

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 5 of 1968

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

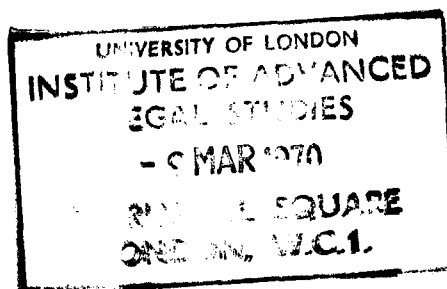
B E T W E E N :-

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

- and -
CHOONG SAM ^{INTERVENER} (added by Order
of Federal Court dated 17th
July 1967) First Respondent

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

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



R E C O R D O F P R O C E E D I N G S

PARKER GARRETT & CO.,
St. Michael's Rectory,
Cornhill,
London, E.C.3.
Solicitors for the
Appellant

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

Solicitors for the First
and Second Respondents

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

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

Appellant

- and -

CHOONG SAM, ^{INTERVENER} (added by Order of
Federal Court dated 17th
July 1967)

First
Respondent

- and -

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

Second
Respondents

- and -

TONG SWEE KING (f) as
Executrix of the Estate of
Ho Kok Yew dec'd

Third
Respondent

R E C O R D O F P R O C E E D I N G S

No. 1

WRIT OF SUMMONS

In the High
Court in
Malaya at Ipoh

IN THE HIGH COURT IN MALAYA AT IPOH

B E T W E E N :

Suit No.
304 of 1964

TONG SWEE KING (f) As Executrix
of the Estate of Ho Kok Yew
dec'd Plaintiff

No. 1
Writ of Summons,
7th July 1964.

- and -

1. PEGANG MINING COMPANY LIMITED
(formerly known as Pegang
Prospecting Company Limited)
2. LEE CHIM YEE and CHAN HON
PENG (f) as Executors of the
Estate of Chan Phooi Hong
deceased Defendants

In the High
Court in
Malaya at Ipoh

GENERAL FORM OF WRIT OF SUMMONS

No. 1
Writ of Summons
7th July 1964.
(Contd.)

THE HONOURABLE DATO SYED SHEH BARAKBAH, P.M.N.
D.P.M.K., P.S.B., CHIEF JUSTICE OF THE HIGH COURT
OF MALAYA IN THE NAME AND ON BEHALF OF HIS MAJESTY
THE YANG DI-PERTUAN AGONG

To:

- (1) Pegang Mining Company Limited
formerly known as Pegang
Prospecting Company Limited,
c/o Messrs. Evatt & Company,
Secretaries
Chartered Bank Chambers,
IPOH.
- (2) Lee Chim Yee and Chan Hong Peng
(f) As Executors of the Estate
of Chan Phooi Hong deceased,
164 Jalan Bander,
KUALA LUMPUR

A

WE COMMAND you that within Eight (8) days -
Deft. No.1. Twelve (12) days - Deft No.2. after
the service of this Writ on you inclusive of the
day of such service you do cause an appearance to
be entered for you in an action at the suit of
Tong Swee King (f) as Executrix of the Estate of
Ho Kok Yew deceased of No. 2, Lau Ek Ching Street,
IPOH.

B

AND TAKE NOTICE that in default of your so
doing the Plaintiff may proceed therein and
judgment may be given in your absence.

C

WITNESS RAJA AZLAN SHAH, REGISTRAR of the
High Court, Malaya this 16th day of July 1964.

Sg. Braddel & Ramani
Plaintiff's Solicitors

Sd. Chiv Charan Singh
Senior Assistant
Registrar, High Court,
Ipoh.

NOTE:-

This Writ is to be served within twelve
months from the Date thereof or if renewed
within six months from the date of the
last renewal including the day of such date
and not afterwards.

D

The defendant (or defendants) may appear hereto by entering an appearance (or appearances) either personally or by Solicitor at the Registry of the High Court at IPOH.

In the High Court in Malaya at Ipoh

A A defendant appearing personally may if he desires enter his appearance by post and the appropriate forms may be obtained by sending a Postal Order for \$3.00 with an addressed envelope to the Registrar of the High Court at Ipoh.

No. 1
Writ of Summons,
7th July 1964.
(Contd.)

INDORSEMENT

The Plaintiff's claim is for:-

- (a) a declaration that the agreement between Pegang Prospecting Limited, the late Ho Man and the late Ho Kok Yew dated the 22nd day of October 1931 is valid and binding between the parties thereto and between the parties hereto as their respective successors
- B (b) specific performance of the terms of the said agreement dated 22nd day of October 1931
- (c) an injunction
- (d) other relief.

Dated this 7th day of July 1964.

Sd. Braddell & Ramani
Solicitors for the Plaintiff
named above.

C This Writ was issued by Messrs. Braddel & Ramani whose address for service is Second Floor, Hongkong Bank Chambers, Benteng, Kuala Lumpur for the Plaintiff who resides at No. 2 Lau Ek Ching Street, Ipoh.

This Writ was served by me at the office of Messrs. Evatt & Co. on the first Defendant on Thursday 16th day of July 1964 at the hour of 11.45 a.m.

Indorsed this 16th day of July 1964.

(Signed)

(Address)

Process Server, High Court,
Ipoh.

5.

No. 2

FURTHER AMENDED STATEMENT OF CLAIM

In the High
Court in
Malaya at Ipoh

The Plaintiff abovenamed states as follows:-

No. 2

Further amended
Statement of
Claim,
7th July 1964.

- A 1. The Plaintiff is the Executrix of the Estate of one Ho Kok Yew deceased under and by virtue of a Grant of Probate of the Will of the said Ho Kok Yew issued to her by the High Court at Ipoh on the 9th day of January 1948 in Administration Petition No. 288 of 1947. She is the widow of the said Ho Kok Yew deceased and the sole beneficiary under his said Will.
- B 2. The said Ho Kok Yew from 1926 and up to the time of his death in 1947 was the Managing Partner of a mining partnership business known as the Khong Heng Kongsí which since 1926 had and still has mining interests in the District of Kinta, in the State of Perak. The Plaintiff is the Attorney of Ho Win Shen the only other partner of the said Khong Heng Kongsí by virtue of Power of Attorney No. 709 of 1957 registered in the High Court at Ipoh.
3. The Plaintiff succeeded to the position of Managing Partner of the said Khong Heng Kongsí after the death of Ho Kok Yew and is still the Managing Partner.
- C 4. The first Defendant is a limited liability Company incorporated on the 13th day of October 1920 in the States of Malaya and has its registered office at the Chartered Bank Chambers at Ipoh.
5. The First Defendant was formerly known as Pegang Prospecting Company Limited and on or about the 23rd day of October 1961 changed its name to Pegang Mining Company Limited.
6. The Second Defendants are the Executors and Trustees of the Estate of one Chan Phooi Hoong deceased

In the High
Court in
Malaya at Ipoh

No. 2

Further amended
Statement of
Claim,
7th July 1964.
(Contd.)

under and by virtue of a Grant of Probate of the Will of the said Chan Phooi Hoong deceased issued to them by the High Court at Kuala Lumpur in Administration Petition No. 19 of 1962 on the 20th day of March, 1963. The said Chan Phooi Hoong died on the 14th day of December 1958.

7. Under an agreement dated the 22nd October 1931 between Pegang Prospecting Limited, the late Ho Man and the late Ho Kok Yew (hereinafter referred to as the said agreement of 22nd day of October 1931) an arrangement was agreed upon by the parties to aggregate 14 pieces of mining lands into one mining scheme to be known as "the Kacha-Menelai Comprehensive Mining Scheme" and to allow the late Ho Kok Yew to work them on terms as set out in the said agreement of 22nd day of October, 1931. A copy of the said agreement dated 22nd October 1931 is annexed hereto and marked "T.S.K.1".

A

B

8. The said 14 pieces of mining lands referred to in the said agreement of 22nd day of October 1931 are as set out in the Schedule annexed thereto.

9. At the time of the said Agreement of 22nd day of October 1931 and at all subsequent material times, the said Ho Kok Yew was the Sublessee or Subsublessee of 13 out of the said 14 pieces of mining lands the exception being Mining Lease No. 11447 Lot 30286 and was operating a mine in one or more of the said 13 pieces of mining lands (hereinafter referred to as the said Khong Heng mine). The details of his title to each of the said 13 pieces of lands are as set out in the Schedule to the said agreement of 22nd day of October, 1931 except that in respect of

C

Mining Lease 8899 Lot 21952

Mining Lease 10217 Lot 24766

D

Mining Lease 11543 Lot 29650

Mining Lease 11544 Lot 29651

they were not held by Ho Kok Yew as sublessee but as subsublessee from Ho Man.

A sketch plan of the said 14 pieces of mining lands is attached hereto and marked "T.S.K.2".

In the High
Court in
Malaya at Ipoh

No. 2
Further amended
Statement of
Claim,
7th July 1964.
(Contd.)

A 10. By the said Agreement of 22nd day of October 1931, the First Defendant Company agreed with the late Ho Man and the late Ho Kok Yew that it would support the application of Ho Kok Yew for aggregation of the 14 pieces of mining lands set out in the said schedule to the said Agreement of 22nd day of October 1931 under the said "Kacha-Menelai Comprehensive Mining Scheme" on certain conditions.

B 11. One of the conditions was that if the First Defendant Company should apply for the acquisition of any land in the vicinity of the said Khong Heng Kongsai Mine for the purpose of including the same in the said mining scheme the late Ho Kok Yew and the late Ho Man should not obstruct or attempt to obstruct or interfere or attempt to interfere with acquisition by the Company of such mining land but that each of them was to assist the First Defendant Company to obtain such land for such purpose.

12. Accordingly, some time in 1931 the late Ho Kok Yew made an application for aggregation of the said lands.

13. Such application for aggregation aforesaid supported by the First Defendant Company was approved and Aggregation Permit No. 2/32 was issued to the late Ho Kok Yew on 13th February 1932 for the following lands:-

C Mining Lease No.

8899	(No. 1 in the schedule to the said agreement of 22nd October 1931)
10527	(No. 7
10400	(No. 8
10525	(No. 9
6694	(No.10
8918	(No.11
9946	(No.12

8.

In the High Court in Malaya at Ipoh	11647	(No.13
	11646	(No.14

No. 2 Subsequently on 21st December 1932 Mining Lease
Further amended No. 10217 (No. 2 in the said Schedule to the
Statement of agreement dated 22nd October 1931) was added to
Claim, the above list of lands aggregated.

7th July 1964.

(Contd.)

14. Some time in 1949 Aggregation Permit No. 2/32
was replaced by Aggregation Permit No. 2/49 dated
8th April 1949 which aggregated the following
lands for mining purposes:

A

Mining Lease No.

6694	(No.10 in the schedule to the said agreement of 22nd October 1931)
------	--

8899	(No. 1
------	--------

9946	(No.12
------	--------

10400	(No. 8
-------	--------

10525	(No. 9
-------	--------

B

10526	(No. 6
-------	--------

10527	(No. 7
-------	--------

11543	(No. 3
-------	--------

11544	(No. 4
-------	--------

11646	(No.14
-------	--------

11647	(No.13
-------	--------

12338	(Not in the said schedule but shown on the plan attached and marked "T.S.K.2")
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C

A copy of the said Aggregation Permit No. 2/49
is annexed hereto and marked "T.S.K.3".

15. On the 15th day of June 1939 a written agree-
ment was entered into between W.J.P. Grenier,

Administrator of the Estate of Ho Man deceased, Mak Shi and Ho Yue Kong, widow and son respectively of the said Ho Man deceased, and the late Chan Phooi Hoong whereby the Estate of Ho Man deceased agreed to sell to Chan Phooi Hoong all the interest of Ho Man deceased in Chop Chan Thye Lee and all the property both immovable and movable of the said Ho Man deceased situate in the Federated Malay States, Johore and in Siam and the Straits Settlements.

In the High Court in Malaya at Ipoh

No. 2
Further amended Statement of Claim,
7th July 1964.
(Contd.)

A

16. By virtue of an Order of Court in Originating Summons No. 107 of 1939 in the High Court at Kuala Lumpur on the 21st day of July 1939 the Administrator of the Estate of Ho Man deceased was in pursuance of the said Agreement dated 15th June 1939 permitted to sell inter alia all the interest of the said Ho Man deceased in Chop Chan Thye Lee and in the properties set out in the said Agreement dated 15th June 1939 to the late Chan Phooi Hoong including the rights and obligations of the said Ho Man in the said agreement dated the 22nd October 1931, hereinafter referred to.

B

17. In pursuance of such Order of Court in the said Originating Summons No. 107 of 1939, the said sale was effected in accordance with the terms of the said Agreement dated the 15th day of June 1939. Copy of the said Order of Court dated 21st July 1939 is annexed hereto and marked "T.S.K.4".

C

18. By virtue of such sale, the said Chan Phooi Hoong acquired and succeeded to the rights and obligations of the said Ho Man under the said Agreement of the 22nd day of October 1931 made between the First Defendant Company, the late Ho Man and the late Ho Kok Yew.

19. The First Defendant Company had knowledge of and consented to such sale by the Estate of Ho Man deceased to the late Chan Phooi Hoong.

D

20. Immediately after the Liberation of Malaya at the end of World War II the First Defendant Company through its Chairman, General Manager and Attorney, affirmed by a letter dated 2nd November 1946 to the late Ho Kok Yew that the said agreement of 22nd October 1931 was still subsisting and valid and binding as between the parties thereto.

In the High
Court in
Malaya at Ipoh

No. 2

Further amended
Statement of
Claim,
7th July 1964.
(Contd.)

A copy of the said letter dated 2nd November 1946 from C.E. Cumming, Chairman, General Manager and Attorney of the First Defendant Company to the late Ho Kok Yew affirming the said Agreement is attached hereto and marked "T.S.K.5".

21. On the strength of such confirmation the late Ho Kok Yew restarted the said Khong Heng Kongsu Mine in the area under the said Aggregation Permit No. 2/49.

A

22. Relying on the mining activities of the late Ho Kok Yew in the Kacha-Menelai Area and the arrangements made between the parties under the said Agreement of 22nd October 1931 the First Defendant Company applied filed two applications for Mining Leases on or about the 3rd August 1946 2nd July 1946; one for :-

- (i) that section of the former Ipoh-Tronoh Railway Reserve shaded "~~RED~~" on the Exhibit "~~T.S.K.2~~" to the north of and adjoining Lots 29650, 30286, 21800 and 12260 (approximately 34 acres)

B

and the other for:-

- (ii) Lot 30286 and 4 other lots (which 4 lots are not material to this suit).

22A. As a result of letter dated 7th day of August, 1946 from the Collector of Land Revenue, Batu Gajah to the General Manager, Kacha & Menelai Mining Scheme in reply to the abovesaid said two applications the First Defendant Company was informed that the said application set out under paragraph 22(i) above for 34 acres of the former Ipoh-Tronoh Railway Reserve could be considered only in respect of that portion between Lots 21952 and 29650 and that the said application set out under paragraph 22(ii) above could not be entertained at all as the majority of the lands applied for were alienated lands.

C

22B. By their letter of 14th October 1946 the First Defendant Company replied to the abovesaid letter of 7th August 1946 from the Collector of Land Revenue, Batu Gajah and reduced their application of 2nd July 1946 for the Railway

D

Reserve to that portion of the Railway Reserve lying between Lots 21952 and 29650.

In the High Court in Malaya at Ipoh.

No. 2
Further amended Statement of Claim,
7th July 1964.
(Contd.)

A 23. On 7th July 1947 Messrs. Evatt & Company, Secretaries of the First Defendant Company, wrote to the Collector of Land Revenue, Kinta, Batu Gajah, setting out their reliance on the arrangements made under the said Agreement of 22nd October 1931 as a ground in support of their aforesaid application. They stated that the First Defendant Company had an agreement with the Estate of Ho Man deceased and the late Ho Kok Yew for mining the surrounding areas and any future areas they might obtain in that neighbourhood. A copy of the said letter from Messrs. Evatt & Company to the Collector of Land Revenue, Batu Gajah, is attached hereto and marked "T.S.K.6".

B 24. Again on 14th July 1947 the First Defendant Company confirmed the subsistence of the said Agreement of 22nd October 1931 in their reply to the late Chan Phooi Hoong and its intention to apply its provisions to the section of the said Ipoh-Tronoh Railway Reserve adjoining Lot 30286.

A copy of the said letter is attached hereto and marked "T.S.K.7".

25. ~~The application of the First Defendant Company made on or about 3rd August 1946 was refused on about 18th August, 1951.~~

C As a result of the First Defendant Company's abovesaid application for the reduced portion of the Railway Reserve as set out in paragraph 22B above, the First Defendant Company was on 21st May 1951 granted a prospecting permit for the portion of the Railway Reserve between Lots 21952 and 29650 in area about $8\frac{1}{4}$ acres.

D 25A. Consequent upon the abovesaid grant of a prospecting permit, the First Defendant Company applied on 15th September 1951 for a Mining Lease over the abovesaid portion of the Railway Reserve of about $8\frac{1}{4}$ acres.

26. The First Defendant Company however applied again on or about 11th September 1951 for a prospecting licence for the following :-

In the High
Court in
Malaya at Ipoh

No. 2

Further amended (b) Lots 28358 and 28390.
Statement of

Claim,
7th July 1964.
(Contd.)

(a) that section of the former Tronoh Railway Reserve shaded "~~RED~~" on "~~T.S.K. 2~~" to the north of and adjoining Lot 30286. (approximately ~~34~~ acres eleven acres); and

27. In this second application of 11th September 1964 Messrs. Evatt & Company as Secretaries of the First Defendant Company stated that the lands applied for were required for future extension of the existing mines.

A

28. At the times material to this second application, the First Defendant Company was itself not operating any mine in that area and the only mine in operation in the said area was that operated by the Khong Heng Kongsu in accordance with the arrangements made under the said Agreement of 22nd October, 1931.

28A. On 6th April 1957, the First Defendant Company applied for a mining lease over Lot 30286 in order that it may be able to mine the common boundary to the Railway Reserve which lies contiguous to the said Lot 30286.

B

29. In October 1956, the First Defendant Company, after protracted proceedings, gave to the late Chan Phooi Hoong a sublease over Mining Leases 8899 and 11543 for Lot Nos. 21952 and 29650 Mukim of Blanja for the purpose of enabling the late Chan Phooi Hoong to subsublease the same to the Plaintiff in accordance with the provisions of the said Agreement of 22nd October 1931.

C

30. The late Chan Phooi Hoong accordingly on 29th October 1956 executed the necessary subsublease in favour of the Plaintiff.

31. The Plaintiff is now working on the said lands held under Mining Leases Nos. 8899 and 11543 under such subsublease from the late Chan Phooi Hoong.

Such sublease expires on 30th December 1965 and the said sublease from the First Defendant Company to the late Chan Phooi Hoong expires on 31st December 1965.

D

By Clause 3 of the said Agreement of 22nd October 1931 the First Defendant Company is bound to renew the said sublease to Chan Phooi Hoong for inclusion in the said Kacha Menelai Comprehensive Mining Scheme by giving in turn a subsublease to the Plaintiff.

In the High Court in Malaya at Ipoh

No. 2
Further amended
Statement of

32. On or about 31st March 1959 all the abovesaid applications of the First Defendant Company as set out in paragraphs 22B, 25A, 26 and 28A ~~made on or about the 11th September 1951~~ were approved by the Perak State Government ~~in respect of~~ and mining leases were granted in respect of the following lands:-

Claim,
7th July 1964
(Contd.)

(a) that section of the former Ipoh-Tronoh Railway Reserve shaded "RED" in "T.S.K.2" (approximately ~~34 acres~~ 18½ acres)

(b) the area formerly held under Mining Leases Nos. 10526 for Lot 28358 and 10527 for Lot 28390 now consolidated as Lot 44407 and held under Mining Certificate No. 3255; and

(c) the area formerly held under Mining Lease No. 11447 now known as Lot 30286 and held under Mining Certificate No. 3256.

33. The Plaintiff had on 13th August 1963 written to the First Defendant Company and to the Second Defendants requesting them to cause the necessary subsubleases to be given to her. The First Defendant has refused to do so though the Second Defendants were willing to comply with such request if they were given the necessary subleases by the First Defendant Company.

34. The First Defendant Company in breach of the said Agreement of 22nd October 1931 is now carrying on mining operations on Lot 30286 held under Mining Certificate No. 3256.

The Plaintiff therefore prays for:-

(i) a declaration that the said agreement of 22nd October 1931 is valid and binding between the parties thereto and between the parties hereto as their respective successors;

In the High
Court in
Malaya at Ipoh

No. 2
Further amended
Statement of
Claim,
7th July 1964.
(Contd.)

- (ii) an order that the First Defendant Company do execute valid and registrable sub-leases in favour of the Second Defendants in accordance with the terms of the said agreement of 22nd October 1931 in respect
 - (a) Mining Certificate No. 3255 for Lot 44407,
 - (b) Mining Certificate No. 3256 for Lot 30286, A
 - (c) the Mining Title to the said portion of the said Railway Reserve approved to it as and when the same is issued;
- (iii) an injunction restraining the First Defendant Company from mining the said Lot 30286 held under Mining Certificate No. 3256;
- (iv) an order that the rate of tribute in such subleases be at 7 per cent; B
- (v) an order that the Second Defendants do in turn execute subsubleases ~~thereover~~ over the lands set out in (ii) above in favour of the Plaintiff in accordance with the terms of the said agreement of 22nd October 1931;
- (vi) such further or other relief as may be just or necessary; and
- (vii) costs of this suit.

Dated and delivered this 7th day of July, 1964. C

Sgd. Braddell & Ramani
Solicitors for the Plaintiff
abovenamed.

Sgd. Chin Swee Onn
Solicitor for the Plaintiff
abovenamed.

No. 2(a)

"T.S.K.1" - Memorandum of Agreement

dated 22nd October 1931

MEMORANDUM OF AGREEMENT made this 22nd day of October, 1931, Between PEGANG PROSPECTING COMPANY LIMITED, a company incorporated in the Federated Malay States with registered office at Ipoh (hereinafter called "the Company") of the first part; HO MAN of Kuala Lumpur (hereinafter called "the Sub-lessee") of the second part; and HO KOK YEW of No. 12 Leong Sin Nam Street, Ipoh (hereinafter called "the Miner") of the third part;

In the High Court in Malaya at Ipoh

No. 2(a)
"T.S.K.1"
Memorandum of Agreement,
22nd October 1931.

WHEREAS the Sub-lessee holds on sub-lease from the Company the mining lands comprised in items Nos. 1 to 4 both inclusive shown in the Schedule annexed and signed as relative hereto which lands have been sub-sublet by the Sub-lessee to the Miner;

B AND WHEREAS the Company on the 1st day of July 1929 renewed the subleases held by the Sub-lessee from the Company in consideration of a verbal undertaking given by the Sub-lessee to erect a pumping plant and to commence working a mine on the portion of the Company's said lands known as the Company's Hill Area, which undertaking the Sub-lessee has failed to carry out.

C AND WHEREAS the Company on or about the 13th day of March 1931 agreed, notwithstanding such failure on the part of the Sub-lessee, to allow the Sub-lessee to transfer or sublet to the Miner the sub-lease granted by the Company to the sub-lessee, in consideration of the Miner as managing partner of the mine known as Khong Heng Kongsai Mine undertaking to advance the working of the said mine in an Easterly direction towards and into the land comprised in the Company's Mining Lease No. 8899 Lot No. 21952 (included in the said Schedule) which undertaking the Miner is at present fulfilling:

D AND WHEREAS the Miner is working all the lands comprised in the said Schedule as one

In the High
Court in
Malaya at Ipoh

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"T.S.K.1"
Memorandum of
Agreement,
22nd October
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(Contd.)

mine known as the said Khong Heng Kongsai
Mines;

AND WHEREAS the Sub-lessee and the Miner have made application to the British Resident of the State of Perak for permission in accordance with section 20 of the Mining Enactment 1928, to keep at work upon any one or more of the lands comprised in the said Schedule the number of labourers (or labour-saving apparatus equivalent thereto) required under sub-section (iii) of section 16 of the said Mining Enactment in respect of the aggregate area of said lands the working of which lands has been described for the purposes of the said application as the Kacha and Menelai Comprehensive Mining Scheme:

A

AND WHEREAS the Company is apprehensive that the permission referred to in the preceding paragraph hereof, if granted, may enable the Sub-lessee and/or the Miner to hold on sublease and/or sub-sublease the Company's mining lands comprised in said Schedule notwithstanding that the terms and conditions of the sub-leases and/or sub-sub-leases are not entirely fulfilled by the sub-lessee and/or sub-sublessee or fulfilled to the satisfaction of the Company;

B

AND WHEREAS the Company has approved of the said application to Government and consents to the said permission being granted under said section 20 of the Mining Enactment 1928, subject always to the conditions hereinafter referred to:

C

NOW IT IS HEREBY AGREED Between the parties hereto as follows:-

1. The Sub-lessee and/or the Miner from the date of this Agreement shall continue working the said Mine in an Easterly direction as at present. The said mine shall be worked in said direction expeditiously, in an orderly, skilful and workmanlike manner with a monitor or at least thirty coolies until such time as the working shall have reached the Company's said Lot No. 24952 and the tin ore deposits therein shall have been exposed to view in such manner that the parties hereto or their fully authorised

D

agents shall be enabled to form an opinion as to the value and extent thereof. Thereafter the working of the ground comprised in said Lot No. 21952 by the Sub-lessee and/or the Miner shall be carried on in such manner and to such extent as the Company and the Sub-lessee and the miner shall mutually agree upon, according to the value of such ground and subject to the terms and conditions of Sub-lease No. 170/29.

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(Contd.)

A

2. The Company hereby releases the Sub-lessee from all and every liability incurred by him under his said undertaking to erect a pumping plant and work the Company's Hill Area.

B

3. The Company shall use its best endeavours to assist the Sub-lessee and/or the Miner to procure the said permission from the Government, and so long as the working of the said Mining Scheme is carried out by the Sub-lessee and/or the Miner according to the requirements of the Government, the Company shall renew from time to time the sub-leases granted by them over the lands comprised in Items Nos. 1 to 4 of the said Schedule for the further periods for which mining leases over such lands shall respectively be renewed or issued to the Company so far as such subleases shall be required for the proper carrying out of the said Mining Scheme.

C

4. The Sub-lessee and the Miner and each of them hereby undertake and agree that they will not nor will either of them in any way obstruct or interfere with or attempt to obstruct or interfere with the acquisition by the Company (or its nominees) in the vicinity of the said Khong Heng Kongsu Mine of any mining lands or any right, title or interest therein (including water rights, rights of depositing tailings or other rights incidental to mining) which the Company may desire to acquire for the purpose of including same in the said Mining Scheme and the Sub-lessee and the Miner hereby undertake and agree further that they and each of them will use their best endeavours to assist the Company in acquiring such mining lands or interest therein.

D

5. In the event of a breach by the Sub-lessee and/or the Miner of any of the conditions of this

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(Contd.)

Agreement, the Company shall thereupon be at liberty to determine forthwith all or any of the sub-leases and sub-subleases granted or hereafter to be granted to the Sublessee and/or the Miner over any lands leased by the Company and/or cancel all or any mining rights to which the Company shall then be entitled and of which the Sub-lessee and/or the Miner may then have the benefit; and in the event of any such breach as aforesaid the sub-lessee and/or the Miner if and when requested by the Company to do so, shall forthwith surrender all or any of said sub-leases and/or sub-subleases and all or any of such mining rights as the Company shall require.

A

6. If and whenever any difference shall arise between the parties hereto or any of them or their successors or representatives respectively as to the construction, effect, incidence or consequence of this Agreement or any part thereof or otherwise relating to the premises, every such difference shall be referred to arbitration in pursuance of the provisions of "The Arbitration Enactment 1912" or any legislative modification or re-enactment thereof.

B

IN WITNESS WHEREOF the seal of the Company has been hereunto affixed and the Sub-lessee and the Miner have hereunto set their hands on the day and year first above mentioned.

SEALED with the Common Seal)
of Pegang Prospecting
Company Limited in the
presence of C.E. Cumming &
J.R. Crawford, Directors
and Evatt & Co., the
Secretaries of the Company)
Sd: C.E. Cumming
Sd: J.R. Crawford
Directors
Sd: Evatt & Co.,
Secretaries. Common Seal

C

SIGNED by the said Ho Man) Sd: Ho Man
in the presence of:-) (In Chinese)

Sd: Ho Kok Yew.

SIGNED by the said Ho Kok Yew) Sd: Ho Kok Yew
in the presence of:-)

D

Sd: G.G. Duddell.

Schedule referred to in the foregoing Memorandum of Agreement dated 22nd day of October, 1931 Between Pegang Prospecting Company Limited of the first part Ho Man of the second part and Ho Kok Yew of the third part.

KHONG HENG COMPREHENSIVE MINING SCHEME: KACHA & MENELAI

Index	M.L.No:	Plan No.	Area A. R. P.	Name of Lessee	Name of Sub-lessee	Date of expiry of M.L.	Remarks
1.	8899	21952	59 1 03	Pegang Prospecting Company Limited	Ho Kok Yew	24.12.37	Hill Area
2.	10217	24766	96 3 10	- do -	- do -	7. 3.44	Upper Flat
3.	11543	29650	19 1 22	- do -	- do -	14.12.37	- do -
4.	11544	29651	22 1 30	- do -	- do -	14.12.37	Lower Flat
5.	11447	30286	18 0 18	Ho Man	Nil	31.12.44	Dump only
6.	10526	28358	16 3 14	Pegang Prospecting Company Limited	Ho Kok Yew	3. 2.39	
7.	10527	28390	4 1 38	- do -	- do -	6. 2.38	
8.	10400	24921	7 0 23	Ho Man	- do -	11. 5.34	

19.

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No. 2(a)
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 22nd October 1931.
 (Contd.)

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20.

