

No. 1 of 1971

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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 Co.Ltd.)

Appellants

- and -

- 10 (1) CHOONG SAM,
 (2) LEE CHIM YEE and CHAN HON
 PENG (f) as executors of
 the estate of Chan Phooi
 Hoong, deceased, and
 (3) TONG SWEE KING (f) as
 executrix of the estate
 of Ho Kok Yew, deceased

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES 28 MAY 1974 25 RUSSELL SQUARE LONDON W.C.1
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Respondents

CASE FOR THE APPELLANT

RECORD

- 20 1. This is an appeal from a judgment and
 order of the Federal Court of Malaysia (Ong,
 C.J., Suffian and Gill, JJ.), given and made
 the 23rd July, 1970, setting aside the
 judgment and order of the High Court in
 Malaya at Ipoh (Ali, J.) given and made the
 9th December, 1966. The High Court rejected
 the claims of the third Respondent (then the
 Plaintiff and hereinafter referred to as such)
 and entered judgment for the Appellants and

pp 101-125

pp 82-90

RECORD

pp 101/2
pp 94-95

the second Respondents (then, respectively, the first and second Defendants and hereinafter referred to as 'Pegang' and 'the second Defendants'). The Plaintiff served Notice of Appeal but later served notice of discontinuance. Thereupon, in the circumstances set out in the judgment of the Federal Court, the first Respondent (hereinafter called 'the Intervener') sought leave to intervene and by order of the Federal Court made the 17th July, 1967, he and the second Defendants were substituted for the Plaintiff as Appellants on the appeal, and the Plaintiff was transposed as second Respondent on the appeal. From this interlocutory order Pegang appealed to the Privy Council. Their appeal was dismissed on the 1st July, 1969. The Federal Court of Malaysia, upon the substantive hearing of the appeal from the High Court, allowed the appeal and granted both the relief sought and also certain further relief which had not been claimed.

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pp 126-
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2. On the 22nd October, 1931, Pegang entered into a written agreement with the late Ho Man (the predecessor in title of the second Defendants) and the late Ho Kok Yew (hereinafter called 'the Miner', who was the Plaintiff's predecessor in title). Ho Man was the sub-lessee from Pegang of four plots of mining land. The Miner was the managing partner of the Khong Heng Kongsai Mine and was the sub-lessee of ten plots of mining land and the sub-sub-lessee of the four lots sub-leased to Ho Man. The Agreement contemplated the aggregation of all fourteen lots into one comprehensive mining scheme (the Kacha and Menelai Comprehensive Mining Scheme, hereinafter referred to as 'the Mining Scheme'). Such aggregation necessitated governmental approval.

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p. 17

3. Paragraph 4 of the 1931 Agreement provided:

10 '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 Kongsii 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.'

20 4. The Plaintiff, who was the widow and executrix of the Miner and his successor as managing partner of the Khong Heng Kongsii Mine, by her Further-Amended Statement of Claim, alleged breaches by Pegang of the 1931 Agreement and sought: (a) a declaration that the 1931 Agreement was valid and binding between the parties thereto and their successors; (b) an order that Pegang, as lessees by mining leases of three lots of land granted to them after 1931, execute sub-leases of the said three lots in favour of the second Defendants (the lots being, respectively, numbered 5, 6 and 7 on the plan TSK 2); and grant a sub-lease of 18½ acres of land forming part of the one-time Ipoh-Tronoh railway line when a lease of such land was granted to Pegang; (c) an order that the second Defendants execute corresponding sub-sub-leases in favour of the Plaintiff; and, (d) an injunction restraining Pegang from mining lot No. 5.

