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IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 1 of 1971

ON APPEAL FROM  
THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

PEGANG MINING COMPANY LIMITED  
(formerly known as PEGANG  
PROSPECTING COMPANY LIMITED)

Appellants

- and -

1. CHOONG SAM
2. LEE CHIM YEE AND CHAN HON  
PENG (f) AS EXECUTORS OF  
THE ESTATE OF CHAN PHOOI  
HOONG DECEASED
3. TONG SWEE KING (f)  
AS EXECUTRIX OF THE ESTATE  
OF HO KOK YEW (DECEASED)

Respondents

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RECORD OF PROCEEDINGS  
(VOLUME 1)

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UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
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Memorandum of Appeal of Second Appellants (Lee Chim Yee and Chan Hon Peng)	14th August 1967
Notes of Argument recorded by Ong, C.J.	11th/18th March 1970
" " " " " Suffian, J.	" " " "
" " " " " Gill, J.	" " " "
Notes recorded by Gill, F.J.	23rd July 1970
Notes of Argument recorded by Ong, C.J.	" " "
Notice of Motion	4th August 1970
Affidavit of Lee Wan Seng	" " "
Affidavit of Choong Sam	13th August 1970
Affidavit of Lee Wan Seng	14th August 1970
Affidavit of Lee Chim Yee and Chan Hon Peng	14th August 1970
Notes of Argument recorded by Ong, C.J.	17th August 1970
" " " " " Gill, J.	" " "
" " " " " S.M.Yong, J.	" " "
All documents listed in Exhibits A1 to A.9 (Pages 310 to 1305) other than those included and numbered in the Index of Reference to this Record.	
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IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

No. 1. of 1971

ON APPEAL FROM  
THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

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

Appellants

- and -

10

1. CHOONG SAM
2. LEE CHIM YEE and CHAM HON  
PENG (f) as Executors of  
CHAN PHOOI HOONG deceased
3. TONG SWEE KING (f) as  
Executrix of the Estate of  
HO KOK YEW deceased

Respondents

RECORD OF PROCEEDINGS

No. 1  
WRIT OF SUMMONS

In the High  
Court in Malaya  
at Ipoh

20

IN THE HIGH COURT IN MALAYA AT IPOH  
Civil Suit No. 304 of 1964

No. 1  
Writ of Summons  
7th July 1964

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

30

GENERAL FORM OF WRIT OF SUMMONS

THE HONOURABLE DATO SYED SHEH BARAKBAH, P.M.N.,  
D.P.M.K., P.S.B., CHIEF JUSTICE OF THE HIGH COURT

In the High  
Court in Malaya  
at Ipoh

IN MALAYA IN THE NAME AND ON BEHALF OF HIS  
MAJESTY THE YANG DI-PERTUAN AGONG.

To:

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

(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 Hon Peng (f)  
as Executors of the Estate of Chan  
Phooi Hong deceased, No. 164, Jalan  
Bandar, KUALA LUMPUR.

10

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.

20

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

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

Sd: Braddell & Ramani  
Plaintiff's Solicitors

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

NOTE:-

30

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

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.

40



In the High Court in Malaya at Ipoh

No. 2

AMENDED FURTHER STATEMENT OF CLAIM

No. 2

AMENDED FURTHER STATEMENT OF CLAIM

Further amended Statement of Claim

7th July 1964

The Plaintiff abovenamed states as follows:-

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. 10

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 Kongsı 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 Kongsı by virtue of Power of Attorney No. 709 of 1957 registered in the High Court at Ipoh. 20

3. The Plaintiff succeeded to the position of Managing Partner of the said Khong Heng Kongsı after the death of Ho Kok Yew and is still the Managing Partner.

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. 30

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 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 40

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.

In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

10 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".

20 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.

30 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

Mining Lease 8899 Lot 21952

Mining Lease 10217 Lot 24766

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.

40 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  
(continued)

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.

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:-

Mining Lease No.

8899	(No. 1 in the schedule to the said agreement of 22nd October 1931)	30
10527	(No. 7	
10400	(No. 8	
10525	(No. 9	
6694	(No.10	
8918	(No.11	
9946	(No.12	

10

20

11647 (No.13)

11646 (No.14)

In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

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

10 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:

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)

10526 (No.6)

20 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").

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

30 15. On the 15th day of June 1939 a written agreement was entered into between W.J.P.Grenier, Administrator of the Estate of Ho Man deceased,

In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

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 moveable of the said Ho Man deceased situate in the Federated Malay States, Johore and in Siam and the Straits Settlements.

10

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.

20

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".

30

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 acknowledge of and consented to such sale by the Estate of Ho Man deceased to the late Chan Phooi Hoong.

40

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.

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".

10 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.

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:-

20 (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)

and the other for:-

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

30 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

In the High Court in Malaya at Ipoh

No. 2

Further amended Statement of Claim

7th July 1964

(continued)

In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

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.  
22B. By their letter of 14th October 1946 the First Defendant Company replied to the above-said letter of 7th August 1946 from the Collector of Land Revenue, Batu Gajah and reduced their application of 2nd July 1946 for the Railway Reserve to that portion of the Railway Reserve lying between Lots 21952 and 29650.

10

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".

20

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.

30

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.~~

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 8½ acres.

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 8½ acres.

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

(a) that section of the former Tronoh Railway Reserve shaded "RED" on "M.S.K.2" to the north of and adjoining Lot 30286. (approximately ¾ acres eleven acres); and

(b) Lots 28358 and 28390.

27. In this ~~second~~ application of 11th September 1951 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.

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 were that operated by the Khong Heng Kongsai 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 to the said Lot 30286.

In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

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20

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In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964  
(continued)

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.

30. The late Chan Phooi Hoong accordingly on 29th October 1956 executed the necessary sub-sublease in favour of the Plaintiff. 10

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.

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 sub-sublease to the Plaintiff. 20

32. On or about 31st March 1959 all the above said 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:- 30

(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 40

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.

In the High  
Court in Malaya  
at Ipoh

No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

10 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:-

- 20 (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;
- (ii) an order that the First Defendant Company do execute valid and registrable subleases in favour of the Second Defendants in accordance with the terms of the said agreement of 22nd October 1931 in respect
- 30 (a) Mining Certificate No. 3255 for Lot 44407,
- (b) Mining Certificate No. 3256 for Lot 30286,
- (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

In the High  
Court in Malaya  
at Ipoh

          
No. 2

Further amended  
Statement of  
Claim

7th July 1964

(continued)

Lot 30286 held under Mining  
Certificate No. 3256;

- (iv) an order that the rate of tribute in such subleases be at 7 per cent;
- (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.

Sgd. Braddell & Ramani

Solicitors for the  
Plaintiff abovenamed.

Sgd. Chin Swee Onn.  
Solicitor for the  
Plaintiff abovenamed.

10

20

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No.2 (a)

"T.S.K.1" - MEMORANDUM OF AGREEMENT  
DATED 22nd OCTOBER 1931

In the High  
Court in Malaya

No.2(a)

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

22nd October,  
1931

10 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;

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;

20 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 under-  
taking the Sub-lessee has failed to carry out.

30 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 Kongsi 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  
40 the Miner is at present fulfilling:

AND WHEREAS the Miner is working all the  
lands comprised in the said Schedule as one mine  
known as the said Khong Heng Kongsi Mines;

In the High  
Court in Malaya  
at Ipoh

No.2(a)

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

22nd October  
1931

(continued)

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:

10

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 subleases and/or sub-subleases are not entirely fulfilled by the sub-lessee and/or sub-sublessee or fulfilled to the satisfaction of the Company;

20

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:

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

30

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. 21952 and the tin ore deposits therein shall have been exposed to view in such manner that the parties hereto or their fully authorised 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

40



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.

In the High  
Court in Malaya  
at Ipoh

No.2(a)

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

22nd October  
1931

(continued)

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.

10 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  
20 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.

30 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 Kongsai 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.

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

In the High Court in Malaya at Ipoh

No.2(a)

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

22nd October 1931

(continued)

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.

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.

10

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.

20

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

30

SIGNED by the said Ho Man in the presence of:-

Sd: Ho Man (In Chinese)

Sd: Ho Kok Yew.

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

Sd: Ho Kok Yew

Sd: G.G. Duddell.

Schedule referred to in the foregoing Memorandum of Agreement dated 22nd d October, 1931 Between Pegang Prospecting Company Limited of the first part 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.
1.	8899	21952	59	1	03	Pegang Prospecting Company Limited	Ho Kok Yew 24.12.37	
2.	10217	24766	96	3	10	--do--	-- do -- 7. 3.44	
3.	11543	29650	19	1	22	-- do --	-- do -- 14.12.37	
4.	11544	29651	22	1	30	-- do --	-- do -- 14.12.37	
5.	11447	30286	18	0	18	Ho Man	Nil 31.12.44	
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	
9.	10525	11191	7	2	26	-- do --	-- do -- 3. 2.39	
10.	6694	16426	2	1	27	-- do --	-- do -- 10. 7.32	

Agreement  
 22nd October  
 1931  
 (continued)

Agreement  
22nd October  
1951  
(continued)

Index	M.L.No:	Plan No:	Area A. R. P.			Name of Lessee	Name of Sub-lessee	Date of expiry of M.L.
11.	8918	21951	3	2	12	Tanda bin Latek and others	Ho Kok Yew S/L	10. 4.32
12.	9946	26173	5	1	16	Wong Sek Ngen (Decd) Adm: Lee Yat Keow	- do -	10. 4.29
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 -	3. 6.38

Certified True Copy  
B.K.Das  
Advocate & Solicitor  
Ipoh, Perak  
26.5.47

21.

No. 2(c)  
"T.S.K.3" - AGGREGATION PERMIT NO. 2/49.  
8th APRIL 1949

In the High  
Court in Malaya  
at Ipoh  
          

Pk.Mines 993/48

No.2(c)  
"T.S.K.3"  
Aggregation  
Permit No.2/49  
8th April 1949

10

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

Sa/- ?

20

MENTRI BESAR, PERAK.

Fk. Mines 993/48

		<u>S C H E D U L E</u>		
<u>Sublease No.</u>	<u>Sublease No.</u>	<u>M.L.No.</u>	<u>Lot No.</u>	<u>Mukim</u>
-	99/28	over 6694	16426	Blanja
67/37	of 66/37	" 8899	21952	"
-	69/37	" 9946	26173	"
-	100/28	" 10400	24921	"
-	100/28	" 10525	11191	"
-	5/26	" 10526	28358	"
-	5/26	" 10527	128390	"
67/37	of 66/37	" 11543	29650	"
67/37	of 66/37	" 11544	29651	Sg. Trap
-	of 68/37	" 11646	31089	Blanja
-	68/37	" 11647	31091	"
-	28/36	" 12338	33689	"

Total:-

No. 2 (d)  
"T.S.K.4" - ORDER OF COURT 21st  
JULY, 1939

In the High  
Court in Malaya  
at Ipoh

FEDERATED MALAY STATES, STATE OF SELANGOR  
IN THE COURT OF THE JUDGE AT KUALA LUMPUR  
Originating Summons No.107 of 1939

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

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

10 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

20 UPON HEARING Mr. W.G.W.Hastings for W.J.P.  
Grenier the abovenamed Applicant and Mak Shi (f)  
and Ho Yue Kong the abovenamed 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  
30 agreement of the 15th day of June 1939.

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.

In the High  
Court in Malaya  
at Ipoh

No. 2 (e)

LETTER C.E.CUMMING to HO KOK YEW, 2nd  
NOVEMBER, 1946

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.

10

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: Ho Kok Yew Esq.,  
Khong Heng Kongsi,  
Ipoh

20



No. 2 (f)

"T.S.K.6" - LETTER EVATT & CO. TO  
COLLECTOR OF LAND REVENUE, 7th JULY 1947

In the High  
Court in Malaya  
at Ipoh

No.2(f)

EVATT & CO.

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

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

"T.S.K.6" -  
Letter Evatt &  
Co. to Collec-  
tor Land  
Revenue

TELEGRAMS. "EVATT"

TELEPHONE: IPOH 129

7th July, 1947.

10 The Collector of Land Revenue,  
BATU GAJAH.

7th July 1947

Sir,

Pegang Prospecting Company Limited and  
Kacha & Menelai Mining Scheme.

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  
application was made in August, 1946, and the area  
was indicated on a Plan attached as between points  
20 "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.

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  
30 Rehabilitation Loan to make mining to be  
recommended, but before the Loan can be obtained  
they have to put an approved scheme, and this  
entails plans for working the Railway Reserve.

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

We have the honour to be,

Sir,

Your obedient servants,

(Sgd) Evatt & Co.

Secretaries.

40

Copy for -

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

In the High  
Court in Malaya  
at Ipoh

No. 2 (g)

"T.S.K.7" - LETTER EVATT & CO. TO CHAN  
PHOOI HOONG, 14th JULY 1947

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.  
14th July, 1947.

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

10

Dear Sir,

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

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

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.

20

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.

30

Yours faithfully,

Signed Evatt & Co.  
Secretaries.

No. 3

REQUEST FOR FURTHER AND BETTER PARTICULARS  
OF STATEMENT OF CLAIM

In the High  
Court in Malaya  
at Ipoh

No. 3

MAXWELL, KENION, COWDY & JONES,  
Advocates & Solicitors,

Request for  
Further and  
Better  
Particulars of  
Statement of  
Claim

Your Ref. 3824/64/NET/NMA P.L. Box No. 42,  
In Reply Please Quote Mercantile Bank  
NTR/LKS/10768 Building,  
Ipoh, Perak,  
Ipoh.

14th August,  
1964

10

M/s. Braddell & Ramani,  
Advocates & Solicitors,  
P.O. Box 372,  
Kuala Lumpur.

Dear Sirs,

Re: Ipoh High Court Civil Suit  
No. 304/64

We refer to the Statement of Claim filed  
herein and apply for the following Further and  
Better Particulars:-

20

Under para. 2 of the Statement of Claim:

"Hong Heng Kongsii.....still has  
mining interests."

State what interests the said Kongsii is  
alleged to have, by whom they were granted  
and at what time, state particularly  
whether any of such interests are registered  
or otherwise.

Under para. 7 of the Statement of Claim:

30

"The Kacha-Menelai Comprehensive Mining  
Scheme."

State the exact details of the said Scheme  
with the greatest particularity identifying  
the document setting out the said Scheme  
and state to what extent the said Scheme  
has been performed and to what extent it  
still remains to be performed; if the said

In the High Court in Malaya at Ipoh

No. 3

Request for Further and Better Particulars of Statement of Claim

14th August, 1964

(continued)

Scheme is a verbal Scheme, state the date, time and place at which the parties agreed, and what was agreed.

Under para. 15 of the Statement of Claim:

"On the 15th day of June 1939 a written Agreement....."

Set out the terms of this said written Agreement in full and verbatim.

Under para. 17 of the Statement of Claim

".....the said sale was effected". State and indentify the document whereby the said sale was effected; set out the items that were sold thereunder and the consideration for each item and the date thereof.

10

Under para.19 of the Statement of Claim:

"The First Defendant Company had acknowledge for and consented to such sale."

State whether the said knowledge was verbal or in writing and on what date it was acquired by the First Defendant Company and by whom it was imparted and, if in writing, indentify the document.

20

State further whether the consent thereto was in writing or verbal and, if in writing, indentifying the document, the parties thereto and the date thereof and, if verbal, state the time and place of the said alleged verbal consent and the parties thereto.

Under para. 34 of the Statement of Claim:

"The first Defendant Company in breach of the said Agreement."

30

State of which term the First Defendant Company is alleged to be in breach.

We are to state that if the Particulars applied for are not supplied to us within seven days of receipt of this letter, we shall have to make the necessary application to Court for same.

Yours faithfully,

Sd. Maxwell, Kenion, Cowdy & Jones.

c.c. M/s. Shearn Delamore & Co.,  
The Eastern Bank Building,  
2, Bentong,  
Kuala Lumpur.

40

No. 4FURTHER AND BETTER PARTICULARS OF STATEMENT  
OF CLAIM

In the High  
Court in Malaya  
at Ipoh

No. 4.

Further and  
Better Particu-  
lars of State-  
ment of Claim

9th September,  
1964

THE PLAINTIFF in pursuance of a Notice dated 14th day of August, 1964 from the First Defendant Company states that the further and better particulars of the Statement of Claim dated the 7th day of July, 1964 are as follows:-

10 1. With regard to paragraph 2 of the Statement of Claim, the mining interests of Khong Heng Kongsu are as follows:-

- (1) Sublease No. 89/56 of Sublease No. 78/56 over Mining Leases Nos. 8899 and 11543 for lots Nos. 21952 and 29650, Mukim Blanja, District of Kinta, registered in the name of Tong Swee King and held by her for Khong Heng Kongsu.

20 This sublease was registered in the office of the Collector of Land Revenue, Kinta, Batu Gajah, on 31st October, 1956.

- 30 (2) Rights to dump under an Agreement dated 17th December, 1928, made between the First Defendant Company, Ho Man, Ho Kok Yew, C.E. Cumming and others in regard to dumping facilities for the parties to the aforesaid Agreement in respect of their respective mining operations in the area covering the lands mentioned in the Schedule to the said Agreement.

2. As to paragraph 7 of the Statement of Claim, particulars of the Kacha-Menelai Comprehensive Mining Scheme are as follows:-

40 This Scheme is referred to in detail in the joint letter dated 10th August, 1932, from Ho Kok Yew and the First Defendant Company to the Deputy Controller, Tin Control, Perak, and in the petition of Ho Kok Yew to the said Deputy Controller, which accompanied the said joint letter.

In the High  
Court in Malaya  
at Ipoh

No. 4

Further and  
Better Particu-  
lars of State-  
ment of Claim

9th September,  
1964

(continued)

The Agreement dated 22nd October, 1931 (Exhibit T.S.K.1) referred to in the Statement of Claim was entered into in relation to such Scheme.

Area 2 is to a great extent worked out, the remaining portion being uneconomic for mining.

Area 4 has been sold to Foong Seong Mines Ltd.

The areas numbered 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, having been worked out, might be useful for dumping purposes.