Index	M.L.No:	Plan No.	Area A. R. P.	Name of Lessee	Name of Sub- lessee	Date of expiry of M.L.	Remarks
9.	10525	11191	7 2 26	Ho Man	Ho Kok Yew	3. 2.39	
10.	6694	16426	2 1 27	- do -	- do -	10. 7.32	Renewal Applied for
11.	8918	21951	3 2 12	Tanda bin Latek and others	S/L Ho Kok Yew	10. 4.32	
12.	9946	26173	5 1 16	Wong Sek Ngen (Decd) Adm: Lee Yat Keow	- do -	10. 4.29	Renewed
13.	11647	31091	11 0 38	C.E. Cumming, Lian Ngim Thai (f), Ho Kok Yew	- do -	3. 6.38	
14.	11646	31089	2 2 00	- do - do -	- do -	3. 6.38	

Certified True Copy

B.K. Das
Advocate & Solicitor
Ipoh, Perak
26.5.47

No. 2(c)

"T.S.K.3" - Aggregation Permit No. 2/49,

8th April 1949

Pk. Mines 993/48

Under Section 20(i) of the Mining Enactment (Cap 147) permission is hereby given to the Executrix of the estate of Ho Kok Yew deceased as sublessee under the Mining Leases specified in the Schedule attached to keep at work upon any one or more of the said lands the number of labourers or labour-saving apparatus equivalent thereto required under sub-section (iii) of Section 16 of the Mining Enactment (Cap. 147) in respect of the aggregate area of such lands.

This permit is valid for a period of 5 years from the date of this permit, unless previously cancelled.

Ipoh, 8th April, 1949.

sd/- ?

MENTRI BESAR, PERAK.

21.

In the High
Court in
Malaya at Ipoh

No. 2(c)
Aggregation
Permit No. 2/49,
8th April 1949.

In the High
Court in
Malaya at Ipoh

No. 2(c)
Aggregation
Permit No. 2/49,
8th April 1949.
(Contd.)

Pk. Mines 993/48

S C H E D U L E

Sublease No.	Sublease No.	M.L.No.	Lot No.	Mukim	AREA A. R. P.
-	99/28	6694	16426	Blanja	2 1 27
67/37	of 66/37	8899	21952	"	59 1 03
-	69/37	9946	26173	"	5 1 16
-	100/28	10400	24921	"	7 0 23
-	100/28	10525	11191	"	7 2 26
-	5/26	10526	28358	"	16 3 14
-	5/26	10527	28390	"	4 1 38
67/37	of 66/37	11543	29650	"	19 1 22
67/37	of 66/37	11544	29651	Sg. Trap	22 1 30
-	68/37	11646	31089	Blanja	2 2 00
-	68/37	11647	31091	"	11 0 38
-	28/36	12338	33689	"	1 1 19
Total:-					160 0 16

23.

No.2(d)

"T.S.K.4" - ORDER OF COURT,
21st July 1939

FEDERATED MALAY STATES, STATE OF SELANGOR

IN THE COURT OF THE JUDGE AT KUALA LUMPUR

Originating Summons No. 107 of 1939

In the matter of the Estate
and Effects of Ho Man alias
Ho Soo, deceased.

A

W.J.P. Grenier,
Administrator of the Estate
of Ho Man alias Ho Soo,
deceased

Applicant

- and -

1. Mak Shi (f)
2. Ho Yue Kong

Respondents

BEFORE THE HON'BLE MR. JUSTICE F. GORDON SMITH
JUDGE OF APPEAL

IN CHAMBERS

21st day of July 1939

B

UPON HEARING Mr. W.G.W. Hastings for W.J.P. Grenier the above named Applicant and Mak Shi (f) and Ho Yue Kong the above named Respondents in person AND UPON READING the Originating Summons dated the 18th day of July 1939 and the affidavit of W.J.P. Grenier affirmed on the 17th day of July 1939 IT IS ORDERED that W.J.P. Grenier the Administrator of the Estate of Ho Man alias Ho Soo deceased be at liberty to sell and transfer to Chan Phooi Hoong or his nominee or nominees all the interest of Ho Man deceased in Chop Chan Thye Lee and in the properties set out in the agreement of the 15th day of June 1939.

In the High
Court in
Malaya at Ipoh

No. 2(d)
"T.S.K.4"
Order of Court,
21st July 1939.

C

Dated this 21st day of July, 1939.

THE SEAL OF THE
SUPREME COURT
FEDERATED MALAY
STATES.

Sd: Mohamed Taib
Assistant Registrar, Supreme
Court, Kuala Lumpur.

24.

No. 2(e)

"T.S.K.5" - Letter C.E. Cumming to Ho Kok Yew,
2nd November 1946

In the High
Court in
Malaya at Ipoh

No. 2(e)

"T.S.K.5"
Letter C.E.
Cumming to Ho
Kok Yew,
2nd November
1946.

We, the Pegang Prospecting Company Limited being the registered Lessee of Mining Lease No. 10217 for Lot No. 24766 in the Mukim of Sungei Trap, do hereby confirm that the sublease granted to you in respect of the said mining lease shall be in force and agree to renew the same on approval of its removal or extension thereof.

A

We further confirm that Subleases granted to you in respect of any other mining leases of the above Company shall be in force and renewable.

Dated this 2nd day of November, 1946.

Signed: C.E. Cumming

Att. & Gen. Manager,
Pegang Prospecting Co., Ltd.

To:

B

Ho Kok Yew Esq.,
Khong Heng Kongsii,
Ipoh.

25.

No. 2(f)

"T.S.K.6" - Letter Evatt & Co. to Collector
of Land Revenue, 7th July 1947

EVATT & CO.
CHARTERED ACCOUNTANTS
SINGAPORE, PENANG, IPOH,
KUALA LUMPUR & MALACCA.

P.O. BOX NO. 136
CHARTERED BANK
CHAMBERS
IPOH, MALAYA

In the High
Court in
Malaya at Ipoh

No. 2(f)

"T.S.K.6"
Letter Evatt &
Co. to Collector
of Land Revenue,
7th July 1947.

A Telegrams: "EVATT"
Telephone: IPOH 129

7th July, 1947

The Collector of Land Revenue,
BATU GAJAH.

Sir,

Pegang Prospecting Company Limited
and Kacha & Menelai Mining Scheme.

B We have the honour to refer to the applica-
tion made by this Company for a mining lease over
part of the Tronoh Railway Reserve which applica-
tion was made in August, 1946, and the area was
indicated on a Plan attached as between points
"AA" and "BB".

We wrote to the Commissioner of Lands,
Seremban, in connection with the application on
13th June last, but have not yet received a reply.

C The position is that the Company has an
agreement with the Estate Ho Man, Deceased, and
the late Ho Kok Yew for mining the surrounding
areas and any future areas we may obtain in this
neighbourhood; Mr. Ho Kok Yew died in April last
and his representatives have applied for a
Rehabilitation Loan to make mining to be recommen-
ded, but before the Loan can be obtained they have
to put an approved scheme, and this entails plans
for working the Railway Reserve.

In the High
Court in
Malaya at Ipoh

We would be obliged if the matter could receive
your early attention.

We have the honour to be, Sir,

No. 2(f)
"T.S.K.6"
Letter Evatt
& Co. to
Collector of
Land Revenue,
7th July 1947.
(Contd.)

Your obedient servants,

(Sgd) Evatt & Co.

Secretaries.

A

Copy for:-

The Representatives of Ho Kok Yew, Deceased
2, Lau Ek Ching Street,
Ipoh.

27.

No. 2(g)

"T.S.K.7" - Letter Evatt & Co. to Chan
Phooi Hoong, 14th July 1947

PPC/V

P.O. Box No. 136,
Chartered Bank Chambers,
Ipoh, MALAYA.

In the High
Court in
Malaya at Ipoh

14th July, 1947.

No. 2(g)
"T.S.K.7"
Letter Evatt
& Co. to Chan
Phooi Hoong,
14th July
1947.

A Mr. Chan Phooi Hoong,
Chop Chan Thye Lee,
164 High Street,
KUALA LUMPUR.

Dear Sir,

Pegang Prospecting Co. Limited
M.L. 10217, Lot 24766

We are in receipt of your letter of 10th instant.

B We were not previously aware that the mining interests of the late Mr. Ho Man had been transferred to you.

Upon production of the Order of Court authorising the transfer we can arrange for the new sublease over this area to be made in your name.

C The provision for renewal is contained in an agreement dated 22nd October 1931, not in the Sublease. We do not know whether you have a copy of that agreement - if you have we would draw your attention to the provisions in para 4 wherein the sublessee agrees to assist the Company in acquiring further mining lands in that area. In drawing your attention to this, we have in mind the railway reserve area where it adjoins your Lot No. 30286.

Yours faithfully,
Signed Evatt & Co.
Secretaries.

No. 3

FURTHER AMENDED DEFENCE OF THE FIRST DEFENDANT

- | | |
|---|---|
| <p>1. The First Defendant has no knowledge of the matters set out in paragraph 1 of the Statement of Claim.</p> | <p>In the High Court in Malaya at Ipoh</p> |
| <p>2. The First Defendant has no knowledge of the matters set out in paragraph 2 nor of the matters set out in paragraph 3 of the Statement of Claim.</p> | <p><u>No. 3</u>
Further amended Defence of First Defendant,
14th August 1964.</p> |
| <p>3. The First Defendant admits paragraphs 4 and 5 of the Statement of Claim.</p> | |
| <p>4. The First Defendant has no knowledge of the matters set out in paragraph 6 of the Statement of Claim.</p> | |
| <p>1. The First Defendant admits paragraphs 1 to 6 and 15 to 19 of the Statement of Claim.</p> | |
| <p>B 5. 2. With respect to the Agreement dated 22nd October, 1931, the First Defendant admits having been a party to it under the name of Pegang Prospecting Limited together with the late Ho Man and the late Ho Kok Yew but makes no further admissions with regard to this Agreement whatsoever and will refer to the terms thereof at the trial of this action.</p> | |
| <p>6. 3. Paragraphs 9, 10, 12, 13 and 14 are matters of evidence and the First Defendant makes no admissions thereon.</p> | |
| <p>C 7. The First Defendant makes no admissions with reference to the written agreement referred to in paragraph 15 of the Statement of Claim and expressly denies that the Order of Court referred to in paragraph 16 of the Statement of Claim did assign or could assign the rights and obligations of the said Ho Man deceased in the said Agreement to any person whatsoever.</p> | |
| <p>D 8. The rights and obligations under the said Agreement are not assignable to any person and only bind the original parties to the agreement.</p> | |

In the High
Court in
Malaya at Ipoh

No. 3

Further amended
Defence of
First Defendant
14th August,
1964.

(Contd.)

~~9. If which is denied, the rights and obligations under the said Agreement are assignable, such rights and obligations were not assigned to the said Chan Phooi Hoong or to the Second Defendants by the said Order of Court or otherwise. -~~

10. 4. The First Defendant denies paragraphs 17, 18, ~~19~~, 20 and 21 of the Statement of Claim.

~~11. Subject to what is set out below the First Defendant admits making the application referred to in paragraph 22 of the Statement of Claim but makes no other admission in regard to that said paragraph. No application was made in 1946 by the First Defendant for the area marked RED in 'TSK2' but an application was made only for a part thereof.~~

A

~~11. 5. The First Defendant admits making the two applications for the lands set out in paragraph 22 of the Statement of Claim on 2nd July 1946 and not on 3rd August 1946 as alleged. It makes no further admission whatever in regard to that paragraph.~~

B

~~12. The First Defendant says that the 14 lots referred to in sub-paragraph 22 (ii) of the Statement of Claim were included in the said Kacha-Menelai Comprehensive Mining Scheme according to the Schedule to the said Agreement and leases were subsequently granted to the First Defendant in respect of these lots but they were not sub-leased to the Plaintiff nor did the Plaintiff ever demand or request such subleases.~~

C

12. 6. As regards paragraph 22A and 22B of the Statement of Claim, the First Defendant admits the letters referred to but will refer to their terms at the trial of this action.

~~13.~~ The First Defendant admits that the letter referred to in paragraph 23 of the Statement of Claim was written as alleged but denies that the said letter has the meaning put upon it by the Plaintiff or that the said letter correctly interprets the said Agreement.

D

14. The First Defendant admits the writing of the letter referred to in paragraph 24 of the Statement of Claim but makes no other admissions in regard to it whatsoever.

~~15. The First Defendant admits paragraphs 25, 26 and 27 of the Statement of Claim but says that the position has now altered from that obtaining at that time and denies that it is bound by any expression of intention therein contained.~~

In the High Court in Malaya at Ipoh

No. 3

Further amended Defence of First Defendant, 14th August 1964.

(Contd.)

~~15. (i) As regards paragraph 25 of the Statement of Claim the First Defendant states that the application made on 2nd July 1946 in respect of the lands specified in paragraph 22(ii) of the Statement of Claim was refused by the Government.~~

9. (i) As to paragraph 25 of the Statement of Claim the First Defendant denies that an application for a reduced portion of the Railway Reserve was made as pleaded. At all material times its application was officially shown as being one for 34 acres of Railway Reserve as pleaded in paragraph 22 of the Statement of Claim. The First Defendant admits that it was granted a Prospecting Permit over 8 $\frac{1}{4}$ acres of the said Railway Reserve on the date pleaded and further admits the terms of paragraph 25A of the Statement of Claim.

~~(ii) As regards paragraph 26 of Statement of Claim the First Defendant admits making an application as alleged except the area of the former Railway Reserve applied for was approximately 11 acres and not 34 acres as alleged.~~

(ii) The First Defendant admits paragraph 26 of Statement of Claim.

(iii) As regards paragraph 27 of the Statement of Claim the First Defendant disputes the construction placed on the application by the Plaintiff and says further that the position has now altered from that obtaining at that time and denies that it is bound by any expression of intention therein contained.

(iv) The First Defendant admits paragraph 28 of the Statement of Claim save and except that the mine operated by Khong Heng Kongsai was not in accordance with the arrangements made under the Agreement of October 1931.

(v) The First Defendant admits making the application referred to in paragraph 28A of the

In the High
Court in
Malaya at Ipoh

No. 3

Further amended
Defence of
First
Defendant,
14th August
1964.
(Contd.)

Statement of Claim but makes no further admissions in respect thereof.

16. 10. The First Defendant admits having given a sub-lease over Mining Leases Nos. 8899 and 11543 to the late Chan Phooi Hoong but denies that it was for the purpose set out in the Statement of Claim.

17. 11. The said Chan Phooi Hoong entered into a sub-sublease with the Plaintiff in the year 1956 in her own right but the said subsublease was on terms different from those of the previous subsublease granted by Ho Man to Ho Kok Yew. A

18. 12 The First Defendant admits that the Plaintiff holds a subsublease of Mining Leases Nos. 8899 and 11543 but denies that the Plaintiff is working the lands.

~~19. 13. The First Defendant admits that the application of the First Defendant as set out in paragraph 32 of the Statement of Claim was approved as set out therein.~~ B

~~19. The First Defendant admits that the application of the First Defendant were approved except that the area of the former Railway Reserve approved to the First Defendant was approximately 18¹/₂ acres and not 34 acres as alleged in paragraph 32 of Statement of Claim.~~

19. 13. The First Defendant states that on 31/3/59 the application of First Defendant were approved and that mining leases were granted to the First Defendant in respect of lands referred to in paragraph 32(b) and (c) of the Statement of Claim in April 1963 and in respect of paragraph 32(a) of the Statement of Claim in October 1965. C

20. 14. The First Defendant admits that it is carrying on mining on Lot 30286 but is not thereby in breach of the said Agreement. D

~~21. The First Defendant denies that either the benefits or the obligations under the said Agreement were assigned either to the Plaintiff or to the Second Defendant herein. The said Agreement referred only to four pieces of land. The said Agreement is not frustrated or has lapsed by effluxion of time and/or by repudiation and acquiescent by the other parties to the Agreement.~~ E

~~22. The said Agreement was terminated by the death of Ho Man and/or of Ho Kok Yew and/or at the expiry of the sublease or subsublease existing at the date of their death.~~

In the High Court in Malaya at Ipoh

~~23.~~ 16. Further or in the alternative the other parties to the agreement being in breach thereof within the terms of paragraph 5 thereof the First Defendant is no more bound thereby.

No. 3
Further amended
Defence of
First Defendant,
14th August
1964.
(Contd.)

A

PARTICULARS OF BREACH

(a) the Miner had not kept in force an Aggregation Permit in respect of the ~~44~~ pieces of mining lands ~~referred to in paragraph 7 of Statement of Claim~~ held by him under a sublease or subsublease between 31st October, 1956 and 30th April, 1958.

B

~~(b) The mine is not being continued to be worked in an easterly direction.~~

(c) The mine has not been worked expeditiously in an orderly skilful or workmanlike manner.

(d) Working of the ground comprised in Lot No. 21952 has not been carried out in a manner agreed by the Company and the sublessee.

C

(e) The work under the mining scheme or the working of the ground is no longer being carried out by the Miner or according to the requirements of Government.

(f) The Miner ceased mining of the land during periods (i) 15/1/63 to 26/6/63 (ii) 12/9/63 to 9/3/64.

D

(g) The Miner has deposited tailings on payable ground, i.e. Lot 30286.

24. 17. If, which is denied, the said Agreement is still valid and/or subsisting between the parties herein the First Defendant has never been and is not now under any obligation thereunder to grant subleases in respect of Mining Certificates Nos. 3255 and 3256 or the said section of the Railway Reserve to any of the parties herein or any of the parties to the said Agreement.

E

In the High
Court in
Malaya at Ipoh

No. 3

Further amended

Defence of

First Defendant,

14th August,

1964.

(Contd.)

25. 18. The said section of the former Ipoh-Tronoh Railway Reserve neither is nor ever was nor could be included in the said Agreement or the said mining scheme. The said section neither is nor ever was mining land.

26. 19. The said Agreement is not enforceable by or against persons other than parties to the Agreement.

27. 20. The said Agreement not being a concluded Agreement is not capable of specific performance.

28. 21. The said Agreement is too vague and uncertain to be specifically performed.

29. 22. No rate of tribute is set out in the said Agreement.

30. 2 . The Plaintiff's laches debars her from Specific Performance.

31. 24. The Plaintiff's claim herein is barred by limitation.

32. 25. The First Defendant denies that the Second Defendant can be ordered to execute a subsublease in favour of the Plaintiff in accordance with the said Agreement.

33. 26. The said Agreement is neither valid and/or binding between the parties thereto nor is it valid and/or binding between the parties herein.

34. 27. Save as is hereinbefore expressly admitted each and every allegation in the Statement of Claim is hereby denied as if set out at length and traversed seriatim.

Dated this 14th day of August, 1964.

Sd. Maxwell, Kenion,
Cowdy & Jones,
Solicitors for the First
Defendant.

This Defence of the First Defendant is
filed on behalf of the First Defendant by their

A

B

C

D

Solicitors, Maxwell, Kenion, Cowdy & Jones,
Mercantile Bank Building, Ipoh.

In the High
Court in
Malaya at Ipoh

To:- The abovenamed Plaintiff and to her
Solicitors, Messrs. Braddell & Ramani,
Second Floor, Hongkong Bank Chambers,
Benteng, Kuala Lumpur.

No. 3
Further amended
Defence of
First Defendant,
14th August
1964.
(Contd.)

A

To:- The Second Defendants Lee Chin Yee and
Chan Hon Peng (f) as Executors of the
Estate of Chan Phooi Hoong deceased,
No. 164, Jalan Bandar,
Kuala Lumpur.

No. 4

DEFENCE OF SECOND DEFENDANTS

1. The Second Defendants admit paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Statement of Claim.

In the High
Court in
Malaya at Ipoh

A 2. The Second Defendants have always been ready and willing to do everything in their power to fulfil their obligations to the Plaintiff but have been unable to do so because the First Defendant has refused to adhere to its obligations to the Second Defendants as set out in detail in the Statement of Claim.

No. 4
Defence of
Second
Defendants,
24th December
1964.

3. The Second Defendants say that their costs should in any event be paid by either the Plaintiff or the First Defendant.

Dated and delivered this 24th day of December, 1964.

B (Sgd) Shearn, Delamore & Co.
Solicitors for the Second
Defendants

This Defence is filed for and on behalf of the Second Defendants by Messrs. Shearn, Delamore & Co. their Solicitors of and whose address for service is No. 2 Benteng, (Top Floor), Kuala Lumpur.

38.

No. 5

JUDGES NOTES OF EVIDENCE (EXTRACT),
12th January 1966.

Hearing resumes

In the High
Court in
Malaya at Ipoh

No. 5
Judges Notes
of Evidence
(Extract),
12th January
1966.

- A (At this stage Ek Tiong informs Court of receipt of notice by Hills asking to produce contract entered into between Plaintiff and Choong Sam. Objects as contract is irrelevant having been entered into only 7 days before date of Writ. Hills submits that contract relevant to show conduct of Plaintiff arising from arrangement to ask someone else to work the mine. Rintoul says that is one of the reliefs prayed for by Plaintiff. Production of contract has no relevance. Plaintiff entitled to contract out. Objects form of notice. Not proper. Refers to O.31 r.49. Concedes that 1st Defendant can apply to Court for order to produce the document. Hills asks that Court regard this as his application for order that contract be produced. I direct that contract be produced. Intld. A.H.)
- B

41.

No. 6

JUDGES NOTES OF EVIDENCE (EXTRACT),
13th January 1966.

Court resumes at 9.30 a.m.

Khoo now joins Rintoul.

Hills informs Court that he has been supplied
with copy of contract as directed by Court.

A Not certain if this was the contract.

Intld. A.H.

Ek Tiong in reply -

This is the only document that he is aware of
and which is required by the notice served on
him.

Intld. A.H.

Hills - Says he is satisfied with the point.

Intld. A.H.

In the High
Court in
Malaya at Ipoh

No. 6
Judges Notes
of Evidence
(Extract),
13th January
1966.

43.

No. 7

JUDGES NOTES OF EVIDENCE (EXTRACT),
18th January 1966.

D.W.3 W. Green affirmed states in English

A Engineer of Perak Hydro. Have been employed about 18 months. Khong Heng was our consumer. Have a file. Have no receipt. Have a letter dated 4th June, 1963, from Choong Sam (D.41). I dealt with Mr. Choong Sam. This was September, 1964. He was a consumer and responsible to us. Yes, Choong Sam pays the bill. Same position today.

In the High
Court in
Malaya at Ipoh

No. 7
Judges Notes
of Evidence
(Extract),
18th January
1966.

Intld. A.H.

No questions by Khoo

Intld. A.H.

No questions by Chia

Intld. A.H.

(Witness released. No objection).

No. 8JUDGMENT OF ALI J.

In the High
Court in
Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.

A This is an action by the Plaintiff for a declaration, specific performance and injunction based on the allegation that the 1st defendant company was guilty of a breach of an agreement signed on the 22nd October, 1931. The Plaintiff is the executrix of the Estate of Ho Kok Yew, deceased, one of the three signatories to the agreement. The third party to the agreement was Ho Man, whose interests in the agreement after his death were assigned to Chan Phooi Hoong, since deceased. The 2nd defendants are the executors of the Estate of Chan Phooi Hoong.

B The declaration asked for by the Plaintiff is to the effect that the agreement is still valid and binding not only on the parties thereto but also on their representatives and assignees. Based on this declaration the plaintiff seeks orders for specific performance and injunction for breach of contract by the 1st defendant company, also a party to the 1931 Agreement. The details of the plaintiff's claims are specifically set out in paragraph 34 of the Further Amended Statement of Claim (see enclosure (47) of the case file).

C The present action arose from the 1st defendant company's refusal to grant sub-leases over certain lands which the plaintiff is interested in mining. The case for the plaintiff, simply stated is that under the relevant provisions of the 1931 Agreement there is an implied obligation on the part of the 1st defendant company to grant those subleases. The lands, which form the subject matter of the present dispute, are those which were acquired by the 1st defendant subsequent to the date of the agreement. These lands are specifically described in sub-para. (ii)(a), (b) and (c) of paragraph 34 of the plaintiff's Further Amended Statement of Claim. They are more particularly described in paragraph 32.

D The circumstances in which the parties signed the 1931 Agreement were these. Ho Kok Yew, representing a Kongsí known as the Khong Heng Kongsí was, at the time, carrying on mining

In the High
Court in
Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.
(Contd.)

operations in an area which comprised of several lots of adjoining lands in the Mukim of Blanja. These lands were in fact old mining lands, some of which had since 1923 been mined under a scheme known as the Kacha-Menelai Scheme. They were divided into three areas, namely (1) Lower Flats, (2) Upper Flats and (3) Hill Areas. The idea behind the Scheme was to work out one area first so that it could form a dumping area for the next stage of mining operations. From the letter appearing on page 31 of Agreed Bundle Volume I, it would appear that mining operations on the Lower Flats had concluded some time in February, 1931. Ho Kok Yew appeared to have begun the second stage of mining operations on the Upper Flats some time in 1926 and in 1931 was on the way towards extending these operations to the Hill Area. It was common ground that Ho Kok Yew's rights to mine these lands were covered by sub-leases or sub-sub-leases granted by Ho Man, who, in the 1931 Agreement, is described as the sub-lessee. Four of these lots were held by Ho Man under sub-leases granted to him by the 1st defendant company. Before the date of the agreement these four lots had been sub-sub-leased to Ho Kok Yew with the consent of the 1st defendant company. They are described in the plan appearing on page 2 of the Agreed Bundle Volume VII as Lots No. 1, 2, 3 and 4. In accordance with the provisions of section 16(iii) of the Mining Enactment then in force Ho Kok Yew would have to comply with certain labour conditions in respect of each of these Lots unless he was issued with a permit to work all of them as one mining area. This permit, which was to be issued under section 20, had to be applied for, but, before this was done, Ho Kok Yew sought the consent of the 1st defendant company to allow the 4 lots to be included in the permit. It would appear that in consenting to the arrangement the 1st defendant company had insisted on a written agreement to be entered into by all three. Apparently the 1st defendant company wanted to be assured that Ho Kok Yew would carry out mining operations in an agreed manner. Hence the 1931 Agreement.

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Before dealing with the agreement it is necessary to say a few words with regard to the events which led to the present proceedings. So far as these are ascertainable from the documents

in the Agreed Bundles, it would appear that the parties to the agreement were for some time quite satisfied with the arrangements made. But when the Japanese invaded this country mining work on this area came to a standstill. After the war Ho Kok Yew was unable to restart the mine immediately, having suffered considerable losses in equipment and materials. In 1946 Ho Kok Yew and Cummings, the Manager of the 1st defendant company, seemed to be working closely together with each other when an application was made on behalf of the 1st defendant company to obtain the Railway Reserve for mining purposes. The documents in the Agreed Bundles clearly established that this Reserve, if alienated to the 1st defendant company, was intended to be included in the Scheme. Approval, however, was obtained well after Ho Kok Yew's death in 1947. As the alienation of the Reserve entailed the removal of the pipe lines it was so arranged that the cost for their removal would be paid by the plaintiff who had then taken charge of Ho Kok Yew's affairs. The relationship between the 1st defendant company and the plaintiff, however, was not as good as when Ho Kok Yew was alive. The plaintiff was having trouble in realising the assets of Ho Kok Yew's estate and there was no ready money to finance the re-working of the mine and to meet the costs for the removal of the pipe lines. For some years this went on and the 1st defendant company were becoming impatient over the delay in restarting the mine. In those circumstances it was not surprising that the 1st defendant company had to think in terms of getting someone else to carry on mining work on their lands. This was objected to by the plaintiff and in the situation it became quite clear that the old arrangement could not continue to the satisfaction of the parties. From the point of view of the 1st defendant company the delay in restarting the mine had not given them any return from the sub-leases and it would be to their advantage to have their lands worked by someone else. As regards the Railway Reserve, the 1st defendant company themselves paid for the cost for removing the pipe lines and the Reserve was eventually given to them. At the same time the 1st defendant company also succeeded in obtaining leases over Lots Nos. 5, 6 and 7 which were previously held by Ho Man and assigned to Chan Phooi Hoong. The acquisition of these lots would not only be useful to the 1st defendant company as a dumping ground but their

In the High
Court in
Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.

(Contd.)

In the High
Court in
Malaya at Ipoh

No. 8

Judgment of
Ali J,
9th December
1966.

(Contd.)

ownership would strengthen the 1st defendant company's position when applying for leases over the remaining portion of the Reserve which adjoins these three lots. These are the lots which now form the subject matter of the plaintiff's claim.

The 1st defendant company in their pleadings raised a number of defences resisting the plaintiff's claim for a declaration and for specific performance. As I understand it, the defence against the claim for a declaration is that the agreement has lapsed by effluxion of time and/or repudiation and acquiescence by the other parties to the agreement. Alternatively the 1st defendant company also averred that they are not bound by the agreement as the other parties had themselves been guilty of breach of contract (see paragraph 16 of the Further Amended Defence Statement). In any event the 1st defendant company contended that even if the agreement is still valid and subsisting between the parties there is no obligation on their part under this agreement to grant the sub-leases asked for by the plaintiff. As against the claim for specific performance the 1st defendant company raised the defences that the agreement was not a concluded agreement and that it was too vague and uncertain. As regards the 2nd defendants, it is only necessary to state here that in their defence pleadings they readily admit the plaintiff's right to the declaration asked for. They expressly stated that they have always been ready and willing to fulfil their obligations under the agreement but were prevented from doing so because of the 1st defendant company's refusal to act in accordance with the agreement. In any event they asked that their costs be paid by either the plaintiff or the 1st defendant company.

I shall now turn to the agreement (see page 25 of the Agreed Bundle Volume I). As can be seen the body of the agreement consists of 6 clauses. The first three of these are concerned with Lots Nos. 1, 2, 3 and 4. The 1st clause relates to the manner in which Ho Kok Yew was to carry out mining operations. The 2nd clause releases Ho Man from his previous liability to the 1st defendant, and the 3rd consists of an undertaking by the 1st defendant company to renew the

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sub-leases of Lots Nos. 1, 2, 3 and 4 for as long as they are able to do so for the purpose of the Kacha-Menelai Scheme. These three clauses do not require much consideration here inasmuch as Lots Nos. 1, 2, 3 and 4 or anyone of them do not form the subject matter of the present action. In terms of the plaintiff's claim it becomes necessary to consider only Clause 4 which is expressed in these terms:

In the High
Court in
Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.
(Contd.)

