the mining land were working such land and were working such land otherwise than in accordance with the provisions of the Enactment.

3. BECAUSE even if the references in Clause 4(b) and in Section 97(ii)(b) to the working of mining land are construed in the sense adopted by the Federal Court the Respondents in cutting down rubber trees over an area of 60 acres of mining land were working the mining otherwise than in an orderly skilful and workmanlike manner in breach of Clause 4(b) of the Sub-lease.

4. BECAUSE the restrictive construction placed by the Federal Court on the reference in Clause 4(b) of the Sub-lease and in Section 97(ii)(b) of the Enactment leads to the absurd result that the Appellants would be liable to a fine under the joint effect of Sections 18 and 120 by reason of the Respondents' breach of the provisions of Clause 16(vii) of the Enactment but would have no right to an indemnity from nor any other remedy against the Respondents.

5. BECAUSE for the reasons stated therein the Judgment of the Trial Court was right and ought to be restored.

JOHN VINELOTT

CHRISTOPHER H. McCALL

No. 27 of 1970

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LEWIS, LEWIS & CO.,
Hale Court,
Lincoln's Inn,
London, W.C.2.