10

What remained to be worked are:-

(a) the former Railway Reserve area lying between former M.L.10526 and 10527 (now M.C.3255) and M.L.8899 on the north and former M.L.11447 (now M.C. 3256) and M.L.11543 on the South; M.C.3255 (Areas 6 and 7) and M.C. 3256 (Areas 5) are necessary for the mining of the Railway Reserve lying in between them;

20

(b) M.L.8899 (Area 1); and

(c) M.L.11543 (Area 3).

3. With regard to paragraphs 15 and 17 of the Statement of Claim, the written Agreement made on 15th June, 1939, between W.J.P.Grenier (Administrator of the Estate of Ho Man deceased), Mak Shi and Ho Yue Kong (widow and son respectively of Ho Man deceased) of the one part and the late Chan Phooi Hong of the other part was for the sale to Chan Phooi Hong of all the interest of Ho Man deceased in Chop Chan Thye Lee and all the property both movable and immovable of Ho Man deceased situate in the Federated Malay States, State of Johore, Straits Settlements and Siam.

30

The said Agreement is in the possession of the Second Defendants, and the Plaintiff will require its production in due course.

40

4. With regard to paragraph 19 of the Statement of Claim, particulars of the knowledge and consent to the sale referred to in paragraphs 15 and 17 of the Statement of Claim are as follows:-

In the High Court in Malaya at Ipoh

No. 4

Further and Better Particulars of Statement of Claim

9th September, 1964

(continued)

10 On the 14th day of July, 1947, Messrs. Evatt & Co., as Secretaries of the First Defendant Company, replying to a request from Chan Phooi Hong dated 10th July, 1947, about the transfer of the mining interests of the late Ho Man to Chan Phooi Hong, agreed on production of the Order of Court authorising the transfer to arrange for it to be made.

The said letter from Messrs. Evatt & Co., dated 14th July, 1947, and the Court Order referred to are annexed to the Statement of Claim and marked "T.S.K.7" and "T.S.K.4" respectively.

20 5. With regard to paragraph 34 of the Statement of Claim, particulars of the breaches of the said Agreement of 22nd October, 1931 (T.S.K.1) committed by the First Defendant Company are as follows:-

30 The said Lot 30286 is part of the Kacha and Menelai Comprehensive Mining Scheme. By the said Agreement, all the lands comprised in the said Scheme were to be mined or to be used for mining purposes by the Khong Heng Kongsu. The First Defendant Company by mining the said Lot was committing a breach of the said Agreement. The party by whom and the manner in which the lands comprising the said Scheme were to be mined is particularly set out in Clause 1 of the said Agreement, and the First Defendant Company in carrying on mining operations on Lot 30286 was doing so in breach of this Clause.

40 The party by whom and the manner in which the lands comprising the said Scheme were to be mined is particularly set out in Clause 1 of the said Agreement, and the said joint letter dated 10th August 1932 from Ho Kok Yew and the First Defendant Company and the First Defendant Company in carrying on mining operations on Lot 30286 was doing so in breach of this Clause. Clauses 1 and 4 of the said Agreement.

Note: Amendments in red made in Open Court.

In the High  
Court in Malaya  
at Ipoh

No. 4

Further and  
Better Particu-  
lars of State-  
ment of Claim

9th September,  
1964

(continued)

Dated this 9th day of September, 1964.

Sd: Braddell & Ramani  
Solicitors for the Plaintiff  
abovenamed.

This Further and Better Particulars was  
filed by Messrs. Braddell & Ramani, Solicitors  
for the Plaintiff abovenamed of Second Floor,  
Hongkong Bank Chambers, Benteng, Kuala Lumpur.

No. 5

Further amended  
Defence of the  
First Defendants

14th August,  
1964

No. 5

FURTHER AMENDED DEFENCE OF THE FIRST  
DEFENDANT.

10

~~1. The First Defendant has no knowledge of the  
matters set out in paragraph 1 of the Statement  
of Claim.~~

~~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.~~

~~3. The First Defendant admits paragraphs 4 and  
5 of the Statement of Claim.~~

~~4. The First Defendant has no knowledge of the  
matters set out in paragraph 6 of the Statement  
of Claim.~~

20

1. The First Defendant admits paragraphs 1 to  
6 and 15 to 19 of the Statement of Claim.

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. 30

3. Paragraphs 9, 10, 12, 13 and 14 are matters



of evidence and the First Defendant makes no admissions thereon.

In the High  
Court in Malaya  
at Ipoh

                      
No. 5

Further amended  
Defence of the  
First Defendants

14th August,  
1964

(continued)

10 ~~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.

8. The rights and obligations under the said  
Agreement are not assignable to any person and  
only bind the original parties to the agreement.

9. If which is denied, the rights and obliga-  
tions 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.

20 ~~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.~~

30 ~~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.~~

40 ~~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~~  
~~and leases were subsequently granted to the First~~  
~~Defendant in respect of these Lots but they were~~  
~~not sublease to the Plaintiff nor did the~~  
~~Plaintiff ever demand or request such subleases.~~

In the High  
Court in Malaya  
at Ipoh

No. 5

Further amended  
Defence of the  
First Defendants

14th August,  
1964

(continued)

12.6. As regards paragraphs 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.

13.7. 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.

14.8. 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 in 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.~~

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 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

10

20

30

40

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.

10 (iv) The First Defendant admits paragraph 28 of the Statement of Claim save and except that the mine operated by Khong Heng Kongs1 was not in accordance with the arrangements made under the Agreement of October 1961.

(v) The First Defendant admits making the application referred to in paragraph 28A of the Statement of Claim but makes no further admissions in respect thereof.

20 16. 10. The First Defendant admits having given a sublease 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 sub-sub-lease was on terms different from those of the previous sub-sublease granted by Ho Man to Ho Kok Yew.

30 18. 12. The First Defendant admits that the Plaintiff holds a sub-sublease 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.

40 ~~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 18½ acres and not 34 acres as alleged in paragraph 32 of Statement of Claim.~~

In the High  
Court in Malaya  
at Ipoh

No. 5

Further amended  
Defence of the  
First Defendants

14th August,  
1964

(continued)

(sic)

In the High  
Court in Malaya  
at Ipoh

No. 5

Further amended  
Defence of the  
First Defendant

14th August,  
1964

(continued)

19.13. The First Defendant states that on 31/3/59 the applications 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.

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. 10

21.15. 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 acquiescence by the other parties to the Agreement.

~~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 sub-lease or sub-sublease existing at the date of their death.~~ 20

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.

#### PARTICULARS OF BREACH

(a) the Miner had not kept in force an Aggregation Permit in respect of the 14 pieces of mining lands referred to in paragraph 7 of Statement of Claim held by him under a sublease or sub-sublease between 31st October 1956 and 30th April 1958. 30

~~(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. 40

(e) ~~The work under the mining scheme and/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~~

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

10 ~~14.~~<sup>17.</sup> 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.

20 ~~15.~~<sup>18.</sup> 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.

~~16.~~<sup>19.</sup> ~~The said Agreement is not enforceable by or against persons other than parties to the Agreement.~~

~~17.~~<sup>20.</sup> The said Agreement not being a concluded Agreement is not capable of specific performance.

~~18.~~<sup>21.</sup> The said Agreement is too vague and uncertain to be specifically performed.

30 ~~19.~~<sup>22.</sup> No rate of tribute is set out in the said Agreement.

~~20.~~<sup>23.</sup> The Plaintiff's laches debars her from Specific Performance.

~~21.~~<sup>24.</sup> ~~The Plaintiff's claim herein is barred by limitation.~~

~~22.~~<sup>25.</sup> The First Defendant denies that the Second Defendant can be ordered to execute a sub-sublease in favour of the Plaintiff in accordance with the said Agreement.

In the High  
Court in Malaya  
at Ipoh

No. 5

Further amended  
Defence of the  
First Defendants

14th August,  
1964

(continued)

In the High  
Court in Malaya  
at Ipoh  

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No. 5

Further amended  
Defence of the  
First Defendants

14th August,  
1964

(continued)

~~3~~ 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.

~~4~~ 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, 10  
.....  
Solicitors for the First  
Defendant.

This Defence of the First Defendant is filed on behalf of the First Defendant by their Solicitors, Maxwell, Kenion, Cowdy & Jones, Mercantile Bank Buildings, Ipoh.

To:

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

20

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.

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No. 6  
DEFENCE OF SECOND DEFENDANTS

In the High  
Court in Malaya  
at Ipoh

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No. 6  
Defence of  
Second  
Defendants

24th December,  
1964

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.

10

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.

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.

20

Sd: 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.

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In the High  
Court in Malaya  
at Ipoh

No. 7

REQUEST FOR FURTHER AND BETTER PARTICULARS  
OF PARAGRAPH 15 OF DEFENCE OF FIRST  
DEFENDANT

No. 7

Request for  
Further and  
Better Particu-  
lars of para-  
graph 15 of  
Defence of  
First  
Defendant

351/65NET/SK  
NTR/LKC/10768

20th January 1965

Messrs. Maxwell, Kenion, Cowdy & Jones,  
Advocates & Solicitors,  
Mercantile Bank Building,  
IPOH.

CERTIFICATE OF POSTING

10

20th January,  
1965

Dear Sirs,

Ipoh High Court Civil Suit  
No. 304 of 1964

Tong Swee King  
Vs.

Pegang Mining Co. Limited & anor.

We refer to par. 15 of the Statement of  
Defence of the First Defendant and hereby require  
you to give us the following further and better  
particulars in respect of the Statement in the  
said para. 15; "the position has now altered  
from that obtaining at that time" -

20

- (a) What was the position "obtaining at that time"?
- (b) When did that position alter?
- (c) How has that position altered?

Yours faithfully,

Sd. Braddell & Ramani.

---



No. 8

FURTHER AND BETTER PARTICULARS OF PARAGRAPH  
15 OF DEFENCE OF THE FIRST DEFENDANT

In the High  
Court in Malaya  
at Ipoh

No. 8

Further and  
Better Particu-  
lars of para-  
graph 15 of  
Defence of First  
Defendant

20th February,  
1965

Paragraph 15:

"The position is now altered from that  
obtaining at that time".

10 (a) The position obtaining at that time was that  
the First Defendant Company was pursuing a  
policy whereby it sub-leased its mining land to  
be mined at a tribute.

Secondly, at that time it was possible to  
mine the area covered by the alleged scheme at a  
profit.

Thirdly, breaches of the agreement in  
paragraph 23 of the Defence of the First  
Defendant had not then been committed.

(b) That position has altered gradually from  
1951 to the date of the issue of the Writ.

20 (c) The position now is that the First Defendant  
Company is carrying out its own mining activities  
and the area covered by the alleged scheme is  
worked out.

Dated this 20th day of February, 1965.

Sd: Maxwell, Kenion, Cowdy & Jones,  
Solicitors for the 1st Defendant.

---

In the High  
Court in Malaya  
at Ipoh

No. 9

REQUEST FOR FURTHER AND BETTER PARTICULARS  
OF PARAGRAPH 21 OF DEFENCE OF FIRST  
DEFENDANTS.

No. 9

Request for  
Further and  
Better Particu-  
lars of para-  
graph 21 of  
Defence of First  
Defendant

28th December,  
1965

CHINN SWEE ONN,  
Advocate & Solicitor,

10, Second Floor,  
Asia Life Building,  
Hale Street, Ipoh,  
Perak, Malaysia.

Telephone (Office: 71358-9  
(House: 2338

10

Our Ref: CSO/SK

28th December, 1965

Your Ref:

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

Dear Sirs,

re: Ipoh High Court Civil Suit  
No. 304/64

I refer you to the last sentence of  
Paragraph 21 of the Defence of the First  
Defendants: "The said Agreement is now frustrated  
or has lapsed by effluxion of time and/or by  
repudiation and acquiescence by the other parties  
to the Agreement," and hereby request further  
and better particulars thereof as follows:-

20

- (i) The date on which the Agreement referred to  
therein became frustrated;
- (ii) the manner in which the said Agreement  
became frustrated;
- (iii) the date on which the said Agreement  
lapsed by effluxion of time;
- (iv) the manner in which the said Agreement  
lapsed by effluxion of time;
- (v) the date on which the said Agreement  
lapsed by repudiation;
- (vi) the manner in which the said Agreement  
lapsed by repudiation;

30

- (vii) by whom the said Agreement was repudiated;
- (viii) the date on which the said Agreement lapsed by "acquiescence by the other parties to the Agreement";
- (ix) the manner in which the said Agreement lapsed by "acquiescence of the other parties to the Agreement";
- (x) the identities of "the other parties to the Agreement".

In the High Court in Malaya at Ipoh

No. 9

Request for Further and Better Particulars of paragraph 21 of Defence of First Defendant

28th December, 1965

10 I shall be grateful if you could kindly let me have the above information before the hearing of the above suit.

Yours faithfully,

Sd: Chin Swee Onn.  
.....

No. 10

FURTHER AND BETTER PARTICULARS OF PARAGRAPH 21 OF DEFENCE OF FIRST DEFENDANTS

3rd January 1966.

20 Chin Swee Onn, Esq.,  
Advocate & Solicitor,  
Asia Life Building,  
Ipoh.

Dear Sir,

Ipoh High Court Civil Suit No.304/64

We refer to your letter of the 28th ultimo and give hereunder the further and better particulars asked for.

30 As regards Items (i) and (ii) - these are no longer relied on by the First Defendant.

As regards Item (iii) - before end of 1958.

No.10

Further and Better Particulars of paragraph 21 of Defence of First Defendants

3rd January, 1966

In the High Court in Malaya at Ipoh

No.10

Further and Better Particulars of paragraph 21 of Defence of First Defendants

3rd January, 1966

(continued)

As regards Item (iv) - by the completion of the Mining scheme in that the lands covered by the scheme were worked out.

As regards Items (v) (vi) and (vii):- (if which is not admitted the said agreement was still in force on the dates mentioned below)

- (a) By Ho Kok Yew making an application on 19th April 1947 to Government for a direct lease over 10 acres of the former Railway Reserve.
- (b) By the plaintiff accepting a sublease direct from first defendant over 23 acres of ML 10217 on 27th February 1958.
- (c) By the plaintiff making an offer to sell to the first defendant in January 1963 the rights under sublease No. 78/56 sublease No. 89/56 over Lots 21952 and 29650 together with the mining equipment thereon for the sum of \$70,000/-.

10

As regards Item (viii) - 1956.

As regards Item (ix) - by the failure of the plaintiff and the second defendants to enforce their alleged rights in respect of Lots 24766 and 29651.

20

As regards Item (x) - the other parties are those persons referred to above.

Yours faithfully,

Sd: Maxwell Kenion Cowdy & Jones

.....



No. 11

ALLEGED FURTHER ACTS OF ACQUIESCENCE  
RELIED ON BY THE FIRST DEFENDANT

In the High  
Court in Malaya  
at Ipoh

No.11

Alleged further  
acts of  
acquiescence  
relied on by  
the First  
Defendant

7th January,  
1966

Chin Swee Onn, Esq.,  
Advocate & Solicitor,  
Asia Life Building,  
Ipoh.

7th January, 1966

Messrs. Shearn, Delamore & Co.,  
Advocates & Solicitors,  
Chartered Bank Chambers,  
Seremban.

10

Dear Sirs,

Ipoh High Court Civil Suit No. 304/64

Further to our letter of 3rd January, 1966  
in the above matter giving Further and Better  
Particulars of paragraph 21 of the first defend-  
ant's defence we write to inform you that the  
first defendant intends to rely on the following  
further acts of acquiescence:-

20

(a) The Plaintiff and her sole partner Ho Win  
Shen on 23rd October 1961 voted in favour  
of Pegang Mining Company Limited working  
the new mining lands.

30

(b) Ho Win Shen the sole partner of the  
Plaintiff in Khong Heng Kongsai as a  
Director of the first defendant company  
acquiesced on 15th December 1961 in the  
decision of the company to mine the Railway  
Reserve and offered to negotiate the  
surrender of Sublease No. 78/56 and Sub-  
Sublease No. 89/56 over Lots 21952 and  
29650.

Yours faithfully,

Sd: Maxwell, Kenion, Cowdy & Jones.

---

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(i) P.W.1  
Evidence of  
Ahmad Saari

No.12  
JUDGE'S NOTES OF EVIDENCE  
(Extract)

Examination by Chia.

P.W.1 Ahmad Saari affirmed states in English.

Chief Assistant District Officer, Batu Gajah Land Office. I have office file in K.L.O. 104/46. Enclosure (1) is an application for mining land. Yes, for 34 acres of State Land as described in application form. Application dated 3rd August, 1946. Yes, received on that date. (Copy on page 83 of Vol.I. Puts in original, P.8). 10

I produce another application for Railway Reserve attached to P.8. (Marked as P.8A).

Yes, I have a plan in the file same as that on page 84 of Vol.V. (Plan put in - P.8B). Enclosure (2) in the same file was an application for 34 acres of old mining land. (Produced and marked P.9). I also produce plans P.9A and P.9B. (Counsel draws attention to letter head: "Kacha-Menelai etc....."). Plan referred to in office letter (See page 85 of Vol.V) is produced. Yes, Pegang replied. (Page 89 of Vol.V). 20

Yes, Enclosure (14) in the file refers to letter of 12th November. (Page 116 of Vol.I). I produce the plan referred to in letter (P.11).

Company knew terms of our letter. (Page 296 of Vol.III). I produce permit to prospect (P.12). Subsequently Pegang submitted application for mining in Railway Reserve - letter of 15th September. 30

I produce application (P.13). Yes, application for Railway Reserve was outstanding.

I have a file 917/51. Enclosure (1) refers to application of 11th September by Pegang for Prospecting Licence. Yes, for Lots No.28390 and No. 28359 and Railway Reserve.

In April, 1957, Pegang also applied for Lot No. 30286. Do not have application in this file.

Yes, Enclosure (34) shows approval of application. Cannot find application. Now find it in 72/57.

10 Have application from Ho Kok Yew (page 96). Received it on 2nd January, 1948. Application was refused. (Page 300 of Vol.III). Put in letter to Executors of the Estate (P.10) dated 7th August, 1951. Produce letter dated 20th August, 1964, from Tong Swee King to Collector (P.11). We sent letter dated 21st August, 1956. (Page 365 of Vol.IV). Yes, it was replied. (Page 366).