A

"4. The Sub-lessee (Ho Man) and the Miner (Ho Kok Yew) and each of them hereby undertake and agree that they will not nor will either of them in any way obstruct or interfere with or attempt to obstruct or interfere with the acquisition by the Company (or its nominees) in the vicinity of the said Khong Heng Kongsu Mine of any Mining lands or any right, title or interest therein (including water rights, rights of depositing tailings or other rights incidental to mining) which the Company may desire to acquire for the purposes of including same in the said Mining Scheme and the Sublessee and the Miner hereby undertake and agree further that they and each of them will use their best endeavours to assist the Company in acquiring such mining lands or interest therein."

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On the face of it, it seems plain to me that this was an undertaking by Ho Kok Yew and Ho Man to assist the 1st defendant company in the acquisitions of lands for inclusion in the Kacha-Menelai Scheme. The Plaintiff's contention is that there is implied in this clause an agreement by the 1st defendant company to sub-lease the land so acquired for the purpose of the Scheme. In support of this contention the plaintiff was obviously relying on the fact that when applying for the Railway Reserve in 1946 the 1st defendant company had clearly indicated their willingness to have it included in the Scheme. Whether the plaintiff is entitled to rely on this fact for the purpose of construing Clause 4 it is not necessary to decide. What is necessary to be considered is whether in terms

D

In the High
Court in
Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.
(Contd.)

of this Clause 4 there can be implied an obligation on the part of the 1st defendant company to sub-lease the lands which they have acquired after the date of the agreement. I find it necessary in the first place to consider whether this clause is in form and substance a concluded bargain which can be enforced by any of the parties thereto. If it is held to be otherwise, then obviously no declaration can possibly be made with regard to its validity and binding effect. As I have already stated, what is expressly provided in this clause is an undertaking of Ho Kok Yew and Ho Man to assist the 1st defendant in acquiring lands. In all probability the parties at the time might have had in mind the possibility of the Railway Reserve being thrown open by the authorities for mining purposes. This Reserve lying virtually in the midst of a mining area, unworked and untapped, must have appeared to all concerned, to say the least, that it was potentially rich in mineral deposits. The fact remains that there was no certainty at the time when the agreement was signed that this Reserve, or for that matter any other land nearby, would be opened for mining. Nor was there any certainty that the 1st defendant company would be successful in their application for the Reserve should it be made available for alienation. In my view but for the effect of the war which forced the abandonment of the Railway Reserve, the parties might still be hoping that it would be thrown open for mining purposes. In the light of this I am inclined to hold that this Clause 4 is nothing more than an expression of hope by the parties that they would work in close co-operation with each other, particularly in the acquisitions of land for the purpose of being included in the Scheme. As such it cannot be regarded as a definite or completed agreement. As was said by Viscount Dunedin in *May and Butcher, Limited v The King* (1934) 2 K.B. 17 at page 21:

"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does

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not depend upon the agreement between the parties."

Something to the same effect was said by Parker, J. in Hatzfeldt-Wildenburg v Alexander (1912) 1 Ch. 284. At page 288 His Lordship said:

In the High Court in Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.

(Contd.)

A "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either

B because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

C In this case even if there was any agreement between the parties it was no more than agreement which contemplates the execution of a further agreement between them. That further agreement, of course, would be the sub-leases. In the sub-leases there will be provided terms relating to tribute as may be agreed to and other conditions for mining operations. As nowhere else in the remaining clauses of the agreement which could lead to a different construction of Clause 4, I am forced to the conclusion that the plaintiff must be denied the declaration asked for. Accordingly there will be judgment for the 1st defendant company. With regard to the plaintiff's claim

D against the 2nd defendants, it is difficult to find from the plaintiff's pleadings whether she had any real cause of action but, in view of the conclusion which I have arrived at, the proper order, I think, would be to enter judgment for the 2nd defendants as well.

On the question of costs, the 1st defendant company of course must be entitled to the full taxed costs, but the same cannot in my judgment

In the High
Court in
Malaya at Ipoh

No. 8
Judgment of
Ali J,
9th December
1966.
(Contd.)

be ordered in respect of the 2nd defendants. In terms of the plaintiff's pleadings it must have been obvious to the 2nd defendants that inasmuch as no allegation of breach of contract had been made against them there was no real cause of action by the plaintiff. The 2nd defendants, if they were so minded, could have, after the close of the pleadings, applied to have the action against them dismissed. Indeed, it was apparent during the trial that the 2nd defendants were in fact supporting the plaintiff's claim. The reason for this is quite obvious for if the plaintiff succeeds in this action, the 2nd defendants stand to benefit by it. It is difficult to understand why the 2nd defendants had not been joined as plaintiffs in this action. But as the plaintiff has chosen to bring this action in this form, she must also be made to bear the 2nd defendants' costs but, in view of what I have stated, there will be an order that the plaintiff shall pay the 2nd defendants costs to be taxed up to the time when the pleadings were closed.

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Sgd. ALI BIN HASSAN

JUDGE MALAYA.

9th December, 1966.

No. 9

ORDER OF COURT

IN THE HIGH COURT IN MALAYA AT IPOH

CIVIL SUIT NO. 304 of 1964

BETWEEN

Tong Swee King (f) as
Executrix of the Estate of
Ho Kok Yew deceased

Plaintiff

- and -

A

1. Pegang Mining Company
Limited (formerly known as
Pegang Prospecting Company
Limited)

2. Lee Chin Yee and Chan
Hon Peng (f) as Executrix
of the Estate of Chan Phooi
Hong deceased

Defendants

BEFORE THE HONOURABLE MR. JUSTICE ALI

BIN HASSAN

B

This 9th day of December, 1966

IN OPEN COURT

C This suit coming on for hearing the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th and 29th days of January, 1966 in the presence of Mr. Ng Ek Tiong (with him Mr. Chia Kim Chwee and Mr. Chinn Swee Onn) of Counsel for the Plaintiff, Mr. A.L. Hills (with him Mr. N.T. Rajah) of Counsel for the Defendant firstly abovenamed, and Mr. R.V.N. Rintoul (with him Mr. R. Khoo) for the Defendants secondly abovenamed AND UPON reading the pleadings and hearing the evidence adduced for the Plaintiff and for the Defendants firstly above-named AND UPON hearing Counsel for the parties

In the High
Court in
Malaya at Ipoh

No. 9
Order of
Court,
9th December
1966.

In the High Court in Malaya at Ipoh THIS COURT DID ON THE 29th DAY OF JANUARY, 1966 ORDER that this suit should stand for judgment.

No. 9
Order of
Court,
9th December
1966.
(Contd.)

AND this suit standing this day in the paper for judgment in the presence of Mr. Chinn Swee Onn of Counsel for the Plaintiff and for and on behalf of Mr. R.V.N. Rintoul of Counsel for the Defendants secondly abovenamed and Mr. N.T. Rajah of Counsel for the Defendants firstly abovenamed

IT IS ORDERED that the suit be dismissed

A

AND IT IS ORDERED that the Plaintiff do pay to the Defendants firstly abovenamed their costs of this suit as taxed

AND IT IS ORDERED that the Plaintiff do pay to the Defendants secondly abovenamed their costs to be taxed up to the time when the pleadings were closed

AND BY CONSENT IT IS FURTHER ORDERED that the Order of Court dated the 25th day of October 1965 in so far as it relates to the proceeds of sale being held in a trust account in the Chartered Bank at Ipoh to be operated by Messrs. Evatt & Co. of Ipoh, be and is hereby rescinded and it is ordered that the Defendants firstly abovenamed do furnish a Banker's guarantee in respect of the nett proceeds of sales of all ore won from Lots 44407, 44408 and 30286 in the Mukim of Blanja and now held in trust and also for the proceeds of further sales of such ore.

B

AND THIS COURT DOTH CERTIFY for 2 Counsel for the Defendants firstly abovenamed in respect of the costs of this suit, under Order 65, rule 27 (47) of the Rules of the Supreme Court, 1957.

C

Given under my hand and the seal of the Court this 9th day of December, 1966.

Sd. Shiv Charan Singh
Senior Assistant Registrar,
High Court, Ipoh.

The Seal of
the High Court,
Malaya.

D

No. 10

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL No. OF 1967

BETWEEN

Tong Swee King (f) as
Executrix of the Estate of
Ho Kok Yew deceased

Appellant

- and -

A

1. Pegang Mining Company
Limited, (formerly known as
Pegang Prospecting Company
Limited)

2. Lee Chim Yee and Chan
Hon Peng (f) as Executors
of the Estate of Chan Phooi
Hong deceased

Respondents

(In the matter of Civil Suit No. 304 of 1964
in the High Court in Malaya at Ipoh)

B

BETWEEN

Tong Swee King (f) as
Executrix of the Estate of
Ho Kok Yew deceased

Plaintiff

- and -

1. Pegang Mining Company
Limited, (formerly known as
Pegang Prospecting Company
Limited)

2. Lee Chim Yee and Chan Hon
Peng (f) as Executors of the
Estate of Chan Phooi Hong
deceased

Defendants

C

NOTICE OF APPEAL

Take Notice that Tong Swee King (f) as
Executrix of the Estate of Ho Kok Yew deceased
being dissatisfied with the decision of the
Honourable Mr. Justice Ali bin Hassan given at
Ipoh on the 9th day of December, 1966, appeals to

In the Federal
Court of
Malaysia

No. 10
Notice of
Appeal,
6th January
1967.

D

In the Federal Court of Malaysia the Federal Court against the whole of the said decision.

Dated this 6th day of January, 1967.

No. 10
Notice of
Appeal,
6th January
1967.
(Contd.)

Sd:- Chinn Swee Onn
Solicitor for the Appellant

To:-

The Registrar,
The Federal Court,
Kuala Lumpur.

A

and to:-

The Registrar,
High Court in Malaya at Ipoh.

and to:-

Pegang Mining Company Limited
and/or their Solicitors,
Messrs. Maxwell, Kenion, Cowdy
& Jones,
Mercantile Bank Building,
Ipoh.

B

and to:-

Lee Chim Yee & Chan Hon Peng,
Executors of the Estate of
Chan Phooi Hoong deceased,
and/or their Solicitors,
Messrs. Shearn, Delamore & Co.,
No. 2, Benteng (Top Floor),
Kuala Lumpur.

C

Filed this 6th day of January, 1967 and
\$500/- deposited in the Court, vide Rt. No.
T.929468 dated 6-1-67.

Sd: Shiv Charan Singh,
Senior Assistant Registrar,
High Court, Malaya,
IPOH.

The address for service of the Appellant is
Chinn Swee Onn, Advocate & Solicitor, No. 10,
2nd Floor, Asia Life Building, Ipoh.

D

57.

No. 11

NOTICE OF MOTION

by Choong Sam (Intervener)

A TAKE NOTICE that on Friday the 31st day of March, 1967 at 10.00 o'clock in the forenoon or as soon thereafter as he can be heard Mr. Ng Ek Tiong of Counsel for Choong Sam, the intervener herein, will move the Court for an Order that either the name of the Appellant on the record be substituted by the name of Choong Sam or that of the Second Respondents substituted in her place and in either case the Appellant be added as a Respondent to the Appeal, upon the usual terms as to costs.

Dated at Kuala Lumpur this 24th day of March, 1967.

Bd. Tsai Yuet Lan
Solicitor for Choong
Sam.

Hamzah bin Dato
Sd. Abu Samah
Chief Registrar, Federal
Court, Malaysia,
Kuala Lumpur.

The Seal of the
High Court,
Malaysia.

To:-

1. Pegang Mining Company Limited,
or their Solicitors, Messrs.
Arulanandom & Co., No. 1 Hale
Street, Ipoh.

C 2. Lee Chim Yee and Chan Hon Peng
(f) as Executors of the Estate of
Chan Phooi Hoong deceased, or
their Solicitors, Messrs. Shearn
Delamore & Co.,
Eastern Bank Buildings,
No. 2, Benteng, Kuala Lumpur.

3. Tong Swee King (f) as Executrix
of the Estate of Ho Kok Yew deceased,
No. 2, Lau Ek Ching Street, Ipoh.

In the Federal
Court of
Malaysia

No. 11
Notice of
Motion by Choong
Sam (Intervener),
23rd March 1967.

In the Federal
Court of
Malaysia

The address for service of the intervener,
Choong Sam, is Miss Tsai Yuet Lan, of No. 5, Jalan
Yang Kelsom, Ipoh.

No. 11
Notice of
Motion by
Choong Sam
(Intervener),
23rd March
1967.
(Contd.)

The Affidavit of Choong Sam filed herein will
be read on the hearing of this Motion.

This Notice of Motion is filed for and on
behalf of the Intervener, Choong Sam, by his
Solicitor, Miss Tsai Yuet Lan, and whose address
for service is No. 5, Jalan Yang Kelsom, Ipoh.

A

Filed this 23rd day of March, 1967 at Ipoh.

Sgd. SHIV CHARAN SINGH
Senior Assistant Registrar,
High Court,
Malaya,
Ipoh.

No. 12

AFFIDAVIT

of Choong Sam

I, Choong Sam of full age and residing at No. 3 Race Course Road, Ipoh do hereby affirm and say as follows:-

In the Federal
Court of
Malaysia

No. 12
Affidavit of
Choong Sam,
23rd March
1967.

- A 1. The proceedings in Perak Civil Suit No. 304 of 1964 from which the unsuccessful Plaintiff in the action has brought this appeal relates to the mine known as the Khong Heng Kongsu Mine.
2. I am the miner actually working the mine under an agreement with the Appellant, and the Respondents are the lessee and sublessees respectively of the mining lands held under Mining Leases Nos: 8899 and 11543 in the Mukim of Blanja in the District of Kinta and entitled to certain tributes from the Appellant to whom I in turn pay tribute.
- B The terms of the agreement between me and the Appellant are set out in the documents dated 1st July 1963, 1st July 1964 and 27th July 1964 now produced and shown to me and marked "A1", "A2" and "A3" respectively.
3. The Appellant and the Respondents are representatives of parties to the agreement dated the 22nd October 1931 a copy of which is now produced and shown to me marked "B".
- C 4. The then existing mining leases which under rights conveyed to me by the Appellant I have been working have been worked out on the surface and unless the contiguous mining leases of which the first Respondent is the lessee are brought into the mining scheme, I shall suffer loss to the tune of approximately ~~£~~1,000,000/- and the Appellant and the 2nd Respondent stand similarly to lose large sums by way of tribute.

These contiguous mining leases are held under Mining Leases 14507, 14508 and 14509 in the Mukim of Blanja aforesaid.

In the Federal
Court of
Malaysia

No. 12
Affidavit of
Choong Sam,
23rd March
1967.

(Contd.)

5. The 1st Respondent has refused to grant the necessary sub-leases to the 2nd Respondent who is ready and willing to grant sub-sub-leases in turn to the Appellant.

6. I therefore requested the Appellant to bring this action against the 1st Respondent to which the 2nd Respondent being a necessary party has been joined as a Co-defendant.

7. I have given her a full and abundantly secured indemnity against her costs in and by the action and she is in effect a name-lender on my behalf in bringing this action as Plaintiff.

A

The document now produced and shown to me marked "C" is the agreement between the Appellant and myself as to the conduct of this action and the financing thereof.

8. The principal if not the sole issue in this action and therefore in this appeal is the proper interpretation of clause 4 of the agreement of 22nd October 1931 in the light of the conduct of the parties evidenced by correspondence between them over a period of over 20 years.

B

9. As a result of contacts and negotiations between the Appellant and the 1st Respondent made without any reference to me, the Appellant has felt persuaded not to proceed with this appeal.

She so informed me at an interview I had with her on 9th March 1967 and as a result of such interview I have written her the letter dated 11th March 1967 a copy of which is now produced and shown to me marked "D". I have had no reply to this letter.

C

She has also written to the Solicitor I had appointed for her the letter dated 9th March 1967 a copy of which is now produced and marked "E".

I have also notified the Registrar of the Federal Court of this development by my letter to him of the 13th March 1967 a copy of which is also now produced and shown to me marked "F".

D

10. I crave leave to assert that this collusive conduct of the Appellant and the 1st Respondent

is designed to destroy the basis of the rights of the 2nd Respondent thereby resulting in the Appellant and the 1st Respondent being released from all their obligations.

In the Federal
Court of
Malaysia

No. 12
Affidavit of
Choong Sam,
23rd March
1967.
(Contd.)

A 11. Now that the attitude of the Appellant in this appeal has become plain it is not unjust to regard her refusal to prosecute the appeal as an admission by her that she is for reasons of her own not claiming any longer any right to be given the sub-sub-lease over these contiguous lands should the appeal succeed.

I have been informed by the 2nd Respondents that they are desirous of prosecuting the appeal and in the event of their appeal succeeding they are willing to let me work these contiguous lands on any terms not less advantageous to them than their present tribute from the Appellant.

B 12. The legal rights of the 2nd Respondents against the 1st Respondent are directly involved in this appeal and they desire to have a proper adjudication of their rights against the 1st Respondent and in turn to secure to me the rights to work these contiguous lands.

C 13. I therefore pray that in exercise of its undoubted power and discretion the Federal Court will direct the names of the parties to this appeal to be amended either by substituting my name as Appellant in place of the present Appellant or the 2nd Respondent be made the Appellant, and in either case making the present Appellant a Respondent so that she may be bound by the judgment of this Honourable Court.

SWORN by the abovenamed)
Choong Sam at Ipoh this)
23rd day of March, 1967) Sd. Choong Sam
at 11.00 o'clock in the)
forenoon.

Before me,

D Sd. R.G. Suppiah,
COMMISSIONER FOR OATHS

I hereby certify that the above affidavit was read, translated and explained in my presence to

In the Federal Court of Malaysia the deponent who seemed perfectly to understand it, declare to me that he did understand it and made his signature in my presence.

No. 12
Affidavit of
Choong Sam,
23rd March
1967.
(Contd.)

Sd. R.G. Suppiah
COMMISSIONER FOR OATHS

This Affidavit is filed for and on behalf of the Intervener, Choong Sam, by his Solicitor, Miss Tsai Yuet Lan, and whose address for service is No. 5, Jalan Yang Kelsom, Ipoh.

A

Filed this 23rd day of March, 1967 at Ipoh.

Sd. SHIV CHARAN SINGH
Senior Assistant Registrar,
High Court, Malaya,
Ipoh.

No. 12(a)

"A.1." - Agreement, 1st July 1963

STAMP OFFICE IPOH
3 JUL 63

In the Federal
Court of
Malaysia

A An Agreement made this 1st day of July, 1963
Between Khong Heng Kongsí of No. 2, Lau Ek Ching
Street, Ipoh (hereinafter called the "Proprietors")
of the one part and Choong Sam of No. 60, Belfield
Street, Ipoh (hereinafter called the "Contractor")
of the other part.

No. 12(a)
"A.1." Agreement,
1st July 1963.

Whereas the Proprietors are the proprietors
of a mine known as "Khong Heng Kongsí" operating on
the lands held under Mining Leases Nos. 8899 and
11543 for Lots Nos. 21952 and 29650 in the Mukim of
Blanja in the District of Kinta containing an
aggregate area of 77 acres more or less situate at
Papan.

B And Whereas these lands aforesaid are owned by
Pegang Prospecting Co. Ltd., of Ipoh and are sub-
leased to the Estate of Chan Phooi Hoong deceased
and the Proprietors hold such mining rights there-
over by virtue of being in the position of Sub-sub-
lessees thereof.

And Whereas the Contractor has agreed to win
tin ore from the said lands for the Proprietors upon
and subject to the terms and conditions hereinafter
set forth.

Now It Is Hereby Agreed As Follows:-

- C 1. The Contractor shall be at liberty to enter
upon and win tin ore from the said mine for the
Proprietors for the period of twelve (12) months
from the 30th day of June, 1963 upon and subject to
the terms and conditions hereinafter mentioned.
2. The Contractor shall employ at his own cost and
expense, all labourers, engine drivers, chargemen,
attendants and other workmen required for the
efficient working of the said mine and shall provide
them with food.

In the Federal
Court of
Malaysia

No. 12(a)
"A.1." Agree-
ment,
1st July 1963.
(Contd.)

3. The Contractor shall insure each and every labourer, including engine drivers and chargemen employed by him under the Workmen's Compensation Ordinance for the time being in force or any amendments or modifications thereof and shall indemnify and keep the Proprietors indemnified against any loss which they may suffer by reason of the Contractor's failure so to do.

4. The Contractor shall work the said mine in accordance with the provisions of the Mining Regulations and subject to any orders issued by the Mines Department. The Contractor shall indemnify and keep indemnified the Proprietors against any loss or damage which the Proprietors may suffer by reason of any breach of the said Regulations or orders committed by the Contractor.

5. The Proprietors at the cost and expense of the Contractor shall allow the Contractor to use the electric power for the working of the said mine. The Proprietors shall with their best endeavours apply to Perak River Hydro-Electric Power Company Limited for the possible restoration of their former allocation of power by the Company to their said mine and if such application is successful, the Contractor shall be allowed to make full use of such restored allocation of power upon the Contractor being solely responsible for the payment of such charges and cost of the same as and when due and payable. However, in the event that the Proprietors shall at such time hereafter require the use of such restored allocation of power in the working of such land or lands other than those mentioned herein, they shall be entitled to remove and make use for themselves of such restored allocation of power on the clear understanding that the Contractor shall be given six (6) months' previous notice from the Proprietors of their said intention in the manner that whatever the allocation of power may be at such time shall be apportioned equally between the Proprietors and the Contractor, that is to say, the Contractor to retain half of the said allocation of power for the working of the said mine and the Proprietors to remove and take away half of the said allocation of power for their own use elsewhere.

6. The Contractor shall deliver all ore won from the said mine to the Proprietors for sale. The

A

B

C

D

Contractor shall be entitled to $85\frac{1}{2}$ (eighty-five and half) per cent and the Proprietors to $14\frac{1}{2}$ (fourteen and half) per cent of the proceeds of each sale of ore.

7. The Contractor shall be at liberty to determine this agreement by giving the Proprietors two months' notice of his intention to do so.

A As witness the hands of the parties hereto.

Signed for and on behalf)	}	KHONG HENG KONGSI
of Khong Heng Kongsi in		Sd. Tong Swee King,
the presence of:-		Managing Partner

Sd. ?

Signed by the said	}	Sd. Choong Sam
Choong Sam in the		
presence of:-		

Sd. Chin Swee Onn

In the Federal
Court of
Malaysia

No. 12(a)
"A.1." Agree-
ment,
1st July 1963.
(Contd.)

No. 12(b)

"A.2." - Agreement, 1st July 1964

In the Federal
Court of
Malaysia

STAMP OFFICE IPOH
1 JUL 64

ORIGINAL

No. 12(b)
"A.2." Agree-
ment,
1st July 1964.

An Agreement made this 1st day of July, 1964
Between Khong Heng Kongsí of No. 2, Lau Ek Ching
Street, Ipoh (hereinafter called the "Proprietors")
of the one part and Choong Sam of No. 60, Belfield
Street, Ipoh (hereinafter called the "Contractor")
of the other part.

A

Whereas the Proprietors are the proprietors of
a mine known as "Khong Heng Kongsí" operating on
the lands held under Mining Leases Nos. 8899 and
11543 for Lots Nos. 21952 and 29650 in the Mukim of
Blanja in the District of Kinta containing an
aggregate area of 77 acres more or less situate at
Papan.

B

And Whereas these lands aforesaid are owned by
Pegang Prospecting Co. Ltd., of Ipoh and are sub-
leased to the Estate of Chan Phooi Hoong deceased
and the Proprietors hold such mining rights there-
over by virtue of being in the position of Sub-
sublessees thereof.

And Whereas the Contractor has agreed to win
tin ore from the said lands for the Proprietors
upon and subject to the terms and conditions herein-
after set forth.

C

Now It Is Hereby Agreed As Follows:-

1. The Contractor shall be at liberty to enter
upon and win tin ore from the said mine for the
Proprietors for the period of twelve (12) months
from the 30th day of June, 1964 upon and subject
to the terms and conditions hereinafter mentioned.

2. The Contractor shall employ at his own cost and
expenses, all labourers, engine drivers, chargemen,
attendants and other workmen required for the
efficient working of the said mine and shall
provide them with food.

D

3. The Contractor shall insure each and every labourer, including engine drivers and chargemen employed by him under the Workmen's Compensation Ordinance for the time being in force or any amendments or modifications thereof and shall indemnify and keep the Proprietors indemnified against any loss which they may suffer by reason of the Contractor's failure so to do.

In the Federal
Court of
Malaysia

No. 12(b)
"A.2." Agree-
ment,
1st July 1964.
(Contd.)

A 4. The Contractor shall work the said mine in accordance with the provisions of the Mining Regulations and subject to any orders issued by the Mines Department. The Contractor shall indemnify and keep indemnified the Proprietors against any loss or damage which the Proprietors may suffer by reason of any breach of the said Regulations or orders committed by the Contractor.

B 5. The Proprietors at the cost and expense of the Contractor shall allow the Contractor to use the electric power for the working of the said mine. The Proprietors shall with their best endeavours apply to Perak River Hydro-Electric Power Company Limited for the possible restoration of their former allocation of power by the Company to their said mine and if such application is successful, the Contractor shall be allowed to make full use of such restored allocation of power upon the Contractor being solely responsible for the payment of such charges and cost of the same as and when due and payable.

C However, in the event that the Proprietors shall at such time hereafter require the use of such restored allocation of power in the working of such land or lands other than those mentioned herein, they shall be entitled to remove and make use for themselves of such restored allocation of power on the clear understanding that the Contractor shall be given six (6) months' previous notice from the Proprietors of their said intention in the manner that whatever the allocation of power may be at such time shall be apportioned equally between the Proprietors and the Contractor, that is to say, the Contractor to retain half of the said allocation of power for the working of the said mine and the Proprietors to remove and take away half of the said allocation of power for their own use elsewhere.

In the Federal
Court of
Malaysia

No. 12(b)
"A.2." Agree-
ment,
1st July 1964.
(Contd.)

6. The Contractor shall deliver all ore won from the said mine to the Proprietors for sale. The Contractor shall be entitled to $85\frac{1}{2}$ (eight-five and half) per cent and the Proprietors to $14\frac{1}{2}$ (fourteen and half) per cent of the proceeds of each sale of ore.

7. The Contractor shall be at liberty to determine this agreement by giving the Proprietors two months' notice of his intention to do so.

A

As witness the hands of the parties hereto.

Signed for and on behalf }
of Khong Heng Kongs in } Sd. Tong Swee King
the presence of:-

Sd. ?

Signed by the said }
Choong Sam in the } Sd. Choong Sam
presence of:- }
sd. Choong Tien Chuan

Chukai Setem ~~8~~ 9-00
Denda ~~8~~ 36-00
Jumlah ~~8~~ 45-00

B

Sd. ?

Timbalan Pemungut Chukai
Setem, Perak, Ipoh.
1/8/64

69.

No. 12(c)

"A.3." - Letter Choong Sam to
Khong Heng Kongs, 27th July 1964.

STAMP OFFICE IPOH

ORIGINAL

In the Federal
Court of
Malaysia

Choong Sam,
60, Belfield Street,
Ipoh.

No. 12(c)
"A.3." Letter
Choong Sam to
Khong Heng
Kongs,
27th July
1964.

A

27th July, 1964

Khong Heng Kongs,
2, Lau Ek Ching Street,
IPOH.

Dear Sirs,

With reference to the Contract Agreement of 1st
July 1964, made between you and I in respect of my
mining for tin ore from the lands held under M.L.
8899 & 11543 for Lots 21952 & 29650 respectively in
the Mukim of Blanja, will you please confirm as
follows:-

B

C

D

- (1) If at the expiry of the said agreement by effluxion of time I shall not have committed a breach of any of the terms and conditions therein, you agree to give me yearly renewals of the said agreement up to the term of the said sub-sublease which you hold over the said lands. Provided Always that in the event that if you shall have had in the first place obtained such extension or renewal to the said sub-sublease which you hold over the said lands you shall agree to give me further yearly renewals of the said agreement up to such extended period or periods of your said sub-sublease.
- (2) You will use your best endeavours to obtain from the Estate of Chan Phooi Hoong deceased and from Pegang Prospecting Co. Ltd., mining rights over the areas to be worked by you as contemplated in the Agreement dated the 22nd October, 1931 made

In the Federal
Court of
Malaysia

No. 12(c)
"A.3." Letter
Choong Sam to
Khong Heng
Kongsi,
27th July
1964.
(Contd.)

between Pegang Prospecting Co. Ltd., Ho Man
and Ho Kok Yew, and when the same are
obtained, to have them included in the said
Agreement to be worked by me on the same
terms and conditions therein.

Yours faithfully,

Sd. Choong Sam
(CHOONG SAM)

A

We confirm the above:

Sd. Tong Swee King

No. 12(e)

"C" Agreement between Choong Sam and
Madam Tong Swee King - 12th July 1963

IPOH: 12th July, 1963.

In the Federal
Court of
Malaysia

No. 12(e)
"C" Agreement
between Choong
Sam and Madam
Tong Swee
King,
12th July 1963.

A Madam Tong Swee King,
Managing Partner of
Khong Heng Kongsi,
No. 2 Lau Ek Ching Street,
Ipoh.