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pp 4-14

5. The second Defendants, by their Defence, admitted the allegations of the Plaintiff and said they had at all times been ready to fulfil their obligations to the Plaintiff, but had been unable to do so because Pegang had refused to honour its obligations under the

p. 39

RECORD

pp. 32-

1931 Agreement. Pegang, by their Further Amended Defence, alleged that the Plaintiff was not entitled to the reliefs she sought because, inter alia: (a) the rights conferred and obligations imposed by the 1931 Agreement had not been assigned to the Plaintiff; (b) the Agreement had expired by effluxion of time, alternatively by repudiation and acquiescence by the other parties; (c) by application of Clause 5 of the Agreement they were no longer bound by it, both the Plaintiff and the second Defendants having committed numerous breaches; (d) even if the 1931 Agreement was still subsisting, Pegang was not, and never had been, under any obligation to grant the sub-leases claimed; and (e) the 1931 Agreement was too vague and uncertain to be specifically performed. 10

6. Neither the Plaintiff nor the Miner's son, Ho Win Shen (who, in addition to being the Plaintiff's partner, was the manager of Khong Heng Kongsu Mine) gave evidence. Evidence on behalf of the Plaintiff was given by : 20

pp. 46-48

(a) Ahmad Saari, Chief Assistant District Officer, Batu Gajah Land Office. The witness dealt with the various applications made to the Land Office, the answers given, and the prospecting and mining licences granted.

(b) Tham Weng Sek, Acting Deputy Senior Inspector of Mines. Among the documents produced by this witness were aggregation applications by the Miner and the Plaintiff, permits granted, and applications for renewal. The witness said that, upon applications for mining land being received, his Department would recommend the applicant having adjacent interests, this being subject to the applicant being able to satisfy the Department that he was able to mine the land. In cross-examination, 30 40

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	the witness said that the Plaintiff's land was not protected by aggregation from the 18th May to the 10th July, 1963. The Khong Heng Kongsu mine, operating on lot 21952 had stopped work between the 15th January and the 26th June, 1963, and again between the 12th September, 1963 and the 5th March, 1964. He agreed that there was a breach of the sub-lease by failure to work for one month and that there was default by failure to work the mine skilfully and that the conviction of the manager of Khong Heng Kongsu was a breach of the sublease. Mining land not worked was liable to forfeiture, and Lot 11543 was liable to forfeiture during the period from October, 1956 to April, 1958.	<u>RECORD</u> p. 51 1.17 p.51 1.26, 27 p.51 1.33 p.52 1.6 p.52 1.10 p.56 1.17 & 25
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20	(c) <u>Thavapragasam</u> s/o Kanapathy Pillai, Inspector of Mines, Batu Gajah. This witness dealt with the workings of the various lots at the material times. In cross-examination he agreed there was an encroachment of a reservoir into the Railway Reserve.	p.59 1.2
30	(d) <u>Robert Hussey</u> , practising under the name of Hannay & Headman, Consulting Engineers. This witness dealt with the boring results and the value of the Railway Reserve for the purposes of working the mine. In cross-examination he stated that he had not bored the Railway Reserve and relied upon the boring results of Cumming.	p.64 1.9
40	(e) <u>Tong Sam Poy</u> , younger brother of the Plaintiff. The witness told the Court that he had delivered Ho Kok Yew's application for the Railway Reserve to Cumming, but under cross-examination his credibility on this aspect of his evidence was seriously impugned, and he agreed on being shown exhibits D36 and D37 that these documents were	p.66 1.6 p.159, 160

RECORD

p.68 1.21

inconsistent with Cumming putting in the application made by Ho Kok Yew. He agreed that there was no written undertaking by Ho Kok Yew to transfer the Railway Reserve to Pegang.

p.71 1.23

(f) Ahmad Azizuddin Bin Sainal Abidin, acting Senior Inspector of Mines. This witness dealt with the Aggregation Permits and said that Tin Control was in force between 15th December, 1957 and 1st October, 1960 and that as far as he knew there were no forfeiture proceedings during the Tin Control period. In cross-

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examination he agreed that by virtue of provisions of Section 16 (iii) (c) of the Mining Enactment there had been a breach in respect of M.L.

p.72 1.9

11543 which had not been worked for 19 months from 15th October, 1956 to 11th June, 1958. He further agreed there was a breach of Clause 8(iii) of the Sub-Lease.