Yes, we received a letter dated 11th December, 1956, from Tong Swee King (Pages 374 and 375 of Vol.IV).

20 Applications for mining land were dealt with at the same time - about 10 applications considered at the same time.

Papan application for Railway Reserve overlapped Pegang's application. Correct myself. It is Merbau's application which overlaps Papan's. All these areas were applied for by Pegang.

Intld. A.H.

30 XXND. (Referred to P.9). Yes, at top it shows it was from Mr. Cummings, Chairman of Pegang. Yes, our reply was sent to Evatt & Co., Secretaries. Yes, it was application by Pegang.

Yes, there was an application by Ho Kok Yew. The two applications partly conflict but not wholly. Yes, they conflict so far as they were for the Railway Reserve. Yes, I would say the whole of Ho Kok Yew's application conflict with part of Pegang's application.

Intld. A.H.

40 BY RINTOUL. Yes, Pegang originally applied for

In the High Court in Malaya at Ipoh

No.12

Judge's Notes of Evidence (Extract)

(i) P.W.1. Evidence of Ahmad Saari (continued)

In the High Court in Malaya at Ipoh

No.12

Judge's Notes of Evidence (Extract)

34 acres. Yes, on 7th August Pegang told that only area marked off by "AA & BB" would be considered. Yes, Pegang accepted that. When I say it conflicted I mean it conflicted with the original application for 34 acres by Pegang. Yes, Ho Kok Yew was the first after Pegang. Ho Kok Yew never applied for area between "AA & BB".

Intld. A.H.

(i) P.W.1. Evidence of Ahmad Saari (continued)

BY COURT. The area marked off by "AA & BB" was made by Inspector of Mines. (Reads minute by Chief Inspector of Mines). The reasons were that the applicant could only be considered for that portion of the Railway Reserve which borders his land and not otherwise.

10

Intld. A.H.

No Re-Examination.

Intld. A.H.

Time 1.15 p.m.

Adjourned to 9.30 a.m. tomorrow.

Intld. A.H.

TUESDAY, 11th JANUARY, 1966

20

Hearing resumes at 9.30 a.m.

Chia calls -

(ii) P.W.2. Evidence of Tham Weng Sek

P.W.2. Tham Weng Sek affirmed states in English.

Acting Deputy Senior Inspector of Mines. Have official file No. 993/48. File relates to Aggregation Permit No. 12/58. Also Aggregation Permit No. 5/64. I have a letter of 9th July from Hannay & Steedman for renewal of Aggregation Permit No. 12/58. I produce document (P.16). This is Aggregation Permit No. 12/58 (P.16A). I have letter dated 10th September, 1963, from Hannay & Steedman - application for renewal of Aggregation Permit No.12/58 (P.16B). Letter of 10th July, 1964, was a reminder to letter of 10th September, 1963 (Page 543 of Vol.V). These are the letters sent together with Aggregation Permit No. 5/64. (Letter P.19 and Aggregation Permit P.18).

30



Aggregation Permit No. 5/64 took effect from 18th May, 1963 - date of expiry of Permit No. 12/58.

Yes, renewal of Mining Lease is within the competence of my office.

Application for renewal of Mining Lease is made to Collector of Land Revenue, who refers application to Department of Mines and other Government Departments concerned.

10 Mines Department puts in report on application with recommendation whether title should or should not be renewed. Before making report Mines Department finds out the proposal for working the mine. If the land is worked by the lessee or sublessee we would recommend renewal.

If lessee can work the land himself we would recommend renewal of title. We enquire as to proposals for working the land. If we are satisfied with proposals for working the land we would recommend renewal.

20 (Referred to Perak Mines File No. 310/49). Yes, this refers to Lot No. 11543 M.L.29650. I have in this file report from Senior Inspector of Mines on application for renewal of Mining Lease. Minute dated 14th October, 1949. Cannot say what led to recommendation for renewal of Lot No. 11543. I produce the minute (P.20).

30 When there are two applications for mining land the question is whether the land can be worked independently. By this I mean the land can be mined without depending on adjacent land for water, tailings, and such like. Yes, self-contained. We also take into consideration other factors and then recommend accordingly. Subject to applicants being able to satisfy us that they are able to mine the land then we recommend applicant having adjacent interests. If a miner has a point in his favour we would recommend him.

40 (Referred to Mines Department File No. 371/46). This relates to applications by Pegang and others for old Tronoh Railway Reserve. Yes, also in respect of other lots. Application No. 1/46

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Judge's Notes of Evidence (Extract)

(ii) P.W.2 Evidence of Them Weng Sek (continued)

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(Extract)

(ii) P.W.2  
Evidence of  
Them Weng Sek  
(continued)

relates to application by Pegang for approximately 34 acres. I produce application and plan (P.8B). Application dated 2nd July, 1946.

Have application by Pegang for old mining land. On this plan area marked red, whereas areas applied for are Lots 30286, 21800, 28715, 12269, 10698. (See plan on page 84 of Vol.I).

Do not have copy of application (Page 96 of Vol.I). Have a copy bearing date 18th April, 1947, of the application for 10 acres. Wording not exactly the same. Copy made by our department I produce copy.

10

(Hills says he does not object to copy being put in - P. 21 and plan P. 21A).

I have application for mining land from Pegang. (Page 301 and attachment). Dated 11th September, 1951.

Yes, I have application as shown on page 378 of Vol. IV. Yes, for Lot No. 30286.

There is application by Hock Hin Leong for Railway Reserve. No copy in my file. There is a record. The Railway Reserve applied for is outlined black on this plan (P.22). Application also for lots adjoining Railway Reserve as outlined in black - Lots No. 28390 and No. 28358 and other lots. His application extends further North East. It conflicts with application by Pegang. (Pages 301, 301A of Vol.III). Also conflicts with Pegang's application dated 15th September, 1951 (P.13A). Also conflicts with Ho Kok Yew's application of 11th December, 1956. (Page 375 of Vol. IV). Yes, this application was for same area as previously applied for and conflicts with Hock Hin Leong's application.

20

30

State Executive Council finally approved application. Yes, Inspector of Mines attends meeting of Executive Council. Yes, this was before my time. Applications were considered about the beginning of 1959.

When Pegang initially applied in 1946 it was for whole of Railway Reserve. But as they had

40

no adjoining interest they were being considered for area between Lot No. 21952 and No. 29654. (Shown P.10). Yes, I have this application in file, dated 7th August, 1946. Ho Kok Yew's application conflicts with Pegang's original application for the whole of the Railway Reserve but not after the area had been reduced and applied for by Pegang on 15th September, 1951. Hock Hin Leong's application dated 11th March, 1957.

Intld. A.H.

XXND. by Hills. Yes, we treated P.16 as the application. True that no Aggregation Permit existing at time it ran out and before application made.

Do not have record that Lot 29650 not worked since before the war. Since 18th May, 1963, up to 10th July not protected by aggregation. No, title not subject to forfeiture. Yes, land not worked for 12 months liable to forfeiture provided it was not aggregated. Do not agree with counsel that if land once aggregated for 11 of 12 months but not aggregated for one month and not worked would be liable to forfeiture. Have no experience of this before.

There is a record of mine called Khong Heng Kongsu operating on Lot No. 21952 having stopped work between 15th January, 1963, and resumed on 26th June, 1963. Further stoppage between 12th September, 1963, and 5th March, 1964.

Yes, between 15th January and 26th June, 18 days of work. Yes, latter period about 7 days' work. According to wording of paragraph 8 (iii) of sublease on pages 369 and 370 of Vol. IV this was a breach by failure to work for one month.

(Shown plan on page 13 of Vol.VII). I see area shaded yellow. Lot No. 30286 is a dumping area. Also shown on page 14 and so on. I agree Lot No. 30286 has been used by Khong Heng Kongsu as dumping area for 10 years.

Quite obviously official approval must have been given to dump on Lot No. 30286. (Ek Tiong

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(ii) P.W.2  
Evidence of  
Them Weng Sek  
(continued)

objects to line of questioning as Schedule to 1938 Agreement clearly indicates that lot was for dumping only. Intl. A.H.)

Yes, it is good mining practice to prospect before using it as a dump.

(Referred to page 59 of Vol.9). I agree that default shown on page 59 was a failure to work mine skilfully.

(Referred to page 369 of Vol.IV). I agree conviction was a breach of Clause 4 of sublease on page 369 of Vol. IV.

10

I agree miner cannot work his land right up to the boundary in depth. Inspector of Mines would require a safe slope back to his own land.

Yes, the deeper one mines the further one has to keep back from the boundary.

I agree mining scheme would come to an end if land is worked out. Yes, this includes deep mining when there is still ore over the boundary. (Referred to page 14 of Vol.I, paragraph 3). I agree with the definition given to term "worked out".

20

(Referred to page 617 of Vol.VI - and page 625). From the figures under "Production", I do not think it was an economic production.

Figures for 1964 at page 626 of Vol.VI make it doubtful if they could make any profit. Yes, I agree it would involve having a loss. (Witness asked to refer to his office file No. 371/46, Enclosure 34, letter from Pegang to Inspector of Mines on Rehabilitation Loan and reply from Senior Inspector of Mines to the letter). Yes, I have these letters. (Letter dated 28th January, D.23, and letter dated 9th February, 1949 - D.24).

30

(Counsel reads letter dated 21.11.51 by Inspector of Mines to witness). I agree that if plan had been carried out lease would have been issued (D.25).

(Referred to memorandum by Inspector of Mines

40

dated June, 1957). The names of applicants in order of priority. Memorandum put in - D.26. Plans attached - D.26A & B. Witness referred to another memorandum in file dated 18th September, 1958, by Inspector of Mines. Counsel reads through part of the memorandum. Rintoul objects to questions put. Intl. A.H.).

10 Yes, a scheme of Papan Mine has been approved in principle. Yes, under Mr. Choong Sam. Cannot remember the area. (Memorandum put in as D.27, Plan D.27A).

Intl. A.H.

20 XXND. by Rintoul. Yes, the titles were aggregated at the material times on Aggregation Permit, leases dated to 18th May, 1963. There was a period between April, 1954, and May, 1958, when these two lots were not under aggregation. Between 1949 and 1954 there was Aggregation Permit No. 2/49 held by Estate of Ho Kok Yew. Next permit was No. 12/58 in the name of Tong Swee King. Between these two there was a period during which the lots were not covered by Aggregation Permit. Ho Kok Yew a sub-sub-lessee. Yes, while Tong Swee King was sub-sublessee she had kept the two lots under aggregation. (Referred to Ex.P.20). Date of the report 14th October, 1959. Yes, in this Pegang had repeated that the Railway Reserve was to be worked by Khong Heng Kongsi. Yes, there was a gap between  
30 Easterly portion and road. Yes, they were the first two applications. There was no suggestion that the two titles should be forfeited for any reason whatsoever.

Encroachments are common - not very common. Yes, the sublease is in standard form. (Referred to sublease on page 370 on question of breach). Yes, Mines Department knew that labour had not worked for one month. No question of lease being cancelled.

40 Yes, I call it working unskilfully when one is found guilty of encroachment. The question did not arise.

Yes, Mr. O'Riley would have instituted

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(ii) P.W.2 Evidence of Them Weng Sek

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proceedings for breach of Clause 8(iii), but he did not.

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Judge's Notes of Evidence (Extract)

(ii) P.W.2 Evidence of Them Weng Sek (continued)

I agree that you must dump somewhere. Yes, miner must have got permission to dump on the land each year. He would not have hydraulic licence if no permission given. Application for hydraulic licence accompanied by plan. These plans are attached to hydraulic licence. Yes, whatever views Pegang Directors might have held of dumping on Lot 30286 it was approved by my department.

10

(Referred to page 59 of Vol.9). Yes, they would have been able to mine the reserve if area AA and BB made available.

(Referred to page 625 of Vol.VI). Yes, this refers to mining within the boundary. They have no relation to the fact if they have been able to mine 3 chains south.

(Referred to D.25). I agree that in the context word "miner" refers to Pegang.

20

(Referred to D.26, page 4). Ho could have put in application earlier.

Intld. A.H.

Time 1.10 p.m.

Adjourned to 9.30 a.m. tomorrow.

Intld. A.H.

WEDNESDAY, 12TH JANUARY, 1966.

Hearing resumes at 9.30 a.m.

P.W.2 (contd.). On former oath.

Re-Examined by Chia. Nothing in my record to show that any applicant for Railway Reserve had diverted the pipeline.

30

Yes, in March, 1959, various sections of the Railway Reserve approved to various applicants. No record of deviation of pipeline by P.W.D. I assumed my present office from

July, 1965. (Referred to page 367 of Vol.IV). Yes, Clause 8(iii) same as Section 16(iii)(g).

In the High Court in Malaya at Ipoh

(Referred to page 625 of Vol.VI). The item stating 17 labour force and 497 H.P. for January exceeds statutory requirement. No requirement from February to May. For June it again exceeds statutory requirement. There was no breach during period between February and May. For September statutory requirement exceeded. Similarly in October, November and December figures exceeded statutory requirement.

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(ii) P.W.2 Evidence of Them Weng Sek

(continued)

10

There was default in January, 1964. (Page 626 of Vol.VI). For February, 1964, statutory requirement exceeded so also in March, 1964. Default in January did not result in breach of sublease. A mine may stop mining operations temporarily to prepare a scheme or permanently. By actual mining operations I mean active ore operation.

20

I have record of hydraulic licence for 1963, 1964 and 1965.

(Referred to Vol.VII page 5 et seq.). Yes, I have copies of plans on page 5 onwards.

(Referred to Vol.IV page 367 et seq.).

(Referred to Vol.9 page 59). Yes, offence was against Section 118.

(Referred to Vol.I page 14). No objection by my department for dumping on Lot 30286.

30

Yes, lands which have been worked out have been worked again.

A rise in tin price is a factor to encourage working on old grounds. Express point there means .3 katis per cubic yard. It is economical to work sub values under present circumstances. I do not know if it would be economical 10 years ago. Yes, mine is considered worked out when ore, even if present, is near the boundary. But this is only a relative term. It does not apply if the land adjoining is available for mining. If miner stopped at boundary and was waiting for

40

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(ii) P.W.2  
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Them Weng Sek  
(continued)

adjacent land he cannot be considered as having stopped.

(Hills says that arising from question by Rintoul that no Aggregation Permit in respect of Lots Nos. 1 and 3 he may have to call witness. Ek Tiong objects. I allow Hills to examine as a witness. Intld. A.H.).

Question by Hills. Yes, I have a file on aggregation. Yes, I am aware of the period during which the two lots were not under Aggregation Permit.

10

Q. Was M.L.8899 being worked during that period? A. Yes, it was worked by Khong Heng Kongsi.

(Referred to page 369 of Vol.IV). No record to show that M.L. 11543. had been worked since after the war. If it had been worked I would have a record. Mining land not worked liable to forfeiture. In this case the two lots would be aggregated and application made for exemption in respect of Lot 11543. In 1956 no application for aggregation and exemption. Nor was there any application for 1957.

20

In 1958 application was made and granted to take effect from 18th May, 1958. Yes, it is correct to say that Lot 11543 was liable to forfeiture during period from October, 1956, to April, 1958.

Intld. A.H.

BY RINTOUL. No, lot was not forfeited. There would be a recommendation for penalty premium on renewal of Mining Lease in December, 1965. Forfeiture would be at Government's instance. Yes, Government would be aware that Madam Tong Swee King had sub-subleases on two mining titles. Yes, also that Aggregation Permit was in force and they did nothing about it. Neither did anybody else.

30

Yes, my department would know that a sub-lessee was working Mining Lease No. 8899 through application for hydraulic licence. I do not know why no action taken. I was not holding

40



office between 1956 and 1958.

I say the title was liable to forfeiture because labour condition was not fulfilled. Yes, technically it was liable.

If I were in office I would look into circumstances and would institute forfeiture proceedings.

Intld. A.H.

No Re-Examination

10

Intld. A.H.

BY COURT. Have no experience of forfeiture proceedings. Mines Department goes back to 4½ years. During my time I have not experienced any case of forfeiture.

Intld. A.H.

BY HILL. Lessee would start proceedings for cancellation of sub-lease or sub-sub-lease not in compliance with the condition.

Intld. A.H.

20 (Witness released. No objection).

P.W.3 Thavapragasam s/o Kanapathy Pillai affirmed states in English.

Inspector of Mines, Batu Gajah, First assumed office on 1st July, 1965.

I have a file No. B.G.181/46.

30

(Referred to letter dated 28th June, 1946, to Inspector of Mines). I have this letter. (Witness shown copy). The original and plan with Senior Inspector of Mines. I have letter dated 12th August, 1946. (Produced - P.28). I have file No. 217/46 (Page 87 of Vol.I). I see letter dated 14th September, 1946, from Senior Inspector of Mines. Yes, I see reply to this. (Page 88 of Vol.I). Not sure if this was procedure at the time. I have a file

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Judge's Notes of Evidence (Extract)

(ii) P.W.2 Evidence of Them Weng Sek (continued)

(iii) P.W.3. Thavapragasam s/o Kanapathy Pillai

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(iii) P.W.3  
Evidence of  
Thavagpragasam  
s/o Kanapathy  
Pillai

(continued)

No. 23/60 and letter dated 27th September, 1963, from Hannay & Steedman (P.29). Plan attached to it was used for preparation of hydraulic licence. (Plan is shown on page 23 of Vol.VII). I have Enclosure (33) in the same file. This is the letter. (Produced - P.30). Have letter dated 17th October, 1963. (Produced - P.31). Yes, approved plan is on page 25 of Vol.VII).

Lot 21952 (No.1) was worked throughout 1951 as shown in my record.

10

M.L.11543 (No.3) was not worked in 1951. Do not know if it was used as dumping ground.

(Referred to page 7 of Vol.VII). Yes, part of Lot 11543 formed part of a dump.

M.L. 10217 (No.2) was not worked in 1951. M.L.11544 (No.4) was not worked in 1951.

I have no record of M.L.11447. Yes, this lot forms part of the dump south of the railway line.

Re Lot 26173 (No.7) I have no record. It was used as a dump.