STAMP OFFICE IPOH

Dear Madam,

Khong Heng Kongsi, Papan

This is to confirm my undertaking to you
as follows:-

- B 1. That I shall be solely responsible for all
your legal fees, expenses and charges in
connection with any arbitration or litigation
that may be necessitated on account of
Khong Heng Kongsi enforcing its rights
against Pegang Prospecting Company Limited
under the Agreement dated the 22nd day of
October 1931 made between Pegang Prospecting
Co. Ltd., Ho Man and Ho Kok Yew.
- C 2. This confirmation extends to any legal fees
charges or expenses of the Representatives
of the Estate of Chan Phooi Hoong deceased
(as successors to Ho Man deceased) in
respect of any such arbitration or litigation
arising out of enforcement of Khong
Heng Kongsi's rights under the said Agreement.
3. You agree that the final decision whether
or not to appeal against any Order of

In the Federal
Court of
Malaysia

Court arising out of such arbitration or
litigation rests with me.

Yours faithfully,

No. 12(e)
"C" Agreement
between Choong
Sam and Madam
Tong Swee
King,
12th July 1963.
(Contd.)

Sd. Choong Sam
CHOONG SAM

I confirm:

A

Sd. Tong Swee King
Tong Swee King as
Managing Partner
Khong Heng Kongsu
Papan.

73.

No. 12(f)

"D" - Letter Choong Sam to Madam Tong
Swee King, 11th March 1967

Choong Sam A.R.
Telephones:
Office-Ipoh 4272
 4273
House - " 3047

No, 60, Belfield Street,
Ipoh, Perak,
Malaya.

11th March, 1967.

In the Federal
Court of
Malaysia

No. 12(f)
"D" Letter
Choong Sam to
Madam Tong
Swee King,
11th March
1967.

A
Madam Tong Swee King,
No. 2, Lau Ek Ching
Street,
IPOH.

Dear Madam,

Re: Federal Court Civil Appeal
No. X4/67

B
At your request conveyed to me through your son, Ho Win Shen, I called to see you on the morning of Thursday the 9th March. You then informed me that you had decided to settle this action and asked me not to proceed with the Appeal. I then pointed out to you that you and I had agreed in writing that you should leave the decision as to whether or not to appeal entirely to me pursuant to the terms of the document of the 12th July, 1963. I therefore insisted on my right to proceed with the appeal.

C
Your brother Mr. Tong Sam Poy was present during that interview and he also advised you against your proposed action.

I am therefore compelled to give you formal notice that you have no right to interfere in the matter of the prosecution of the appeal which I have already brought and you are aware that though the action and the appeal are brought in your name you bear no liability as to any costs that may be awarded in connection therewith.

In the Federal
Court of
Malaysia

If I do not receive from you a satisfactory
reply on or before the 15th instant I shall have
counsel instructed so as to protect my rights in
connection with pursuing the appeal without any
hindrance from you.

No. 12(f)
"D" Letter
Choong Sam to
Madam Tong
Swee King,
11th March
1967.
(Contd.)

Yours faithfully,

sd: Choong Sam

A

75.

No. 12(g)

"E" - Letter Tong Swee King to
Mr. Chinn Swee Onn, 9th March 1967

REGISTERED

Tong Swee King (f)
as Managing Partner
of Khong Heng Kongs
2, Lau Ek Ching
Street, IPOH.

9th March, 1967.

In the Federal
Court of
Malaysia

No. 12(g) "E"
Letter Tong
Swee King to
Mr. Chinn Swee
Onn,
9th March
1947.

Mr. Chinn Swee Onn,
Advocate & Solicitor,
10, 2nd Floor Asia Life Building,
IPOH.

Dear Sir,

Re: Federal Court Civil Appeal
No. of 1967
Tong Swee King (f) - Appellant
vs.
Pegang Mining Co. Ltd. and
another - Respondents.
(In the matter of C.S.304/64
in the High Court in Malaya
at Ipoh
Tong Swee King (f) - Plaintiff
vs.
Pegang Mg. Co. Ltd.
and another - Defendants)

As I have decided not to allow the Appeal in my
name as Executrix against the decision given in the above
to proceed further, kindly withdraw the Appeal which
you have filed.

Yours faithfully,
Sd. Tong Swee King

c.c. The Chief Registrar,
Federal Court,
Law Court, Kuala Lumpur.

76.

No. 12(h)

"F" - Letter Choong Sam to
Chief Registrar, Federal Court,
13th March 1967

In the Federal CHOONG SAM
Court of
Malaysia

Telephones:
Office-Ipoh 4272,
4273
House - " 3047

No. 60 Belfield
Street,
Ipoh, Perak,
Malaya.

No. 12(h)
"F" Letter
Choong Sam to
Chief
Registrar,
Federal
Court,
13th March
1967.

The Chief Registrar,
Federal Court,
Malaysia,
Kuala Lumpur.

13th March, 1967.

A

Tuan,

Re: Federal Court Civil Appeal
No. X4/67

B

I was informed by Mr. Chin Swee Onn the Solicitor for the Appellant herein that he had been notified by the Appellant to withdraw the Appeal by her letter of the 9th instant, a copy of which has been forwarded to you by her.

I have the honour to inform you that as the Contractor actually working the mine I have been responsible for bringing this action and engaging counsel for it, the Appellant being in effect a name-lender to protect my rights.

C

I have therefore written to the Appellant the letter of the 11th instant a copy of which I attach.

I also send you herewith a copy of the document of the 12th July 1963 which is referred to in my letter.

77.

I am informed and verily believe that the Appellant and the 1st Respondent are acting in collusion to deny me my rights as Contractor working the mine. I am therefore writing this to you to have the matter on record. The appropriate procedural steps are being taken to permit the appeal to proceed so that an adjudication on the merits of the action may be obtained from the Court of Appeal.

A

Yours faithfully,

Sd. Choong Sam.

In the Federal
Court of
Malaysia

No. 12(h)
"F" Letter
Choong Sam to
Chief
Registrar,
Federal
Court,
13th March
1967.

(Contd.)

78.

No. 13

NOTICE OF PARTY DISCHARGING HER
SOLICITOR AND ACTING IN PERSON

TAKE NOTICE that I, Tong Swee King (f) the abovenamed Plaintiff intend to act in person in this action in the place of Mr. Chinn Swee Onn, Advocate and Solicitor and that my address for service is No. 2, Lau Ek Ching Street, Ipoh.

In the Federal
Court of
Malaysia

No. 13
Notice of
Party dis-
charging her
Solicitor
and acting
in person,
24th March
1967.

A Dated this 24th day of March, 1967.

Sd. Tong Swee King
Tong Swee King (f)

To:-

1. The Chief Registrar,
Federal Court,
Law Court, Kuala Lumpur.
- B 2. The Defendant firstly
abovenamed or their
Solicitors Messrs.
Arulanandom & Co.,
No. 1, Hale Street, Ipoh.
3. The Defendants secondly
abovenamed or their
Solicitors Messrs. Shearn
Delamore & Co.,
The Eastern Bank Building,
C 2, Benteng, Kuala Lumpur.
4. Mr. Chinn Swee Onn,
Advocate & Solicitor,
No. 10, 2nd Floor,
Asia Life Building,
Ipoh.

No. 14

NOTICE OF DISCONTINUANCE OF APPEAL

TAKE NOTICE that I the Appellant abovenamed hereby wholly discontinue this Appeal against the Respondents.

In the Federal
Court of
Malaysia

Dated this 24th day of March, 1967.

No. 14
Notice of
Discontinuance
of Appeal,
24th March
1967.

Sd. Tong Swee King
Tong Swee King (f) as
Executrix of the Estate
of Ho Kok Yew, Deceased,
2, Lau Ek Ching Street,
Ipoh.

A

To:-

1. The Chief Registrar,
Federal Court,
Law Court, Kuala Lumpur.
2. The Defendant firstly
abovenamed or their Solicitors
M/s. Arulanandom & Co.,
1, Hale Street, Ipoh.
3. The Defendants secondly
abovenamed or their
Solicitors M/s. Shearn
Delamore & Co.,
The Eastern Bank Buildings,
2, Benteng, Kuala Lumpur.

B

No. 15

AFFIDAVIT OF CHAN HON PENG

I, CHAN HON PENG (f) a Federal Citizen
residing at No. 12, Jalan Delima, Kuala Lumpur,
hereby affirm and say as follows:-

In the Federal
Court of
Malaysia

No. 15
Affidavit of
Chan Hon
Peng,
27th March
1967.

- A 1. I am one of the two Executors of the Estate
of Chan Phooi Hong, deceased who were named as
the Second Defendants and in this appeal are the
present Second Respondents. I am authorised by
my co-executor to make this affidavit on behalf
of the estate of the deceased.
2. I have perused the Affidavit of Choong Sam
affirmed on the 23rd day of March 1967, and filed
herein, and my co-executor has also had the
contents read over and interpreted to him.
3. The Estate of Chan Phooi Hong is adversely
affected by the Order of Court dated the 9th day
of December 1966 made in the said Suit and is
desirous of pursuing the appeal against the said
B Order.
4. Prior to and at the time of the filing of the
Suit I and my co-executor were ready and willing
to carry out all our contractual obligations, but
were prevented from doing so by the attitude
adopted by the Plaintiff.
5. As the matter in issue in the action concerned
agreements which had been entered into long before
we became Executors, we had no direct knowledge of
the material facts so as to enable us to decide
C whether or not the Estate should initiate proceed-
ings to enforce its rights.
6. As the Estate has a direct legal interest in
the pursuit of this claim and the appeal, we are
prepared to be substituted as the appellants in
the appeal should the Court so deem it expedient.

AFFIRMED at Kuala Lumpur }
this 27th day of March } Sd. Chan Hon Peng.
1967 at 9.40 a.m. }

Before me,

D Sgd. W.P. Sarathy

In the Federal Commissioner for Oaths
Court of High Court
Malaysia Kuala Lumpur

No. 15
Affidavit of
Chan Hon
Peng,
27th March
1967.
(Contd.)

This Affidavit is filed by Messrs. Shearn
Delamore & Co., and Drew & Napier, Solicitors
for the Respondents abovenamed whose address
for service is at Eastern Bank Building, No. 2
Benteng, Kuala Lumpur.

A

No. 16

AFFIDAVIT OF LEE WAN SENG

I, Lee Wan Seng of full age and a Federal Citizen, c/o Evatt & Company, Chartered Bank Chambers, Station Road, Ipoh, hereby affirm and say as follows:-

In the Federal
Court of
Malaysia

No. 16
Affidavit of
Lee Wan Seng,
29th March
1967.

- A 1. I am the Chairman of the Board of Directors of the Defendant Company firstly abovenamed and am full acquainted with all the facts of the above case.
2. I have read the Notice of Motion dated 24th March, 1967 and filed herein and also the Affidavit of Choong Sam sworn to at Ipoh on 23.3.67 and filed herein in support of the Notice of Motion.
- B 3. I am advised by my Solicitors and I verily believe that this application is misconceived and that this application should be dismissed with costs.
4. The intervener has no legal interest in the subject matter of this suit as
- C (a) He has no legal interest in the agreement dated 22nd October, 1931.
- (b) The terms of the intervener's agreement with the Appellant viz: the letter dated 27th July, 1964 being Exhibit A3 attached to the intervener's Affidavit are vague and inconclusive and as such cannot be made the basis of any action for specific relief.
- (c) As on the date of the Notice of Motion viz: 24th March, 1967 the Appellant herself has no legal interest in M.L. 14507, 14508 and 14509.
- (d) The sublease granted by our Company over M.L. 8899 and 11543, Lots 21952 and 29650, Mukim of Blanja to the second Respondent contains a prohibition against

In the Federal
Court of
Malaysia

No. 16
Affidavit of
Lee Wan Seng,
29th March
1967.

(Contd.)

subleasing without our consent and therefore even if the Appellant had succeeded in the suit, the intervener could not obtain any rights over the new leases without our consent and therefore no person claiming to derive an interest through her can have any legal interest.

5. If the intervener had any legal interest in the subject matter of the suit, he should have joined as co-plaintiff and not waited till after judgment had been given against the Appellant and the appeal withdrawn by the Appellant. The intervener claims rights acquired before the suit was filed and has by his conduct in not joining as a co-plaintiff abandoned those alleged rights.

A

6. The letter dated 12th July, 1963 from the intervener to the Appellant being Exhibit C attached to the intervener's Affidavit is invalid and unenforceable in the Court of Law and not binding on the Appellant as its provisions offend against the principles of law relating to maintenance and champerty.

B

7. With regards to the second Respondent, I aver that if the second Respondent intended to prosecute the suit, the second Respondent should have been a co-plaintiff in the action. The fact that the second Respondent was not a co-plaintiff can only lead to the conclusion that the second Respondent refused to be a co-plaintiff in the original action.

C

8. By the agreement dated 31st day of May 1963 between the second Respondent and the Appellant being on page 480, Vol V of the agreed bundle documents in the original trial the second Respondent transferred all their legal and equitable rights over the said mining leases and the adjoining lands to the Appellant and has no legal interest in the subject matter of the suit, and hence cannot be substituted in place of the Appellant.

D

9. As both the intervener and the second Respondent have no legal interest in the subject matter of the suit, this honourable

Court has no jurisdiction to entertain or allow the Application.

Affirmed by the abovenamed }
Lee Wan Seng at Ipoh dated } Sd. Lee Wan Seng.
this 29th day of March, }
1967. }

Before me,

Sd. R.G. Suppiah

COMMISSIONER FOR OATHS

This Affidavit is filed by Messrs.
Arulanandom & Co., Advocates & Solicitors of
No. 1, Hale Street, Ipoh, Solicitors for the
first Respondent.

In the Federal
Court of
Malaysia

No. 16
Affidavit of
Lee Wan Seng,
29th March
1967.
(Contd.)

No. 17

AFFIDAVIT OF LEE WAN SENG

I, Lee Wan Seng of full age, Federal Citizen, residing at 110, Jalan Haji Eusoff, Ipoh, hereby make oath and say as follows:-

In the Federal Court of Malaysia

1. I am the Chairman of the Board of Directors of the Respondent firstly abovenamed and I am duly authorized by the company to make this further affidavit.

No. 17
Affidavit of
Lee Wan Seng,
26th April
1967.

- A 2. By paragraph 10 of the affidavit of Choong Sam sworn to on the 23rd of March, 1967 reference is made to collusive conduct on the part of the Appellant abovenamed and the Respondent firstly abovenamed. If by the use of the words "collusive conduct" Choong Sam means agreeing together then I do agree that the Appellant and the first Respondent have reached an amicable arrangement.
- B If, however, by the use of the words "collusive conduct" the said Choong Sam suggests a deceitful agreement or compact between the Appellant and the Respondent firstly abovenamed then I must state, with all emphasis, that there was no collusion of that sort between the Appellant and the Respondent firstly abovenamed.

Sworn by the abovenamed }
Lee Wan Seng at Ipoh } Sd. Lee Wan Seng.
this 26th day of April, }
1967. }

C Before me,

Sd. R.G. Suppiah
COMMISSIONER FOR OATHS

This Affidavit is filed by Messrs. Arulanandom & Co., Advocates & Solicitors of No. 1, Hale Street, Ipoh, Solicitors for the first Respondent.

90.

No. 18

AFFIDAVIT OF TONG SWEE KING

I, Tong Swee King (f) of full age, Federal Citizen, residing at No. 2, Lau Ek Ching Street, Ipoh, hereby make oath and say as follows:-

In the Federal
Court of
Malaysia

1. I am the appellant abovenamed and I am the executrix of the estate of Ho Kok Yew, deceased.
- A 2. I admit what is alleged by paragraph 1, 2, 3, 6 and 9 of the affidavit filed herein by Choong Sam.
3. I deny that I have been given a full and abundantly secured indemnity against such costs as may be payable by me.
- B 4. It is true that I have decided not to proceed with the appeal and that I do not intend to proceed with the appeal. By paragraph 10 of the said affidavit of the said Choong Sam he makes reference to collusive conduct on my part and the respondent firstly abovenamed. If by the use of the words "collusive conduct" the said Choong Sam means agreeing together then I do agree that the appellant and respondent firstly abovenamed have reached an amicable arrangement. If, however, by the use of the words "collusive conduct" the said Choong Sam suggests a deceitful agreement or compact between the appellant and the respondent firstly abovenamed then I must state, with all emphasis, that there was no collusion of that sort between the appellant and the respondent firstly abovenamed.
- C 5. Save as is expressly admitted herein I make no admissions in regard to the other allegations contained in the said Choong Sam's affidavit.
- D 6. I adopt the grounds set forth in the affidavit filed on behalf of the respondent firstly abovenamed and I further say with respect, that the said Choong Sam could not by possibility have been made a party to the action in the High Court at Ipoh by service and that as such the

No. 18
Affidavit of
Tong Swee
King,
28th April
1967.

In the Federal
Court of
Malaysia

No. 18
Affidavit of
Tong Swee
King,
28th April
1967.
(Contd.)

said Choong Sam cannot, at this stage, seek to intervene.

7. I pray that this Honourable Court may be pleased to make an order dismissing the application filed by the said Choong Sam.

SWORN at Ipoh in the State)
of Perak this 28th day of } Sd. Tong Swee King.
April, 1967.

Before me

Sd. S.A. Lingam

Commissioner for Oaths.

A

This affidavit was filed by Messrs.
Dharmananda & Co. Advocates & Solicitors of No. 27
Hale Street, Ipoh, on behalf of the Appellant
abovenamed.

No. 19

Cor: Syed Sheh Barakbah, Lord President,
Malaysia.
Azmi, Chief Justice, Malaya.
Ong Hock Thye, Judge, Federal Court.

NOTES OF ARGUMENT RECORDED BY SYED
SHEH BARAKBAH, LORD PRESIDENT, MALAYSIA.

2nd May, 1967.

In the Federal
Court of
Malaysia

A Dharmananda for App.

Arulanandom (with N.T. Rajah) for 1st Resp.

Ronald Khoo for 2nd Resp.

Ng Ek Teong (with Miss Tsai) for Intervener.

Ek Teong:

Choong Sam to be App.

B 2nd Deft. to be App.

Ptff. to be 2nd Deft. Resp.

Choong Sam's affidavit.

Agreement - p. 16.

Agreement - p. 9 Ex.A.1

Choong Sam contract for leases 8899 & 11543

Agreement - p. 12 - Ex.A.2 renewal of Ex.A.1 -
extended to 30.6.1965.

Ek Teong (contd.):

Action filed in 1964.

C At time of action Choong Sam's contract was still
in force.

New Agreement A.3 - 27.7.64

No. 19
Notes of
Argument
recorded by
Syed Sheh
Barakbah, Lord
President,
Malaysia,
2nd May, 1967.

In the Federal Tong Swee King filed a suit agst. Pegang Mining
Court of Co. & Lee Chim Yee & Chan Hon Peng.
Malaysia

Ex.C - p.24.

No. 19
Notes of
Argument
recorded by
Syed Sheh
Barakbah, Lord
President,
Malaysia,
2nd May,
1967.
(Contd.)

Judgment for Defts. & Ptff appealed.

Agreement between App & 1st Rest.

App. withdrew appeal.

A

Arulanandom:

Affidavit 29.3.1967 - para 8 (in the record of
trial) - Resp. 2 - no further rights.

Transitional Rules 1963 - Rule 27.

Rule 8.

R.S.C. O.16 r.11.

In re Securities Insurance Co. - (1894) 2 Ch.D.
410, 413, 414.

B

Ex parte Ellis, In re Ellis - (1876) 2 Ch.D. 797,
798.

In re Markham, Markham v. Markham - (1880-81)
16 Ch. 1.

Jopp v. Wood - 55 E.R. 411.

Dollfus Mieg et Compagnie S.A. v. Bank of England -
(1951) 1 Ch.D. 33.

Amon v. Raphael Tuck & Sons Ltd. - (1956) 1 Q.B.D.
357.

1. So long as I can show that I have a legal right
in the subject matter of the suit and that legal
right is affected in the proceedings then I am
entitled to be added as a party. Contract with
the App.

C

2. By virtue of letter which gives me the right to
sue I step into the shoes of App.

Bhubneshwar Prasad v. Sidheswar - 1949 A.I.R.
Patna 309, 310.

Howden v. Yorkshire Miners' Assn. - (1903) 1
K.B.D. 308, 328.

At the moment there is no proceeding before the
Ct. as appeal has been withdrawn.

Arulanandom (contd.):

A Question whether App. can appeal agst. the judg-
ment in the Civil Suit.

A. Practice 1957 p. 1244 "Who may appeal"

In re B. An Infant - (1958) 1 Q.B.D. 12, 16.

Choong Sam could not have been made a party in the
original suit.

Dispute is about new mining leases, not lands 8899
& 11543.

A. 3 p. 15.

B At most Choong Sam had a commercial interest.

In re I.G. Farbenindustrie A.G. Agreement - (1943)
2 A.E.R. 525, 528.

No locus standi.

Crawcour v. Salter - (1882) 30 W.R. 329.

In re Youngs, Doggett v. Revett - (1885) 30 Ch.D.
421, 425, 427.

The Millwall - 1905 P.D. 155.

O.12 r.23 R.S.C.

Young v. Holloway - 1895 P.D. 87.

C Wytcherley v. Andrews - (1869-72) 2 P. & D. 327.

Windeatt v. Windeatt - (1962) 1 A.E.R. 776.

Intervener shd. have joined in the proceedings
earlier.

Dharmananda:

Agreement between App. & Resp. 1 dated 15.3.1967.

In the Federal
Court of
Malaysia

No. 19
Notes of
Argument
recorded by
Syed Sheh
Barakbah, Lord
President,
Malaysia,
2nd May, 1967.
(Contd.)

In the Federal Notice of Appeal filed on 6.1.67.

Court of

Malaysia

Amon v. Raphael Tuck & Sons Ltd. - (1956) 1 Q.B.
357.

No. 19

Notes of

Doc. A.3.

Argument

recorded by

Sec.14 Specific Relief Ord. 1950.

Syed Sheh

Barakbah, Lord App. is no more than a name-lender according to

A

President, Choong Sam.

Malaysia,

2nd May, 1967. Remedy is an action for damages. In the Bank case,
(Contd.) subject matter still existing. Present case -
subject matter has vanished.

Ek Teong:

Legal rights affected & would be curtailed. Filing
notice of withdrawal is not actual withdrawal
without order of Ct.

Khoo adopts submission of Ek Teong.

B

C.A.V.

Sgd. S.S. Barakbah

2.5.67

17th July, 1967.

Ek Teong for Choong Sam.

Ronald Khoo for the Est. of Chan Phooi Hong

Arulanandom for Pegang Mining

Dharmananda for Tong Swee King

Judgments delivered by L.P. & Ong, F.J. & C.J.
Malaya (dissenting).

C

Order: Application granted & costs of this
application be costs in the appeal.

Extension of time to file record for a month from
today.

Sgd. S.S. Barakbah

17.7.67

No. 20

NOTES OF ARGUMENT RECORDED BY AZMI,
CHIEF JUSTICE

2nd May, 1967

Coram: Barakbah, L.P., Azmi, C.J., Ong F.J.

Mr. Ng Ek Teong for Intervener, Choong Sam (with Miss Tsai).

In the Federal
Court of
Malaysia

Mr. Dharmananda for appellant.

A

Mr. F. Arulanandom with Mr. N.T. Rajah for 1st Respondent.

Mr. Ronald Khoo for 2nd Respondent

Mr. Ek Teong: Motion.

No. 20
Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.

If my application is allowed:

B

2nd Respondent to become Appellant in place of Tong Swee King.

Tong Swee King (present appellant) be made 2nd respondent.

Terms of motion.

Read (Choong Sam's) Intervener's affidavit. Refer Agreement B in intervener's affidavit.

Pegang was lessor.

Ho Man sublessee.

Ho Man sub-leased to Ho Kok Yew.

New lands now subsequently acquired.

C

Para. 4 -

Question is whether new lands be included in the Kudang Mining section.

It lies between Lot 8899 and 11543. It was in

In the Federal
Court of
Malaysia

No. 20

Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.
(Contd.)

Japanese time, a lot over which the railway
line was built and available to Kudang.

Intervener came into picture.

See agreement A. 14th July, 1963 - for working of
lot 8899 and 11543.

Choong Sam intervener became contractor on yearly
contract.

A

Agreement A. 2 in same terms for 12 months up to
30.6.1965.

Action was filed on 1964 whilst Choong Sam's
contract was still in force.

Owing to regulation mine department would not
allow mine to work.

That was why the contract was not renewed.

But executed another agreement - A.3, renewing
the old agreement.

B

As result of these agreements Choong Sam would be
the person who should be working on the mine.

Refer to Choong Sam's agreement para. 4.

Para. 5.

Para. 6 - 1st Respondent refused to renew the
contract when asked to.

Appellant filed a suit at request of 2nd
Respondent.

Para. 7.

C - Choong Sam and Tong Swee King agreed to take
up proceedings.

C

As result case was filed.

Judgment against plaintiff.

Appeal lodged.

In meantime 1st Respondent and Appellant in breach of agreement.

Appellant withdrew the appeal.

Contract - Choong Sam - to stand to lose.

A Tong Swee King and Pegang had come to an agreement and said not collusive. But that agreement deprived Choong Sam of opportunity to get back his money. In the circumstances Choong Sam asks this Court to let him intervene.

So did the Estate of Chan Phooi Hong.

(Mr. Ronald Khoo agrees).

(Mr. Arulanandom refers to Lee Wan Seng - para - 8 of agreement dated 29.3.1967 refers to 2nd Respondent).

B I ask intervention because of Appellant's withdrawal of the appeal.

Application under Federal Court (Transitional) Rules.

Rule 27.

Rule 8(1) - power of Court equal to High Court.
Order 16 Rule 11 - to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the case or matter be added.

C In re Securities Insurance Co. (1894) 2 Chan. Div. 410 page 413 - "Now what was the practice of the Court of Chancery and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a prima facie case why he should have leave he will get it." So necessary for me to come here and ask for leave.

D Page 414 - Kay C.J. - "if he is aggrieved by it it is very easy for him to obtain leave."

In the Federal Court of Malaysia

No. 20
Notes of Argument recorded by Azmi, Chief Justice of Malaysia, 2nd May, 1967.
(Contd.)

In the Federal Ex parte Ellis. In re Ellis (1876) 2 Chan Div.
Court of 797.
Malaysia

Read headnote.

No. 20
Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.
(Contd.)

Page 798 - James L.J.....

In re Markhams Markham v. Markham 16 Chan 1.

Jopp v. Wood 55 E.R. 411

A

Dollfus Mieg et Campagnie S.A. v. Bank of England -
1951 Chan Div. 33

Headnote.

Held: (1) had direct interest in the subject-
matter.

(2)

Amon v. Raphael Tuck & Sons Ltd. - 1956 1 Q.E.B.
357.

Held:

B

(So far as I can show I have a legal right on the
subject matter of the suit and that legal right
is affected in the proceedings. To show that
right that I have is right against appellant.

Secondly - By virtue of agreement with appellant
I step into shoes of Appellant).

Transposing of Appellant to Respondent.

Prasad Narain Singh v. Mukerjee 1949 A.I.R. Patna
309.

Judgment: Para /27

C

Short adjournment.

Counsel as Before.

Ek Teong: Howden v. Yorkshire Miners' Association -
1903 1 K.B. 308. 328 - "But then it was said
that the plaintiff was not the proper plaintiff
..... natural justice."

(at page 329).

All we ask that we are given leave to come to Court.

Ronald Khoo: I adopt the arguments of Choong Sam.

Arulanandom - (for Pegang)

Judgment given in Civil Suit.

A

Notice of appeal filed but withdrawn.

At the moment there is no appeal before this Court.

Question is whether the appellant may appeal against that judgment. A.P. 1957 - p. 1244
"Who may appeal".

By leave of Court an outsider may appeal if he could possibly be made a party.

B

Without leave - if he could show he is a person interested against or prejudicially affected by the judgment.

In re B and Infant - 1958 1 Q.B.D. 12 Page 16
bottom "Mr. Simpson, for the mother"

Choong Sam has to show he was a party to the proceedings.

Choong Sam's right respecting A 1 and A 2.

Dispute between woman and Pegang A 3 - para. 2
"When the same are obtained."

C

This contract does not confer upon Madam Tong any right.

Could she sue for specific performance on A 3?

I submit no.

I submit Choong Sam cannot be made a party and therefore not as an appellant.

At most Choong Sam had a commercial interest.

In the Federal
Court of
Malaysia

No. 20
Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.
(Contd.)

In the Federal
Court of
Malaysia

See I.G. Farbenindustrie A.G. Agreement - 1943
2 All E.R. 525. 528 - "The Fact a
party".

No. 20
Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.
(Contd.)

He has no locus standi.

Crawcour v. Slater - 1882 W.R. 329.

I submit Choong Sam could not have been made a
party.

See (1885) 30 Chan. D. 421 in Youngs, Doggett v.
Revett 426 "The legal personal representative
of the"
427 "This is a novel experiment
cannot be allowed."

A

The Millwall - 1905 Prob. 155 Order XII r. 23.

Young v. Holloway 1895 p. 87.

Wycherley v. Andrews L.R. 2 P & M. 327.

Windeatt v. Windeatt 1962 1 All E.R. 776.

I submit appellant cannot be allowed to
intervene because he could not have been made
a party.

B

Respondent (2) should have joined as co-plaintiff.
He had abandoned his rights to Appellant.

I emphasise there is no appellant before the
Court - it has been withdrawn.

Sd. Azmi

Dharmananda:

Agreement between Appellant and Pegang made on
15.3.1967.

C

Notice of Appeal on 6.1.1967.

Question of commercial interest.

Refer (1956) 1 Q.B. 357 - Amon v. Raphael Tuck &
Sons Ltd.

What interest has Choong Sam?

Appellant's interest rests on A.3.

Having regard to Agreement Appellant has divested all her interest - See sec. 14 of Specific Relief Ordinance No. 29/1950.

Another matter Choong Sam chose to rest his case on appellant not until she had divested her right in A. 3.

A

Only action is for damages against her.

In the Bank case, the right of subject matter was there.

Apart from that I adopt arguments of Mr. Arulanandom.

Sd. Azmi.

Ek Teong: Reference commercial interest - Our interest is more than commercial interest because of A. 3.

B

Our legal right was affected by the Judgment.

(2) "Standing by".