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7. Evidence on behalf of Pegang was given by:-

p.73 1.30

(a) Francis Neale Mugliston, Manager of Evatt & Co., Ipoh, Secretaries of Pegang. This witness generally dealt with the matters in issue and stated that during the 8 years between 1955 and 1963 the Plaintiff acted as if the 1931 Agreement had ceased to have effect and no mention of the 1931 Agreement was made during the period. He stated that he had seen Ho Kok Yew's application for 10 acres of land (Railway Reserve),

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p.74 1.38

but he could not find any record of Ho Kok Yew approaching Pegang for approval of his application for the Railway Reserve. He said that two substantial parts of the lands

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	comprised in the Mining Scheme had been worked by other contractors and that the Plaintiff had received direct Sub-Leases over 2 areas. In cross-examination, he said that the Mining Scheme ceased to exist as an economic proposition since 1959 and that the Sub-Leases granted in 1937 and 1956 in respect of Lots 1 and 3 were not in accordance with the 1931 Agreement, because there was no provisions for renewals.	<u>RECORD</u> p.75 1.10 p.76 1.3 p.76 1.16
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	(b) <u>Percival Ewan Waugh</u> , Director of <u>Vallentine Dunne & Co.</u> , Kuala Lumpur, Mining Engineers. This witness gave evidence that the mine was not working economically and efficiently since 1958 on production of figures shown. On his several visits to the mine since 1955, the mine was never in operation. The witness also gave evidence of stoppages of work at the mine. He said, in connection with acquiring adjoining land, that any deviation would have to be paid by the miner.	p.79 1.8 p.79 1.30 p.79 1.40
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	(c) <u>W. Green</u> , Engineer of Perak River Hydro, who gave evidence that Khong Heng Kongsi was Perak River Hydro's consumer but he dealt with the Intervener, who paid the bills.	p.80
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	8. The hearing of the action, which had commenced on the 10th January, 1966, ended on the 18th January, 1966. On the 31st January Pegang's Secretaries wrote to the Plaintiff invoking Clause 5 of the 1931 Agreement, and giving notice of cancellation of the Agreement (without prejudice to Pegang's claim that it had been determined previously).	pp.119-120
	9. Ali, J., delivered his judgment on the 9th December, 1966. He said the Plaintiff's case,	pp.82-90 p.83 1.12

RECORD

simply stated, was that under the relevant provisions of the 1931 Agreement, Pegang were under an implied obligation to grant sub-leases of lots acquired by them after the date of the Agreement. He referred to the lots in respect of which relief was claimed as being the lots concerned. He then dealt with the events which led up to the 1931 Agreement, saying that, by 1931, the Miner was extending his mining operations towards the Hill area. The extension would involve working 14 lots, being the ten held by the Miner as sub-lessee and the four held as sub-sub-lessee. Unless the Miner could obtain a permit to aggregate all 14 lots as one mining area, he would be obliged to comply with certain labour requirements in respect of each individual lot. Accordingly he sought the permission of Pegang to include the four sub-sub-leased lots in his application for an aggregation permit. Pegang insisted upon a written agreement binding all three parties because they wished to be assured that the Miner would mine in an agreed manner. (Pegang drew their income by way of tribute, this being calculated as a proportion of the value of ore won.)

p.84 1.26

10. The learned Judge said that until the Japanese invasion, when mining stopped, all parties were satisfied, the Miner having obtained his aggregation permit (in fact, the permit, obtained in February, 1932, was in respect of 4 lots). In 1946 the Miner, having suffered losses, was unable to re-start the mine, but he and Mr. Cumming, of Pegang, seemed to be working closely together when an application was made by Pegang in respect of the Railway Reserve land. The documents showed that, at this stage, Pegang intended, if it obtained the Railway Reserve, to include it in the Mining Scheme, but approval of the application was not obtained until 1959, many years after the Miner's death in 1947. The relationship between Pegang and the Plaintiff was not as good as it had been between Pegang and the Miner.

