

16, 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 5 of 1968

ON APPEAL FROM

THE FEDERAL COURT OF MALAYSIA

B E T W E E N : PEGANG MINING COMPANY LIMITED Appellants
(formerly known as Pegang
Prospecting Company Limited)

--- and ---

CHOONG SAM, intervener (added First Respondent
by Order of Federal Court
dated 17th July, 1967)

--- and ---

LEE CHIM YEE and CHAN HON PENG(f) Second Respondents
as Executors of the Estate of
Chan Phooi Hong deceased

--- and ---

TONG SWEE KING(f) as Third Respondent
Executrix of the Estate
of Ho Kok Yew deceased

UNIVERSITY OF LONDON
INSTITUTE OF CHINESE
LEGAL STUDIES

19 MAR 1968
25 BURNLEY SQUARE
LONDON, W.C.1

CASE FOR THE APPELLANT

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Record

1. This is an appeal against the order of the Federal Court of Malaysia (Barakbah L.P. and Ong F.J., Azmi C.J. Malaya dissenting) dated the 17th July 1967, whereby it was ordered that the First Respondent and the Second Respondents be made Appellants in the place of the Third Respondent in the appeal then pending in that Court from the judgment of the High Court in Malaya at Ipoh (Ali J.) dated the 9th December 1966 whereby the Third Respondent's action against the Appellants and the Second Respondents had been dismissed.

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2. The action was originally brought by the Third Respondent as Executrix of Ho Kok Yew, deceased, who had been the managing partner of a mining partnership business known as the Khang Heng Kongsu which had since 1926 had mining interests in the district of Kinta in the State of Perak.

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By the further amended Statement of Claim dated the 7th July 1964, the Third Respondent alleged that a written agreement dated 22nd October 1931 made between the Appellants, the deceased Ho Kok Yew, and one Ho Man (hereinafter referred to as "the 1931 agreement") was still binding and effective between the parties thereto and their successors; that the interest of Ho Man in the 1931 agreement had passed to one Chan Phoi Hong, and on his death to his executors, the Second Respondents; that, in the events which had happened, the Appellants had acquired or were about to acquire leasehold interests in certain mining lands; that by reason of the terms of the 1931 agreement, the Appellants were bound to grant sub-leases of such mining lands to the Second Respondents, and that the Second Respondents in turn were bound to grant sub-sub-leases of such lands to the Third Respondent. 10 20

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3. The further amended Defence of the Appellants admitted the making of the 1931 agreement, but denied that it had the meaning and effect alleged in the Statement of Claim; the agreement did not relate to the mining of lands referred to in the Statement of Claim, or was not binding in relation thereto.

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4. The Defence of the Second Respondents simply admitted all the allegations in the Statement of Claim, and alleged that the Second Respondents had always been ready and willing to do everything in their power to fulfil their obligations to the Third Respondent but had been unable to do so because the First Respondents had refused to carry out its obligations as set out in the Statement of Claim. Apart from asking for costs to be paid by one of the other parties, no relief was claimed by the Second Respondents either in this Defence or otherwise. 30 40

5. The trial of the action took place in the High Court in Malaya at Ipoh over a number of days, during which a considerable body of evidence, both documentary and oral, was given.

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Judgment was delivered by Ali J. on the 9th December 1966. He said that the case for the Third Respondent, the original plaintiff, simply stated was that by the relevant provisions of the 1931 agreement there was an implied obligation on the Appellants to grant sub-leases over the lands in dispute; those lands 50

10 had been acquired by the Appellants since 1931. The learned Judge then dealt with the facts surrounding the mining of the land since 1931, both in relation to the original areas referred to in the 1931 agreement, called Lots 1, 2, 3 and 4, and also in relation to new areas the subject matter of dispute, called Lots 5, 6 and 7 and the Railway Reserve, over which the Appellants had only acquired rights since some time after 1947, when Ho Kok Yew had died. After his death there had been difficulties over financing the mining work and the Appellants had become impatient over the delay and had considered making other arrangements for mining the new areas.