Appeal withdrawn and no record of appeal filed and no order made.

Sd. Azmi.

Khoo: I am adopting Ek Teong's argument.

C.A.V.

Sd. Azmi.

17th July 1967

Coram: Barakbah, Lord President, Malaysia.
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court.

C

Mr. Ng Ek Teong for Intervener.

Mr. Ronald Khoo for Estate of Chan Phooi Hong.

Mr. Arulanandom for Pegang Mining.

In the Federal Court of Malaysia

No. 20
Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.
(Contd.)

In the Federal
Court of
Malaysia

No. 20
Notes of
Argument
recorded by
Azmi, Chief
Justice of
Malaysia,
2nd May, 1967.
(Contd.)

Mr. Dharmananda for Tong Swee King.

I read my judgment, and dismissed the application.

Ong J. read his judgment allowing application.

S.S. Barakbah read a judgment concurring with
Ong. J.

Application allowed.

No objection from Counsel for other parties.

Time to file record extended to a month from
today.

A

Sd. Azmi.

No. 21

NOTES OF ARGUMENT RECORDED BY ONG
HOCK THYE, F.J.

Tuesday, 2nd May, 1967:

Mr. Ng Ek Teong for Intervener (with Miss Tsai)

Mr. R. Khoo for 2nd respondent

Mr. F. Arulanandom with Mr. N.T. Rajah for 1st
respondent

A

Mr. P.P. Dharmananda for appellant.

Ng Ek Teong:

Notice of Motion of 24.3.'67.

Choong Sam to be plaintiff and appellant

2nd respondent to be appellant in place of what
he was:

B

That Tong Swee King be made 2nd respondent

- refer affidavit of Choong Sam of 23.3.'67

- para 3. Agreement "B" - agreement of 22.10.'31.

- new lands acquired by Pegang after the War.

- clause 4 - the vital clause.

- material lots were 8899 & 11543 (see
Schedule)
on either side of railwayline - former railway
lands new lease

C

- agreements A1, A2, A3 - show how Choong Sam
comes in.

- A1 of 14.7.63 (p.9) refer to working of Lots
8899 & 11543 -

- Choong Sam was contractor on yearly contract -

In the Federal
Court of
Malaysia

No. 21
Notes of
Argument
recorded by
Ong Hock
Thye, Federal
Judge of
Malaysia,
2nd May, 1967.

In the Federal Court of Malaysia - see A2 of 1.7.64 (p.12) was a renewal of A1 for 12 months - effective to 30th June 1965

No. 21
Notes of
Argument
recorded by
Ong Hock
Thye, Federal
Judge of
Malaysia,
2nd May, 1967.
(Contd.)

- action filed in 1964 - while Choong Sam's contract was still in force.

- now see A3 - referring to agreement A2 Choong Sam at all relevant times was working the lands - subject matter of the suit.

- para 4, 5 & 6

Dharmananda - confirms - facts as stated are common ground.

Ng Ek Teong - refers p.24 - Choong Sam's undertaking to Tong Swee King - and note clause 3.

Tong Swee King in breach of agreement with Choong Sam - - decided to withdraw appeal.

R. Khoo - supporting intervener's application.

Law:

L.N. 242/63 F.C. C.A. (Transitional) Rules

rule 27

rule 8

R.S.C. Order 16 rule 11

In re Securities Insurance Co. (1894) 2 Ch.D. 410
@ 413 (onus) para 2 of p. 413, @ 414 per Kay
C.J.

Ex parte Ellis; In re Ellis (1876) 2 Ch. 797

In re Markham; Markham v. Markham 16 Ch. D.1

Jopp v. Wood 55 E.R. 411

Dollfus Mieg et Compagnie S.A. v. Bank of England -
(1951) 1 Ch.D. 33

Amon v. Raphael Tuck & Sons Ltd. (1956) 1 Q.B.D.
357

A

B

C

Prasad Narain Singh v. Mukerjee

A.I.R. (1949) Pat. 309 @ 310

Rights of an interested party to bring action:

Howden v. Yorkshire Miners' Association (1903)
1 K.B.D. 308 @ 328

Arulanandom: (for 1st respondent)

A

There is no case pending and Choong Sam asked for leave to intervene. Decision insuit was handed down. Appeal withdrawn - no proceedings now before the Ct. Question is whether the applicant is the person who can appeal against judgment of Ali J. - see (1957) A.P. @ 1244 "who may appeal?"

In re B. and Infant - (1958) 1 Q.B. 12 @ p.16

B

Submit - Choong Sam could not possibly be made a party to the action - At most Choong Sam would have a "commercial interest" cf. "legal" interest.

In re I.G. Farbenindustrie A.G. Agreement - (1943)
2 A.E.R. 525, 528

Crawcour v. Salter (1882) W.R. 329

Submit - Choong Sam could not be made a party - Hence court has no jurisdiction to allow this application.

C

In re Youngs, Doggett v. Revett - (1885) 30 Ch.D. 421, 425 Cotten L.J.

The Millwall - (1905) P.D. 155 R.S.C. Order 12 rule 23

- standing by - (1895) p.87 (1869-72) L.R. 2 P.D. p.327 (1962) 1 A.E.R. 776
- embarrassment and prejudice to 1st respondent -
- nothing improper for 1st respondent to waive costs and settle.

In the Federal
Court of
Malaysia

No. 21
Notes of
Argument
recorded by
Ong Hock
Thye, Federal
Judge of
Malaysia,
2nd May, 1967.
(Contd.)

In the Federal
Court of
Malaysia

- intervener should have joined in the proceedings earlier.

- there is no appellant before the court.

No. 21
Notes of
Argument
recorded by
Ong Hock
Thye - Federal
Judge of
Malaysia,
2nd May, 1967.
(Contd.)

Dharmananda:

Hands up agreement - 15.3.'67

Notice of appeal filed - 6.1.'67

A

Amon v. Raphael Tuck & Sons Ltd. (1956) 1 Q.B.
357, 381

What interest has Choong Sam against appellant?

- his interest rests on A 3.

Tong Swee King the appellant has divested herself
of all interest by the agreement of 15.3.'67 -
Section 14 of Ordinance 29/50.

Choong Sam chose to rest his case on appellant -
and not to reveal his interest to this Court
until now - he is in identical position as
she is. His only remedy now is an action for
damages against her.

B

In other respects adopt argument of Arulanandom.

Ng Ek Teong:

Tong Swee King knew of agreement with Choong
Sam.

Rights affected are legal rights.

C.A.V.

C

(Sd) H.T. Ong
2.5.'67

Monday, 17th July 1967:

Counsel as before.

C.J. reads judgment - dismissing application.

I read my judgment.

109.

L.P. agrees with me.

Order in terms proposed by me.

(Sd) H.T. Ong

17.7.'67.

In the Federal
Court of
Malaysia.

No. 21
Notes of
Argument
recorded by
Ong Hock
Thye, Federal
Judge of
Malaysia,
2nd May, 1967.
(Contd.)

A

No. 22

JUDGMENT OF AZMI, CHIEF JUSTICE, MALAYA

Coram: Barakbah, Lord President, Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court.

In the Federal
Court of
Malaysia

A This is an application by Choong Sam, to whom I will refer as the intervener, for an order that the name of Tong Swee King, hereinafter referred to as the appellant, be substituted with that of the intervener, or with that of Lee Chim Yee and Chan Hong Peng, hereinafter referred to as the second respondents and in either case the appellant be added as a respondent.

No. 22
Judgment of
Azmi Chief
Justice of
Malaysia,
17th July,
1967.

B The appellant as the executrix of the estate of Ho Kok Yew deceased brought an action against Pegang Mining Co. Ltd., formerly known as Pegang Prospecting Co. Ltd., and hereafter referred to as the first respondent, and also against the second respondents as executors of Chan Phooi Hong deceased.

It would appear that the first respondent has been sub-leasing certain mining lands held under mining Licences Nos: 8899 and 11543 in Lots Nos: 21952 and 29650 in the State of Perak, containing an area of about 77 acres to the second respondents, and the second respondents had been sub-leasing the same to Khong Heng Kongsu now represented by the appellant.

C In reference to this land appellant made a contract, the last one apparently on the 1st July 1964, under which the intervener was to work on the mining land and win tin ore from the said land. It was part of the agreement that all the ore won from the said land was to be delivered to the appellant and the proceeds of each sale of ore were to be divided as follows: namely 85½% to the intervener and 14½% to the appellant. The intervener was of course, to employ his own workers for the efficient working of the mine and he also undertook to indemnify the appellant against any loss or damage which she might suffer by reason of any breach of the provisions of the Mining Regulations or orders issued by the Mines Department.

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According to the intervener's affidavit affirmed on the 23rd March 1967, the first respondent had refused to grant the necessary sub-lease to the second respondents who, however are ready to sub-lease it to the appellant and as a result the intervener had succeeded in making the appellant bring this action against the first respondent and the second respondents after giving her a full indemnity against her costs - see Exhibit "C" to the intervener's affidavit.

A

The appellant brought the action Civil Suit No. 304 of 1964 in the High Court at Ipoh against the respondents and on the 9th December 1966 the High Court gave judgment in favour of the first respondent. On 6th January 1967, the appellant appealed against the whole of the decision to the Federal Court. But on the 15th March 1967, the appellant and the first respondent executed an agreement under which the first respondent paid her \$10,000/- on her undertaking to withdraw the appeal against the said judgment of the High Court.

B

As a result, the appellant did not proceed with her appeal.

It is obvious that so far as the intervener is concerned, he has a contractual right against the appellant under his contract dated 1st July 1964. It was urged, however, on his behalf that he is entitled to be added as a party, and in place of the appellant.

C

Mr. Ng Ek Teong, on behalf of the intervener firstly cited to us the case of In Re Securities Insurance Company (1) and particularly read the following passage to us from the judgment of Lindley L.J. at page 413.

"I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the

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order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a prima facie case why he should have leave he will get it; but without leave he is not entitled to appeal."

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- A It might be mentioned, however, that in the case referred to, the Judge having made the order sanctioning an arrangement under the Joint Stock Companies Arrangement Act, 1870, an appeal was presented by persons whose interests as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the Judge when his sanction was applied for, nor obtained leave to appeal.

- B The next case was ex parte Ellis. In re Ellis.⁽²⁾ There it was held that the holder of a Bill of Sale was entitled to appeal from the adjudication of bankruptcy of a debtor.

In re Markham, Markham v. Markham⁽³⁾ the headnote says that leave to a person interested in, but not a party to an action, to appeal from an order, may be obtained by ex parte application to the Court of Appeal.

- C In Jopp v. Wood⁽⁴⁾ leave was given to the Crown to intervene on the ground that it had a claim as duty on the legacy. In other words, that it was materially interested in the matter.

In Amon v. Raphael Tuck & Sons Ltd.⁽⁵⁾ the headnote says that

"the application was, in effect, an application for leave to intervene against the will

(2) 1875-76 2 Ch. 1

(3) 1880-81 16 Ch. 1

(4) 55 E.R. p. 411

(5) 1956 Q.B.D. 1 357

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of the plaintiff; that in such a case the appropriate test to determine whether the intervenor was a party 'who ought to have been joined, or whose presence before the court may be necessary' to enable the court completely and effectually to adjudicate upon and settle all the questions involved in the cause or matter within Ord. 16, r. 11, was: Would the order for which the Plaintiff was asking directly affect the intervenor, not in his commercial interests, but in the enjoyment of his legal rights? Applying the test, D. was within the rule, for the injunction sought by the plaintiff in effect would restrain the further manufacture of the "Stixit" pen and therefore, although the fact that D was entitled to a royalty or commission gave him only a commercial interest in the continued manufacture, if he could show that the defendants were by contract, obliged to manufacture a reasonable quantity of "Stixit" pens he would have a right of action against them if they did not do so, and might ask in a subsequent action for specific performance of an agreement which the Court had ordered not to be performed. The court accordingly had jurisdiction to make the order sought which, in the circumstances was one which it was proper that the court in its discretion should make."

A

B

In Dollfus Mieg et Compagnie S.A. v. Bank of
England (6)

C

The plaintiffs issued a writ against the Bank of England claiming delivery of certain bars of gold originally held by a French Company on behalf of the plaintiffs but looted by the Germans from the French Bank and subsequently recovered in Germany and lodged with the Bank of England by the Governments of the United Kingdom, the United States and France for safe custody pending their ultimate disposal. They also applied for an injunction restraining the bank from parting with possession of the gold bars. The bank applied to have the writ set aside on the ground that the bars were in possession or control of the depositor governments and that the action

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impleaded two foreign sovereign states which declined to submit to jurisdiction. On this motion Jenkins J. made an order as prayed. On appeal to the Court of Appeal further evidence was given that since the issue of the writ in action, 13 of the bars had been sold by mistake of a subordinate official although the bars had been segregated pending receipt of directions from the governments. On that evidence the Court of Appeal reversed the order of Jenkins J. It was desired to appeal to the House of Lords and the Government of the United States and France now applied that they be added as defendants, in order to make independent presentation of the case before the House. It was contended for the applicants and admitted by the Bank that the Bank would be embarrassed in conducting an appeal in which it would have to protect its own interest and those of the applicants as it might be that the mistaken disposal of the 13 bars would result in the bank's being under a liability both to the plaintiff and the applicants. It was held that there was jurisdiction to make the order prayed as the applicants had a direct interest in the subject matter of the action and a right akin to a proprietary right therein and as the true test was what would be the result on the subject matter if the applicants' right could be established.

It should be noted, however, that in this case the Court of appeal held that the Governments, the applicants, had a right nearly akin to a proprietary right and that was the reason why they were allowed to be added as a party in the appeal.

Mr. Ng Ek Teong at the end of his address said that the intervener had a legal right on the subject matter of the action and that that right is affected by these proceedings, and therefore he has a right to be substituted as the appellant in the appeal.

Mr. Arulanandom for the first Respondent said that at the most the intervener had only a commercial interest in the sub-lease and if that is so he has no right to be joined as a party and in support cited to us

re I.G. Farbenindustrie A.G. Agreement(7)

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In the Federal The headnote reads as follows:
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"The appellants took out an originating summons, ex parte, asking for a vesting order under the Trustee Act, 1925, s. 51, of certain patents registered in the name of a German company. They also asked for rectification of the Register of Patents. The basis of application was that the German company were bare trustees for the appellants and that they were entitled to have the patents vested in them and the register rectified accordingly. The respondents to this appeal contended that they should be added as parties to the summons on the ground that they were holders of a compulsory licence granted under the Patents, designs, Copyright and Trade Marks (Emergency) Act, 1939:-

A

Held: as the respondents had only a commercial interest in the subject-matter of the summons, they were not entitled to be added as parties and the court had no jurisdiction to add them."

B

At page 528, Lord Greene M.R. said:

"The fact that a person has a commercial interest in litigation and nothing more, in my opinion, not merely gives him no right to demand to be added to proceedings by the result of which that commercial interest may be affected, but the court has no jurisdiction to add him any more than it has jurisdiction to add any man in the street. It is the practice of the court, and the court has power in proper cases, to add at his own request a party who claims to have a legal interest in the subject-matter of the suit. That is a thing that frequently happens in proceedings in the Chancery Division where creditors, debenture holders, beneficiaries and persons of that character, who have an interest in the proceedings, not merely a commercial interest, but a legal interest, can in proper circumstances apply for and obtain an order to be added as defendants in administration proceedings or whatever the proceedings may be. Where a person alleges nothing more than a commercial

C

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interest or alleges a legal interest which is shown on the face of it to be non-existent - I say that because counsel did allege a legal interest and he alleged one which, in my opinion, on the facts and in law is completely non-existent - and therefore, comes before the court as a person claiming only a commercial interest in the suit, I have never heard of a case where the court has claimed to exercise jurisdiction to add him as a party."

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A

In my view, the intervener in this case has no legal interest in the matter. He merely has a commercial interest and a decision of the court one way or the other would only affect his pocket. If such a person were entitled to be added as a party it would make litigation well nigh impracticable.

B

In the circumstances, I would therefore say that this court has no jurisdiction to add the intervener as a party, or that his name be substituted for that of the appellant. The application is therefore dismissed with costs.

CHIEF JUSTICE MALAYA.

Date: 17th July 1967
Ipoh.

Mr. P.P. Dharmananda for Appellant.

Mr. Ronald Khoo for 2nd Respondent.

Mr. F. Arulanandom for 1st Respondent.

Mr. Ng Ek Teong for Intervener.

No. 23

JUDGMENT OF ONG HOCK THYE, F.J.

Coram: Syed Sheh Barakbah, Lord President,
Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court,
Malaysia.

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A On October 22, 1931 an agreement relating to
what was described as the "Khong Heng Comprehen-
sive Mining Scheme: Kacha and Menelai" was made
between Pegang Prospecting Company, Limited, Ho
Man and Ho Kok Yew, respectively the lessee, sub-
lessee and sub-sub-lessee of certain mining lands
in the Kinta Valley Mukim of Blanja. The
successors or representatives of the three parties
are now the first respondent company, the second
respondents and the appellant respectively. The
agreement and sub-leases, or renewals thereof,
B were still valid and operative at all relevant
times as far as the present litigation is
concerned.

The question at issue was the proper inter-
pretation of clause 4 of the said agreement, which
reads as follows:

C "The Sub-lessee and the Miner and each of them
hereby undertake and agree that they will not
interfere with or attempt to obstruct or
interfere with the acquisition by the Company
(or its nominees) in the vicinity of the said
Khong Heng Kongsu Mine of any mining lands or
any right, title or interest therein (includ-
ing water rights, rights of depositing
tailings or other rights incidental to
mining) which the Company may desire to
acquire for the purpose of including same in
the said Mining Scheme and the Sub-lessee and
the Miner hereby undertake and agree further
D that they and each of them will use their
best endeavours to assist the Company in
acquiring such mining lands or interest
therein."

The miner referred to was Ho Kok Yew, who
carried on mining operations under the name of

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Khong Heng Kongsi; his legal personal representative is Tong Swee King, the appellant. As I understand it, the question arose in this manner. The Kacha and Menelai Mining Scheme comprised inter alia Mining Leases Nos. 8899 and 11543, which were separated by the permanent way and reserved lands along a railway line. These interjacent lands having become available for mining after the closure of the railway line, Mining Leases Nos. 14507, 14508 and 14509 over the same were granted to the first respondent company.

A

By an agreement in writing dated July 1, 1963, made between the applicant, Choong Sam, and the appellant, the applicant was given the right for twelve months to enter upon and work the lands comprised in Mining Leases Nos. 8899 and 11543 in consideration of the payment of tribute. The agreement was renewed on July 1, 1964 for another period of twelve months. On July 27, 1964 what had also been tacitly agreed between them for over a year past was reduced to writing in the form of a letter from the applicant to the appellant as follows:

B

"(1) If at the expiry of the said agreement by effluxion of time I shall not have committed a breach of any of the terms and conditions therein, you agree to give me yearly renewals of the said agreements up to the term of the said sub-sublease which you hold over the said lands. Provided always that in the event that if you shall have had in the first place obtained such extension or renewal to the said sub-sublease which you hold over the said lands you shall agree to give me further yearly renewals of the said agreement up to such extended period or periods of your said sub-sublease.

C

(2) You will use your best endeavours to obtain from the Estate of Chan Phooi Hong deceased and from Pegang Prospecting Co. Ltd., mining rights over the areas to be worked by you as contemplated in the Agreement dated the 22nd October, 1931 made between Pegang Prospecting Co. Ltd., Ho Man and Ho Kok Yew, and when the same

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are obtained, to have them included in the said Agreement to be worked by me on the same terms and conditions therein."

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These terms were confirmed by the appellant's signature appended to the letter. Paragraph 2 referred to the new mining leases.

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A As the lands under Mining Leases Nos. 8899 and 11543 had been worked out on the surface, the interjacent lands comprised in Mining Leases Nos. 14507, 14508 and 14509 were sought to be brought within the Khong Heng Comprehensive Mining Scheme, of which Mining Leases Nos. 8899 and 11543 were original component parts. Thus the question arose whether, on the proper construction of clause 4 of the 1931 agreement, the respondent company was obliged to throw their new mining leases into the pool of the said comprehensive mining scheme. In that event they would, of course, be obliged to grant sub-leases resulting in Choong Sam, the applicant, being able to work these lands along with Mining Leases Nos. 8899 and 11543, over which he already holds mining rights under agreement with the appellant. The respondent company took the view that it was not bound to do so.

C The applicant, therefore, requested the appellant to take action against the respondent company for enforcement of her claim to work the new lands withheld by the company from inclusion in the said mining scheme. The second respondents, being necessary parties, were joined as co-defendants. Before commencing proceedings the following agreement had been made between the applicant and the appellant:

"IPOH: 12th July, 1963.

D Madam Tong Swee King,
Managing Partner of
Khong Heng Kongsu,
No. 2, Lau Ek Ching Street,
IPOH.

Dear Madam,

Khong Heng Kongsu, Papan

This is to confirm my undertaking to you as follows:-

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1. That I shall be solely responsible for all your legal fees, expenses and charges in connection with any arbitration or litigation that may be necessitated on account of Khong Heng Kongsy enforcing its rights against Pegang Prospecting Company Limited under the Agreement dated the 22nd day of October 1931 made between Pegang Prospecting Co. Ltd., Ho Man and Ho Kok Yew.
2. This confirmation extends to any legal fees, charges or expenses of the Representatives of the Estate of Chan Phooi Hoong deceased (as successors to Ho Man deceased) in respect of any such arbitration or litigation arising out of enforcement of Khong Heng Kongsy's rights under the said agreement.
3. You agree that the final decision whether or not to appeal against any order of Court arising out of such arbitration or litigation rests with me.

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Yours faithfully,

(Sd) CHOONG SAM.

I confirm:

(Sd) Tong Swee King
Tong Swee King as Managing
Partner,
Khong Heng Kongsy,
Papan."

C

On December 9, 1966 Ali J. gave judgment against the appellant. On January 6, 1967 she filed notice of appeal to the Federal Court against the whole of the said decision. On March 15, 1967 the appellant, having accepted from the respondent company payment of \$10,000/- "as an ex-gratia payment in full settlement of all her claims against the company without any admission of liability on the part of the company", agreed in consideration thereof to withdraw her appeal and not to prosecute the matter further against the company in any proceedings. In return the Company waived all

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rights to costs awarded in its favour by the Court.

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A Although this agreement was reduced to writing on March 15, 1967 it had in fact been concluded between the appellant and the respondent company at least a week earlier. This is clear from the appellant's letter of March 9, 1967 to Mr. Chin Swee Onn, the advocate and solicitor appointed by the applicant to act on the appellant's behalf in the action and appeal, instructing him to withdraw the appeal. A copy of the letter was simultaneously sent to the Registrar of the Federal Court. On that same date the appellant informed the applicant of her decision.

B The negotiations which led to this agreement had, of course, been conducted in secret; otherwise Mr. Chin Swee Onn, the appellant's own solicitor, would not need to be informed on March 9. The respondent Company's own solicitors too, had been kept in the dark by their clients. This again seems an irresistible inference. Messrs. Maxwell, Kenion, Cowdy & Jones had been the company's solicitors. Yet they were not the solicitors who prepared and attested the agreement of March 15. This was done by Mr. Arulanandom, who appeared instead of a member of the firm of Maxwell, Kenion, Cowdy and Jones to oppose the
C applicant in this Court.

In the circumstances it is perhaps not surprising that the applicant alleged collusion between the appellant and the respondent company designed to release them from their respective obligations. Both vehemently denied the allegation. In an affidavit sworn on April 26, 1967 and filed on behalf of Lee Wan Seng, Chairman of the Board of Directors of the company, by Mr. Arulanandom, the denial was in these terms:

D "If by the use of the words 'collusive conduct' the said Choong Sam means agreeing together then I do agree that the appellant and the respondent firstly abovenamed have reached an amicable arrangement. If, however, by the use of the words 'collusive conduct' the said Choong Sam suggests a deceitful agreement or compact between the

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appellant and the respondent firstly above-named then I must state, with all emphasis, that there was no collusion of that sort between the appellant and the respondent firstly abovenamed."

This was repeated verbatim et litteratim in the affidavit sworn on April 28 by the appellant and filed on her behalf by her new solicitors, Messrs. Dharmananda & Co. These denials, however, hardly serve to transform the picture. Irrespective of their personal views the fact remains that whether acting in concert pursuant to their agreement was or was not collusive conduct must depend on the object intended and achieved. That they succeeded goes without saying, for the proper construction of clause 4 no longer falls to be determined by the courts unless the applicant obtains the leave he prays for to intervene. He accordingly moves this Court for an order that either the name of the appellant on the record be substituted by that of the applicant himself or by those of the second respondents, who support the application, and that in either case the appellant be added as a respondent to the appeal.

On the merits of this application I have had the advantage of reading the draft judgment of the learned Chief Justice. After quoting the headnote in the All England Reports of In re I.G. Farben-industrie A.G., (1) and an excerpt from the judgment of Lord Greene M.R., he quotes the editorial note as follows:

"To be joined as a party a person must, however, have a legal interest in the subject-matter of the proceedings. That interest has been called a legal interest, not by way of contrast with an equitable interest but as being an interest which the law recognises. It is not sufficient that the person has a commercial interest and is likely to be affected in his pocket by a decision one way or the other. If such a person were entitled to be added as a party, it would make litigation well-nigh impracticable."

(1) (1943) 2 A.E.R. 525

Then he goes on:

"That expresses my view. I would therefore say in this case that the intervener has no legal interest in the matter. All he has is a commercial interest, an interest that would affect his pocket; and I would therefore say that this court has no jurisdiction to add him as a party."

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While agreeing with the learned Chief Justice that the editorial note accurately summarises the law, I must say, with the utmost respect, that I am absolutely nonplussed by his ratiocination therefrom. To draw, from the facts in I.G. Farbenindustrie, the conclusion "that the intervener has no legal interest in the matter," necessarily means that, in the judgment of the learned Chief Justice, the present applicant stands in no better position than Boots Pure Drug Co. when they opposed the application of Bayer Products Ltd. for a vesting order relating to certain patents standing in the name of the German Company. I should have thought that the dicta expressed in I.G. Farbenindustrie are clearly in the applicant's favour rather than otherwise. The facts in that case and in the present one are, in my view, as different as night is from day. To quote Lord Greene M.R.(1)

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"It is argued by Mr. Valentine Homes that in view of the language of the Patents, &c (Emergency) Act, 1939, Boots have a legal interest in the subject-matter of the summons to which they seek to be added as a party.

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He confessed himself, however, unable to find any words which could appropriately describe the nature of that legal interest and I share his difficulty. He pointed out that under the licence and the Patents, &c. (Emergency) Act, 1939, his clients are entitled to bring proceedings in their own name, but that is also possible under ss. 24 and 27 of the Patents Acts, for the grantee of a compulsory licence granted under those sections can

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(1) (1944) 1 Ch. 41 at 42

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in certain circumstances bring an action for infringement in his own name. It seems, however, clear that such a right in a licensee has nothing to do with the subject-matter of these proceedings which relate solely to the legal title to these patents. Ought that title to be vested in Bayers, or ought it to remain vested in I.G.? Whichever way that question is answered, the position of Boots cannot be affected from the legal point of view. When I say "legal interest" I am not thinking of any distinction between a legal and an equitable interest, but of an interest which the law recognizes."

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In that case it should be observed that counsel for Boots was himself unable to describe the nature of the legal interest which had to be shown to support the application. In the instant case, however, the learned Chief Justice, while stating his conclusion, gave no reasons that I am able to discover for holding that all the applicant had was a commercial interest. With all respect this reminds me of what Holroyd Pearce L.J. said in Oliver v. Ashman(2):

B

"To say in Shelley's words 'I cannot argue, I can only feel' may be permitted in a juryman but it is rarely a sound foundation for a judgment."

In the instant case, far from being unable to disclose a legal interest, the applicant has shown that, in the event that clause 4 obliges the respondent company to sublease the interjacent new mining lands, the appellant would in turn be bound by her contract with the applicant to renew annually his right to work these lands till exhaustion of the ore contents. The rights of the appellant against the respondent company to work the lands, even if the second respondents were bought out, would prima facie be specifically enforceable. So would the applicant's rights against the appellant. Once it is held that the appellant has such rights the applicant's own rights cannot be denied. If this substantive

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right can be passed over in cavalier fashion by describing it as a "commercial interest", then I confess I do not know where to draw the line between a legal right and a commercial interest. At the risk of tedious repetition I quote again Lord Greene M.R. regarding the position of Boots:

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A "Ought the title to be vested in Bayers, or ought it to remain vested in I.G.? Which-ever way that question is answered, the position of Boots cannot be affected from the legal point of view."

For my own part, therefore, I have no doubt that the applicant has a very real legal interest in the subject-matter of the litigation.

B Such being the case, the applicant is clearly an aggrieved person whose legal rights have in effect been defeated or circumvented by the appellant and the respondent company acting in concert to cut the ground from under his feet. Are the courts powerless in these circumstances to prevent an injustice? The authorities are clear: see Amon v. Raphael Tuck & Sons Ltd., (3) also Dollfus Mieg et Cie S.A. v. Bank of England (4) and In re I.G. Farbenindustrie A.C. (1)

C In Raphael Tuck's case Devlin J. (as he then was) speaking of Order 16, rule 11, at page 368, said:

D "... the present case, in my view, turns upon the true construction of the rule, and in particular the meaning of the words, 'whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter'. The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no

(3) (1956) L.Q.B. 357

(4) (1951) 1 Ch. 33

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jurisdiction under the rule to join a person whose presence is not necessary for that purpose."

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His Lordship went on thus, at page 371:

"If this is the line of authority that is the correct one to apply, then I think the test is: 'May the order for which the plaintiff is asking directly affect the intervenor in the enjoyment of his legal right?'"

A

(Contd.)

At page 379 he said:

"It had always been the practice in equity to join as parties not merely those who in strictness 'ought to have been joined' but also those whose presence was necessary to complete and effectual justice."

Finally, at page 381, is the following passage:

"It is not enough that the intervenor should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally - that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested."