RECORD

p.85 l.20

10 There was a delay of some years in re-starting the mine, and Pegang had to think in terms of getting someone else to mine their lands. It became clear that the old arrangement could not continue to the satisfaction of the parties. Further, as alienation of the Railway Reserve to Pegang entailed removal of a pipeline, it was arranged that this work would be paid for by the Plaintiff, but she failed to pay for it and eventually the cost of removal was borne by Pegang themselves.

20 11. The learned Judge did not deal in detail with the evidence relating to the alleged breaches of the Agreement by the Plaintiff, or with Pegang's allegations that the Agreement had lapsed by effluxion of time or acquiescence. He rested his judgment on his interpretation of Clause 4 of the Agreement. He held that it was an undertaking by the Miner and Ho Man to assist Pegang in the acquisition of lands for inclusion in the Mining Scheme. The Plaintiff, in support of her contention that Clause 4 implied an obligation by Pegang to sub-lease land so acquired to the second Defendants for sub-sub-lease to her, relied upon the willingness of Pegang, in 1946, to include the Railway Reserve in the Mining Scheme. What had to be decided was whether the Plaintiff was entitled to rely upon this willingness, but whether Clause 4 implied
30 an enforceable obligation to sub-lease and sub-sub-lease. Clause 4 was no more than an expression of hope by the parties that they would work together, particularly in connection with the acquisition of land for inclusion in the Mining Scheme. If there was any agreement between the parties it was no more than an agreement contemplating the execution of further sub-leases, and these sub-leases
40 would have to contain terms (e.g. as to tribute to be paid and conditions of mining operations) upon which further agreement of the parties would be required. In these circumstances Clause 4 could not be read as a concluded agreement to grant sub-leases.

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RECORD

Therefore the Plaintiff's claim must fail.

pp.96-100

12. On the 14th August, 1967, the Intervener filed his Memorandum of Appeal. In it he alleged, inter alia, that in the circumstances of the case it was necessary for the Court to deal with lots 1 and 3 for the purpose of disposing of all the matters arising out of the action. He claimed, further, that the learned Judge had erred in refusing to allow the Plaintiff to amend her claim to include a prayer for relief in respect of lots 1 and 3. (There had been no appeal from this interlocutory order of the learned Judge.) 10

pp.101-125

13. The judgment of the Federal Court was delivered by Ong, C.J. He commenced by dealing with the events which led up to the Plaintiff's discontinuance of her appeal and the intervention of the Intervener. He then dealt with the relationship between Mr. Cumming, of Pegang, and the Miner, saying that throughout all the post-war years, until Mr. Cumming was asked to resign, in 1959, the correspondence between Pegang and the Miner and, after the death of the latter, the Plaintiff, was replete with affirmations that the Railway Reserve would be made available to Khong Heng Kongsi as part of the Mining Scheme. The 'removal' of Mr. Cumming therefore, the learned Chief Justice said, 'became necessary when the Railway Reserve was approved to Pegang.' 20 30

p.104 1.35

p.106 1.3

14. He then turned to a consideration of Clause 4, agreeing with Ali, J. that the documents clearly established that the Railway Reserve, if alienated to Pegang, was intended to be included in the Mining Scheme. However, he differed from Ali, J. on the matter of the enforceability of Clause 4. The ratio decidendi of the judgment of Ali, J. was, he said, first, that there was no certainty that Pegang ever would acquire further lands for the purpose of including them in the Scheme and, 40