20 The learned Judge set out the defences pleaded by both Defendants, and considered the terms of the 1931 agreement. Clause 2 contained an undertaking to renew sub-leases on Lots 1-4, which were immaterial to the present action. Clause 4 was relied upon by the Third Respondent; it was an undertaking by Ho Man and Ho Kok Yew to assist the Appellants to acquire further mining lands or interests therein to include in the mining scheme, but the Third Respondent claimed that there was implied in the clause an agreement in favour of the other parties to the 1931 agreement by the Appellant to lease the land so acquired for the purposes of the scheme. 30 However, in the view of the learned Judge, clause 4 did not contain a concluded agreement to that effect; it was nothing more than an expression of hope that the parties would work closely together; it was no more than an agreement to make a further agreement if and when further mining lands were acquired by the Appellants; such further agreement would be in the form of sub-leases, whose 40 terms would have to be agreed, including the amount of tribute to be paid. Such further agreement had never been made. The Third Respondent's claim accordingly failed and there must be judgment for the Appellants with costs. It was difficult to see what claim there was against the Second Respondents, but there would be an order for judgment in their favour, but with costs only up until close of pleadings, since at that time 50 the Second Respondents could have successfully claimed to have been dismissed from the action.

6. On the 6th January 1967 the Third Respondent filed notice of appeal to the

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Federal Court against this judgment. On the 24th March 1967 the Third Respondent, having on the same day given notice that she was acting in person, filed a notice in the Federal Court that she was wholly discontinuing her appeal. This discontinuance was filed in pursuance of a written agreement between herself and the Appellants dated the 15th March 1967, whereby she received an ex gratia payment of \$10,000 in full settlement of her claims against the Appellants, and she further agreed to withdraw her appeal. 10

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7. On the 23rd March 1967 the First Respondent applied to the Federal Court by motion to be substituted as appellant in the place of the Third Respondent. In a supporting affidavit, he stated that he was the miner who had since 30th June 1963, been actually working the areas of which the Third Respondent was sub-lessee of the Appellants and was currently working as a contractor under an agreement made in July 1964 which was annually renewable by him. If the Third Respondent did not obtain the leases which were the subject matter of the action, he would suffer a very large loss in the future. He said that he had asked the Third Respondent to bring the action and had given her a written indemnity against her costs in return for which she had agreed that he should have the final decision as to whether or not to appeal against any order made by a Court in the proceedings. He asserted that the settlement between the Third Respondent and the Appellants was collusive for the purpose of destroying the Second Respondents rights to the lands in dispute. 20 30

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An affidavit was filed on behalf of the Second Respondents saying that they were prepared to be substituted as appellants in the pending appeal, if the Court deemed it expedient. 40

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8. The motion was heard by the Federal Court of Malaysia on the 2nd May 1967, and judgment was given by the Federal Court (Barakbah L.P. and Ong F.J., Azmi C.J. Malaya dissenting) on the 17th July 1967, allowing the application.

Azmi, C.J. of Malaya, delivered the first judgment. He referred to the history of the case and the abandonment by the Third Respondent of her appeal. The First Respondent clearly had a contractual right against the Third Respondent, 50

but, upon an analysis of the English authorities applicable to the First Respondent's application, it was necessary for the First Respondent to show that he had a legal interest in the litigation, rather than a mere commercial interest. The First Respondent did not have a legal interest in the subject matter of the present case, and ought not to be joined as a party.

10 9. Ong F.J. in his judgment said that the question in issue in the action was the proper interpretation of clause 4 of the 1931 agreement. By reason of the agreement secretly made between the Third Respondent and the Appellants, that question would no longer fall to be determined by the Court unless the present application were granted. On his understanding of the English authorities, the learned Federal Judge had no doubt that the applicant had a very real legal interest in the subject matter of the litigation, because if the Third Respondent was entitled to the leases she claimed over the lands in dispute, the First Respondent would be entitled to enforce his contractor's agreement of 27th July, 1964 against her to enable him to mine those lands. The First Respondent was an aggrieved person whose legal rights had been circumvented by the Third Respondent and the Appellants acting in concert to cut the ground from under his feet. 20 The Third Respondent ought to be held to her contract with the First Respondent to allow him full conduct of her case in the action, and she was estopped from acting in a contrary manner and leaving the First Respondent in the lurch. The application should be allowed, the First Respondent and the Second Respondents should be substituted as appellants, and the Third Respondent should be made a respondent to the appeal. 30

40 10. Barakbah L.P. said that he had read the judgments of the other two judges and agreed with that of Ong F.J. The applicant was legally interested in the action since a favourable result to the Third Respondent's appeal would undoubtedly give the First Respondent the right to work the lands in dispute. In view of the indemnity as to costs given by the First Respondent to the Third Respondent, it was only just and equitable that the First Respondent should 50 be allowed to intervene.