B

C

The appellant and respondent company have both strenuously opposed this application. I shall deal with each case separately. The appellant, in my judgment, ought to be held to her contract to leave the conduct of the litigation in the hands of the applicant: he who pays the piper should be entitled to call the tune. Any other course would be unconscionable by reason of her own conduct. On the faith of her promise in writing the applicant had expended what must have been a very considerable sum of money. Is he to be left without any remedy by reason of her going over, as it were, to the enemy? To such conduct, I would

D

respectfully apply the new estoppel thus stated by Denning L.J. (as he then was) in Lyle Meller v. Lewis:⁽⁵⁾

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"It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact: but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

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This new estoppel applies to representations as to the future. Take the kind of assurance which was held binding in Central London Property Trust v. High Trees House Ltd. ⁽⁶⁾ and in Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. ⁽⁷⁾ in the Court of Appeal (first action)^x, and in the House of Lords (second action)^y. In each of those cases a creditor during the war gave a promise or assurance to the other party that he would for the time being forgo sums which were thereafter to become due to him. In the High Trees case it was rent. In the Tungsten case it was sums payable by way of compensation. The assurance was not a contract binding in law, but it was an assurance as to the future, it was intended to be acted upon, it was acted upon, and it was held binding on the party who gave it

B

C

This new estoppel also applies to representations about legal relations. Take the kind of assertion or assurance which was held binding in Robertson v. Minister of Pensions, ⁽⁸⁾ and in the decision of the Privy Council in Harnham Singh v. Jamal Pirbhai ⁽⁹⁾ to which Lord Hailsham drew our attention this morning. In each of those cases one party had made to the other a clear and explicit assertion of the legal relationship existing between them. In the

(5) (1956) 1 W.L.R. 29, 35-36

D

(6) (1947) K.B. 130; 62 T.L.R. 559

(7)x 69 R.P.C. 108

(7)y (1955) 1 W.L.R. 761; (1955) 2 A.E.R. 657

(8) (1949) 1 K.B. 227; 64 T.L.R. 526

(9) (1951) A.C. 688

In the Federal
Court of
Malaysia

No. 23
Judgment of
Ong Hock
Thye, Federal
Judge of
Malaysia,
17th July,
1967.
(Contd.)

Robertson case it was a statement by the Crown to an Army officer: 'Your disability has been accepted as attributable to military service.' In the Harnham case it was an unequivocal statement by a tenant that he 'will remain in occupation as a statutory tenant'. The statement was not in either case a contract, and not regarded as such, but it was an assurance as to the legal position - as to the legal consequences of the facts known to both - which was intended to be acted upon, it was acted upon, and it was held to be binding."

A

In my judgment the appellant should not be permitted to leave the applicant in the lurch. As to the company, unless the appellant's objections are sustained I see no point, at this stage, to inquire into the merits of the case or of the appeal itself, as suggested in the affidavit of Lee Wan Seng affirmed on March 29, 1967. The sole and manifest object of the respondent company in paying \$10,000/- to the appellant was to take no risk of the judgment of Ali J. being reversed on appeal. Once I have come to the conclusion that, in fairness and justice, the applicant ought to be given leave to intervene, I do not think the respondent company's objections raise any further obstacle to the making of the order applied for.

B

I would accordingly allow the application, give leave to substitute the applicant's name for that of the appellant, add the second respondents as second appellants (to which they have consented) and in their place substitute the appellant to be jointly respondent with the company; the costs of this application, in the exercise of my discretion, I order to be costs in the appeal.

C

(Sgd) H.T. ONG

Ipoh
17th July 1967. JUDGE,
FEDERAL COURT, MALAYSIA.

D

Mr. Ng Ek Teong for Intervener (with Miss Tsai)

Mr. Ronald Khoo for 2nd respondent

Mr. F. Arulanandom with Mr. N.T. Rajah
for 1st respondent

Mr. P.P. Dharmananda for the appellant.

No. 24

JUDGMENT OF SYED SHEH BARAKBAH,
LORD PRESIDENT, MALAYSIA

Cor: Syed Sheh Barakbah, Lord President,
Malaysia,
Azmi, Chief Justice, Malaya.
Ong Hock Thye, Judge, Federal Court.

In the Federal
Court of
Malaysia

No. 24
Judgment of
Syed Sheh
Barakbah,
Lord President
of Malaysia,
17th July,
1967.

- A I have had the advantage of reading the judgments of Azmi, C.J. Malaya and Ong, F.J., and with respect I agree with the views expressed by my brother Ong. I have nothing to add except to say that the applicant is legally interested in Civil Suit No: 304 of 1964 as the result of the appeal in the Appellant's favour will undoubtedly give the applicant the right to work certain lands along with mining leases Nos: 8899 and 11543 pursuant to the agreement dated 27th July, 1954,
- B made with the appellant. In other words the final decision of the appeal must affect the applicant in his legal right to mine certain lands which are presumably the subject matter of the appellant's claim in the said suit - see the case of Amon v. Raphael Tuck & Sons Ltd.(1) In my view the applicant is not only commercially interested in the matter but he is legally interested in it.

- C Furthermore, from the very beginning of the suit the applicant had given the appellant a full and an abundantly secured indemnity against her costs in and by the action and only at the last moment did she decide not to proceed with the appeal. In the circumstances it seems to me that it is only just and equitable that the applicant should be allowed to intervene. I therefore agree with my learned brother Ong that the application should be granted and the costs of the application should be costs in the appeal.

(Sgd.) S.S. Barakbah.

- D Ipoh,
17th July, 1967.

LORD PRESIDENT,
FEDERAL COURT OF MALAYSIA.

(1) [1956] 1 Q.B. 357.

In the Federal P.P. Dharmananda Esq. for the appellant.
 Court of
Malaysia F.C. Arulanandom Esq. (N.T. Rajah Esq. with him)
 for 1st respt.

No. 24
 Judgment of Ronald Khoo Esq. for 2nd respondent.
 Syed Sheh
 Barakbah, Ng Ek Teong Esq. (Miss Tsai Yuet Lan with him)
 Lord President for intervener.
 of Malaysia,
 17th July,
 1967.
 (Contd.)

A

No. 25

ORDER OF FEDERAL COURT FOR
SUBSTITUTION OF PARTIES

Coram: Syed Sheh Barakbah, Lord President,
Federal Court of Malaysia,
Azmi, Chief Justice, High Court in
Malaya,
Ong Hock Thye, Judge, Federal Court,
Malaysia

In the Federal
Court of
Malaysia

No. 25
Order of
Federal Court
for substitution
of Parties
17th July 1967

A

UPON MOTION made unto Court on the 31st day
of March, 1967 by Mr. Ng Ek Teong (with him Miss
Y.L. Tsai) of Counsel for the Applicant Choong
Sam, and in the presence of Mr. P.P. Dharmananda
of Counsel for the Appellant of Mr. F.C. Arulanand-
om of Counsel for the Respondents firstly above-
named and of Mr. R. Khoo of Counsel for the
Respondents secondly abovenamed AND UPON READING
the Notice of Motion dated 24th March, 1967 and the
Affidavits of Choong Sam dated the 23rd day of
March, 1967, of Chan Hon Peng dated the 27th March,
1967, of Lee Wan Seng dated 29th March and 26th
April, 1967 of Tong Swee King dated 28th April,
1967 and filed herein:

B

AND UPON HEARING Counsel as aforesaid IT WAS
ORDERED that the application do stand adjourned
for judgment:

C

AND the same coming on for judgment this day
in the presence of Mr. Ng Ek Teong (with him Miss
Y.L. Tsai) of Counsel for the Applicant, Mr. P.P.
Dharmananda of Counsel for the Appellant, Mr. F.C.
Arulanandom of Counsel for the Respondents
firstly abovenamed and Mr. R. Khoo of Counsel for
the Respondents secondly abovenamed:

D

IT IS HEREBY ORDERED that the Applicant Choong
Sam and the Respondents secondly abovenamed, Lee
Chim Yee and Chan Hon Peng (f), be substituted for
Tong Swee King (f) as Appellants in this Appeal and
that the said Tong Swee King (f) be transposed as
the second Respondent in this Appeal.

AND IT IS FURTHER ORDERED that the costs of
this motion be costs in the Appeal.

Given under my hand and the Seal of the Court
this 17th day of July, 1967.

AU AH WAH
CHIEF REGISTRAR, FEDERAL COURT,
MALAYSIA.

No. 26

NOTICE OF MOTION

A TAKE NOTICE that the Court will be moved on Monday the 25th day of September, 1967, at 10.00 o'clock in the forenoon or soon thereafter as Counsel can be heard by Mr. F.C. Arulanandom of Counsel for the abovenamed Respondent firstly abovenamed for an order that conditional leave be granted to the Respondent firstly abovenamed to appeal to His Majesty the Yang di-Pertuan Agong against the whole of the judgment and order of the Federal Court of Malaysia given on the 17th day of July, 1967, deciding that the Applicant Choong Sam and the Respondents secondly abovenamed, Lee Chim Yee and Chan Hon Peng (f), be substituted for Tong Swee King (f) as Appellants in this Appeal and that the said Tong Swee King (f) be transposed as the second Respondent in this Appeal.

In the Federal
Court of
Malaysia

No. 26
Notice of
Motion,
7th September,
1967.

Dated this 7th day of September, 1967.

B Sd. Ng Mann Sau Sd. Arulanandom & Co.,
Deputy Registrar, Solicitors for the
Federal Court, Malaysia, First Respondent.
Kuala Lumpur.

L.S.

To:- The Chief Registrar,
Federal Court, Malaysia,
Kuala Lumpur.

C This Notice of Motion was filed by Messrs.
Arulanandom & Co., Advocates & Solicitors, No. 1,
Hale Street, Ipoh, Counsel for the abovenamed
Respondent firstly abovenamed.

This application is supported by the
Affidavit of Lee Wan Seng affirmed on the 1st day
of August, 1967.

To:- 1. Mr. Ng Ek Teong,
c/o Messrs. Braddell & Ramani,
Advocates & Solicitors,
Hongkong Bank Chambers,
Kuala Lumpur.

In the Federal
Court of
Malaysia

No. 26
Notice of
Motion,
7th September,
1967.
(Contd.)

2. Lee Chim Yee and Chan Hon Peng (f)
as Executors of the Estate of Chan
Phooi Hong, Deceased or their
Solicitors Messrs. Shearn,
Delamore & Co.,
Eastern Bank Building, No. 2, Benteng,
Kuala Lumpur.
3. Tong Swee King (f) or her Solicitors,
Messrs. Dharmananda & Co.,
Advocates & Solicitors,
27, Hale Street, Ipoh.
4. Miss Tsai Yuet Lan,
Advocate & Solicitor,
No. 5, Jalan Yang Kelsom, Ipoh.
5. Mr. Chin Swee Onn,
Advocate & Solicitor,
10, Asia Life Building,
Ipoh.

A

Filed this 16th day of August.

B

Sd. Ng Mann Sau,
Deputy Registrar,
Federal Court, Malaysia,
Kuala Lumpur.

No. 27

NOTES OF ARGUMENT RECORDED
BY ONG HOCK THYE, F.J.

Coram: C.J. Malaya, Ong, F.J., Azlan Shah J.

In the Federal
Court of
Malaysia

T.O. Kellock, Q.C. with F. Arulanandom & N.T. Rajah
for Pegang Mining (Applicant)

No. 27

Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.

A Ng Ek Teong with Miss Tsai for appellant in appeal,
(Choong Sam)

R. Khoo for Lee Chim Yee and Chan Hon Peng (f)

Kellock: 2 motions today -

(1) for leave to appeal

(2) consequential application for stay.

19 day hearing - 9.12.66 judgment of Ali, J.

B 6.1.67 Tong Swee King filed notice of appeal

9.3.67 she directed her solicitors to withdraw
pursuant to an agreement between Tong Swee
King and Pegang Mining.

24.3.67 Choong Sam first time appeared on the
scene - asked for appeal to be reopened.

17.7.67 - Order of Federal Court.

Choong Sam standing by while agent Tong Swee
King fought the case.

Right to intervene - based on legal interest.

C Submit that should be open to appeal now.

2 further points -

If there is a right of intervener to intervene,
was he too late or not?

Even if not too late - was he not estopped by
his conduct from setting forth his interest at
this stage?

In the Federal
Court of
Malaysia

No. 27

Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

Concede this is interlocutory - appeal from an
interlocutory order.

But a final order was reopened.

And a fundamental change made in position of
parties.

The test - (1964) M.L.J. 72.

Ng Ek Teong:

Appeal from interlocutory order

Refers to affidavit of Lee Wan Seng, para 1
"final"

Para 4

s. 74 Judicature Act.

s. 75(b) - "fit one for appeal"

paras 2 & 4 of affidavit

para 4 - s. 74(1)(a)(iii) - nature of the case.

s. 74(1)(a)(ii) or (iii)

Affidavit does not so rest on them.

Choong Sam's affidavit - para 3

F. Arulanandom filed another affidavit of 22.9
in reply to Choong Sam's

Nothing said about interlocutory or final order.

Now Pegang applied under s. 74(1)(b)

Pegang confines itself to grounds in para 4

Pegang now debarred from arguing on other
grounds (outside para 4) conditional that court
grant special leave on ground that case is a
fit one for appeal.

(1936) M.L.J. 106 (Rep. @ p.87)

A

B

C

Kellock:

It is still open to Pegang to make this application for leave to appeal from an interlocutory order.

Sd. H.T. Ong

Friday, 29th September, 1967: (Continued)

A

Kellock, Q.C. Continues -

Not here to argue points in full today.

Although technically an interlocutory appeal - the state of the parties has been radically changed - almost a final order - non litigant converted into litigant.

Hornbeam Co. Ltd. v. Lembaga Alat-Alat Luar Negri

B

(1964) M.L.J. 73

Benoy Krishna Mukerjee v. Satish Chandra Gill

55 I.A. 131 - submit, may be distinguished
"general rule" p.134

Rule in criminal cases: - beg in aid the same test used in criminal cases.

Instant case -

I (a) Pegang would suffer - facing expense and litigation if this application is refused.

C

II (b) Arguable case? clearly it is - one pointer is that it was a majority decision, looking only at the legal aspect.

The Federal Court decision was on question of "legal interest" - see p.8 of Ong F.J.'s judgment.

Distinction would be drawn between "direct" and "indirect" legal interest.

In the Federal Court of Malaysia

No. 27

Notes of Argument recorded by Ong Hock Thye, F.J., 25th & 29th September, 1967.

(Contd.)

In the Federal
Court of
Malaysia

No. 27
Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

Also submit, there was a misinterpretation of
the contract between Choong Sam and Madam Tong
S. King - see p.3 of judgment.

"Use your best endeavours"

"Use of best endeavours" is not specifically
enforceable Choong Sam, of course, has remedy
of breach of contract against Tong Swee King -
that would be the best course for him (Choong
Sam) - submit it was only a personal contract.
Therefore there are strong arguments of
reasoning against the judgment of the Federal
Court - undeniable that this case is one of
great legal importance - the point should be
tested in a supreme court - also it stands as
a precedent.

A

Was Choong Sam not too late to intervene?

Order 16 r.11 R.S.C. - contains one limitation -
"at any stage of the proceedings"

Were there any proceedings at the stage when
Choong Sam asked to be joined - real position
was as if there had been no notice of appeal -
same as when judgment of lower court is final -
there must be a line drawn somewhere!

B

Duke of Buccleuch (1892) P.201, 208 & 211
"at any stage"

Hence the two parties to the action had come
to an agreement.

Facts of case;

- Consider position of the intervener -
estoppel (?) against Tong Swee King (p.10 of
judgment of Ong)
- submit it is incorrect that Choong Sam has
no remedy - he has action of damages against
Tong Swee King.
- Why did Choong Sam stand by? let everybody
be under the impression that Tong Swee King
had full unencumbered title.

C

- Submit Choong Sam's conduct comes clearly within the definition of estoppel.

In the Federal Court of Malaysia

Put in another way:

By Choong Sam's own contract - Choong Sam made Tong Swee King his agent for the conduct of the case - vide letter of 12.7.63.

No. 27
Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

A Choong Sam was undisclosed principal, to eyes of the world she has normal authority of a litigant.

If Choong chose to conduct his case in this manner, clothing Tong Swee King with authority, he was bound by the decision she makes - estoppel applies both ways.

(Azlan: s.179 of our Contracts Ordinance)

B Submit: leave should be granted unless one comes within some such situation as in the Hornbeam case, when there is no point to it - or if the costs are so enormous as to be out of proportion to the problem.

As to convenience, submit it is not the real test.

From the practical point of view - what is the choice here?

Leave now - or apply to Privy Council.

I Ng Ek Teong:

C Choong Sam - undisclosed principal? bound by act of Tong Swee King.

Assuming that to be so - Tong Swee King having given undertaking to follow instructions - went against them -

- notice of intention - 24.3.67
- application of Choong Sam also dated 24.3.67 and filed 24.3.67
- motion of intervener filed at Ipoh 23.3.67
- notice of discontinuance filed 24.3.67

In the Federal
Court of
Malaysia

No. 27
Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

- what was date of filing? - 27th
- no agreement between Pegang and Tong Swee King produced, when Tong Swee King and Pegang objected.
- agreements produced only at hearing of application before the court.

II. Tong Swee King was appellant - she resisted application for substitution - hence she was made respondent - it is for her to decide whether or not to appeal against the decision of the Federal Court.

A

Now - note Tong Swee King not present.

It is Pegang that is pressing for appeal by this application for leave.

Re Hornbeam:

The L.P. took 3 matters in consideration.

following Banks v. Hollingsworth,

B

(1893) 1 Q.B. 442 @ 447 - 448

"reasonable, judicial and careful" consideration of the circumstances.

"I do not say that etc." (p. 448 - line 7)

Appellant merely showing an arguable case, or denial of some right only, is not enough.

Three points of law raised by appellant as of considerable importance in favour of granting leave

Our law followed Indian law - Indian judgments of great persuasive value.

C

..cf. s.109) Indian Civil Procedure Code of 1908
s.110) - same as our s. 74(i)(ii)
Notes.109(c) = our 74(i)(a)(iii) with 71(i)(b)

1. Banarsi Parshad v. Kashi Krishna Narain

28 I.A. 11 at 13

"Special exercise of Judicial discretion"

In the Federal
Court of
Malaysia

2. Radhakrishna Ayyar v. Swaminatha Ayyar

(1920) 48 I.A. 31 @ 33 (reference to Banarsi -
with approval) and p. 34 (top 4 lines)

Shell Co. v. Municipal Council, (1961) M.L.J.
149

No. 27
Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

A Ramanatha Chettiar v. Iyengar & Ors.

1931 A.I.R. (Madras) 641 @ 642 @ 643

(difficult question of law not enough - it
must be of general and public importance)
p. 643 - subst: question of law - a new point -
how was case a "fit one?"

Nandy v. Prasad Singh (1934) A.I.R. (Pat) 564 -
re expense and delay (565 last para)

B Babu Govind Das v. Indrawathi

(1940) A.I.R. (All) 38 @ 39 R & at 40 L.

(Validity - effect of agreement between Tong Swee
King and Choong Sam could not be considered
here - or in Privy Council at this stage).

23.3.67 - no withdrawal of appeal had occurred -
on that date Pegang had an appeal on its hands,
whether at instance of Tong Swee King or Choong
Sam.

(1936) M.L.J. p.106 (Terrell C.J.)

C Reprint(p.87) - delay and expense etc.

Replies to the 3 points:

(1) Question of legal interest, or not, depends
on the facts - the law is well settled -
(p.8 Ong's judgment) -
Consideration of facts at this stage -
is not it premature?

Chinnaswami v. Nallappa

(1948) A.I.R. (Mad) p.111

In the Federal
Court of
Malaysia

No. 27

Notes of Argu-
ment recorded
by Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

(2) Contract between Tong Swee King & Choong Sam - of personal service? (using her best endeavours) - see para 1 of the agreement.

(3) Choong Sam was in effect, active throughout -

(4) Notice of "intention" to withdraw is not a withdrawal - at least not effective without any order.

A

(5) Order not perfected may be recalled.

(6) Estoppel? At this stage - does not raising of this question, a question of fact - premature at this stage to try that issue.

R. Khoo:

Supports Ng Ek Teong -

Adds - client is sandwiched between the con-
tending parties - but his rights are undoubted
rights.

B

Kellock:

Do not agree "substantial question" of law not
enough - with reference to the first two
authorities.

- but accept the later authority - applying
discretion under 109(c) or here 74(1)(c) - it
is one of factors to be considered. - will
agree that test is "interest of justice" vide
last case cited by Ng. Ek Teong.

C

Here the order goes to the root of the action -
"forcing parties who have agreed to settle a
case to relitigate"

(a) What is or is not a "legal interest" -
in this case is a legal point.

(b) "use best endeavours etc". personal nature
of the contract.

(c) letter of court was dated 9.3.67 - copy to
Chief Registrar.

145.

Notice filed 27.3.

(d) L.N. 242 - rule 10

(e) Choong Sam bound by Tong Swee King's agreement when it was made on 15.3.67 - that is the estoppel.

Submit - in conclusion - in interests of justice, leave should be granted.

A

Order: Leave granted by majority.

I dissent.

(Sd) H.T. Ong.

29.9.'67.

In the Federal
Court of
Malaysia

No. 27
Notes of
Argument
recorded by
Ong Hock
Thye, F.J.,
25th & 29th
September,
1967.
(Contd.)

147.

No. 28

NOTES OF ARGUMENT RECORDED
BY AZMI, CHIEF JUSTICE

Coram: Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court,
Raja Azlan Shah, Judge.

In the Federal
Court of
Malaysia

Kuala Lumpur.

25th September 1967.

No. 28

Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.

A T.O. Kellock, Arulanandom and N.T. Rajah for
Applicant (Respondent) Ng Ek Teong with Miss Tsai
for Appellant.

Kellock: I act for Pegang

Madam Tong not represented.

Ng Ek Teong for Chan Hong Peng.

B Order substituting Mr. Chong Sam for Tong Swee
King as Appellant in Civil Appeal No. 4/67.
It also made Lee Chim Yee and Chan Hong Peng
2nd Appellants.

Also Order for extending period to file Record
of Appeal.

2 Motions before the Court.

1. Leave to appeal.

2. For stay pending hearing of appeal against
interlocutory order.

Affidavits dealt with stay only.

Summary of case.

C Civil action in Perak on what Madam Tong's
interpretation of clause 4 in an agreement -
i.e. whether Madam Tong was entitled to
certain mining lease.

Writ issued has no mention of Chong Sam.

Ali J's judgment.

In the Federal
Court of
Malaysia

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

Dismissed suit.

Tong filed notice of appeal.

Letter 9.3.67 - she directed her solicitor to
withdraw appeal.

Subsequently formally, withdrawal of notice
allowed.

In furtherance of an agreement with Pegang she
got \$10,000 waiver for cash.

A

24.3.67 Chong Sam for first time appeared on
scene.

Served notice of motion asking for order
either:

1. Name of applicant substituted for in her
place.

2. Respondent substituted for her.

Affidavit - Chong Sam had been conducting this
case -

B

paragraphs 6 and 7 of bundle - Ex. C.

Chong Sam objected to the settlement.

This Court by a majority granted the order.

Reasonable result appellant forced to proceed
against Chong Sam substituted for appellant
and therefore fought in Court of Appeal and
not in original Court.

Chong Sam had done nothing when case fought by
his agent.

This court by majority held applicant had a
legal interest and therefore had a right to
intervene.

C

The point whether this wrong or correct from
this interlocutory order.

That is by itself an important question of law
and should be decided by a higher Court.

Two further points raised by this Order -
and important enough to grant leave.

If there is a right to intervene at this stage
or was it too late or in other words had he
a case to intervene.

3. Had he not been estopped by his conduct at
this stage. According to his affidavit Madam
Tong was agent. Fact she was agent was not
disclosed. If that is true, he had clothed
her with full authority. Therefore he was
bound by her act and therefore estopped from
denying that.

Not my task to argue in full to say you are
wrong but only if you are right or wrong.

I consider not final. More fundamental than
usual - court changed the parties.

The order reopened that question.

This is something - very fundamental - change
in the parties.

Hornbeam Co. Ltd. v. Lembaga Alat-Alat Pembakaran

Luar Negeri & ors. 1964 M.L.J. 73

Ek Teong: Since Kellock conceded this is a interlocu-
tory order - refers to affidavit of Lee Wan
Seng of 1.8.67 - paragraph 2 - first order -

Paragraph 4 - "fit one for appeal"

Para. (b) of Sec. 74 of Courts of Judicature
Act.

therefore limited to 74(1)(a)(ii) and (iii),
not under paragraph (b).

Chong Sam's affidavit sworn on 21.9.67 paragraph
4,

Refer to Wan Seng's affidavit sworn on 22.9.67.

Nothing said as to interlocutory Order.

Pegang now purports to apply for leave as to
interlocutory order.

In the Federal
Court of
Malaysia'

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

In the Federal
Court of
Malaysia

No. 28

Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.

(Contd.)

I therefore submit as has been done, to specifically rely under Sec. 74(2)(a)(1) and (11). therefore debarred from arguing application on any other grounds.

Refer to Re Kavena Hadjee Mohamed Yoosuf, dead. Estate & Trust Agencies (1927) Ltd. v. Fatimah Sham binte Hadji Sahib & Ors. 1936 M.L.J. 106 (Reprint at 85).

A

Terrell J's Judgment page 87 - D - 2nd para.

The applicant in this case is bound to argue on the grounds submitted.

He cannot now argue on the basis that is an interlocutory order - not set out in this application.

Sd. Azmi.

Kellock: My duty is mainly to file an appeal and all grounds open to us.

B

No intention to surprise my learned friend.

Sd. Azmi.

In 1936 M.L.J. 106 - Court proceeded to deal on question though not mentioned in application.

Sd. Azmi.

Allowed to proceed with his original argument.

Sd. Azmi.

Adjourned to 29th September at 10 a.m.

29th September 1967

C

Counsel as before.

Kellock: I have sent a final affidavit.

I repeat though interlocutory status of parties so changed by this order, it has now some characteristic of a final Order - in turning non-litigant into a litigant.

Test this Court has to apply - whether an appeal will lie from any interlocutory judgment or order depends on whether this Court "considers it a fit one for appeal to his Majesty."

In the Federal Court of Malaysia

See Hornbeam Co. Ltd v. Lembaga Alat-Alat Pembakaran Luar Negeri & Ors. 1964 M.L.J. 73

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

A At page 74 - E - for purpose of this application this Court should assume the Judge was wrong and the Court of Appeal was wrong in the sense that the course of reasoning which led the Court of Appeal to its decision was erroneous - everything must be presumed in favour of the applicant.

Applicant must show to this court, however, that there is at least an arguable case for reversing the conclusion at which the Court of Appeal arrived.

B He must show to this court that not only are there defects in the chain of reasoning which led to the result but he must also show this court that he has been deprived of something to which he is entitled, in some way prejudiced and in some way likely to suffer in consequence if the decision against which he appeals is allowed to stand.

The order which we ask leave to appeal is an order made by this court - on this question you yourselves are divided.

C First question - whether intervener had a legal interest - fundamental point in the judgment.

Ong F.J. at page 8 - "Far from being unable to disclose a legal interest, the applicant"

Question is direct or indirect interest.

Contract with Chong Sam and Madam Tong - page 3 of Ong's judgment "You will do your best"

Not a specific contract but a personal one.

Therefore no legal interest of Chong Sam.

Not correct in my view Chong Sam's right could be enforced by any Court.

In the Federal
Court of
Malaysia

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

This point being made there are strong arguments
against a chain of reasoning of this Court.

I submit it is hard to deny it is a point of legal
interest as this is a point which should be
tested by the Highest Court.

I submit this is an arguable case.

2nd point - Whether it was too late to intervene. A

Order 16 - R. 11.

Appeal having been withdrawn - therefore no notice
of appeal before Court.

No issues left before Court

The Duke of Buccleuch - 1892 L.R. Prob. 201 208 -

"I think that the fact that the damages remained
to be assessed rendered the decree of the judge
..... "page 209.

If still issue in action pending, no final
judgment, but no issue still before Court there-
fore no final judgment. B

Page 211 Lord Esher M.R.

No proceedings before this Court at time inter-
vener came into picture.

With respect this point of some importance.

3rd point on facts of this case.

Conduct of intervener.

Estoppel against Tong Swee King - page 10 bottom
"Appellant strongly opposed this application". C

Doctrine of estoppel against us but strongly
against Chong Sam - everybody believing Madam
Tong had an incumbrance on the land.

He appeared on scene only when something went
wrong.

He had not taken any

Estoppel - Chong Sam's conduct in the record.

Chong Sam came into that definition.

If some one stood by and let his interest be affected - he should not be allowed to come in and intervene.

By his conduct the applicant, Chong Sam fairly made Madam Tong his agent for conduct of his case.

A

See letter of 12th July 1963 - page 4 of Ong's judgment.

This was an undisclosed principal.

To the eyes of the world Chong Sam has normal authority of a litigant.

Chong Sam chose to conduct his case in such manner, he was bound by act of his agent.

This is another form of estoppel.

B

3 points

(1) No legal interest.

(2) No proceedings in existence. (No. issue left to be determined).

(3) Estoppel.

If I am right - I argue leave should be allowed.

Having raised a point that should be considered, leave should be granted unless we come with such a situation as Hornbeam Co. case where there is no point in it.

C

If point is fundamental enough question of costs should not come in.

There is an arguable point - fundamentally changed status. I submit leave should be given unless it is pointless.

If you refuse I go to Privy Council.

My application for stay - I should think it follows as a matter of course.

In the Federal
Court of
Malaysia

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.

(Contd.)

In the Federal Ek Teong: Chong Sam is undisclosed principal
Court of therefore bound by his agreement with Madam
Malaysia Tong Swee King having settled case, principal
cannot deny settlement.

No. 28

Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

Notice of withdrawal dated 24.3.67 filed on
27.3.67.