20

No record of Lot 24921 (No.8). From the hydraulic licence I can say it was once used as a reservoir and tailing area. Yes, so also Lot 11191 (No.9) was a water reservoir. It was State Land. Yes, both lots (Nos. 8 and 9) were State Land at the time.

Yes, Lot 21951 was used as a dump. No record of mining. So also Lot 26173.

Lot 21091 (No.13) was part of dump. Not working in 1951.

30

Lot 31089 (No.14) not worked in 1951. Used as a dump.

Lot 33689 (country lot). No record of working on this mine.

Yes, of all the 15 pieces of land the only mine working was Lot 21952 (No.1)

Intld. A.H.

XXND. by Hills. (Referred to page 25 of Vol.VII). Yes, on this plan the old mine reservoir shows that an old water hole appears to be in the Railway Reserve. Cannot say why reservoir had gone into Railway Reserve.

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10 One of the reasons for the encroachment was that the wall of the reservoir was too deep and the bank had moved into the Railway Reserve.

(Referred to page 39). Yes, the letter is a cyclostyled letter. Not a routine letter nowadays. Do not know why it was cyclostyled.

(iii) P.W.3 Evidence of Thavagpragassam s/o Kanapathy Pillai

Intld. A.H.

(continued)

XXND. by Rintoul. Plans on 25 and 26 - cost the same to mine.

Intld. A.H.

Re-Examined by Chia. According to plan on page 24 of Vol. VII a mine was working in South West corner. Yes, encroachment could be by natural causes.

20 Intld. A.H.

(Witness released. No objection).

Adjourned for 10 minutes.

Intld. A.H.

Hearing resumes.

30 (At this stage Ek Tiong informs Court of receipt of notice by Hill 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

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of Evidence  
m (Extract)

(iii) P.W.3  
Evidence of  
Thavagpragassam  
s/o Kanapathy  
Pillai

(continued)

(iv) P.W.4  
Evidence of  
Robert Hussey

asks that Court regard this as his application for order that contract be produced. I direct that contract be produced. Intld. A.H.).

Chia calls -

P.W.4 Robert Hussey affirmed states in English.

Residing at 42 Tambun Road. Practising under name of Hannay & Steedman, Consulting Engineers. Have been engaged by Khong Heng Kongsii. Tong Swee King was one of the Directors of Khong Heng Kongsii.

10

On 6th January, 1966, I wrote on behalf of Madam Tong Swee King. (Put in by consent - P.32). I have received reply. This is the reply. (P.33)

Have seen letter on page 41 of Vol.I). Brought to my notice by plaintiff's solicitors.

Have studied boring results attached to that letter. Over past 9 years I have been connected with mining in this country. I have to carry out boring and also interpret values of tin and iron ores from prospecting report carried out by other persons.

20

I graduated from Technical College in London. Been to Royal Engineers College after advanced courses with engineering equipment. Arrived in Malaya in 1945. Was civil and constructing engineer for 12 years and Mines Manager and Mining Consultant since 1957. The boring results (page 41) refer to Lot 21952. I produce plan - cross-section sketch of this lot. (Sketch plan put in as P.34). Summarising the boring results it would appear that behind the reservoir there were good values. The area was temporarily closed down due to subsidence.

30

Value of Railway Reserve appears extremely good.

When Executors of Khong Heng reached the Railway Reserve amount of earth did not show good values. From Cummings' report it appears to be running in stringers. Yes, certain strips would be of good value. Have not been with Khong Keng

40

for the last few months.

Without the Railway Reserve, Khong Heng could not economically work deeper into the mine. Mine could not go deeper unless Railway Reserve conceded to them.

With the Railway Reserve a much larger and more practical mine could be operated.

10 Yes, Railway Reserve is 100 per cent necessary for Lots Nos. 1 and 3 (Page 2 of Vol. VII). Lots Nos. 6 and 7 shown on page 2 of Vol. VII necessary for the other side of the Railway Reserve.

Intld. A.H.

Adjourned to 9.30 a.m. tomorrow.

Intld. A.H.

Rintoul asks to be excused from attendance from tomorrow when Mr. Khoo takes over.

Court excuses Rintoul.

Intld. A.H.

20 THURSDAY, 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.

Not certain if this was the contract.

Intld. A.H.

Ek Tiong in reply -

30 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.

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(iv) P.W.4  
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P.W.1  
Ahmad bin  
Saari  
(recalled)

Chia recalls P.W.1

P.W.1 Ahmad bin Saari affirmed states in English

(Referred to file No.K.L.O.142/47). I have application from Ho Kok Yew with sketch plan for area shaded in red. (P.35 and plan P.35A).

Intld. A.H.

XXND. by Hills. My Register of Mining Applications shows that it was received in January, 1948. Yes, the copy made by the Mines Department shows date of receipt on 19th April, 1947. Yes, not signed by collector. Do not have Register of Mining Applications for 1947.

10

Intld. A.H.

XXND. by Rintoul. Probably no application received in 1947. Yes, the official number given was 1948 number.

Intld. A.H.

Re-Examined by Chia. Yes, the file No. 142/47 was opened in April, 1947. Yes, application received and had to be registered by another clerk. This probably caused the delay as the application had to be registered again.

20

Intld. A.H.

BY COURT. This book is not for the purpose of determining priority of application.

Intld. A.H.

(Witness released. No objection).

P.W.4  
Evidence of  
Robert Hussey  
(continued)

P.W.4. R. Hussey now continues. (On former oath)

XXND. by Hills. Have been working for Khong Heng Kongsai for 1½ years - from December, 1962, when I first visited the mine. Visited once or twice a month. Working till today. 1½ years of regular visits but thereafter intermittent visits. Yes, last few months had not been called to go to the mine. Went to mine three days ago. Before that on 27th June, 1964.

30

My visits were with Mr. Ho Ban Seng (Ho Win Sen). He was the Manager of the mine. Saw Mr. Choong Sam in June, 1964. Mining activity reduced in 1964.

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10 When I first went there Kongsii was operating in a limited area with 8 inch gravel pump - horizontal pump. One palong was physically working. Another in position. Shortly afterwards they closed the mine for alteration to put in electrical vertical gravel pump. They also put in excavators. It was in June, 1964, that activity reduced. They used the jig system to recover the finer ore which they were losing. They used a 4" water pump.

(iv) P.W.4 Evidence of Robert Hussey (continued)

I knew of further reduction. That was after I left.

Yes, the cost of mining with 18 inch gravel pump was between \$12,000/- to \$16,000/- a month.

20 (Referred to Vol.VI page 625). Yes, for the period the production figure shows that it was uneconomical. But this is always the case with some mines for until they came to richer ground the figures would show hat it is uneconomical. This is true if one has rich land to work towards.

30 (Referred to Vol.VII pages 23, 24, 25). They must have good cause to work from page 23 to 26. They have rich ground to go to now if they go deep. Yes, there are payable areas under the reservoir. I have not prospected, but this was substantiated by Mr. Cummings. At present area expressly difficult to work. Yes, when mining in depth one has to slope back to one's own boundary.

(Referred to page 29 of Vol.VII). Southern bank of reservoir cannot be determined from the plan. It was never deep.

Since 1962 there was a directive that the slope should be 1 and 1½.

40 (Shown P.34). My diagramatic plan shows 2 bore holes. Yes, the lime runs through 2 bore holes. Diagram taken from my plan. Have passed examination by Mines Department in Johore and

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(iv) P.W.4  
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Perak. I feel I am qualified to draw a plan. Yes, I qualified as Army Engineer - Royal College of Engineers, England, in 1943. Course was for 32 weeks. Do not possess degree or diploma in engineering. Do not have degree or diploma to show qualification as a Mining Engineer. I do consultant work myself. No other qualified engineer.

I have not bored the Railway Reserve. Yes, I relied on Mr. Cummings' report. 10

Diagram is an interpretation of boring results. Yes, assumption if you wish to call it.

Intld. A.H.

XXND. by Rintoul. I am accepted by Mines Department as a Consultant. Yes, Mines Department recognises me as a Consultant. Have many other clients apart from Khong Heng. Have a doubt on Mr. Cummings' boring. Yes, Mr. Cummings had a theory that 5 bores were sufficient. Yes, my opinion that Railway Reserve is worth mining is based on Mr. Cummings' boring results. (Referred to Vol.I page 14, paragraph 3). Definition given cannot apply to Lot 8899 in view of present price of tin. I agree with counsel with this. Yes, it was as a result of my inexperience. 20

Yes, I would want the Railway Reserve to be included in the mining scheme. I agree with Mr. Cummings when he said that it was necessary for the two adjoining lots. 30

(Hills asks for leave to question witness before Re-Examination. No objection. Witness referred to page 534 of Vol.V). Yes, this was written by me. Yes, I wrote the last paragraph as read out. by counsel.

Intld. A.H.

BY RINTOUL. Yes, that was in 1964.

Intld. A H.

RE-EXAMINATION. I wrote it before I had



Cummings' boring results. During my time with Khong Heng there was no step. Have no personal knowledge of the subsidence apart from what I learned in Cummings' report.

Intld. A.H.

(Witness released. No objection).

Adjourned to 12 noon.

Intld. A.H.

Hearing resumes.

10 Chia calls -

P.W.5 Tong Sam Poy affirmed states in English.

Living in 36, Lau Ek Ching Street, Ipoh. 66 years old. I am a retired business man. Own property. Chairman, Board of Directors of Federal Dispensary. Also Chairman of Board of Directors of Toh Allang Mine. Committee Member of Perak Turf Club.

20 Plaintiff, Tong Swee King, is my youngest sister. Her husband was Ho Kok Yew. She is Executrix of the Estate and sole beneficiary of the Estate. Ho Kok Yew was Managing Partner of Khong Heng Kongsi from 1925 to his death in 1947. Ho was also Director of Pegang Prospecting Company. He was Director of Toh Allang Mining. Ho died on 28th April, 1947. I was staying with him before his death. A year before his death he had stomach complaint. It was discovered that he had cancer of the liver. This was a month before he died. He practically did not leave the house. Yes, he was confined to bed. Yes, he was suffering. On being informed that he was seriously ill I went to help him in his business. Went in early 1947 when he fell ill. Before that I was not familiar with his business. He explained to me whatever I did not know about his business. (Shown application on page 96 of Vol.I). I have seen this document before.

30

40 (Hills objects on ground that what was said by the deceased was hearsay. Not evidence under Section 32. Chia says evidence admissible.

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Judge's Notes of Evidence (Extract)

(iv) P.W.4 Evidence of Robert Hussey (continued)

(v) P.W.5 Evidence of Tong Sam Poy

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(v) P.W.5  
Evidence of  
Tong Sam Poy  
(continued)

It is part of res gestae. Hills says evidence is hearsay. Chia submits under Section 7 of Evidence Ordinance evidence admissible. I over-rule Chia's submission and ask that question may not be put which may be hearsay).

Ho Kok Yew gave me the letter. I delivered the letter to Cummings. I knew Cummings. He was very close friend of Ho Kok Yew. He was a frequent visitor. Yes, even before Ho's illness especially so before serious illness. I knew of the arrangement between Ho and Cummings. I told Cummings that it was the application he wanted from Ho Kok Yew. I knew that if Ho Kok Yew received the land he would give it to Pegang. Yes, at this time I was actually engaged in the mining affairs of Ho.

10

I knew that he was sublessee of certain lands near the Railway Reserve. Lot No. 1 on my map was one of the lands. Lot No. 2 was also one of the lands. Lot No. 3 was also one of the lands Ho had under sublease. So also Lot No. 4. I was aware that Pegang Company had applied for the section of the Railway Reserve between Lot No. 1 and Lot No. 3. I was afraid that Chan Phooi Hoong might apply for the Railway Reserve. Cummings agreed with me. If portion applied for by Ho and portion applied for by Pegang were approved then the whole portion could be used for mining by Ho. I never doubted the sincerity of the arrangement.

20

After his death I continued helping with his mining affairs. I had to consult various experts on behalf of his widow. I consulted Mr. Greenwood of Thomas & Hornidge. I knew he was a Director of Pegang. Consulted Greenwood on deviation of pipeline on Railway Reserve. We discussed mining matters such as leases, Loans Board, and rights of contract.

30

Intld. A.H.

Adjourned to 9.30 a.m. tomorrow.

Intld. A.H.

40

FRIDAY, 14th JANUARY, 1966

Hearing resumed:

(Hills at this stage draws attention to paragraph 24 et seq. of amended defence as indicating defences raised. Intld. A.H.).

P.W.5 Tong Sam Poy, on former oath continues evidence.

10 By contract I mean the 1931 agreement. Mr. Wagner died in 1954. I stopped helping my sister in 1954. I just handed the letter to Cummings. I confirmed that the reserve was to be subleased to Ho Kok Yew.

Intld. A.H.

XXND. Have business both in Kuala Lumpur and Ipoh. Stayed in Kuala Lumpur at the time. Came to Ipoh early in 1947. Cannot remember exactly where I was during certain period. I travelled about before Ho's death. Some three or four months stayed in Ho's house off and on before he died.

20 Yes, Ho gave me the application after he signed. Gave it to Cummings probably on the 16th of April. Ho gave it to me that day. Did not see him sign. After I have seen the application I say it must have been the 16th. Given to me in his house. Yes, he was in his bed. Later on Cummings came along and I delivered it to him. Ho was lying in bed and was suffering. He could not walk downstairs. He would not want to see visitors. Yes, he refused to see Cummings. He did not mind me. Yes, I remember incident clearly. 30 Sure it happened. Remember giving evidence during arbitration. I was not sure then. At arbitration I said I was not sure that Ho made the application. When I said that I meant that although he signed the application it was given to Cummings. What Cummings did to it I do not know. What I meant at arbitration was that I was not sure whether application had been filed or not.

40 (Hills refers to notes at arbitration. Read to witness). I went to the Land Office to enquire. I was told Ho had made an application. I still say I was not sure at arbitration because of what the clerk in the Land Office told me. I did not see the application. I did not say at the arbitration

In the High Court in Malaya at Ipoh

No.12

Judge's Notes of Evidence (Extract)

(v) P.W.5 Evidence of Tong Sam Poy (continued)

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(v) P.W.5  
Evidence of  
Tong Sam Poy  
(continued)

about giving application to Cummings. Did not mention that Cummings had application. I was in the room during arbitration most of the time. Yes, Greenwood was there. Cannot remember whether I was present when Greenwood gave evidence. I heard some of the things he said. Not all. Told my lawyer about Cummings having the application. Greenwood probably said that Ho applied for portion of Railway Reserve which had been applied for by the Company and that it was contrary to agreement of 1931. Do not know why my Counsel did not cross-examine him. I am certain I gave application to Cummings.

10

(Witness shown by defence counsel notes by Cummings. Witness reads lower half of notes on "Wagner's Latest". When asked if Cummings could have said what was stated in notes witness does not reply. Intl. A.H.) (Put in notes, D.36).

(Shown another letter by Cummings dated 14th June, 1950, to Directors of Pegang, page 3, where he mentioned purchases). Yes, what was said there was inconsistent with Cummings putting in the application. I am telling the truth. Do not know if he lied to the other Directors. (Put in letter as D.37). No written undertaking to transfer Railway Reserve to Pegang.

20

Intl. A.H.

No questions by Khoo.

Intl. A.H.

RE-EXAMINATION. During arbitration I was not asked by any lawyer questions on application. No questions put to me by anybody.

30

Intl. A.H.

BY COURT. Went to the Land Office to enquire after Ho's death. I went to enquire about the letter because of the arbitration. Did not write to enquire from Cummings as the parties were already not on good terms.

Intl. A.H.

(At this stage Chia puts in letter by Ho dated

40

28th June, 1946, to Inspector of Mines for permission to slope M.L.8899 into Railway Reserve. Admitted by consent - P.38)

In the High Court in Malaya at Ipoh

No.12

Judge's Notes of Evidence (Extract)

10

(Chia submits that 2 documents - D.37 and D.36 - should not be admitted as defendant had failed to disclose in affidavit. Hills says that allegation of letter being handed to Cummings not expected. Only yesterday defence came to know of it and it becomes necessary to rebut by documents intended to put in. Chia, in reply, refers to letter by Das in referring to this matter. I indicate that I will give my ruling when application is made to put in D.37. Intld. A.H.)

(continued)

(Chia says he would ask leave to recall Senior Inspector of Mines later - by tomorrow 15th at the latest to produce a missing document. Subject to this plaintiff has no other witness.

Intld. A.H.).

20

Ek Tiong - Now puts in formally amended Statement of Claim as amended. Notice of amendment approved had earlier been considered (Amended statement put in).

Intld. A.H.

Hills - Observes that further amendment should be in green.

Intld. A.H.

Ek Tiong - Undertakes to do this.

30

Intld. A.H.

On further amendment, paragraph 28A, Hills objects.

Intld. A.H.

Ek Tiong - Draws attention to page 384 Vol.IV.

Intld. A.H.

Hills - Withdraws objection.

Intld. A.H.

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(continued)

Hills' address

Ek Tiong - Asks to put in a Civil Suit File.  
(By consent file put in as P.39).

Hills opens - Intld. A.H.

Hills opens - filing further amendment to defence.

Refers to prayers.

Says points of defence are:-

(a) Uncertain Further sub-lease subject  
of further negotiation - whether it  
should form part of the scheme.

(b) Agreement expired as scheme has been  
worked out. 10

(c) Breaches by miner to entitle defendant  
to cancel i.e. stoppages, dumping on  
payable ground, contracting out,  
encroachment on Railway Reserve,  
failure to aggregate.

(d) Reputation:

(i) 1947 application by Ho Kok Yew.

(ii) Acceptance of annual permit over  
Lot 24766 (No.2). 20

(iii) Offer by plaintiff to sell rights  
and property to Pegang for  
\$70,000/-.

(e) Acquiescence and delay:

Since 1956 plaintiff agreed in a number  
of things but did not take any step.

(f) Refusal or failure to mine.

Period 1946 to 1951.

On correspondence: divide that into 1st  
Chapter - Negotiation, which broke down. 30

2nd Chapter - Dog in the manger attitude.

3rd Chapter - Abandonment of claim.  
Acquiescence.