p.109 1.10

secondly, that the Agreement contemplated further agreements, being sub-leases, the terms of which remained to be agreed. As to the first point, the mere fact that Clause 4 dealt with a contingency did not make it unenforceable. As to the second point, Ong, C.J., said it was to be borne in mind that Ho Man and the Miner were men of experience. He did not think it likely that they would surrender valuable rights (i.e. the rights of a miner to priority among applicants for land adjacent to his mine) for nothing. In truth, the question of future negotiation of sub-lease terms, in the learned Chief Justice's view, did not arise. All applications by Pegang had been made on the basis that land granted would be included in the Mining Scheme. For all lands in the Scheme the rate of tribute and all other material conditions were, he said, known factors. Mining leases were in standard form as prescribed in the Mining Enactment. All that was needed for a sub-lease was agreement on the one essential, that being tribute, and Ong, C.J., considered that the rate of tribute for every case under the 1931 Agreement had been agreed in 1948. He therefore held that Clause 4 was enforceable, and bound Pegang to sub-lease the lands in dispute. He considered he was fortified in this view by finding that, throughout a long span of years, the parties to the Agreement had corresponded with one another on this basis. Further, Pegang had made representations to the Collector of Land Revenue, in 1947 and 1951, on the same basis. It was not until the 27th July, 1963, when Pegang's Secretaries, in answer to a request for a sub-lease of the Railway Reserve replied that it was the intention of Pegang to mine the land itself and not make it available to the Khong Heng Kongsi, that there was, in Ong C.J.'s view, the first clear repudiation of the 1931 Agreement.

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20 p.110 1.46

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15. The learned Chief Justice then dealt with other defences raised by Pegang. First, he did not think they were able to rely upon the fact that the Plaintiff's son, when a director

RECORD

p.119 1.6 of Pegang, voted in favour of Pegang mining the Railway Reserve. This was not acquiescence by the Plaintiff, because her son was on the Board by virtue of his late father's, the Miner's, shareholding, not as representative of the Khong Heng Kongsu. Next, the answer to the defences of effluxion of time, repudiation by the other parties, and breaches of the Agreement by the other parties lay, he said, in the letter written by Pegang's Secretaries on the 31st January, 1966 (see para. 8 above). Pegang had doubtless been aware throughout of their rights under Clause 5. As they had chosen to disregard the alleged breaches, these must be held to have been waived. Further, if there had been any unequivocal repudiation of the Agreement (as to which there was no evidence), Pegang had never signified acceptance of such repudiation. As cancellation had been expressed to be effective from the date of the letter, it was implicit that the Agreement was taken as binding until the 31st January, 1966. 10

pp.119-120

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p.122 1.16 40

16. One point made by Pegang called for special mention, because, if established, it might indicate some merit in the argument that the Plaintiff had abandoned her rights. A condition of the grant of the Railway Reserve to Pegang was that they should pay the cost of removal of a pipeline. Pegang had complained that the Plaintiff had been dilatory or holding back from paying the cost of removal. The burden of complying with the conditions of approval fell upon Pegang, and in the absence of any special agreement to the contrary - the learned Chief Justice said there was none - this burden could not be expected to fall on a sub-lessee. Pegang, he added, treating the liability as its own, had never communicated to the Plaintiff that she would have to pay the whole or a proportion of the cost. The Plaintiff had given an undertaking to Pegang to pay for the deviation and, in the view of Ong, C.J., had never withdrawn it, but Pegang had failed to notify her of the condition prescribed for the grant of the Railway Reserve. For these

reasons the appeal should be allowed.

RECORD

17. It is respectfully submitted that the Federal Court erred upon a number of material matters. Thus :

- 10 (a) Ong, C.J., was wrong on the evidence in holding that the rate of tribute in all cases of sub-leases under the 1931 Agreement had been agreed in 1948. Even if it had been, that would not have rendered clause 4 as accepted in 1931 a binding obligation to grant sub-leases. Furthermore, the form of sub-lease prescribed by the Mining Enactment is not comprehensive, but leaves a number of important terms to be agreed between the parties.
- 20 (b) The learned Chief Justice failed to consider the documentary evidence adduced that Chan Phooi Hoong (now represented by the Second Defendants) in the Arbitration proceedings commenced in 1952 had claimed an increased rate of tribute from the Plaintiff as a condition precedent for executing Sub-Sub-Leases in her favour and contended that he was not legally bound to execute Sub-Sub-Leases in the term of the previous Sub-Sub-Leases.
- 30 (c) If, contrary to the contentions of Pegang, Clause 4 of the 1931 Agreement was something more than an agreement to agree, then, on a true interpretation of the Agreement, the obligation of Pegang under Clause 4 was not of infinite duration, but was limited to that period of time during which the Mining Scheme remained, or reasonably approximated to, the Scheme as it existed in 1931. By
- 40 July, 1963, when application for sub-leases was made to Pegang by the Plaintiff and the second

RECORD

Defendants, the Mining Scheme had little, if any, resemblance to the Scheme as it was in 1931.