Chong Sam's application to intervene filed on
same day.

A

Agreement between Pegang and Madam Tong not
known.

It is interesting to note it is Pegang who is
pressing this appeal.

Hornbeam's case cited.

page 73 top - refer to Banks v. Hollingsworth
and Another - 1893 1 Q.B. 442.

Page 447 "The question upon an application of
this nature is whether considering all the
circumstances"

B

I submit Hornbeam's case deals only with 2
conditions when leave should be given.

Kellock submits 3 points of law considerable
importance.

Our law follows the Indian law.

Indian Civil Procedure sec. 109 and 110.

Sec. 109: Sec. 110.

must also in addition - whether there is a
substantial question of law.

C

Indian provisions similar to ours therefore
we can go to Indian cases.

Banarsi Parshad v. Kashi Krishna Narain & Anor.
Vol. 28 I.A.11

Radhakrishna Ayyar and Anor. v. Swaminatha Ayyar
Vol. 48 I.A.31.

Question whether case of importance.

1961 M.L.J. 149 - Shell Co. of the Federation of Malaya Ltd. v. Chairman, Municipal Council (No. 2).

Question of whether substantial question of law only - not support for leave to be given.

A 1931 A.I.R. (Madras) 642 Ramanathan Chettiar v. Audinatha Ayyangar & others - Question of delay and expenses.

1934 A.I.R. (Patna) 564 - Nrisingha Charan Nandy vs Rajniti Prasad Singh and others

Left column page 565 - "Another consideration which we must keep in view in granting the certificate required"

B Babu Govind Das and another v. Mt. Indrawati and others. - 1940 A.I.R. (Allahabad) 38.

Page 39 right column. "It is clear that cl.(c) of S.109 applies even to interlocutory (top next page).

Re Kavena Hadjee/Mohamed Yoosuf decd. 1936 M.L.J. 106 Reprint at 85.

Page 88 - second column - "In a matter of this kind the interest of the beneficiaries"

Applicant must give substantial reasons before this Court should allow it.

C Substantial question of law enough.

Applicant took up 3 points.

Whether Chong Sam had legal interest or not - depends on the facts. The law itself well settled - refer Ong F.J.'s judgment - 8.

Chinnaswami alias Narayana Reddiar - Nallappa Reddiar.

1948 A.I.R. Madras 111.

Page 112 - headnotes.

In the Federal Court of Malaysia

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

In the Federal
Court of
Malaysia

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

Page 3 of Ong F.J.'s judgment.

(i) If at the expiry of the said agreement

As to nature of withdrawal - not merely instructions to withdraw. Requires order of this Court to make it final.

Question of cost to be considered. I reply to last point.

Estoppel - I do not see how he can estopped.

I submit no substantial law involved.

Sd. Azmi.

Ronald Khoo for Lee Chim Yee and Chan Hon Peng.

Our rights not disputed.

If application allowed, we would be dragged.

We have a small tribute. For this are we to be dragged to Privy Council on this side issue between Chong Sam and Pegang.

Sd. Azmi.

Kellock: Involment of 2nd Respondents not relevant.

Cases cited do not say.

Subsequent cases merely substantial question of law not enough but Court should consider.

Question of discretion - different factor.

In the interest of justice I accept that interest.

Points of fundamental question of law.

1934 Patna - transfer to another Court.

This is a different case where though interlocutory resurrected a dead matter.

A

B

C

My learned friend says law settled on legal interest

I submit not.

Refer Lord Greene in re. I.G. Farbenindustrie A.G. 1943 2 A.E.R. 525

A Question of too late - Notice of Madam Tong to Solicitor dated 9th March, 1967.

Notice of Discontinuance - filed on 27th.

Motion of Chong Sam filed on 23rd.

Question of issue between 2 parties and no question of costs for decision.

Rule 10 of Federal Court Rules.

I submit no proceedings in existence when Chong Sam filed his application.

B Estoppel the signing of the agreement made on 16th March.

In interest of justice you should give leave.

Sd. Azmi.

Leave to appeal (two to one) given and consequential order in terms.

Cost to abide decision of Privy Council.

Sd. Azmi.

In the Federal Court of Malaysia

No. 28
Notes of
Argument
recorded by
Azmi, Chief
Justice,
25th & 29th
September,
1967.
(Contd.)

No. 29

NOTES OF ARGUMENT RECORDED
BY RAJA AZLAN SHAH, J.

25th September 1967

In the Federal
Court of
Malaysia

T.O. Kellock Q.C., with F. Arulanandom and N.T.
Rajah for Pegang Mining Co. (Applicant)

No. 29

Notes of
Argument
recorded by
Raja Azlan
Shah, J.
25th & 29th
September,
1967.

A Ng Ek Teong with Miss Y.L. Tsai for Appellant in
Appeal (Choong Sam)

R. Khoo for Lee Chim Yee and Chan Hong Peng (f)

Kellock addresses:

Two motions.

Affidavits mainly dealing with stay.

Summary of case:

B Plaintiff v. Pegang Mining Co. Ltd. in C.S. in
Ipoh.

Interpretation of clause 4.

Whether plaintiff is entitled to certain mining
areas.

In interlocutory matters Choong Sam's name not
raised.

Ali, J. dismissed case. Plaintiff has no right
under Agreement.

Plaintiff appealed.

C Letter of 9.3.1967: plaintiff directed solici-
tors to withdraw appeal.

Formal notice of withdrawal.

\$10,000/- paid to plaintiff by Mining Co.

On 24.3.1967 Choong Sam appears on appeal for
the first time.

In the Federal
Court of
Malaysia

No. 29
Notes of
Argument
recorded by
Raja Azlan
Shah, J.
25th & 29th
September,
1967.
(Contd.)

Choong Sam intervenes.

Affidavit: paras. 6 and 7.

Choong Sam agent?

Federal Court granted Order.

Choong Sam sustained as appellant by majority decision. Choong Sam had a legal interest in the matter. Order of 17.7.1967.

A

Was he too late in intervening?

If he was not too late. Estoppel. Choong Sam clothed plaintiff with conduct of case.

Concedes that it is an interlocutory matter.

Fundamental change in position of parties.

Test - (1964) M.L.J. 73

Ng Ek Teong addresses:

Sect. 74(1)(b) Courts of Judicature Act, 1964.

B

Affidavit of Lee Wan Seng dated 1.8.1967 rested on Sect. 74(ii) or (iii) and not on Sect. 74 (1)(b).

Affidavit of Lee Wan Seng dated 22.9.1967.

Cites (1936) M.L.J. 106, 108, 109.

(Adjourned to 29.9.1967).

29th September, 1967

Kellock addresses:

Test is in (1964) M.L.J. 73, 74.

If fundamental rule of law is involved, leave ought to be granted. Fundamental principle involved. Arguable case must be established by the applicant.

C

Question whether or not intervener had a legal interest in the subject matter in the dispute?

Cites pp. 8 & 9 of Ong F.J's judgment.

P. 3 of Ong's judgment is not right.

Not specifically enforceable contract, being a personal contract.

It follows no legal interest in Choong Sam.

Too late to intervene.

O.16 r.11.

"At any stage of the proceedings".

When appeal was withdrawn, action was over.

No issues left to be argued by the parties.

Fry L.J. at p. 211.

Cites Duke of Buccleuch, (1892) P.D. 208.

Distinguished from present case.

Conduct of intervener.

Ong's judgment pp. 10-11.

By his own affidavit appellant made lady his agent in conduct of the case. Letter dated 12.7.1963. Estoppel.

Undisclosed principal.

Point still open to the applicant now. Do not know if that point was argued before the court.

Leave to appeal should be granted unless it comes within Hornbeam's case (unless point is useless).

Convenience is not the test.

Ng Ek Teong addresses:

If Choong Sam is an undisclosed principal.

N/Motion filed on 23.3.1967.

In the Federal
Court of
Malaysia

No. 29
Notes of
Argument
recorded by
Raja Azlan
Shah, J.
25th & 29th
September,
1967.
(Contd.)

In the Federal
Court of
Malaysia

No. 29
Notes of
Argument
recorded by
Raja Azlan
Shah, J.
25th & 29th
September,
1967.
(Contd.)

N/Discontinuance filed on 27.3.1967.

Agreement of \$10,000/-.

Banks v. Hollingsworth, (1893) 1 Q.B. 442, 447.

Sect. 109(c) Indian Civil C.P.C. 1908 (to be sparingly exercised).

Sect. 110.

Cites (1900-01) 28.I.A. 11, (Below the stated amount).

A

Cites Radhakrishna Ayyar's case, (1920-21) 48 I.A. 31. A substantial point of law alone is not enough. (Banarsi followed).

Cites Shell Co. v. Chairman, Municipal Council, (1961) M.L.J. 149.

Cites Ramanathan Chettiar, (1931) A.I.R. (Mad.), 642, 643, 644. It must be of public importance. Difficult question of law is not sufficient.

B

Cites Nand v. Prasad Singh, (1934) A.I.R. (Pat.) 564, 565. Expense and delay.

Cites (1940) A.I.R. (All.), 38, 39. (To delay the substantial dispute between the parties is a ground for disallowing leave).

Re Kavena Hadjee, (1936) M.L.J. 106.

Mohamed Yusuf, deceased.

There must be special circumstances: 55 I.A. 131.

C

Principles of law well settled - stated in judgment. Question is applying the law to the facts.

Cites (1948) A.I.R. (Mad.), 111.

Subsequent question of law does not arise if the principle of law is well settled and the only point in question is the application of the facts to the law.

P.3 of Ong's judgment - personal contract.
Specific performance not applicable.

N/Discontinuance not effective until order is
extracted. Not a final order until order is
extracted.

Estoppel.

A R. Khoo for estate for Chan Phooi Hoong.

Kellock replies:

Substantial question of law is a ground.
Different factors involve different consider-
ations.

Points of law are important not only to litigants
but also to administration of justice.

If Order of 17.7.1967 is wrong.

B What is or what is not "a legal interest" is a
difficult point of law. The facts are settled.
It is the other way round.

Letter dated 9.3.1967.

N/Discontinuance dated 27.3.1967.

Delay. Transitional Rules. Rule 10.

Estoppel is the signing of the agreement on
15.3.1967.

LEAVE GRANTED
COSTS FOLLOW EVENT IN PRIVY COUNCIL

C (Sgd) RAJA AZLAN SHAH.
JUDGE
HIGH COURT

In the Federal
Court of
Malaysia

No. 29
Notes of
Argument
recorded by
Raja Azlan
Shah, J.
25th & 29th
September,
1967.
(Contd.)

No. 30

ORDER GRANTING CONDITIONAL LEAVE TO
APPEAL AGAINST ORDER OF 17th JULY, 1967

Before: AZMI, CHIEF JUSTICE, HIGH COURT IN
MALAYA:
ONG HOCK THYE, JUDGE, FEDERAL COURT,
MALAYSIA

and

RAJA AZLAN SHAH, JUDGE, HIGH COURT
IN MALAYA

IN OPEN COURT.

This 29th day of September, 1967

In the Federal
Court of
Malaysia

No. 30

Order granting
conditional
leave to
appeal against
Order of 17th
July, 1967,
29th September
1967.

UPON MOTION made unto Court on the 25th day of September, 1967 by Mr. T.O. Kellock Q.C. (with Mr. F.C. Arulanandom and Mr. N.T. Rajah) of Counsel for Pegang Mining Company Limited, in the presence of Mr. Ng Ek Teong (with Miss Tsai Yuet Lan) of Counsel for Choong Sam who by order made herein dated the 17th day of July, 1967, was substituted one of the Appellants herein in place of Tong Swee King (f) and Mr. R. Khoo of Counsel for Lee Chim Yee and Chan Hon Peng (f) AND UPON READING the Notices of Motion dated 7th September, 1967 respectively and the Affidavits of Lee Wan Seng affirmed on 1st August, 1967 and 26th August, 1967 respectively, the Affidavit of Choong Sam affirmed on the 21st September, 1967, the Affidavit of Chan Hon Peng (f) one of the two executors of the Estate of Chan Phooi Hong, Deceased affirmed on 21st September, 1967 and the Affidavit of Lee Wan Seng affirmed on the 22nd September 1967 all filed herein AND UPON HEARING the arguments of Counsel aforesaid:

IT WAS ORDERED that this matter do stand adjourned to the 29th day of September, 1967 for further arguments:

AND THE SAME COMING UP FOR FURTHER ARGUMENT this 29th day of September, 1967, in the presence of Counsel as aforesaid AND UPON READING the Affidavit of Lee Wan Seng affirmed on 26th September, 1967 and filed herein AND UPON HEARING the Counsel:

In the Federal
Court of
Malaysia

No. 30

Order granting
conditional
leave to
appeal against
Order of 17th
July, 1967,
29th September
1967.

(Contd.)

IT IS ORDERED that leave be and is hereby granted to Pegang Mining Company Limited the Respondents firstly abovenamed to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of the Federal Court dated 17th day of July, 1967 upon the following conditions:

(1) That the Respondents firstly abovenamed do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar, Federal Court, Malaysia, in the sum of ~~£~~5,000/- (Dollars Five thousand only) for the due prosecution of the Appeal, and the payment of all such costs as may become payable to Choong Sam the intervener/
Appellant and the second Respondent/Appellant in the event of the Respondent firstly abovenamed not obtaining an order granting them final leave to appeal, or of His Majesty the Yang di-Pertuan Agong ordering the Respondent firstly abovenamed to pay to Choong Sam the intervener/Appellant and the second Respondent/Appellant the costs of the Appeal as the case may be; and

A

B

(2) That the Respondents firstly abovenamed do within the said period of three (3) months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Record and for the despatch thereof to England.

C

AND IT IS FURTHER ORDERED that all proceedings in and the hearing of the above Appeal be stayed till the final disposal of the Appeal to His Majesty the Yang di-Pertuan Agong against the Order of this Court given on the 17th day of July, 1967:

AND IT IS LASTLY ORDERED that the costs of and incidental to this application be costs in the Appeal.

D

GIVEN under my hand and the seal of the Court this 29th day of September, 1967.

Sd: Ng Mann Sau
Deputy Registrar,
FEDERAL COURT, MALAYSIA.

- L.S. -
THE SEAL OF THE
FEDERAL COURT MALAYSIA.

No. 31

ORDER OF FEDERAL COURT GRANTING
FINAL LEAVE TO APPEAL TO HIS MAJESTY
THE YANG DI-PERTUAN AGONG

Before: SYED SHEH BARAKBAH, LORD PRESIDENT,
MALAYSIA:
AZMI, CHIEF JUSTICE, HIGH COURT IN
MALAYA:

In the Federal
Court of
Malaysia

and

A

ONG HOCK THYE, JUDGE, FEDERAL COURT,
MALAYSIA:

No. 31

Order of
Federal Court
granting
Final leave
to appeal to
His Majesty
the Yang Di-
Pertuan Agong,
8th January,
1968.

IN OPEN COURT

This 8th day of January 1968

B UPON MOTION made unto Court this day by Mr.
F.C. Arulanandom of Counsel for Pegang Mining
Company Limited, the first Respondent abovenamed in
the presence of Mr. V. Ponniah of Counsel for Choong
Sam the intervener and Mr. S. Woodhull of Counsel
for Lee Chim Yee and Chan Hon Peng (f) the second
Respondents abovenamed AND UPON READING the Notice
of Motion dated the 12th day of December, 1967 and
the Affidavit of Lee Wan Seng affirmed on the 24th
day of November, 1967 and filed herein AND UPON
C HEARING the arguments of Counsel as aforesaid.

C IT IS ORDERED that final leave be and is hereby
granted to the Respondent firstly abovenamed to
appeal to His Majesty the Yang di-Pertuan Agong
against the whole of the Judgment and Order of the
Federal Court of Malaysia given on the 17th day of
July, 1967, deciding that the Applicant Choong Sam
and the Respondents secondly abovenamed, Lee Chim
Yee and Chan Hon Peng (f), be substituted for Tong
Swee King (f) as Appellants in this Appeal and that
D the said Tong Swee King (f) be transposed as the
second Respondent in this Appeal.

AND IT IS ORDERED that the costs of and inciden-
tal to this application be costs in the Appeal.

GIVEN under my hand and the seal of the Court
this 8th day of January, 1968.

L.S.
Sd. Au Ah Wah
Chief Registrar,
FEDERAL COURT, MALAYSIA.

No. 32

GROUND'S OF DISSENTING JUDGMENT OF ONG

HOCK THYE, F.J.

when Order of 29th September 1967 was made

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

In the Federal
Court of
Malaysia

No. 32

A FEDERAL COURT CIVIL APPEAL NO.X.4 OF 1967
(Ipoh High Court Civil Suit No.304 of 1964)

Grounds of
Dissenting
judgment when
Order of 29th
September
1967 was made,
14th March.
1968.

BETWEEN

TONG SWEE KING (f)
as Executrix of the Estate
of Ho Kok Yew, deceased Appellant

CHOONG SAM Intervener

and

B 1. Pegang Mining Co. Ltd.
(formerly known as Pegang
Prospecting Co. Ltd.)
2. Lee Chim Yee and Chan Hon
Peng (f) as Executors of
the Estate of Chan Phooi
Hong, deceased Respondents

Coram: Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court,
Malaysia

C Azlan Shah, Judge, High Court,
Malaya.

D The order made on September 29, 1967, granting
Pegang Prospecting Company Limited leave to appeal
to His Majesty the Yang di-Pertuan Agong from the
judgment of this court given on July 17, 1967, was
the decision of the majority from which I dissented.
My brother, Raja Azlan Shah, who concurred with the
learned Chief Justice, was not a member of the
court which made the order appealed from. On that
account, he was, perhaps, not as fully conversant

In the Federal
Court of
Malaysia

No. 32

Grounds of
Dissenting
judgment when
Order of 29th
September
1967 was made,
14th March,
1968.

(Contd.)

with the grounds of decision therein as the learned Chief Justice, who was. After more than five months, the latter has still not stated the reasons for his decision, as expected of him by their Lordships of the Privy Council. It may well be that he considered his own judgment dismissing the application of the intervener impregnable, but, with respect, that fact alone is not all that mattered. I feel it my duty to state why I did dissent.

As Mr. Kellock very properly conceded, the appeal is against an interlocutory order. Paragraph (b) of section 74(1) of the Courts of Judicature Act 1964 provides for leave to appeal being granted "from any interlocutory judgment or order which the Federal Court considers a fit one for appeal". This, of course, means that the grant of leave is wholly discretionary. Nevertheless, the exercise of such discretion must not be capricious, arbitrary or unreasonable. Where no grounds are given, I venture to say, with all respect, that the unsuccessful litigant has cause to feel dissatisfied.

From the purely practical point of view, I consider the grant of leave at this stage in the interests of neither party. Had the substantive appeal being allowed to proceed to hearing in due course, Pegang Prospecting Co., whether successful or not, in any further appeal to His Majesty the Yang di-Pertuan Agong, will either be as happily placed as if leave had been refused, or as respondents, be still entitled (a) to raise the objection that the intervention should never have been allowed and (b) to contend, further, that the decision in the substantive appeal was wrong. The Company cannot, under any circumstances, be prejudiced by our refusing leave. On the other hand, a considerable saving in costs for all parties would be assured, since there need only be one further appeal in any event, instead of two, which have perhaps become inevitable. It is only the intervener who must needlessly be made to suffer now, as a result of the majority decision. I do not think it right and proper for this court to abdicate its function of exercising its discretion judicially, nor should it be forgotten

A

B

C

D

that this court owes responsibilities to their Lordships of the Privy Council to do so. In my opinion, therefore, the grant of leave at this stage is wholly unjustifiable, quite apart from adding to the delay, which is already considerable, and increasing costs which are rising like a frightful incubus.

In the Federal
Court of
Malaysia

No. 32
Grounds of
Dissenting
judgment when
Order of 29th
September
1967 was made,
14th March,
1968.

(Contd.)

A In an earlier case in this court, Hornbeam Co. Ltd. v. Lembaga Alat-Alat Luar Negri(1) a precedent already exists showing how the discretion in such matters should be exercised. I can see no special circumstances which entitled the Pegang Prospecting Company to privileged treatment denied to the applicant in that case.

B My view, with the greatest respect, is that the Company should have been left the alternative of applying to the Privy Council for leave to appeal. It is certainly premature at this stage for any party to go into the merits of the case. To say that the interlocutory order of this court is prejudicial to the Company, in effect, prejudices the whole issue. The Lord President and I have held, rightly or wrongly, for the reasons stated in our judgments, that the intervenor's legal interests were rights to work the land in dispute. It can afford him no consolation whatsoever should he ever obtain a judgment on paper against Madam Tong Swee King, simply for breach of contract, while losing forever all rights to work the land, which must be of considerable value to be so strenuously fought for. Foreclosure of an appeal on the merits, which appears to be the objective of the Company, seems to me an injustice which the courts should not be powerless to prevent.

(sgd.) H.T. ONG.

Kuala Lumpur,
14th March 1968.

JUDGE,
FEDERAL COURT, MALAYSIA.

D T.O. Kellock, Q.C. with F. Arulanandom & N.T. Rajah
for Pegang Mining (Applicant)
Ng Ek Teong with Miss Tsai for appellant in appeal
(Choong Sam)
Ronald Khoo for Lee Chim Yee and Chan Hon Peng (f).

(1) (1964) M.L.J. 73.

EXHIBITS

A4(xxvi) - MEMORANDUM OF SUB-LEASE

A4(xxvi)
Memorandum of
Sublease No. 727644
78156 of
Mining Leases
8899 and
11543,
12th October,
1956.

No.78/56 of Mining Leases 8899 and 11543

VOLUME 170 FOLIO 93

STAMPS \$8.00

FEDERATION OF MALAYA

A

PRESENTATION No. 4539 at 10 a.m. this 15.10.56

SCHEDULE X

(Section 36(i) of the Mining Enactment Cap.147)

DISTRICT OF

MUKIM BLANJA, KINTA

Sub Lease No. 78/56

I/We, Pegang Prospecting Company Limited, a company incorporated in the Federation of Malaya hereinafter called the sub-lessor, being the registered lessee/lessees of two piece of mining land at Kacha described in Mining Leases Nos. 8899 and 11543 Lot Nos. 21952 & 29650 Mukim of Blanja of date 27.6.17 & 20.12.1929 and subject to such encumbrances, liens and interests as are endorsed thereon:

B

In consideration of the sum of dollar One (\$1.00) paid to us by Chan Phooi Hoong of 146, High Street, Kuala Lumpur the receipt of which we hereby acknowledge and of the payment of tribute as hereunder set forth.

Do hereby sub-lease to the said Chan Phooi Hoong of 146, High Street, Kuala Lumpur the said two piece of mining land coloured red upon the plan hereunto attached, and estimated to contain (78) acres (2) roods and (25) poles, more or less, for the period of the said leases subject to the provisions of the Mining Enactment, and to the following conditions, restrictions and exceptions:

C

1. That the sub-lessee shall pay to the sub-lessors, or to their duly appointed agent, tribute upon all ore removed from the said land at the rate of seven (7%) per cent
2. That the said tribute shall be paid immediately after each sale of ore, of which sales the Sublessors shall have two (2) clear days' notice and the right to be present at such sale.
3. That the sub-lessee shall be liable upon suit before the Senior Inspector of Mines or any Court to pay to the sub-lessors the sum of \$250.00 as a penalty for each and every breach of the conditions above set out which he may commit.
4. 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-lessor for any expenses which they may incur, whether as fine inflicted on them or otherwise, on account of any breach of this condition by the sub-lessee.
5. That the sub-lessors or their duly appointed agent may at all reasonable times enter upon and view the land and may inspect any books of account of ore produced from the land.
6. That the Sublessors shall be liable to pay to the State the annual rent due upon the land.

EXHIBITS

A4(xxvi)
Memorandum of
Sublease No.
78156 of
Mining Leases
8899 and
11543,
12th October,
1956.
(Contd.)

Presentation No. 4577 } Sublet by Chan Phooi
Sub Lease No. 89/56 } Hoong to Tong Swee King
of } (f) for the period of
Sub Lease No. 78/56 } Sub Lease No. 78/56 less
one day at 10 a.m. this
21st day of December,
1956.

Signed C.L.R.

EXHIBITSA4(xxvi)

Memorandum of
Sublease No.
78156 of
Mining Leases
8899 and
11543,
12th October,
1956.

(Contd.)

7. That the sub-lessee shall not be entitled to transfer or assign this sub-lease without the written authority of the sub-lessors.

8. That this sub-lease shall be liable to cancellation at any time at the discretion of the Senior Inspector of mines or the Court upon proof.

(i) That the sub-lessee has failed to pay to the sub-lessors the amount of any moneys which he is by the terms of this sub-lease bound to pay for a period of six months from the date at which such payment became due.

A

(ii) That the sub-lessee has not worked the land in accordance with clause 4 of this sub-lease or has by his default rendered the land liable to forfeiture under the Mining Enactment.

B

(iii) That the sub-lessee has not during the period of six months employed at least (79) labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of the Mining Enactment for not less than one month in mining the land.

(iv) That the sub-lessee has committed a breach of Clause 7 of this sub-lease.

C

9. That the Sublessee agrees to pay to the Sublessors tribute on any portion of the quota which they do not use to produce ore from the lands in question that is to say tribute on such portion of the quota as they use to produce ore on other lands provided that if any part of the quota is not used at all then no tribute thereon is payable to the Sublessors.

Dated this 12th day of October 1956.

Sd. C.E. Cumming	Director
Sd.	Director
Sd. Evatt & Co.	Secretaries

D

.....
Sub-lessors.

I do hereby accept this sub-lease to be held by me as sub-lessee for the term and subject to the conditions, restrictions and exceptions above set forth.

EXHIBITS

A4(xxvi)

Memorandum of
Sublease No.
78156 of
Mining Leases
8899 and
11543,
12th October,
1956.
(Contd.)

Chan Phooi Hoong by his
attorneys
Sd. Lee Chim Yee
Sd. Chan Hon Peng
.....
Sub-lessee

A Original P/A K.L.O.
14/56
delivered & returned.

Memorial made in the Register Mining Leases,
Volume 139 & 166, Folio 99 & 43 at 10 a.m. this
15th day of October, 1956.

.....
Collector

FIRST SCHEDULE

(Section 4 of the Act of Parliament No. 1 of
1960)

B FORM A

I hereby testify that
the signature of the Sublessee's attorney above
written in my presence on this 9th day of October
1956 are according to my own personal knowledge
the true signature of the Chan Hon Peng (f) &
Lee Chim Yee who have acknowledged to me Ong Hock
Thye that they are of full age and that they have
voluntarily executed this instrument.

Witness my hand

C Sd. Ong Hock Thye
Advocate & Solicitor
IPOH.

EXHIBITS

FORM B

A4(xxvi)
Memorandum of
Sublease No. 78156 of
Mining Leases
8899 and
11543,
12th October,
1956.

I Bimal Kumar Das, as Advocate and Solicitor
of the Supreme Court of the Federation of Malaya,
hereby certify that on this 12th day of October
1956, the common seal of Pegang Prospecting
Company Limited was duly affixed to the above
written instrument in my presence in accordance
with the regulations of the said company.

Witness my hand

A

(Contd.)

Sd. B.K. Das
Advocate & Solicitor
IPOH

A4(xxvii) - MEMORANDUM OF SUB-SUB-LEASE

No. 89/56 of Sublease 78/56 of Mining Leases
Nos. 8899 and 11543

Stamps 50 cents
STAMP OFFICE
29 OCT 1956
IPOH

VOLUME 171 FOLIO 4

EXHIBITS

A4(xxvii)
Memorandum of
Sub-sublease
No. 89/56 of
Sublease 78/
56 of Mining
Leases Nos.
8899 and
11543,
26th October
1956.

A

FEDERATION OF MALAYA

Presentation No. 4577 at 10 a.m. this 31.10.56

SCHEDULE X

(Section 36(i) of the Mining Enactment Cap. 147)

DISTRICT of Kinta MUKIM Blanja

Sub-Sublease No. 89/56 of Sub-Sublease No. 78/56

B

I, CHAN PHOOI HOONG of No. 146, High Street,
Kuala Lumpur hereinafter called the Sub-sub-lessor,
being the registered Sub-lessee by virtue of Sub-
lease No. 78/56 of a piece of mining land at Kacha
described in Mining Leases Nos. 8899 and 11543
Lot Nos. 21952 and 29650 of date 27.6.17 and
20.12.29 and subject to such encumbrances, liens
and interests as are endorsed thereon:

C

In consideration of the sum of dollar one
only (~~8~~1.00) paid to me by TONG SWEE KING (F) of
Nos. 2-4, Lau Ek Ching Street, Ipoh hereinafter
called the Sub-sublessee the receipt of which I
hereby acknowledge and of the payment of tribute
as hereunder set forth.

Do hereby Sub-sub-lease to the said TONG
SWEE KING (F), hereinafter called the Sub-sub-
lessee, all the said piece of mining land
estimated to contained seventy-eight (78) acres
Two (2) roods and Twenty-five (25) poles, more
or less, for the period of the said Sub-lease
less one day, subject to the provisions of the

EXHIBITS

A4(xxvii)

Memorandum of
Sub-sublease
No. 89/56 of
Sublease 78/
56 of Mining
Leases Nos.
8899 and
11543,
26th October
1956.

(Contd.)

Mining Enactment, and to the following conditions, restrictions and exceptions:

1. That the Sub-sub-lessee shall pay to the Sub-sub-lessor, or to his duly appointed agent, tribute upon all ore removed from the said land at the rate of nine (9%) per cent.

2. That the said tribute shall be paid immediately after each sale of ore, of which sales the Sub-sublessor shall have two (2) clear days' notice and the right to be present at such sale.

A

3. That the Sub-sub-lessee shall be liable upon suit before the Warden/Senior Inspector or any Court to pay to the Sub-sub-lessor the sum of \$250.00 (Dollars two hundred and fifty only) as a penalty for each and every breach of the conditions above set out which she may commit.