On the law -

Refers to agreement (Vol.I p.25)

Analysing agreement -  
 Scheme started in 1923.  
 Dumping agreement - 1928.  
 Sub-leases.  
 1931 Agreement (Reads Agreement).  
 Clause 4 - terms uncertain.

Intld. A.H.

In the High  
 Court in Malaya  
 at Ipoh

No.12

Judge's Notes  
 of Evidence  
 (Extract)

Hill's address  
 (continued)

10 Time 12 noon.

Adjourned to 9.30 a.m. tomorrow.

Intld. A.H.

SATURDAY, 15th JANUARY, 1966

Hearing resumes at 9.30 a.m.

Chia now calls -

P.W.6 Ahmad Azizuddin bin Zainal Abidin affirmed  
 states in English:

(vi) P.W.6.  
 Evidence of  
 Ahmad Azizuddin  
 bin Zainal  
 Abidin

20 Acting Senior Inspector of Mines. Have been  
 in Perak since 1st May, 1965. Have a file on  
 Aggregation Permit 12/58. (Page 420 of Vol.IV).  
 Have application for renewal of Permit No. 2/49.  
 (Page 206 of Vol. II). Yes, there was a gap.  
 Tin control in force between 15th December, 1957,  
 until 1st October, 1960. As far as I know there  
 has been no forfeiture proceedings during the tin  
 control period. No record of forfeiture proceed-  
 ings against M.L. 8899 and M.L. 11543. Permit  
 12/58 was renewed by Aggregation Permit of 5/64.

Intld. A.H.

30 XXND. (Referred to Section 16(iii)(c) of  
 Mining Enactment). According to section read to  
 me there has been a breach in respect of M.L.  
 11543 - not being worked for about 19 months from  
 15th October, 1956 up to 11th June, 1958.  
 (Referred to sub-lease on page 367 of Vol.IV).  
 The date should count from date of renewal of  
 lease, not of sub-lease. (Agreed date of renewal

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(vi) P.W.6  
Evidence of  
Ahmad Azizuddin  
bin Zainal  
Abidin

(continued)

was in 1951.

Intld. A.H.

No one is allowed to work pipeline reserve. The mining requirement is a Mining Certificate. Yes, generally it is the administration's intention to have pipeline removed. (Referred to Mining Rules on pipeline). Yes, area with a Mining Certificate, 60 feet area from pipeline is maintained. (Referred to letter on page 532 of Vol.V). Yes, Clause 8(iii) of the sub-lease would appear to have been violated in view of the period stated in the letter on page 532 of Vol.V).

10

Intld. A.H.

No questions by Khoo.

Intld. A.H.

RE-EXAMINATION. (Referred to page 556 of Vol.VI). Yes, after 1½ years section 16(iii)(c) would apply.

Cannot say whether or not Pegang has Aggregation Permit in respect of lot for period between 8th April, 1954, to date of Aggregation Permit 12/58.

20

The offence is on the lease. Where labour is employed it is not necessary there should be production. Yes, one can have preparatory work. Yes, mine could stop temporarily to change pump.

(Referred to page 625 of Vol.VI). From September, 1963, there was a drop in H.P. Cannot say why.

Intld. A.H.

30

(Ek Tiong asks that he be given time to find out if Pegang had Aggregation Permit. Hills says that not being a miner Pegang could not obtain Aggregation Permit. Any person having registered interest - lessee, sub-lessee or sub-sub-lessee can apply. Intld. A.H.).



Hills calls -

D.W.1 Francis Neale Mugliston affirmed states  
in English:

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(vii) D.W.1.  
Evidence of  
Francis Neale  
Mugliston

Residing at 74 Gopeng Road, Ipoh. Manager of Evatt & Co., Ipoh. Held that position since January, 1955. Before that was in Singapore. Fellow of Institute of Chartered Accountants of England and Wales.

10 When I took over Evatt were Secretary of Pegang. I was appointed a Director of the Company. I am still Director. I dealt with any correspondence relating to affairs of Pegang except during leave period.

Yes, as a result of this case I went through the file.

(Shown D.36 and D.37). I recognise these documents. When Cummings was Director I was a Director. I am familiar with signature of late Cummings.

20 (Looks at D.36 and D.37). I feel sure that his signature appeared in the documents. I found them in file marked Directors' Circulars and Correspondence. File in custody of my firm and I am personally responsible.

From record Ho Kok Yew was a Director of Company until his death.

30 (Referred to page 342 of Vol.IV). Yes, Das & Co. were our solicitors. Remember this letter very well. On instruction of Directors I wrote to Das to agree to waive arbitration clause. (Letter dated 4th August, 1955).

(Referred to page 509 of Vol.V). During intervening 8 years Plaintiff acted as if the 1931 agreement had ceased to have effect. No mention of 1931 agreement during that period.

(Referred to Statement of Claim, paragraph 29). I do not agree with the paragraph because the sublease was for the period of lease only. It was not in accordance with the terms of the 1931 agreement.

40 (Referred to page 385 of Vol.IV). Lot No.1 and

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(vii) D.W.1  
Evidence of  
Francis Neale  
Mugliston

(continued)

Lot No. 3 - Mining Leases expired on 31st December, 1965. Renewal applied for within stipulated period. So far have received no letter approving renewal.

Plaintiff was not working. Lot No. 3 had not been worked since the war. (Rest of answer on contracting out not admissible after objection by counsel for plaintiff. Intld. A.H.)

(Referred to Vol.IV page 424). On 11th January, 1963, Company paid \$147,100/- for expenses to deviate pipeline. Yes, this was before Mining Certificate was issued.

10

Next condition agreed by Government at \$41,000/- On 22nd April, 1965, paid \$7,000/- deposit, balance to be paid by instalments. Have paid two instalments.

No agreement for deviation. Compensation paid: \$6,932.55 to T.O.L. holders in respect of the whole area.

Paid approximately \$19,000/- to prospect the Railway Reserve.

20

(Referred to page 2 of Vol.VII). Lots No. 6 and No. 7 are now under Lot 14477. The lot was approved to us on 31st March, 1959. We have a Mining Lease on No. 5. No.6 and No.7 reverted to State on 31st December, 1950.

We applied for Lot No. 5 in 1957. Had been leased to Ho Man. Reverted to State on 31st December, 1955. Not renewed. (Stopped for stating what he believed). Railway Reserve was not considered by the Company as part of the mining scheme. Nor do the other lots form part of the mining scheme. Lot No. 5 was in 1931 agreement used as a dump only.

30

We opened a mine on Lot No. 5 in July, 1963. From then until September, 1965, we won 162 piculs.

I have seen Ho's application for 10 acres of land. I cannot find the Company's record of Ho approaching Company for approval to apply for the land.

40

Have seen letter on page 371 of Vol.IV. I know composition of Khong Heng Kongs. Two kongs's. Plaintiff was Director. Her son was Director from 1959 to 1963. I consider the Kacha-Menelai Scheme to have ceased to exist in 1958 as the land had been worked out. It ceased to be an economic proposition.

10 I consider the 1931 agreement ceased to have any force from 1956 for a similar reason. Two substantial parts have been worked by other contractors. They had direct dealings with Madam Swee King. I refer to Lot No. 2. She received direct subleases over 2 areas.

Yes, I was present at all meetings of Company when Ho Win Shen was a Director since December, 1957. He is still Chairman. Ho Win Shen had never voted against Company mining the Railway Reserve.

Intld. A.H.

20 XXND. by Chia. Yes, I am familiar with details of Kacha-Menelai Scheme. Scheme to work the Upper Flats and Hill Areas. I know the Lower Flats from the agreement. Lots there - Nos. 6, 7, 12, 14 and 13. In the Hill Area Nos. 1 and 2. Also Nos. 9, 10 and 11.

Cannot remember if Nos. 13 and 14 were owned by anyone in 1928.

30 (Referred to page 602 of Vol.VI). Yes, this referred to Lot No. 13. The first stage was completed on the Lower Flats in 1931. It entered final stage in 1940, entering into Lot No. 1. Final stage was excision of Lots 1 and 2. Upper Flats area and Hill Area can be worked together by dumping on lower ground. Yes, to work out the stage so that it could become a dumping area.

40 Have been to Lot No. 1. There is a big hole. Do not know if sump was 80 feet below. Yes, I am prepared to accept that below for about 160 feet there are rich deposits. Have seen Cummings' boring results.

(Referred to page 41 of Vol.I). No, term "worked out" not a relative term. Cannot see reason why

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No.12

Judge's Notes of Evidence (Extract)

(vii) D.W.1 Evidence of Francis Neale Mugliston

(continued)

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at Ipoh

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Judge's Notes  
of Evidence  
(Extract)

(vii) D.W.1  
Evidence of  
Francis Neale  
Mugliston  
(continued)

Lot No.1 and Lot No.2 cannot be worked at the same time. Do not know where it would be dumped.

I will qualify what I say about scheme being worked out by saying that I consider this to be so because of the low production since 1959 and from Cummings' report. I refer to page 35 of Vol. 9. Khong Heng not working on mine in 1959. Scheme ceased to exist as an economic proposition.

I agree that on page 631 Pegang received tribute of over six thousand dollars. If miner stopped mining there would be no tribute. Do not mean mining stopped permanently. They might continue mining at a loss. Pegang could not work without title. If plaintiff had Railway Reserve she could work Lots 1 and 3.

10

The sublease for 1956 was not in accordance with 1931 agreement as it was only for the term of the Lease and not for renewal.

The 1937 subleases or sub-subleases of Lots 1 and 3 are not in accordance with the 1931 agreement if they do not mention renewals.

20

Intld. A.H.

Adjourned to 9.30 a.m. tomorrow.

Intld. A.H.

TUESDAY, 18TH JANUARY, 1966

Hearing resumes at 9.30 a.m.

XXN. of D.W.1 by Chia continues. Cummings retired in 1959. He was very old. He died in September 1960 or 1961.

I would say definitely that this is Cummings' signature on D.36. So would I say of the signature on D.37. Had known Cummings since 1955 until before his death. During the period I was familiar with his handwriting. He wrote notes on Directors' book. Have seen him write. Towards the end he had to use one hand to hold the other hand when writing.

30

(Shown a document and asked if he could say it

was Cummings' handwriting). I would not be able to say that this was Cummings' handwriting. Yes, this letter was written in 1956.

10 Yes, as far as I am aware the 1931 agreement came to an end in 1956. That was my opinion towards latter part of 1956. I think my opinion was shared by my co-Directors then. To the best of my knowledge this opinion not recorded anywhere. Company did not write to plaintiff informing her of this opinion. No, Company never wrote to plaintiff terminating 1931 agreement.

(Referred to letter on page 384 of Vol.IV). Yes, this was in 1957. In letter on page 386 we could have said that the 1931 agreement had ceased to have any effect but we did not say it. The Company considered that the Railway Reserve not part of the mining scheme.

20 (Referred to page 505 of Vol.V). Second paragraph of letter was written since we had approval of the Railway Reserve. Before approval there were negotiations. Whatever intention of previous Board not intention of present Board.

(Referred to letter on page 358 of Vol.IV). The decision to refuse plaintiff the Railway Reserve was made either in 1960 or 1961.

30 (Referred to page 43 of Vol.9). Cannot say when decision made not to give the land. Do not think there is any record in writing of this. The nearest to saying this was a letter dated 27th July, 1963. (Page 505 of Vol.V).

Yes, one Company file during arbitration is still missing. Do not know what file contained. It could contain documents vital to the present action.

(Referred to D.36 and D.37). These are Directors' circulars kept in Directors' Circulars and Correspondence File. Yes, these are issued every year.

40 (Chia asks witness if he can produce all circulars at 2.30 p.m. Hills objects. Says all relevant documents have been produced. Chia refers to D.36 and D.37 as having been put in by defendant

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(vii) D.W.1  
Evidence of  
Francis Neale  
Mugliston

(continued)

In the High  
Court in Malaya  
at Ipoh

No.12

Judge's Notes  
of Evidence  
(Extract)

(vii) D.W.1.  
Evidence of  
Francis Neale  
Mugliston  
(continued)

from among privileged documents. Refers to Affidavit of Documents (Page 24 in case file). Asks for leave to inspect documents - Directors' Circulars and Correspondence.

Hills in reply: D.36 and D.37 not relevant to case pleaded. Plaintiff's case closed. Cannot ask for inspection. Refers to Mallal's Supreme Court Practice and asks Court to refer to Annual Practice 1957, page 519, on conclusiveness of Affidavit of Documents. Also Mallal's Supreme Court Practice, page 382.

10

COURT. D.36 and D.37 have been put in only to impeach plaintiff's witness, Tong Sam Poy, on suggestion that Ho had applied for Railway Reserve with consent of Cummings. Chia now withdraws application for order to inspect documents. Intld. A.H.)

XXN. proceeds. In letter on page 373 of Vol.IV by Company, Company was not acting under 1931 agreement. No, Madam Tong Swee King was not acting under 1931 agreement. As plaintiff was mining we saw no harm to ask her to apply. We could not stop her.

20

Intld. A.H.

RE-EXAMINATION. No, since I joined Board never expressed intention to sublease Railway Reserve to plaintiff.

Intld. A.H.

BY COURT. The tribute received for Lot No. 1 (See page 631 of Vol.VI).

30

(Witness released. No objection).

(viii) D.W.2.  
Evidence of  
Percival Ewan  
Waugh

D.W.2. Percival Ewan Waugh affirmed states in English.

Director of Vallentine Dunn & Co., Kuala Lumpur. Qualified Mining Engineer. Graduate of Camborne School of Mines, Member of American Institute of Mining Engineers, Associate Member of Institute of Engineers, Malaysia. Came to Malaya in 1947. Have been with various mining

firms. Have been with Vallentine for 14 years. Yes, have been close to mining since 1947. Visit Ipoh once a month.

In the High Court in Malaya at Ipoh

(Referred to mine on Lot No.1, page 2 of Vol. VII). Visited this mine since 1955. Yes, on several occasions. Visited it in June, 1964 - on 25th June. Mine was not in operation at the time. The mine never was in operation during my visits. Have visited since 1955 at least half a dozen times. The mine was not working economically and efficiently. This was since 1958. Not working economically on production figures shown. (Pages 617 to 627 of Vol.VI). The production in 1949 was 30 piculs.

No.12

Judge's Notes of Evidence (Extract)

10

(viii) D.W.2 Evidence of Percival Ewan Waugh

(continued)

1960 - 21 piculs  
1961 - 31 piculs  
1962 - 20 piculs  
1963 - 16.6 piculs  
1964 - 16.6 piculs

20

I say that cost of the mine was at \$12,000/-. To show a profit mine had to produce more (Referred to letter on page 632 of Vol.VI). Yes, this shows profit and loss account. There was switch from 18 inch gravel pump to 4 inch pump lampang mine. This was in 1962. Scale of mining came to about 1/5th.

As regards efficiency this was not properly carried out. They mined first instead of prospecting first. This is bad mining practice.

30

Stoppage - 12th September to 12th March, 1964 - was a breach of sublease. During stoppage there was an alteration in mining scheme - resiting. Some leases took 8 hours to a week. Second stoppage was due to change of scheme and resiting. It would take about a week.

I carried out a survey on encroachment. It is miner's duty to apply for aggregation. Lessee or sub-lessee not mining cannot apply.

40

A miner cannot work in depth to a boundary One cannot work the mine unless one acquires the adjoining land. Any deviation would have to be paid by the miner. So also squatter removal.

In the High Court in Malaya at Ipoh

(Referred to diagramatic sheet by Hannay & Steedman). This is not based on survey. The bed rock seems to be based on Cummings' report.

No.12

Intld. A.H.

Judge's Notes of Evidence (Extract)

XXND. Vallentine Dunn not General Manager of mine held by Pegang.

Intld. A.H.

(viii) D.W.2 Evidence of Percival Ewan Waugh

No cross-examination by Khoo

Intld. A.H.

(continued)

No Re-Examination.

10

Intld. A.H.

(Witness released. No objection).

Hills informs Court that he wishes to call another witness.

Intld. A.H.

(ix) D.W.3. Evidence of W.Green

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

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.

20

Intld. A.H.

No questions by Khoo.

Intld. A.H.

No questions by Chia.

Intld. A.H.

(Witness released. No objection).

30



No. 13  
INTERLOCUTORY ORDER OF ALI, J.

In the High  
Court in Malaya  
at Ipoh

Before the Honourable Mr. Justice Ali

No.13

This 25th day of October, 1965.

In Open Court

Interlocutory  
Order of Ali, J.

25th October  
1965

O R D E R

10 Upon reading the Notice of Motion herein dated the 6th day of October, 1965 (Enclosure 20) filed herein and upon hearing Mr. K.C.Chia (with him Mr. Ng Ek Tiong and Mr. Chin 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 of Counsel for the Defendants secondly abovenamed and By Consent

It is Ordered that the hearing of the above action be fixed for the first and second weeks in the month of January, 1966 commencing from the 3rd day of January, 1966.

20 And It is Ordered that from date hereof the net proceeds of sales of all ore won from Lots 44407, 44408 and 30286 in the Mukim of Blanja, less expenses incurred in starting up the mine on Lot No. 44408 aforesaid the amount of which is to be ascertained and agreed to between the parties hereto and less operating expenditure, be held in a separate trust account in the Chartered Bank at Ipoh to be operated by Messrs. Evatt & Co. of Ipoh, who will subsequently pay out  
30 in accordance with any Order of this Honourable Court;

40 And It Is Ordered that the Plaintiff be entitled at her own expense to station at the mine or mines on the lots aforesaid a representative who may inspect the books of account relating to the expenditure incurred in operating the said mine or mines thereon, the quantity of ore produced therefrom, and the amount realised from sales of such ore, and inspect the production of ore therefrom, the ore produced, the removal of

In the High  
Court in Malaya  
at Ipoh

No.13

Interlocutory  
Order of Ali, J.

25th October,  
1965

(continued)

such ore for sale and every wash up of  
every palong and jig recovery of ore;

And It Is Ordered that the Defendant firstly  
abovenamed do give the Plaintiff and the  
Defendants secondly abovenamed full notice  
of each sale of such ore at which the  
Plaintiff and the Defendant secondly above-  
named shall have the right to be present,  
and copies of every sale invoice and of  
every monthly return made to the Mines  
Department;

10

And It Is Ordered that the costs herein be cost  
in the cause;

And It Is Lastly Ordered that there be liberty to  
apply.