(d) Ong, C.J. was wrong in relying upon the subsequent conduct of the parties to interpret the provisions of clause 4.

(e) There were a number of breaches of the Agreement by the Plaintiff which on the evidence Pegang could not be said to have waived. 10

(f) Ong, C.J. held that the Plaintiff would readily have contributed to the cost of moving the pipe-line if asked to do so. She had in fact agreed in 1948, not to contribute to the cost, but to 'proceed with' the work. She never did so, nor, although she had been told that Pegang would require her to bear the cost and she must have known that the work was carried out, did she ever offer any payment. She must therefore, as Ong, C.J. was himself inclined to acknowledge, be deemed to have abandoned her rights. 20

(g) The finding by Ong, C.J., that Mr. Cumming was removed from the Board of Pegang because his continued presence on the Board would not permit the Plaintiff to be 'kept in the dark so that Pegang could steal a march on her', is quite unsupported by the evidence. On the contrary, the evidence was that when, in 1959, Mr. Cumming retired from the Board he was very old and could write only with great difficulty. He died soon after he left the Board. 30

p.122 1.34

p.76 1.27

(h) Although the evidence indicates that a miner mining in a given area usually received priority over others upon 40

applications to mine lands adjacent to his operations, Ong, C.J. would appear to have overlooked the significance of the fact that a mining title was given to Pegang in the face of outstanding applications by the Miner.

RECORD

10 (j) The finding that Ho Man and the Miner, by entering into the 1931 Agreement, surrendered valuable rights for nothing in return is not supported by the evidence. There was no 'right' which they surrendered. Furthermore, the Miner and Ho Man obtained, not merely the consent of Pegang to an aggregation of lands, but also Pegang's promise to assist the Miner in seeking an aggregation permit; and Ho Man was released from liability for his breach of an undertaking.

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p.109 1.43
p.110 1.39

(k) In the light of the evidence, the letter written by Pegang's secretaries on the 31st January, 1966 does not justify the comment 'amazing'.

p.119

(l) Ong, C.J. was wrong in stating that Pegang's intention themselves to mine the Railway Reserve was first communicated to the Plaintiff in 1963.

30 (m) Reliefs were granted which were not sought, i.e. those covered by paras. 2(i), (v) and 3 of the Order of the Federal Court and that Court's order for specific performance of the agreement between the Intervener and the Plaintiff.

18. It is respectfully submitted that the judgment of the Federal Court was wrong, and the orders made ought to be set aside, with costs,

RECORD

and the order of Ali, J. restored, for the following, among other,

R E A S O N S

1. BECAUSE clause 4 of the 1931 Agreement does not imply any obligation to grant sub-leases:
2. BECAUSE Clause 4 of the 1931 Agreement constituted no more than an agreement to negotiate towards future sub-leases and sub-sub-leases upon the occurrence of contingencies: 10
3. BECAUSE the 1931 Agreement had expired by effluxion of time, acquiescence or change of circumstances:
4. BECAUSE the Plaintiff and the second Defendants evinced an intention no longer to be bound by the 1931 Agreement, which was accepted by Pegang:
5. BECAUSE the judgment and orders of Ali, J. were right and ought to be affirmed. 20

J. G. Le QUESNE

GERALD DAVIES

No.1 of 1971
IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

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 Co. Ltd.) Appellants

- and -

- (1) CHOONG SAM
- (2) LEE CHIM YEE and CHAN HON
PENG (f)
(as executors of the estate
of Chan Phooi Hoong, deceased
and
- (3) TONG SWEE KING (f)
as executrix of the estate
of Ho Kok Yew, deceased

CASE FOR THE APPELLANT

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