B

4. That the Sub-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-sublessor for any expenses which he may incur, whether as fine inflicted on him or otherwise, on account of any breach of this condition by the sub-sub-lessee.

5. That the Sub-sub-lessor or his duly appointed agent may at all reasonable times enter upon and view the land, and may inspect any books of account of ore produced from the land.

C

6. That the Sublessor shall be liable to pay to the State the annual rent due upon the land.

7. That the Sub-sub-lessee shall not be entitled to transfer or assign this Sub-sub-lease without the written authority of the Sub-sub-lessor.

8. That this sub-sub-lease shall be liable to cancellation at any time at the discretion of the Warden/Senior Inspector or the Court upon proof.

D

- (i) That the Sub-sub-lessee has failed to pay to the Sub-sub-lessor the amount of any moneys which he is by the terms of this Sub-sub-lease bound to pay for a period of six months from the date at which such payment became due.
- A (ii) That the Sub-sub-lessee has not worked the land in accordance with clause 4 of this Sub-sub-lease or has by his default rendered the land liable to forfeiture under the Mining Enactment.
- (iii) That the Sub-sub-lessee has not during the period of six months employed at least seventy nine (79) labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of the Mining Enactment for not less than one month in mining the land.
- B (iv) That the Sub-sub-lessee has committed a breach of Clause 7 of this Sub-sub-lease.
9. That the Sub-sublessee agrees to pay to the Sub-Sublessor tribute on any portion of the quota which they do not use to produce ore from the lands in question that is to say tribute on such portion of the quota as the Sub-sublessee use to produce ore on other lands PROVIDED that if any part of the quota is not used at all then no
- C tribute thereon is payable to the Sub-sublessor.

Dated this 29th day of October 1956.

Chan Phooi Hoong
by his attorneys

Sd. Lee Chim Yee
Sd. Chan Hon Peng

.....
Sub-Sub-lessor.

I do hereby accept this Sub-sub-lease to be held by me as Sub-sub-lessee for the term and

EXHIBITS

A4(xxvii)
Memorandum of
Sub-sublease
No. 89/56 of
Sublease 78/
56 of Mining
Leases Nos.
8899 and
11543,
26th October
1956.
(Contd.)

EXHIBITS

subject to the conditions, restrictions and exceptions above set forth.

A4(xxvii)

Memorandum of
Sub-sublease
No. 89/56 of
Sublease 78/
56 of Mining
Leases Nos.
8899 and
11543,
26th October
1956.

(Contd.)

Sd. Tong Swee King

.....

Sub-Sub-lessee

Memorial made in the Register Sub Lease,
Volume 170, Folio 93 at 10 a.m. this 31st day
of October, 1956.

A

.....

Collector

I, hereby testify that the signatures of
the Sub-sublessor's Attorney above written in
my presence on this 29th day of October 1956
are to my own personal knowledge the true
signatures of Chan Hon Peng (f) and Lee Chim
Yee who have acknowledged to me TAN TEOW BOK
an advocate & solicitor of the Supreme Court
of the Federation of Malaya that they are of
full age and that they have voluntarily
executed this instrument.

B

Witness my hand

Sd. Tan Teow Bok.

SCHEDULE XXXVIII(a)

(Under section 178 of "The Land Code,
Cap. 138)

C

I, hereby testify that the signature of
Sub-Sublessee above written in my presence
on this 24th day of October 1956 is to my
own personal knowledge the true signature of
Tong Swee King (f) who has acknowledged to
me Kok Yat Khong, an advocate & solicitor of
the Supreme Court, of the Federation of
Malaya that she is of full age and that she

has voluntarily executed this instrument.

Witness my hand

Sd. K.Y. Khong
Advocate & Solicitor
Ipoh, Perak.

A

EXHIBITS

A4(xxvii)
Memorandum of
Sub-sublease
No. 89/56 of
Sublease 78/
56 of Mining
Leases Nos.
8899 and
11543,
26th October
1956.
(Contd.)

A5(xxxiii) - AGREEMENT between Lee
Chim Yee, Chan Hon Peng and Tong Swee King

EXHIBITS

A5(xxxiii)
Agreement
between Lee
Chim Yee,
Chan Hon
Peng and
Tong Swee
King,
31st May,
1963.

AN AGREEMENT made at Kuala Lumpur this 31st day of May 1963 Between Lee Chim Yee and Chan Hon Peng (f) as Executors and Trustees of the Estate of Chan Phooi Hoong, deceased of No. 164, High Street, Kuala Lumpur (hereinafter called the First Party) of the one part and Tong Swee King (f) of No. 2, Lau Ek Ching Street, Ipoh (hereinafter called the Second Party) of the other part.

A

WHEREAS:-

(a) The late Chan Phooi Hoong was granted a sub-lease over those two pieces of mining lands comprised and held under Mining Lease Nos. 8899 and 11543 for Lot Nos. 21952 and 29650 respectively in the Mukim of Blanja in the District of Kinta (hereinafter referred to as the said "Land") by Pegang Prospecting Co. Ltd., Ipoh (hereinafter referred to as the said "Company") and which sublease was duly registered as Sublease No. 78/56 (hereinafter referred to as the said "Sublease") at the rate of seven (7%) per cent tribute to the said Company.

B

(b) By a Memorandum of Sublease dated the 29th day of October, 1956 and duly registered as Sub-sub-lease No. 89/56 of Sublease No. 78/56 the late Chan Phooi Hoong had sub-subleased the said lands to Tong Swee King (f) at the rate of nine (9%) per cent tribute (hereinafter referred to as the said "Sub-sublease").

C

(c) Previous to the said Sub-sublease an agreement was entered on the 23rd day of September, 1953 between the late Chan Phooi Hoong and the said Tong Swee King (f) (hereinafter referred to as the said "Previous Agreement") bearing certain reference to the said lands and others adjacent thereto.

(d) The parties hereto have now arrived upon certain arrangements and understanding concerning the rights benefits share and interest in the said Sublease No. 78/56 from the said Company to the late Chan Phooi Hoong which they desire to reduce into writing.

D

NOW IT IS HEREBY MUTUALLY AGREED between the parties hereto as follows:-

EXHIBITS

A5(xxxiii)
Agreement
between Lee Chim
Yee, Chan Hon
Peng and Tong
Swee King,
31st May, 1963
(Contd.)

1. In consideration of the premises and of the sum of dollars five thousand (\$5,000/-) only now paid by the Second Party to the First Party (the receipt whereof the First Party hereby acknowledges) to be dealt with and applied for as hereafter provided, the First Party hereby confirms and agrees to relinquish and forego the two (2%) per cent tribute over and above the seven (7%) per cent tribute payable by the first Party to the Company under the said Sublease No. 78/56, that is to say, notwithstanding the rate of nine (9%) per cent tribute payable by the Second Party to the First Party under the said Sub-sublease No. 89/56 of Sublease No. 78/56 the First Party shall as from henceforth and hereafter be paid the reduced rate of tribute at seven (7%) per cent only instead of at the rate of nine (9%) per cent as have had been so done prior to the execution of this agreement hereof.

2. That though the First Party shall as from now be receiving and paid the reduced rate of seven (7%) percent tribute from all ore won and removed from the said lands the First Party hereby reaffirms that it shall conscientiously use its best endeavours to obtain a renewal and renewals of the said Sublease No. 78/56 from the said Company and immediately thereafter granting to the Second Party a renewal and renewals of the said Sub-sublease No. 89/56 of Sublease No. 78/56 for the term of its renewal or renewals and upon similar terms and conditions excepting that the rate of tribute to be paid to and received by the First Party from the Second Party shall be seven (7%) percent only and no more or at such rate of tribute as the Company may insist upon on renewal or renewals of Sublease No. 78/56.

3. The sum of dollars five thousand (\$5,000/-) paid herein under Clause 1 above by the Second Party to the First Party shall be treated as payment in one lump sum for the share or difference of tribute under the said Sub-sublease No. 89/56 of Sublease No. 78/56 which the First Party would normally be paid and receiving during the term of the said Sub-sublease No. 89/56 of

EXHIBITS

A5(xxxiii)
 Agreement
 between Lee
 Chim Yee, Chan
 Hon Peng and
 Tong Swee King,
 31st May,
 1963.
 (Contd.)

Sublease No. 78/56 were this agreement hereof not been made.

4. In the event that at such time when it shall be required of the First Party to attend to or to obtain a renewal or renewals of the said Sublease No. 78/56 from the said Company upon its expiry should the First Party be indisposed or otherwise to attend to and to obtain a renewal or renewals of the same at such time for one reason or another, the First Party shall agree to delegate such specific powers and authorities to the Second Party to act attend and obtain such renewal or renewals of the said Sublease for and on behalf of the First Party.

A

5. If need be or the necessity arises the Second Party shall be at liberty to resort to or submit in the event that the said Company shall not agree or refuse to grant a renewal or renewals of the said Sublease No. 78/56 the issue for a renewal or renewals of the said Sublease No. 78/56 to the High Court or such other Courts for adjudication for and on behalf of the First Party provided always that all cost expense fees or legal charges shall be met with and settled entirely by the Second Party who shall indemnify and keep indemnified the First Party against the same.

B

6. The First Party shall not be held responsible for the refusal to renew the said Sublease No. 78/56 by the said Company and the Second Party shall have no right to claim whatsoever compensation for such non-renewal or renewals from the First Party.

C

7. The First Party shall however whenever require to agree to zealously support and assist the Second Party in the matter of such renewal or renewals of the said Sub-sublease and/or such application or applications to the Company for the working rights over such adjoining land or lands belonging to or alienated by the said Company, the cost and expense so involved to be entirely borne and paid by the Second Party.

D

8. This agreement hereof shall in no way prejudice affect or adverse such obligations as

are contained in the said previous Agreement referred to under this agreement.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

EXHIBITS

A5(xxxiii)

Agreement
between Lee Chim
Yee, Chan Hon
Peng and Tong
Swee King,
31st May,
1963.
(Contd.)

A Signed by the said Lee Chin Yee } Lee Chin Yee
and Chan Hon Peng (f) as } Chan Hon Peng
Executors and Trustees of the }
Estate of Chan Phooi Hoong, }
deceased in the presence of:- } Executors and
Trustees of the
Estate of Chan
Phooi Hoong,
deceased.

B ADVOCATE & SOLICITOR
KUALA LUMPUR
Probate No. 19/62
High Court,
Kuala Lumpur

Signed by the said Tong Swee King (f) in the presence of:- } Tong Swee King

ADVOCATE & SOLICITOR
KUALA LUMPUR

EXHIBITS

A6(i)

Lease for
Mining Land
District of
Kinta No.
8899,
24th December,
1916.

A6(i) - LEASE FOR MINING LAND

DISTRICT OF KINTA No. 8899

Renewal approved vide S.R. 2248/16

Federated Malay States,
State of Perak
Schedule D

Section 9(i) of "The Mining Enactment, 1911."

This Lease is issued by the Resident of Perak on behalf of His Highness the Sultan of Perak to Teow Chon and those claiming under him to occupy for the term of Twenty-one (21) years from the Twenty-fourth (24th) day of December 1916 that portion of land in the Mukim of Blanja estimated to contain Fifty-nine (59) acres One (1) roods Three (3) perches, more or less, which said portion of land with the dimensions, abuttals and boundaries thereof is delineated on the plan drawn on these presents and more particularly on Revenue Survey plan number 24952 deposited in the Office of the Deputy Superintendent of Revenue Surveys, Kinta subject to the payment therefor of the annual rent of Sixty (~~860~~-) dollars Nil cents, and to the employment thereon of not less than Sixty (60) coolies, and to the provisions and conditions set out in "The Mining Enactment, 1911".

A

B

Provided always and it is hereby expressly agreed and declared that -

- (a) this Lease shall not vest in any person any right whatsoever in respect of any mineral oil but all rights in respect of the working, getting and removal of mineral oil on and under the land hereby leased are reserved to the Ruler of the State absolutely;
- (b) if at any time any mineral oil shall be discovered on or under any portion of the land hereby leased, the lessee shall be bound to surrender to the Ruler of the State, if and when so required by the Resident, such portion of the land as the Resident may direct;

C

D

(c) for any breach of the obligation set out in paragraph (b) this lease shall be forfeitable;

EXHIBITS

A6(i)

(d) the lessee shall be entitled to receive in respect of loss or damage, if any, sustained by him in consequence of such surrender as aforesaid reasonable compensation on the terms set out in sub-section (iv) of section 16 of "The Mining Enactment, 1911".

Lease for Mining Land District of Kinta No. 8899, 24th December, 1916.

(Contd.)

A

In witness whereof the said Resident has hereunto set his hand and caused the public seal of the State to be affixed at Taiping this 25th day of June, 1917 in the presence of: Sgd. ? } Signed and Sealed by Resident of Perak.

Signed by the said Teow Chon this 14th day of June, 1917, in the presence of: Sgd. ? } Sgd. ? (In Chinese)

B Registered at the Kinta Land Office, this 27th day of June, 1917.
Journal No. 535/17.
No. of Former Title. M.L. 5673.

Sgd. ?
Collector of Land Revenue, Kinta.

C Presentation No. 4645 Miscellaneous No. 7/37. The term of this lease is hereby extended from the 24th day of December, 1937 to the 31st day of December, 1950 by Order of the Resident under Section 24(ii) (a) of the Mining Enactment (Cap.147) at 11 a.m. this 23rd day of January, 1937. (Vide KLO.797/36).

Sgd. ?
Collector of Land Revenue, Kinta.

D Presentation No. 1645 Miscellaneous 35/50. The term of this lease is hereby extended up to the 31st day of December, 1965 by Order of the Ruler in Council under Section 24(ii)(a) of the Mining Enactment (Cap. 147) at 10 a.m. this 1st day of April, 1950 (KLO. No. 239/49) Subject to the imposition of the following Express Condition:-

The lessee for the time being shall permit duly authorised officers of the Kinta Town Board

EXHIBITSA6(i)

Lease for
Mining Land
District of
Kinta No.
8899,
24th December,
1916.

(Contd.)

to enter upon the land herein comprised for the purpose of carrying out such anti-malarial measures as may be considered necessary by the said Board, and shall pay, on demand, to the Chairman of the said Board the cost of such anti-malarial measures as assessed by such Chairman.

Sgd. ?
Collector of Land Revenue, Kinta.

A

Transfer 171/17 Transferred to Lim Sin Aik by the abovenamed Teow Chon, this 10 - July, 1917.

Sgd. ?
C.L.R.

Sublease 160/17 Sublet to Leong Sin, Tai Woon and Leong Chen for the term of the lease by the abovenamed Lim Sin Aik this 30 October, 1917.

Sgd. ?
C.L.R.

Sublease 12/18 } Sublet to Leong Sin by the above-
of } named Leong Sin Tai Woon and
Sublease 160/17 } Leong Chen this 16 January, 1918.

B

Sgd. ?
C.L.R.

Sublease 12/18 } Cancelled surrendered this 29th
of } May, 1918.
Sublease 160/17 }

Sgd. ?
C.L.R.

Transfer 166/18 } Transferred to Leong Sin two-
of } thirds (2/3) interest by the
Sublease 160/17 } abovenamed Tai Woon and Leong
Chen, the said Leong Sin thus
becoming the sole sublessee,
this 29 May, 1918.

C

Sgd. ?
C.L.R.

Transfer 269/18 Transferred to Teow Chon by the abovenamed Lim Sin Aik, subject to Sublease 160/17, this 6 September, 1918.

D

Sgd. ?
C.L.R.

Transfer 438/20. Transferred to Pegang Prospecting Company Limited by the abovenamed Teow Chon subject to Sublease 160/17, this 8 December, 1920.

EXHIBITS

A6(i)

Lease for Mining Land District of Kinta No. 8899, 24th December, 1916.

Sgd. ?
C.L.R.

A Transfer 439/20 } Transferred to Pegang Prospecting
of } Company Limited by the
Sublease 160/17 } abovenamed Leong Sin this 8
December, 1920.

Sgd. ?
C.L.R.

Charge 14/20. Charged to Teow Chon by the abovenamed Pegang Prospecting Company Limited, subject to Sublease 160/17, this 13 December, 1920.

B Sgd. ?
C.L.R.

Sublease 160/17, Cancelled surrendered this 5th January, 1923.

Sgd. ?
C.L.R.

C Sublease 1/23. Sublet to Ho Man for seven (7) years from the 11th day of September, 1922 by the abovenamed Pegang Prospecting Company Limited this 5 January, 1923.

Sgd. ?
C.L.R.

Transmission 6/23 } Transmitted to Lian Ngim Thai
of } (f) as representative of the
Charge 14/20 } estate of Teow Chon alias Tian
Chon (deceased) by Probate
dated 12 October, this 15 June,
1923.

D Sgd. ?
C.L.R.

<u>EXHIBITS</u>	Charge 14/20.	Satisfied this 15 June, 1923.	
<u>A6(i)</u> Lease for Mining Land District of Kinta No. 8899, 24th December, 1916. (Contd.)		Sgd. ? C.L.R.	
	Sublease 83/27 } of Sublease 1/23 }	Sublet to Ho Oi Chee for the term of the Sublease less the last seven days thereof by the above- named Ho Man, this 20 May, 1927.	
		Sgd. ? C.L.R.	A
	Transfer 166/28 } of Sublease 83/27 } of Sublease 1/23)	Transferred to Ho Kok Yew by the abovenamed Ho Oi Chee, this 26 September, 1928.	
		Sgd. ? C.L.R.	
	Sublease 83/27 } of Sublease 1/23 }	Cancelled - surrendered. Produced and entered at Batu Gajah this 11th day of July, 1929 at 10.20 o'clock in the fore-noon.	B
		Sgd. ? C.L.R.	
	Sublease 1/23	Cancelled - surrendered. Produced and entered at Batu Gajah, this 11th day of July, 1929 at 10.20 o'clock in the forenoon.	
		Sgd. ? C.L.R.	
	Sublease 170/29	Sublet to Ho Man for the term of seven years from 1st July, 1929 by the abovenamed Pegang Pros- pecting Company Limited. Produced and entered at Batu Gajah this 11th day of July, 1929 at 10.20 o'clock in the fore-noon.	C
		Sgd. ? C.L.R.	
	Sublease 170/29	Cancelled - Lapsed - this 23rd day of January, 1937.	D
		Sgd. ? C.L.R.	

Presentation No.
4963

Sublease No. 66/37. Sublet by
Pegang Prospecting Company
Limited to Mak Shi (f) and Chan
Phooi Hoong as Trustees for the
term of the lease at 10 a.m.
this 28th day of June, 1937.

EXHIBITS

A6(i)

Lease for
Mining Land
District of
Kinta No.
8899,
24th December,
1916.
(Contd.)

A

Sublease No. 66/37

Lapsed and Cancelled this 15th
day of October, 1956.

Sgd. ?
Collector.

Sgd. ?
Collector.

Presentation No.
4539

Sublease No. 78/56. Sublet by
Pegang Prospecting Company
Limited to Chan Phooi Hoong
for the period of the lease at
10 a.m. this 15th day of
October, 1956.

B

Sgd. ?
Collector.

Presentation No.
7273

Miscellaneous No. 4/62. Change
of name from Pegang Prospecting
Company Limited to Pegang Mining
Company Limited registered at
10 a.m. this 22nd day of January,
1962.

C

Sgd. ?
Collector.

This certified copy of Mining Lease No. 8899 is
issued under Section 76 of the Evidence Ordinance in
connection with the Ipoh High Court Civil Suit No.
304/64.

CERTIFIED TRUE COPY

Sgd. Collector of Land
Revenue, Kinta.

Checked:

D Sgd.
Regn. Clerk.

EXHIBITS

A6(iii) - LEASE FOR MINING LAND
DISTRICT OF KINTA NO. 11543

A6(iii)

Lease for
Mining Land.
District of
Kinta No.
11543,
14th December,
1928.

Conversion, Excision & Amalgamation S.R.3026/27
K.L.O. 555/27 Vol.166 Folio 43

Federated Malay States,
State of Perak.

Schedule D

Section 9(i) of The Mining Enactment, 1911.

A

This lease is issued by the Resident of Perak on behalf of His Highness the Sultan of Perak to Pegang Prospecting Company Limited and those claiming under them to occupy for the term of Nine (9) years from the Fourteenth (14th) day of December, 1928 that portion of land in the Mukim of Blanja, Lot 29650 estimated to contain nineteen (19) acres One (1) rood twenty-two (22) poles more or less which said portion of land with the dimensions abuttals and boundaries thereof is delineated on the plan drawn on these presents and more particularly on revenue survey plan number 28785 deposited in the Office of the Assistant Superintendent of Revenue Survey, Kinta, subject to the payment therefor of the annual rent of Nineteen (£19/-) dollars fifty (50) cents and to the employment thereon of not less than twenty (20) coolies and to the provisions covenants and conditions set out in the Mining Enactment 1911 and to the other covenants and conditions expressly set forth hereunder:

B

C

Provided always and it is hereby expressly agreed and declared that -

In witness whereof the said	} Sealed and signed
Resident has hereunto set his	
hand and caused the seal of	
the State to be affixed at	
Taiping this 18th day of	
October, 1929 in the presence	} by the British Resident of Perak. (Sgd. C.W.H. Cochrane)
of: Sgd ?	
Office Assistant	

D

Signed by the said Pegang Pros- }
 pecting Co. Ltd. by its }
 Attorney C.B. Cumming this 5th }
 day of October, 1929 in the }
 presence of: Sgd. ? - }
 2nd Clerk L.O. Ipoh. }

Pegang Prospecting
 Co. Ltd. by its
 attorney
 Sgd. C.B. Cumming
 P.A. 120/20
 (K.L.O.)

EXHIBITS

A6(iii)

Lease for
 Mining Land.
 District of
 Kinta No. 11543.
 14th December,
 1928.

Registered at the Kinta Land Office this 20th day
 of December, 1929 at 12.10 p.m.

(Contd.)

A Presn. No. 1294/29
 No. of former title M.L. 6085 & 10216, M.C. 874
 & Grant 7008 M/As. 7/27,
 8/27 & 21/27.

Sgd. ?
 Collector of Land Revenue, Kinta.

B Presentation No. 4646 Miscellaneous No. 8/37. The
 term of this lease is hereby extended from the 14th
 day of December, 1937 to the 31st day of December
 1950 by order of the Resident under Section 24(ii)
 (a) of the Mining Enactment (Cap. 147) at 11 a.m.
 this 23rd day of January, 1937 (Vide K.L.O. 797/36)

Sgd. ?
 Collector of Land Revenue, Kinta.

C Presentation No. 1645 Miscellaneous 35/50. The
 term of this lease is hereby extended up to the
 31st day of December, 1965 by Order of the Ruler in
 Council under Section 24(ii) (a) of the Mining
 Enactment (Cap. 147) at 10 a.m. this 1st day of
 April, 1950 (K.L.O. No. 239/49) Subject to the
 imposition of the following Express Condition:-

Sgd. ?
 Collector of Land Revenue, Kinta.

D The lessee for the time being shall permit
 duly authorised officers of the Kinta Town Board
 to enter upon the land herein comprised for the
 purpose of carrying out such anti-malarial measures
 as may be considered necessary by the said Board,
 and shall pay, on demand, to the Chairman of the
 said Board the cost of such anti-malarial measures
 as assessed by such Chairman.

Sublease 170/29. Sublet to Ho Man for the term of
 seven years from 1st July, 1929, by the abovenamed

EXHIBITS

A6(iii)

Lease for
Mining Land.
District of
Kinta No.
11543,
14th December,
1928.
(Contd.)

Pegang Prospecting Company Limited. Produced and entered at Batu Gajah, this 11th day of July, 1929 at 10.20 o'clock in the fore-noon.

Sd. Meer Ahmad.
C.L.R.

L.S.

I hereby certify that the above endorsement is a true copy of that on the register of Mining Certificate No. 874.

A

Sgd. ?
Collector of Land Revenue, Kinta.

Sublease 170/29. Cancelled - Lapsed - this 23rd day of January, 1937.

Sgd. ?
Collector of Land Revenue, Kinta.

Presentation No. 4963 Sublease No. 66/37. Sublet by Pegang Prospecting Company Limited to Mak Shi (f) and Chan Phooi Hoong as Trustees for the term of the lease at 10 a.m. this 28th day of June, 1937.

B

Sgd. ?
Collector of Land Revenue, Kinta.

Sublease No. 66/37 Lapsed and Cancelled this 15th day of October, 1956.

Sgd. ?
Collector of Land Revenue, Kinta.

Presentation No. 4539 Sub Lease No. 78/56. Sublet by Pegang Prospecting Company Limited to Chan Phooi Hoong for the period of the lease at 10 a.m. this 15th day of October, 1956.

C

Sgd. ?
Collector of Land Revenue, Kinta.

Presentation No. 7273 Miscellaneous No. 4/62. Change of Name from Pegang Prospecting Company Limited to Pegang Mining Company Limited registered at 10 a.m. this 22nd day of January, 1962.

Sgd. Ahmad Sohar
Collector of Land Revenue, Kinta.

D

195.

This certified copy of Mining Lease No. 11543 is EXHIBITS
issued under Section 76 of the Evidence Ordinance in
connection with Ipoh High Court Civil No. 304/64. A6(iii)

Checked: CERTIFIED TRUE COPY.

Sgd.
Regn. Clerk.

Sgd.

Collector of Land Revenue, Kinta.
Batu Gajah

Lease for
Mining Land.
District of
Kinta No.
11543,
14th December,
1928.
(Contd.)

A

196.

EXHIBITS

D. 41 - LETTER: Hock Hin Leong Limited to
Chief Consumer's Engineer,
Ipoh.

D.41

Letter: Hock Hin
Leong to Chief
Consumer's
Engineer, Ipoh,
4th June, 1963.

HOCK HIN LEONG LIMITED

60 Belfield Street,
Ipoh,
Perak, Malaya.

A

4th June 1963.

The Chief Consumers' Engineer,
Perak River Hydro Electric Power Co. Ltd.,
Ipoh.

Dear Sir,

Re Consumer P. 285 I
Hock Hin Leong No. 2.

We apply for the transfer of the 150 K.V.A.
transformer at p.285 I to the Khong Heng Mine at
Papan, as our Mr. Choong Sam is to work the said
Khong Heng Mine on contract.

B

Mr. Choong Sam also applies for a 150 vertical
pump complete with other gears to be installed at
the said Khong Heng Mine (Consumer G.272).

Yours faithfully,

HOCK HIN LEONG LIMITED

Sd: Choong Sam

Managing Director

c.c. to Khong Heng Kongsil,
Papan.

EXHIBITS

(Unmarked)

(Unmarked) - AGREEMENT between
Tong Swee King and Pegang Mining Company
Limited

Agreement
between Tong
Swee King
and Pegang
Mining
Company
Limited,
15th March,
1967.

STAMP OFFICE
IPOH - 27 MR'67.

AN AGREEMENT made this 15th day of March, 1967
Between Tong Swee King (f) Executrix of the Estate
of Ho Kok Yew, Deceased of 2, Lau Ek Ching Street,
Ipoh (hereinafter referred to as "the Settlor") and
Pegang Mining Company Limited a company incorpora-
ted in the States of Malaya and having its regis-
tered office at Chartered Bank Chambers, Ipoh
(hereinafter referred to as "The Company").

A

WHEREAS the Settlor commenced proceedings
against the Company in Ipoh High Court Civil Suit
No. 304 of 1964

AND WHEREAS the High Court at Ipoh on the 9th
day of December, 1966 gave judgment in favour of
the Company

B

AND WHEREAS by Notice of Appeal dated 6th day
of January, 1967, the Settlor appealed against the
whole of the decision of the said Court to the
Federal Court

AND WHEREAS the Settlor and the Company have
come to a settlement about their differences.

NOW THIS AGREEMENT WITNESSETH as follows:-

1. In consideration of the Company paying to the
Settlor the sum of \$10,000/- (Dollars ten thousand)
only (the receipt of which the Settlor hereby
acknowledges) as an exgratia payment in full
settlement of all her claims against the Company
without any admission of liability on the part
of the said Company in respect of the claims of
the Settlor against the said Company, the Settlor
as Executrix of the Estate of Ho Kok Yew, Deceased
hereby agrees and undertakes to withdraw the said
appeal against the decision of the Ipoh High Court
Civil Suit No. 304 of 1964 on the 9th day of
December, 1966 and not to prosecute the said
matter against the said Company either in this or
any other proceedings.

C

D

EXHIBITS

(Unmarked)

Agreement
between Tong
Swee King and
Pegang Mining
Company
Limited,
15th March,
1967.

(Contd.)

2. The Settlor hereby agrees on behalf of the said Estate that all liabilities of the Company in respect of the prayers in Civil Suit No. 304 of 1964 to the said Estate are hereby fully and completely discharged.

3. The said Company hereby waives all costs expenses and other payments awarded against the Settlor in the said Ipoh High Court Civil Suit No. 304 of 1964 and the Settlor's liabilities in respect of such award are hereby fully discharged.

A

4. This agreement shall be binding on the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first abovewritten.

SIGNED and DELIVERED by
the said Tong Swee King
(f) in the presence of :-

Sd. Tong Swee King.

B

Sd. F.C. Arulanandom
ADVOCATE & SOLICITOR,
IPOH.

SIGNED and DELIVERED by
the said Pegang Mining
Company Limited in the
presence of :-

Sd. Lee Wan Seng
Director
SEAL OF
PEGANG MINING
COMPANY LIMITED

Sd. A. Niblock
Director

C

Sd. F.C. Arulanandom
ADVOCATE & SOLICITOR,
IPOH.

PEGANG MINING CO.,
LTD.
Sd. J.W. West.
Secretary.

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

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

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

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

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

R E C O R D O F P R O C E E D I N G S

PARKER GARRETT & CO.,
St. Michael's Rectory,
Cornhill,
London, E.C.3.
Solicitors for the
Appellant

GRAHAM PAGE & CO.,
49 Victoria Street,
London, S.W.1.
Solicitors for the First
and Second Respondents