Given under my hand and the seal of the  
Court this 25th day of October, 1965.

Sd: A.F.Rajaratnam

Ag: Senior Assistant Registrar,  
High Court,  
Ipoh

20

No.14

Judgment of  
Ali, J.

9th December,  
1966

No. 14

JUDGMENT of ALI, J.

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.

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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 claim are specifically set out in paragraph 34 of the Further Amended Statement of Claim (see enclosure (47) of the case file).

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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 sub-leases. 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.

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

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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.

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 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 so 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 these 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 arrangements 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 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

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the 1st defendant company also averred that they are not bound by the agreement as the other parties had themselves been guilty of a 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 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 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 any one 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:

"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 Kongsai Mine of any mining lands of 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 same 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."

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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 acquisition 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 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,

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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 acquisition 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: 10

"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 not depend upon the agreement between the parties. 30

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:

"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 40



enforceable contract either because the condition is unfulfilled or because the law does not recognise 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."

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10 In this case even if there was any agreement  
between the parties it was no more than an  
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  
20 1st defendant company. With regard to the  
plaintiff's claim 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.

30 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  
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  
40 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

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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.

Sgd. ALI BIN HASSAN

JUDGE, MALAYA

9th December, 1966.

TRUE COPY

Sgd. CHIN SEN BOO  
Secretary to Judge,  
Ipoh.

No.15

Order of Court

No. 15

ORDER OF COURT

10

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

A n d

1. Pegang Mining Company  
Limited (formerly known  
as Pegang Prospecting  
Company Limited) 20
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

THIS 9TH DAY OF DECEMBER, 1966. IN OPEN COURT

O R D E R

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  
Oon) of Counsel for the Plaintiff, Mr. A.L.Hills  
(with him Mr. N.T. Rajah) of Counsel for the

30

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 abovenamed AND UPON hearing Counsel for the parties

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Court in Malaya  
at Ipoh

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THIS COURT DID ON THE 29TH DAY OF JANUARY, 1966 ORDER that this suit should stand for judgment

(continued)

10 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

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

20 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

30 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.

AND THIS COURT DOETH 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.

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

Sgd. Shiv Charan Singh.

Senior Assistant Registrar, High Court, Ipoh.

In the  
Federal Court  
of Malaysia

No. 16

NOTICE OF APPEAL OF PLAINTIFF (TONG SWEE KING)

No. 16

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

Notice of  
Appeal of  
Plaintiff  
(Tong Swee  
King)

CIVIL APPEAL NO. 1967

6th January,  
1967

BETWEEN

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

AND

10

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)

BETWEEN

20

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

30

NOTICE OF APPEAL

Take Notice that Tong Swee King (f)  
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  
the Federal Court against the whole of the said  
decision.

Dated this 6th day of January, 1967.

In the  
Federal Court  
of Malaysia

Sd. Chin Swee Onn  
.....  
Solicitor for the Appellant

No. 16

To:

Notice of  
Appeal of  
Plaintiff  
(Tong Swee  
King)

The Registrar,  
The Federal Court,  
Kuala Lumpur.

6th January,  
1967

and to:

10

The Registrar,  
High Court in Malaya  
at Ipoh.

(continued)

and to:

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

and to:

20

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.

Filed this 6th day of January, 1967 and  
\$500/- deposited in Court, vide Rt. No. T.929468  
dt. 6.1.67.

30

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.



In the  
Federal Court  
of Malaysia

No. 17

ORDER SUBSTITUTING CHOONG SAM, AND LEE  
CHIM YEE AND CHAN HON PENG AS APPELLANTS

No. 17

Order substitu-  
ting Choong Sam  
and Lee Chim  
Yee and Chan  
Hon Peng as  
Appellants

17th July 1967

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT IPOH

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. X 4 OF 1967

Between

Tong Swee King (f)  
as Executrix of the Estate  
of Ho Kok Yew, deceased ... APPELLANT 10

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 Hoong, deceased ... RESPONDENTS

(In the matter of Ipoh High Court  
Civil Suit No. 304 of 1964) 20

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 Hoong, deceased ... DEFENDANTS 30

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 Open Court

This 17th day of July, 1967

O R D E R

In the  
Federal Court  
of Malaysia

No. 17

Order substitu-  
ting Choong Sam  
and Lee Chim  
Yee and Chan  
Hon Peng as  
Appellants

17th July 1967

(continued)

10 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. Dharmandanda of Counsel for the Respondents firstly abovenamed 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:

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

20 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:

30 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.

Hamzah bin Dato Abu Samah

CHIEF REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.

In the  
Federal Court  
of Malaysia

No. 18

MEMORANDUM OF APPEAL OF FIRST APPELLANT  
(CHOONG SAM)

No. 18

Memorandum of  
Appeal of  
First Appellant  
(Choong Sam)

14th August,  
1967

Choong Sam the First Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Mr. Justice Ali given at Ipoh on the 9th day of January 1966 on the following grounds:

I. The learned Judge was wrong in finding that there was any delay on the part of the Plaintiff as representative of the Estate of Ho Kok Yew in restarting the mine after the Japanese occupation. 10

II. The learned Judge erred in concluding that the terms of Clause 4 of the Agreement of 22nd October 1931 taken together with the other clauses of the said Agreement did not constitute an agreement but merely contemplated the execution of a further agreement between the parties.

III. The learned Judge failed to appreciate:-

(a) that by the terms of Clause 4 of the Agreement of 22nd October 1931, the First Defendant Company had the option to decide whether or not they desired to acquire any land in the vicinity of the Khong Heng Mine for inclusion in the said Kacha-Menelai Mining Scheme, and that in the event of their opting to include such lands in the said Scheme, the Plaintiff and the Second Defendants were bound to undertake to assist the First Defendant Company to acquire such lands for the purpose of such Scheme; 20 30

(b) that the first Defendant Company had in fact exercised the option to apply for Lots 5, 6 & 7 and the Railway Reserve for the purpose of inclusion in the Kacha-Menelai Scheme and had in addition called upon the Plaintiff and the Second Defendants to make good this undertaking to assist it to acquire such mining land; 40



- (c) that in fact both the Plaintiff and the Second Defendants did fulfil this undertaking to assist the First Defendant Company to acquire the said mining land;
- (d) that having taken advantage of the undertaking given by the Plaintiff and the Second Defendants and their assistance to acquire the said mining lands, the First Defendant Company was obliged to have the said mining lands included in the Kacha-Menelai Mining Scheme;
- (e) that the manner in and terms on which mining lands were included in the said Scheme, that is to say, by a sublease from the First Defendant Company to the Second Defendants and a subsublease from the Second Defendants to the Plaintiff, can be clearly ascertained from the contents of the Agreement of 22nd October 1931;
- (f) that the meaning of the terms of the said Clause 4 were clearly understood by the parties thereto and were acted upon by them on the basis of their understanding;
- (g) that the Court is free to ascertain the meaning and import of the terms of the said Clause 4 from the conduct of the parties subsequent to the execution of the said Agreement.

IV. The learned Judge should have found:-

- (a) that there was a clear and binding agreement between the parties that Lots 5, 6 & 7 and the Railway Reserve were to be included in the Kacha-Menelai Mining Scheme together with Lots 1 and 3 for mining by the Plaintiff;
- (b) that the said Lots 5, 6 & 7 and the Railway Reserve should be included in the said Kacha-Menelai Mining Scheme by the First Defendant Company executing a sub-lease to the Second Defendants and

In the  
Federal Court  
of Malaysia

No. 18

Memorandum of  
Appeal of  
First Appellant  
(Choong Sam)

14th August,  
1967

(continued)

In the  
Federal Court  
of Malaysia

No. 18

Memorandum of  
Appeal of  
First Appellant  
(Choong Sam)

14th August,  
1967

(continued)

the Second Defendants in turn executing a sub-sublease to the Plaintiff;

- (c) that the terms and conditions of the said subleases and subsubleases should be similar to the sublease and subsublease granted in respect of Lots 1-4 and referred to in the said Agreement of 22nd October 1931.

V. The learned Judge should have further found that the said Clause 4 was certain in its terms and gave rise to binding obligations between the parties which should be specifically enforced.

10

VI. The learned Judge having found that the documents in the Agreed Bundle of Documents clearly established that the Railway Reserve, if alienated to the First Defendant Company, was intended to be included in the Kacha-Menelai Mining Scheme should have ordered specific performance by the First Defendant Company granting a sublease thereover to the Second Defendants and the Second Defendants in turn granting a subsublease to the Plaintiff, such sublease and subsublease to be in the form and terms similar to those of Lots 1-4 when they were included in the said Mining Scheme and referred to in the Agreement of 22nd October, 1931.

20

VII. The learned Judge was wrong in holding that Lots 1-4 or any one of them do not form the subject matter of the action and failed to appreciate

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- (a) that Lots 1 & 3 were at the time of the filing of the action held under a sublease and subsublease by the Second Defendants and Plaintiff respectively as part of the Kacha-Menelai Mining Scheme;
- (b) that such sublease and subsublease expired before the hearing of the action;
- (c) that in the particulars given by the Plaintiff dated 9th September 1964 the Plaintiff had stated that the remaining areas in the Kacha-Menelai

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Mining Scheme to be worked are Lots 1, 3, 5, 6, 7 and the Railway Reserve;

- (d) that in the circumstances it was necessary to deal with Lots 1 & 3 for the purpose of disposing of all the matters arising out of the action.

10 VIII. The learned Judge was wrong in refusing to allow the Plaintiff to amend the prayer in the Amended Statement of Claim by the addition of a Paragraph ii(d) so as to include Lots 1 and 3 amongst the areas over which the Plaintiff has prayed for subsubleases to be granted to her.

IX. The learned Judge was wrong in refusing a declaration that the Agreement of 22nd October, 1931 is valid and binding between the parties to this action as respective successors of the parties to the said Agreement.

X. The learned Judge should have held

- 20 (a) that there is a valid and subsisting agreement binding upon the parties to the action;
- (b) that the Kacha-Menelai Mining Scheme is still being operated by the Plaintiff;
- (c) that the said Mining Scheme at present includes Lots 1, 3, 5, 6, 7 and the Railway Reserve lying between them;
- 30 (d) that the said lands should be subleased by the First Defendant Company to the Second Defendants who should in turn subsublease them to the Plaintiff for mining;
- (e) that the terms of the said subleases and subsubleases should be similar to those granted and extant on 22nd October 1931 in respect of Lots 1-4 being Sublease No. 170/29 and subsublease No. 20/31.

In the Federal Court of Malaysia

No. 18

Memorandum of Appeal of First Appellant (Choong Sam)

14th August, 1967

(continued)

Dated this 14th day of August, 1967.

.....Tsai.Pue.Shan.....  
Solicitor for the First Appellant

In the  
Federal Court  
of Malaysia

No. 18

Memorandum of  
Appeal of  
First Appellant  
(Choong Sam)

14th August,  
1967

(continued)

To:-

1. The Chief Registrar,  
Federal Court of Malaysia,  
Kuala Lumpur.
2. The Senior Assistant Registrar,  
High Court,  
Ipoh.
3. Messrs Shearn Delamore & Co.,  
Solicitors for the Second Appellants,  
Eastern Bank Building,  
No. 2, (Top Floor),  
Embankment,  
Kuala Lumpur. 10
4. Messrs. F.C. Arulanandom & Co.,  
Solicitors for the First Respondents,  
No. 1, Hale Street,  
Ipoh.
5. Messrs. P.P. Dharmananda & Co.,  
Solicitors for the Second Respondent,  
No. 27, Hale Street,  
Ipoh. 20

The address for service of the First  
Appellant is c/o Miss Y.L. Tsai, Advocate &  
Solicitor, No. 5, Jalan Yang Kalsom, Ipoh.

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No. 18  
JUDGMENT OF ONG, C.J.

In the  
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of Malaysia

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10 An extraordinary feature of this case - that a non-litigant now becomes the principal appellant while the leading plaintiff disclaims any further interest in these proceedings - requires a preliminary word of explanation. The action followed a dispute between the plaintiff, Madam Tong Swee King, and the defendant company (hereinafter called "Pegang" for short) regarding the proper interpretation of clause (4) of a tripartite agreement made on October 22, 1931. The third party to this agreement was the predecessor in title of the other defendants (now the second appellants) who have been joined as necessary parties. They had made common cause with the plaintiff until she decided to abandon this appeal.

20 The determination of the question at issue involves the right to mine certain extremely rich tin-bearing lands which were once a railway reserve. The new party, now the first appellant, having obtained from Tong Swee King a licence to enter upon and mine certain lands required to be sub-subleased to her under the 1931 agreement, had requested her to apply to Pegang for extra sub-subleases to include a portion of the former railway reserve, for which the company had been given mining leases by the State Government in 30 1963. This Pegang refused to do, preferring to mine the lands itself, rather than be content with tribute.

40 Shortly before making her application to Pegang Tong Swee King had entered into an agreement with her licensee, the first appellant, whereby he undertook to be solely responsible for any costs incurred by her in enforcing her rights under the agreement of 1931 by arbitration or litigation and Tong Swee King, for her part, agreed that the final decision whether or not to appeal against any order of the court arising out of such arbitration or litigation should rest with the first appellant. Upon the High Court deciding in favour of Pegang on December 9, 1966. Tong Swee King duly gave notice of appeal to the

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Federal Court, but on March 15, 1967, in breach of her agreement with the first appellant and contrary to his express instructions, she surreptitiously accepted from Pegang a cash payment, said to be \$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" and further agreed to withdraw her appeal and not to prosecute the matter further against the company in any proceedings. She filed notice of discontinuance of her appeal on March 24, 1967 - the same date that the first appellant, having come to know of her volte-face, filed notice of motion for leave to intervene and be substituted for Tong Swee King in the appeal. The order of this court made thereon was affirmed by their Lordships of the Privy Council in Privy Council Appeal No. 5 of 1968; the judgment explains the present position of the parties to this appeal.

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The railway reserve comprises an area of approximately 18½ acres which, together with the adjacent lands on either side, could not be worked formerly for fear of undermining the permanent way. In 1908 a short branch railway had been built to connect the then thriving mining village of Tronoh to Ipoh on the main line. Unfortunately it passed through some of the richest mining lands in the Kinta Valley, sterilising the entire railway reserve by rendering it out of bounds to miners. The principal result of the 1931 agreement had been the bringing together of 14 different parcels of mining land - 4 of them held by Pegang as lessees and sub-leased to one Ho Man who himself held 6 parcels - under a single mining scheme (known as the Kacha-Menelai Comprehensive Mining Scheme) to be operated as one mine by aggregation of Pegang's property with all the other parcels then being worked as sub-sublessee by Ho Kok Yew, the husband of Tong Swee King, under the name or style of Khong Heng Kongsi. It was in evidence and not contradicted that at the time of the 1931 agreement and long thereafter Ho Kok Yew was the sub-lessee or sub-sublessee of 13 out of the 14 parcels of mining lands which comprised the Kacha-Menelai Comprehensive Mining Scheme. The Ipoh-Tronoh railway ran through the middle of these aggregated lands, but its lines were

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destroyed and the rails removed during the Japanese occupation. That this railway had long outlived its usefulness even in pre-War days may be seen in the Directors' Report made on December 6, 1939 at the Annual General Meeting of Pegang (see p. 422) as follows:-

"Referring to your Directors' Report: Mine No:4, opened during the year by your Sub-lessee, was prospected by the Company at the Towkay's expense locating what is known as the valuable Schistose lead to a depth of nearly 100 feet below ground level beneath some 50 feet of old workings; your Sub-lessee intends to increase his pumping plant in order to cope with the unexpected depth; unfortunately previous prospecting by the Company disclosed that the 'Schistose lead' as opposed to the 'Granite Limestone contact lead' strikes N.E. from Mine No.4 under the Tronoh Railway to return and disappear in a southerly direction also beneath the Railway at a point some 24 chains east of the mine: thus you will understand that we, as are many others, remain up against the miniature railway which for many years has served little purpose other than obstructing tin-mines by its presence and the considerable main road traffic with its numerous level crossings."

The "sub-lessee" referred to in those minutes was Ho Kok Yew, who also was a Director of Pegang. This intimate connection between the Khong Heng Kongsai of Ho Kok Yew and Pegang and their mutual interest in the "Kacha-Menelai Comprehensive Mining Scheme" stands out conspicuously in the large volume of correspondence exhibited in this case.

It may not be out of place here to add a few words about the relationship between Mr. Ho Kok Yew and Mr. C.E. Cumming, the founder of Pegang and Chairman of its Board of Directors for 39 years. They had been friends of long standing and this was what Mr. Cumming said at the 23rd Annual General Meeting of Pegang on December 1, 1947:-

"Gentlemen: your Directors have already with deep regret recorded in their report the

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death of our colleague and Sublessee, Towkay Ho Kok Yew. I would ask you to rise for a time during which I express our sympathy with his family and Khong Heng Kongsi, of which he was Managing Director. Not only has the Company lost a valuable co-operator, but many others also a friend indeed; I and my family can never forget the material help afforded to us by Towkay Ho Kok Yew and his wife, at great risk I may add, when we were interned by the Japanese and immediately following our return to Ipoh when we were homeless.....".

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On April 22, 1947 Mr. Cumming had written to the Collector of Land Revenue, Batu Gajah, regarding an "Application for Permit to Continue Prospecting in view of Proposed Transfer of Kinta Water Main from Old Railway Reserve to Road Reserve and Deviation of S. Johan" (see p. 451 - 454). He concluded the letter as follows:-

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"10. I regret to say that Towkay Ho Kok Yew of 'Kacha-Menelai Mining Scheme' Khong Heng Kongsi and Director of Pegang Prospecting Company etc. is lying desperately ill at his house No. 2 Lau Ek Ching Street, Ipoh, and that I have been obliged to tell his family that I intend to carry on with due regard to his interests."