11. On the 29th September, 1967 the Appellants

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were granted conditional leave to appeal by the Federal Court of Malaysia and on the 8th February 1968 final leave to appeal was granted.

12. The Appellants respectfully submit that the majority judgments of the Federal Court were wrong and ought to be reversed.

It is submitted that while a Court, under the relevant rules of procedure, has a discretion whether or not to permit a new party to be joined to existing proceedings, such discretion must be exercised in accordance with principles already laid down in decided cases. In particular an intervener must show that the interest which he has or claims in the subject matter is a legal interest, and not a mere commercial interest. Such principle was apparently accepted in all the judgments of the Federal Court, but, it is submitted, was wrongly applied by the majority judgments to the facts of the present case. The First Respondent's only interest in the case arises as a result of his contract of 27th July 1964 with the Third Respondent to mine whatever land she might be entitled to occupy under leases originating with the Appellants. The First Respondent has never claimed to be entitled to any legal interest in any of the mining lands either held by the parties hereto or in dispute between them, or to be entitled to call for the grant to him of any such legal interest. The First Respondent's interest could only have arisen if the Third Respondent had been successful in the action, in which event he would prima facie have been entitled to call upon the Third Respondent to fulfil her contract with him to permit him to mine. It is submitted that upon the English authorities cited in the Federal Court such an interest cannot be described as greater than a commercial one, which is not sufficient to give the First Respondent grounds for intervention in the proceedings.

13. It is further submitted that, if the Federal Court had any discretion over the grant of the application made to it, such discretion should have been exercised in favour of the Appellants. The agreement of 27th July, 1964 upon which the First Respondent relies to found an interest in the proceedings, was made after the

issue of the writ in the action and considerably after the dispute between the Appellants and the Third Respondent had arisen. The First Respondent had made no attempt to join in the proceedings before the trial judge gave judgment. There are no issues on the pleadings which directly affect the First Respondent, and he is not affected in any legal interest by the result of the trial. The settlement by the Third Respondent of her claims by a payment by the First Respondent in return for a withdrawal by her of all her claims made in the action means that there can now be no outstanding issues of any kind upon the pleadings, whoever the parties to an appeal in the Federal Court may be. It is submitted that only in very exceptional circumstances can a party, even one claiming a legal interest in the proceedings, be added for the first time at the appellate stage of an action, and that no such circumstances exist in the present case. It is submitted that even if the Third Respondent has broken her agreement with the First Respondent to permit him to control her conduct in the action, such a consideration is irrelevant to the application made to the Federal Court, and that the reasoning of Ong F.J. to the contrary is wrong.

14. It is further submitted that it was not correct for the Second Respondents to be added as appellants in the appeal to the Federal Court, whether with or without the First Respondent also being added. The Second Respondents have adopted a negative attitude throughout the proceedings; they sought no relief on the pleadings and judgment was given at the trial in their favour. They suffered no prejudice by reason of the settlement by the Third Respondent of her claims, and even without such settlement would have had no ground upon which to appeal against the judgment of the trial judge. The joinder of the Second Respondents as appellant was not considered in any of the judgments of the Federal Court, and, it is submitted, ought not to have been ordered.

15. The Appellants therefore respectfully submit that this appeal should be allowed and that the order of the Federal Court of the 17th July 1967 should be set aside, with costs, for the following, among other

R E A S O N S

(1) Because there were no grounds upon which either the First Respondent or the Second Respondents could have been substituted as appellants before the Federal Court.

(2) Because the First Respondent had no legal interest in the subject matter of the proceedings.

(3) Because the First Respondent's only interest was the prospect of commercial advantage as a result of the proceedings. 10

(4) Because the settlement between the Appellants and the Third Respondent had brought the proceedings to an end.

(5) Because there were no outstanding issues to be considered on appeal before the Federal Court.

(6) Because of the other reasons in the judgment of Azmi, C.J. Malaya.

MERVYN HEALD

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ANTHONY HILLS

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THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

PEGANG MINING COMPANY
LIMITED (formerly Appellant
known as Pegang
Prospecting Company
Limited)

--- and ---

CHOONG SAM, intervener First
(added by Order of Respondent
Federal Court dated
17th July 1967)

--- and ---

LEE CHIM YEE and Second
CHAN HON PENG(f) Respondents
as Executors of
the Estate of Chan
Phooi Hong deceased

--- and ---

TONG SWEE KING(f) as Third
Executrix of the Respondent
Estate of Ho Kok
Yew deceased

C A S E

FOR THE APPELLANT

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