Such being Mr. Cumming's expressed intentions all along, it will be observed that throughout all the post-War years -- until he was invited on October 20, 1959, to resign so as to make way for Mr. Lee Wan Seng - the correspondence between Pegang and Ho Kok Yew (and with his widow after his death) was replete with affirmation and re-affirmations that the railway reserve would be made available to Khong Heng Kongsi as part of the Kacha-Menelai Mining Scheme. Mr. Cumming's removal therefore became necessary when the railway reserve was approved to Pegang. In fact he was voted out on September 30, 1959 (see pp. 920 - 922) even before he was informed that his presence on the Board would not be tolerated (p. 911). Shortly after, Mr. Lee Wan Seng replaced him as Chairman.

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I now turn to clause (4) upon which the



parties have placed different interpretations. It reads -

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"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 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."

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The meaning and intent of this clause seems to me perfectly clear. It contemplated future acquisitions of land in the vicinity of Khong Heng Kongsii Mine. The Khong Heng Kongsii was operating the aggregated area as a single mine under the Kacha-Menelai Comprehensive Mining Scheme. The railway reserve ran through these lands like a spinal cord. That it should necessarily form part of the Khong Heng Mine under the Comprehensive Scheme, whenever available, goes without saying: see letters dated July 2, 1946 (on pp. 455 - 6) from Pegang to the Commissioner of Lands, applying for 34 acres of "abandoned mining areas" including the railway reserve. The letter-heads "Khong Heng Mine" and "Kacha & Menelai Mining Scheme" were displayed by Pegang and the grounds of the application were stated as follows:-

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"The area would fall into our mining scheme of which the annual assessment is 6300 pikuls; our production was broken by restriction but we expect to live up to our reputation in the course of time; the Scheme is registered as No. 2/32 under the Mining Enactment the holder being Ho Kok Yew of No. 2, Lau Ek Ching Street, Ipoh."

My view simply iterates the conclusion of fact

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reached by the trial judge who stated it in unambiguous language, thus:-

"The documents in the Agreed Bundle clearly established that this Reserve, if alienated to the 1st defendant company, was intended to be included in the Scheme".

Hence, to aver - as the Defence does and as Counsel for Pegang still contend -- that this reserve "neither is nor was nor could be included in the said Agreement or the said Mining Scheme" is manifestly absurd.

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The question next to be decided is whether or not clause (4) imposes an obligation on Pegang to sublease the railway reserve, leaving tribute rights to the company. The circumstances leading to the execution of the agreement in 1931 have been set out by the learned trial judge in his grounds of decision (see pp. 193 - 5) and no complaint has been directed against this part of the judgment. It was quite clear, as the judge said, that "in consenting to the arrangement the 1st defendant company had insisted on a written agreement to be entered into by all three".

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Why Pegang was particularly anxious to have the stipulations of clause (4) expressed in writing is again non-controversial. These miners had doubtless been aware of the established practice in the Mines Department that State lands should be alienated for mining purposes only to persons actively engaged in working lands in the immediate vicinity thereof, in preference to others hailing from more distant parts or having a remoter interest in current mining operations. Since Pegang was founded by Mr. Cumming in 1920 he had been content all along to acquire lands for it as a prospecting company and lease them to be worked on tribute by miners. Indeed, Pegang never did a stroke of mining itself for over 40 years until the railway reserve became available. On the other hand, Ho Kok Yew was the miner actually implementing the Kacha-Menelai Comprehensive Mining Scheme and entitled on that account to priority over Pegang in any application for new lands within the area of the Scheme or its vicinity. It was manifestly for this reason that clause (4) was expressly inserted at the

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insistence and for the benefit of Pegang in order to ensure that any available new lands which might fall to be mined by Ho Kok Yew should be liable to payment of tribute to Pegang in the same manner as the lands comprised in the Scheme. What interest, otherwise, could Pegang possibly have, as non-miners, except the tribute rights which the company claimed under the Scheme? Hence, in the context of the agreement, the weight to be given to this clause cannot be denied. This agreement contained only six clauses. Clause (1) removed the causes of Pegang's past dissatisfaction with its sub-lessee Ho Man's mining operations, while clause (2) was merely incidental thereto. Clause (3) obliged Pegang to assist the other parties in furtherance of the Mining Scheme and to grant renewals of subleases for the duration of its own leases. Clause (4) then went on to provide for new acquisitions "for the purpose of including the same in the said Mining Scheme". Finally, clauses (5) and (6) provided for remedies for breach of contract - including non-observance of clause (4) - and arbitration of future disputes and differences.

Reading this agreement the learned trial judge himself was driven to find, as he unambiguously put it, that "on the face of it, it seems plain ..... that this was an undertaking by Ho Kok Yew and Ho Man to assist the 1st defendant company in the acquisition of lands for inclusion in the Kacha-Menelai Scheme". In other words, this clause involved their surrender of valuable rights to Pegang. What was the company giving in return? Nothing, thought the judge because, in his own words "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 acquisition of land for the purpose of being included in the Scheme". But, it may be asked, was it a stipulation primarily for close co-operation in general and only secondarily, having incidental reference to the acquisition of new lands in particular? With respect, I do not think so, for there is no ambiguity in the expression of their common intention defining with precision the object and purpose of this clause. In coming to his conclusion the judge stated his reasons thus:-

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"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 acquisition of land for the purpose of being included in the Scheme. As such it cannot be regarded as a definite or completed agreement".

As authority for this view the learned judge cited a passage in the judgment of Viscount Dunedin in May and Butcher Ltd. v. The King<sup>(1)</sup> and another from the judgment of Parker J. in Hatzfeldt-Wildenburg v. Alexander<sup>(2)</sup> and he continued as follows:-

"In this case even if there was any agreement between the parties, it was no more than an 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

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(1) (1934) 2 K.B. 17, 21.  
(2) (1912) 1 Ch. 284, 288.

tribute as may be agreed and to other conditions for mining operations. As nowhere else in the remaining clauses of the agreement which could lead me 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".

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10 The ratio decidendi was, therefore, stated in the clearest of terms: there was no certainty whatever regarding the contingency provided for; ergo, the principle stated in the cited authorities applied; moreover, the agreement here contemplated the execution of a further agreement, namely, the sub-leases, for which the rate of tribute, among other things, remained to be agreed upon; for that reason also the claim must fail.

20 With all respect, I think this is taking too simplistic a view of the meaning and intent of clause (4). In the first place, the cases cited are not authorities for the proposition that, because the contingency provided for was uncertain, clause (4) relating thereto "cannot be regarded as a definite or completed agreement". However remote the possibility, there is no rule of law which says that any bargain or agreement made relating to a future event which may never happen is not a binding contract. Examples which come  
30 readily to mind are policies of marine and fire insurance.

In the second place, was it a logical, or necessary, or even reasonable inference that the parties contemplated the execution of a further agreement? The agreement itself was indubitably drawn by a legal draftsman. It would be passing strange if he had drawn clause (4) so that this clause alone represented merely pious hopes  
40 without intending it to be as legally binding as the other five clauses therein. Indeed sanctions for breach of clause (4) are provided by clause (5). Stranger still would it be to assume that both Ho Man and Ho Kok Yew, with their eyes open, surrendered valuable rights for no quid pro quo whatsoever. They undertook not to obstruct any application by Pegang for new lands; nay, more,

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they undertook to use their best endeavours to assist the company in acquiring such mining lands or rights therein, to their own detriment. They were miners ripe in experience who appreciated the value of the new acquisitions -- especially around the railway reserve, for which, according to the evidence, Ho Kok Yew had contributed his share towards the prospecting expenses. They knew as well as Pegang how rich the railway reserve was. Ho Man was then holding leases himself over Lots 5, 6 and 7 (so numbered for easy reference in the Plan) which straddled the reserve and entitled him to priority, as against Pegang, over the area in between. Ho Kok Yew was the man in possession of all the 14 parcels of the Kacha-Menelai Comprehensive Mining Scheme and on that account having top priority over the others. The judge, nevertheless, was of opinion that clause (4) gave them no rights whatsoever to the railway reserve once it was alienated to Pegang. This view, I regret to say, cannot be supported upon any reasonable view of the facts. A contract between men of good business acumen must in the nature of things be fair and reasonable and there was nothing in the circumstances of this case to suggest that Pegang was in a position to dictate terms, however unreasonable, to its own peculiar advantage. The principle to be applied, therefore, in reading clause (4), is to construe it "fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat: per Lord Wright in Hillas v. Harcourt.(3)

In coming to the decision he did, it would appear that the judge overlooked what was significant enough in clause (4) to have satisfied both Ho Man and Ho Kok Yew that they were not surrendering valuable rights for nothing in return. The new lands were clearly stated to form part of the Kacha-Menelai Comprehensive Mining Scheme when obtained. All applications by Pegang for the new lands were made on that basis. For all lands in this Scheme the rate of tribute and all other material conditions were known factors. There was no reason for any party to

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(3) 147 L.T.R. 514.

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10 demand or expect the part to be dealt with differently from the whole. The onus must be on the party who contends otherwise. Therefore, id certum est quod certum reddi potest, which is a maxim too well-known to need reiteration. Mining sub-leases are in standard form as prescribed in the Mining Enactment. For all practical purposes, it has been the accepted standard practice, for as long as the Enactment itself and the enactments it superseded were in force, that all that was needed for a sublease was agreement in one essential particular, namely, the rate of tribute. Such being the case, I regret to say that I am unable to agree with the conclusions of the trial judge that any new subleases between the parties require further agreement settling material terms and conditions. In my view clause (4) is self-contained and self-sufficient by virtue of the explicit reference to the Kacha-Menelai  
20 Comprehensive Mining Scheme.

On this point there was ample documentary evidence proving that the parties in fact were ad idem as to their respective rights and obligations under clause (4). Having waded through the massive bundles of documents produced at the trial, I think it is sufficient to refer to a few. There is a letter dated February 9, 1949 from Evatt & Co. the Secretaries of Pegang to Tong Swee King, the plaintiff, in which they stated:-

30 "Your letter of 21st January addressed to Mr. Chan Phooi Hoong has been considered by the Directors.

40 They consider that the rights of all parties are adequately covered by the existing agreements and sub-leases, and the Company is prepared to stand by the terms of the agreements and sub-leases if the other parties carry out their responsibilities. They do not consider that there is any need for a further 'comprehensive agreement' as requested by you and they are not prepared to sign one".

It is important to note that a copy of this "comprehensive agreement" has been sent to Pegang. Its clause (9) substantially reproduced clause (4) of the 1931 agreement with the addition of a

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last sentence, presumably introduced ex majore cautela, as follows:-

"The company on its part undertaking in the event of securing any mining lease or other relative rights to sublease or assign them to the miner for the express purpose aforesaid."

No exception was taken to this obligation expressed on the part of the company to sublease any new acquisition to the plaintiff; on the contrary it was explicitly affirmed. 10

The Plaintiff replied on February 17, 1949 underlining the statement of fact in her letter as follows:-

"I note that your Directors consider that the rights of all parties are adequately covered by the existing agreements and subleases".

On July 6, 1949 Messrs. Thomas and Hornidge, consulting Mining Engineers to the plaintiff, wrote to the Chinese Tin Mines Rehabilitation Board as follows:- 20

".....The representative of the Estate (of Ho Kok Yew) appreciated long ago that there was no question of Pegang Prospecting Co. Ltd. entering into any fresh agreement due to the fact that the present agreement contains dumping facilities for the mine which for certain reasons it would be impossible to replace. It was eventually agreed many months ago that any additional agreement was not necessary. 30

2. We are informed today by the representative of the Estate, Mr. Tong Sam Poy, that the delay was due to the Board, or the solicitors of the Board as we were told, requiring an assurance that the abandoned railway reserve adjoining the mine and applied for by Pegang Prospecting would be subleased to the mine as soon as a mining title was received as a quid pro quo for the subletting of M.L. 11544. 40



3. We attach hereto a letter from the Secretaries, Pegang Prospecting Co. Ltd. giving the assurance requested."

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The letter above referred to was as follows:-

"7th July 1949

The Secretary,  
Chinese Tin Mines Rehabilitation Board,  
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Sir,

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Pegang Prospecting Co. Ltd.

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With reference to the third paragraph of Messrs. Thomas & Hornidge's letter dated 6th July 1949. addressed to you and which accompanies this letter, we have pleasure in assuring you that, in consideration of M.L. 11544 being sublet to Towkay Foong Seong, we will arrange for a sublease of the abandoned Railway reserve adjoining Mine 5 to the Estate of Ho Kok Yew as soon as this Company receives the Mining Lease for which it has already applied.

We are, Sir,  
Your obedient servants,  
Sd. Evatt & Co.  
Secretaries.

c.c. Thomas & Hornidge  
c.c. Estate of Ho Kok Yew."

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Lest it be suggested that, at that stage, the last sentence was added to clause (9) of the draft agreement in an attempt by the plaintiff to improve her position by tacking on an undertaking which was never in clause (4) of the 1931 agreement, I hasten to add that this draft should be read, as I have done, in the light of what transpired earlier at the Board Meeting on August 5, 1948 (see pp. 542 - 547). It had then been minuted (see p.543) even more explicitly as follows:-

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"Railway Reserve: Mr. Chan Kwong Soon agreed that Mr. Chan Phooi Hoong would use

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his best endeavours to have the portion of the Railway Reserve adjoining M.L. 11447 alienated to the Company: the Company would then sublease it to him at 7% and he would sub-sublease it to the Estate of Ho Kok Yew, deceased, at 10% tribute".

The concluding paragraph of these minutes read:-

"It was agreed by all present that, when the matters in discussion had been settled, it was desirable that a new agreement should be drawn up between the existing parties in place of the 1928 Dumping Agreement and the 1931 Mutual Assistance Agreement".

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Hence, it was merely pursuant to the decision of the Board that the plaintiff produced the draft, which the company considered supererogatory. The 1931 agreement, be it noted, was described by Pegang as a "Mutual Assistance Agreement". Would there have been any mutuality if the assistance to be rendered was all one way? The acknowledgment of Pegang's own obligation to sublease the reserve to Chan Phooi Hoong for a tribute of 7% and by the latter at 10% to the Estate of Ho Kok Yew therefore leaves no doubt as to the quid pro quo.

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It is therefore abundantly clear that the parties were at all times fully conscious of their precise mutual rights and obligations under clause (4) with regard to the railway reserve. In the year following the exchange of letters quoted above the Secretaries of Pegang proceeded to write on May 16, 1950, to the plaintiff (with copy to Chan Phooi Hoong) reaffirming the rights and obligations of the contracting parties thus:-

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"With regard to the Railway Reserve, it has already been agreed, and we confirm our undertaking, that in the event of our obtaining a lease or leases over any portion of the existing railway reserve adjoining our property, we will grant a sub-lease to Mr. Chan Phooi Hoong at 7% and he has undertaken to grant you a sub-sublease over the same at 10% tribute. Mr. Chan Phooi Hoong further agreed that he would use his best endeavours to have any Railway Reserve area to which he

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might be considered to have a prior claim, alienated to the Company, or if the leases were alienated to him, he would transfer them to the Company; in every such case, the Company would sublease the areas to him at 7% and he would sub-sub-lease them to you at 10%. These matters were agreed by Mr. Chan Phooi Hoong's attorney at the meeting on 5th August 1948".

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10 This was written almost 19 years after the 1931 agreement, when memories perhaps needed refreshing. An iteration of the meaning and effect of clause (4) is not to be taken to imply that there was a new agreement made on August 5, 1948. Had there been any doubt regarding the rate of tribute, it was then settled once for all. At all events it was never the case pleaded by Pegang. Having thus spelt out its own obligations in 1950 -- exactly as they must have been  
20 understood all along by the other parties to the agreement of 1931 -- can Pegang now be heard to say that it never held out any promise as alleged and that in any event, even if there was such promise, it is nevertheless unenforceable because there still remain undefined areas of agreement essential to a valid contract?

Not only among the parties inter se was the meaning and effect of clause (4) perfectly clear, but Pegang had also made representations to the  
30 same effect to the Collector of Land Revenue in a letter of July 7, 1947 bearing the heading "Pegang Prospecting Co. Ltd. and Kacha & Menelai Mining Scheme", as follows:-

"We have the honour to refer to the application made by this Company for a mining lease over part of the Tronoh Railway Reserve..... The position is that the Company has an agreement with the Estate of 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 enable mining to be recommenced, but before the Loan can be obtained they have to put up an approved scheme and this entails plans for working the Railway Reserve".

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(continued)

On September 11, 1951 Pegang's Secretaries again wrote to the Collector of Land Revenue enclosing an application for a prospecting licence over the Railway reserve and adjoining lands. The letter was in these terms:-

"This application refers to land adjoining the Company's present mining leases and refers to areas which are required for future extension of existing mines".

In the event, the applications for the railway reserve remained in abeyance for a considerable period. On April 6, 1957 Pegang next applied for a mining lease over Lot 30286 (No. 5 in the Plan). This was obviously with a view to acquiring the railway reserve adjoining it. Lots 5, 6 and 7 including the railway reserve were duly approved to Pegang in 1959 (see pp. 894 - 897). But it will be observed that as late as October 1956, Pegang had granted Chan Phooi Hoong a sublease No. 78/56 at 7% tribute over Lots 21952 and 29650 (Nos. 1 and 3 in the Plan) which straddled another section of the railway reserve. This Pegang need not have done had it not recognised the 1931 agreement as binding. Again, pursuant to such agreement, these two parcels were promptly sub-sub-leased to the plaintiff. These same lands were still being worked by the plaintiff when she issued writ in the action against Pegang on July 16, 1964; action was inevitable following an exchange of letters calling for subleasing of the railway reserve by Pegang. To Chan Phooi Hoong's representatives she had written on July 9, 1963 (with a copy to Pegang) as follows:-

"I, Tong Swee King, of Khong Heng Kongsui understand that the lands formerly known as Tronoh Railway Reserve .... have been approved to Pegang Prospecting Co. Ltd. (now known as Pegang Mining Co. Ltd.) and that Mining Certificates thereto are being issued.

Under the circumstances, will you now please take the necessary steps so that my mine (Khong Heng Kongsui) could extend its workings to the said Railway Reserve".

The representatives of Chan Phooi Hoong then wrote

to Pegang on July 18, 1963, calling upon the company to carry out its obligations. To its sublessee and the plaintiff sub-sublessee Pegang's Secretaries replied on July 27, 1963 as follows:-

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23rd July 1970  
(continued)

10           "Your letter of 18th July and Madam Tong Swee King's letter of 9th July have been brought to the notice of our Board of Directors. We are instructed to inform you that, in no circumstances whatsoever does your sub-sublease extend the working of the Khong Heng Kongsu Mines into any portion of land which has been approved to, or is owned by, this Company.

20           2. We are further instructed to advise you that it is not, and never has been, the intention of our Board to make available for mining by the Khong Heng Kongsu any portion of the former railway reserve. The portion of the railway reserve in respect of which this Company has an approved application for a mining title will be incorporated in this Company's own mining scheme".

On this date, then, appeared the first clear repudiation by Pegang of the 1931 agreement. After scant delay, it was followed by the plaintiff's action.

30           Ordinarily this stand taken by Pegang should be nothing unusual had the question arisen for the first time between competing claimants to the railway reserve. But it is, to say the least, astounding that Pegang could have treated all previous correspondence on the matter, especially the assurance given in its letter of May 16, 1950, as writ in water. Pegang knew in 1950, as it did in 1931, that the railway reserve contained extremely valuable deposits of tin-ore. Should this court in all conscience be astute to assist Pegang in wriggling out of its legal obligation? To this question there should be  
40           but one answer for the reasons which I have already stated at length.

The fact that the subleases -- and the sub-subleases thereunder -- expired on December 31, 1965 is of course immaterial, for the action was commenced on July 16, 1964 and at the material

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date the plaintiff was working Lots 21592 and 29650 (Nos. 1 and 3 on the Plan) as sub-sublessee under the Kacha-Menelai Comprehensive Mining Scheme. No other mine but Khong Heng's was then in operation over any part of the area covered by this Scheme. Nor does the fact that the appellant was mining these lands as the plaintiff's licensee alter the rights and obligations of the parties to the 1931 agreement. This was the view expressed by the Privy Council in relation to arguments put forward against the interlocutory order made by this court. With respect I hold the same view.

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At this stage, I should digress for a moment to add a few words regarding Lots 21952 and 29650. It will be remembered, as I stated earlier, that these two lots straddling the railway reserve had been subleased by Pegang in October 1956 to Chan Phooi Hoong at 7% tribute under Sublease No. 78/56. Mr. Cumming was then Chairman of Pegang's Board of Directors and he was an original signatory of the 1931 agreement. Under him Pegang had doubtless no intention to renege its obligations. On December 16, 1961, however, Pegang under its new Chairman, Mr. Lee Wan Seng, realised that the sublease did prejudice their position as regards the interjacent railway reserve. Hence the Board decided as thus minuted (see p. 1284):-

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"RAILWAY RESERVE: It was agreed, in principle, that the Railway Reserve Area should be mined by the Company under the General Managership of Vallentine Dunne & Associates Ltd. It was also agreed that it would be necessary for the Company to obtain a cancellation of Sublease No. 78/56, over M.Ls. 8899 and 11543, Lots Nos. 21952 and 29650, in order that the Company might be in a position to mine the Railway Reserve Area. Mr. Ho Win Shen undertook to make enquiries and to advise the Board of the amount of compensation which would be requested in this connection."

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This decision of the Board was cited by counsel as evidence of acquiescence by the plaintiff Tong Swee King in the Company taking over the railway reserve for itself -- on the

ground that one of the directors present was her son, Ho Win Shen. In my view this is fallacious. He was on the Board qua director by virtue of his, or his late father's, holdings in the company. He was not in attendance as representative of Khong Heng Kongsi, he was never Khong Heng's managing partner with authority to make decisions binding on the Kongs, he was not the legal representative of the Estate of Ho Kok Yew, deceased, who was the sub-sublessee, and there is no evidence that this decision "in principle" was ever accepted by the plaintiff. Ho Win Shen proved to be persona non grata to his co-directors and was removed by them on April 27, 1963.

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As to the other defences pleaded by Pegang, I think they may be disposed of briefly. It was contended that the 1931 agreement had lapsed by effluxion of time or by repudiation by the other parties to the agreement. It was also pleaded in the alternative that the other parties, being in breach of the agreement, Pegang is no more bound thereby. The short answer to all these contentions is that, if they were right and the agreement had ceased to be valid, it is amazing that, after conclusion of the hearing and arguments by counsel in the High Court, Pegang should have found it necessary to take steps, while judgment was pending, to give notice of termination of the agreement in these terms:-

"Pegang Mining Company Limited

31st January 1966.

The Executors of the Estate of  
Chan Pooi Hoong, Deceased  
Madam Tong Swee King.

Dear Sirs/Madam,

In view of your breaches and your repudiation of the Agreement of 22nd October 1931 disclosed by the evidence in Ipoh High Court Civil Suit No. 304/64 the Company hereby gives you notice that it exercises its powers under Section 5 of the Agreement to cancel any mining rights to which the Company is entitled and of which you claim to have the benefit.

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The Agreement is therefore now cancelled.

This notice is without prejudice to our claim that the Agreement has in any event been determined because the ground covered by the Kacha & Menelai Comprehensive Mining Scheme is worked out.

Yours faithfully,

Sgd. Evatt & Co.

Secretaries."

Pegang was doubtless aware all along of its rights under clause (5) of the 1931 agreement. As it had chosen to disregard the alleged breaches they must be held to have been waived. If, in addition, there was any unequivocal repudiation of the agreement -- of which there is no evidence -- Pegang had never signified its acceptance that the agreement was at an end. Where is the evidence that Pegang had done so? I do not think it right to allow Pegang to blow hot and cold as it pleased. Cancellation of the agreement was expressed to be effective from the date of the notice. Such being the case, it is implicit that the agreement was taken as binding until January 31, 1966. I have nevertheless, carefully considered the various defences and the arguments of counsel thereon. It is sufficient to say in a word, that I find no merits whatever in any of them. To take one instance, it seems to me that for Pegang to say that the "Kacha-Menelai Comprehensive Mining Scheme is worked out" is to fly in the face of the facts; not only do Lots 1 and 3 remain to be worked out by the plaintiff or her licensee, but also Lots No. 5, 6 and 7 over which Pegang had obtained fresh leases for itself in substitution for the successors of Ho Man. Indeed, Pegang is presently mining on Lot 5 -- which gives the lie to the allegation that the Kacha-Menelai Scheme had since ceased to exist after its lands had been exhausted or worked out.

Before concluding, I think it necessary to mention that I have not overlooked a point made much of by Pegang, that the plaintiff had been dilatory or holding back from paying for the cost of deviating the pipe-line required before the



railway reserve could be thrown open to mining, with the result that Pegang had to bear such expenses. It is important to remember that Pegang was a prospecting company, living solely on tribute. Such tribute had always been derived from lands obtained by Pegang at its own expense.

10 The question of law which may be said fairly to arise in the present case is: Should the burden of complying with the conditions prescribed by the State for the grant of any mining lease fall on the grantee? I have no doubt that the answer must be in the affirmative. Pegang was in fact the party required by the Kinta Land Office to observe and carry out inter alia the following conditions in order to obtain approval of its application for the former railway reserve (see pp. 894 - 6):-

- "(ii) Premium: \$50/- per acre;
- (iii) Rent: \$2/- per acre per annum;
- 20 (iv) Survey fees: actual cost;
- (vii) payment of the cost of any necessary deviation of the pipe-line;
- (viii) payment of a contribution of \$5/- per picul based on the estimated tin concentrate content of the area under application etc.;
- (ix) execution of an agreement for the deviation of the pipe-line;
- 30 (x) execution of a Letter of Indemnity in favour of Government against claims by T.O.L. holders and the Temple Committee."

40 In the absence of any special agreement to the contrary -- of which there was none -- it is clear that the burden of paying for the pipe-line cannot be expected of a sublessee or sub-sublessee, any more than payment by him of the premium and survey fees. What is more, the levy of \$5/- per picul imposed by condition (viii) is clearly a liability of Pegang's, as was the payment of the premium, annual rent and survey fees. The conditions, such as they were, cannot be deemed severable, so

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(continued)

that condition (vii) should be considered on a different and special footing. These conditions were immediately accepted by Pegang by its letter of April 27, 1959 (see p. 900). Treating the liability as entirely its own concern, Pegang never communicated these terms to the plaintiff or otherwise intimated that she would have to pay the whole or contribute a proportion of the cost of the pipe-line. Had this been shown to have been done, there may perhaps be some merit in the argument that she must be deemed to have abandoned her rights. In point of fact, had she been asked, or vouchsafed the opportunity to make a contribution, the evidence leads me to believe that she would have readily done so. This is borne out by evidence on the record. At the Board Meeting of Pegang on August 5, 1948 an undertaking to pay for the pipe-line deviation was given by the plaintiff's attorney and minuted (see p.543) as follows:-

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"Pipe Line Deviation: Mr. Tong Sam Pooi said that his principal would proceed with the deviation of the Government pipe line as agreed by Government".

This undertaking was never withdrawn. Indeed, the Consulting Mining Engineer to Khong Heng Kongsu subsequently confirmed in a letter to the Government Executive Engineer dated January 13, 1950 that "the Estate of Ho Kok Yew must decidedly want to make the deviation to the pipe-line". Since then the plaintiff had never given any intimation of a contrary intention as she never did relinquish her ambition to mine the railway reserve. In these circumstances, therefore, Pegang's failure to notify her of the conditions prescribed for approval of the reserve lands may significantly be coupled with the expulsion of Mr. Cumming from the Board of Directors. She was kept in the dark so that Pegang could steal a march over her. Then Mr. Cumming's removal seemed expedient, because his co-directors were well aware of his promise to do the right thing by the family of the late Mr. Ho Kok Yew. Among the signatories of the 1931 agreement he was the sole survivor who should know, as he had repeatedly affirmed in writing, that clause (4) was an agreement which required no further agreement to

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be legally binding. He had given abundant proof that he would not eat his words. Hence I do not think that failure by the plaintiff to defray the costs of the new pipe-line amounted to such default which should debar the plaintiff from the reliefs sought.

I would accordingly allow this appeal and declare and order as follows:-

- 10 1. That the Agreement of October 1931 is valid and binding between the parties thereto and their respective successors and that the material rights and obligations of the parties and their successors remain effective except as varied by consent of all parties.
- 20 2. That pursuant to the said Agreement the Pegang Mining Company Limited in consideration of the payment of tribute at 7% do execute sub-leases to the 2nd appellants as representatives of Chan Phooi Hoong, deceased, over the following lands, that is to say
  - (i) M.L.8899, 10217, 9946, 11646 and 11647;
  - (ii) M.C. 3255 now M.L. 14509;
  - (iii) M.C. 3256 now M.L. 14507;
  - (iv) The whole of the Railway Reserve now M.L. 14508; and
  - (v) M.L. 11543.
- 30 3. That the 2nd appellants in consideration of the payment of tribute at 10% do execute sub-subleases over all the lands so sub-leased to them by Pegang Mining Company Limited in favour of Tong Swee King (f), as representative of the Estate of Ho Kok Yew, deceased.

40 The plaintiff, now second respondent, although served, has not asked to be heard or taken any part in this appeal. Since the order of this court requires the second appellant to execute sub-subleases of the lands above-described in her favour, it is possible that the

In the  
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(continued)

In the  
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23rd July 1970  
(continued)

order may be frustrated should she be persuaded by Pegang to refrain from accepting her sub-subleases. In that event she and Pegang would still succeed in denying to the first appellant his licence to work the lands, notwithstanding that, once clause (4) is held valid, as I do, his rights as a litigant to an order giving him possession must follow as a matter of course. For this reason I consider it necessary to make further orders as follows:-

- 10
4. That in the event of the second respondent neglecting or failing within 2 weeks of notice being given to her of the sub-subleases being ready for her acceptance and execution thereof, the Registrar of this court be and is hereby directed to accept such sub-subleases so as to carry out the obligation of the Estate of Ho Kok Yew deceased to Choong Sam, the first appellant, and so as to enable him to enter upon and work the lands covered by such sub-subleases in accordance with the terms of his agreement with the Estate of Ho Kok Yew deceased dated July 27, 1964. 20
5. And it is declared that Choong Sam, the first appellant, is entitled to specific performance of his said agreement with the estate of Ho Kok Yew deceased either by the representative of the said Estate or by the Registrar of this court as the case may be so long as the Mining Leases and sub-leases and sub-subleases over the said lands shall be renewed or continue in force. 30
6. And it is directed that the Collector of Land Revenue, Batu Gajah, do make the appropriate memorials and entries on the Register of Mining Titles in respect of the said lands to give effect to the terms of this Order.
- My attention being directed to the interlocutory order made by the High Court on October 25, 1965 permitting the Pegang Mining Co. Ltd., the first respondent, to remain on and mine such parts of the said lands as it had entered upon, the further order of this court is that the order of October 25, 1965 be discharged, that such right 40

of the first respondent be and is hereby terminated and that Pegang do deliver up possession to the first appellant Choong Sam and lastly that the first respondent do pay over to the first appellant the nett proceeds of sale of all ore won from Lots 44407, 44408 and 30286 as undertaken by the first respondent and set out in the said Order of October 25, 1965. Liberty to all parties to apply generally.

In the  
Federal Court  
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23rd July 1970  
(continued)

10 As to costs, the first respondent will pay all costs of the trial and of this appeal to Choong Sam, the first appellant. We will hear argument on the second appellants' costs. The second respondent is, of course, not entitled to nor liable for any costs.

(Sgd.)

CHIEF JUSTICE  
HIGH COURT IN MALAYSIA

20 Kuala Lumpur,  
23rd July, 1970

Dr. R. Ramani (Messrs Chinn Swee Onn and T.K.Sen with him) for first appellant.

Mr. Ronald T.S. Khoo for second appellants.

Dato' Eusoffe Abdoolcader (Messrs A.L. Hills and N.T. Rajah with him) for first respondent.

Second respondent absent and not represented.

30 TRUE COPY  
(TNEH LIANG PENG)  
Secretary to Chief Justice  
High Court  
Malaya

24/7/70

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In the  
Federal Court  
of Malaysia

No. 20

ORDER OF FEDERAL COURT

No. 20  
Order of  
Federal Court  
23rd July 1970

Coram: Ong Hock Thye, Chief Justice, High  
Court, Malaya.  
Suffian, Judge, Federal Court, Malaysia.  
Gill, Judge, Federal Court, Malaysia.

IN OPEN COURT

THIS 23RD DAY OF JULY, 1970.

O R D E R

THIS APPEAL coming on for hearing on the 11th, 12th, 13th, 14th, 16th, 17th and 18th days of March, 1970, in the presence of Dr. R. Ramani (with him Mr. Chinn Swee Onn and Mr. T.K. Sen) of Counsel for the Appellant firstly abovenamed and Mr. Ronald Khoo Teng Swee of Counsel for the Appellants secondly abovenamed and of Dato Eusoffe Abdoolcader (with Him Mr. A.L.Hills and Mr. N.T. Rajah) of Counsel for the Respondent firstly abovenamed, the Respondent secondly abovenamed not appearing:

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AND UPON READING the Record of Appeal filed herein AND UPON HEARING the arguments of Counsel aforesaid IT WAS ORDERED that this Appeal do stand adjourned for judgment:

AND the same coming on for judgment this day in the presence of Dr. R. Ramani (with him Mr. Chinn Swee Onn and Mr. T.K. Sen) of Counsel for the Appellant firstly abovenamed and Mrs. S.B. Menon of Counsel for the Appellants secondly abovementioned and Dato Eusoffe Abdoolcader (with him Mr. N.T. Rajah) of Counsel for the Respondent firstly abovenamed, the Respondent secondly abovenamed not appearing:

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IT IS ORDERED that the Appeal be and is hereby allowed and that the Order of the High Court of the 9th day of December, 1966 is hereby set aside:

AND IT IS DECLARED AND ORDERED as follows:

1. That the Agreement of the 22nd day of October 1931 is valid and binding between the parties thereto and their respective successors and that the material rights and obligations of the parties and their successors remain effective, except as varied by consent of all parties;
- 10 2. That pursuant to the said Agreement the Pegang Mining Company Limited the Respondent firstly abovenamed in consideration of the payment of tribute at 7% do execute subleases to the Appellants secondly abovenamed as representative of the Estate of Chan Phooi Hoong, deceased, over the following lands, that is to say
- (i) the lands formerly comprised in M.L. 8899 and 10217 for Lots 21952 and 24766 respectively;
- 20 (ii) M.C. 3255 now M.L. 14509 for Lot No. 44407;
- (iii) M.C. 3256 now M.L. 14507 for Lot No. 30286;
- (iv) the whole of the Railway Reserve now M.L.14508, for Lot No. 44408; and
- (v) M.L.11543 for Lot No. 29650.
3. That the Pegang Mining Company Limited the Respondent firstly abovenamed do execute in favour of Tong Swee King (f) as Representative of the Estate of Ho Kok Yew deceased, the Respondent secondly abovenamed:
- 30 (i) a sublease over the land formerly held under M.L.9946 for Lot No. 26173 in consideration of the payment of tribute at 7%; and
- (ii) a sublease over the lands formerly held under M.L. 11646 and M.L. 11647 for Lots 31089 and 31091 respectively in consideration of the payment of tribute at 8%.
- 40 4. That the Appellants secondly abovenamed in

In the  
Federal Court  
of Malaysia

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No. 20

Order of  
Federal Court  
23rd July 1970  
(continued)

In the  
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No. 20

Order of  
Federal Court  
23rd July 1970  
(continued)

consideration of the payment of tribute at 10% do execute sub-subleases over all the lands subleased to them by Pegang Mining Company Limited the Respondent firstly abovenamed in favour of Tong Swee King (f) as Representative of the Estate of Ho Kok Yew deceased, the Respondent secondly abovenamed:

5. That in the event of Tong Swee King (f) the Respondent secondly abovenamed neglecting or failing to accept within two (2) weeks of notice being given to her of the subleases and sub-subleases as hereinbefore stated being ready for her acceptance and execution, the Registrar of this Court be and is hereby directed to accept such subleases and sub-subleases so as to carry out the obligations of the Estate of Ho Kok Yew deceased to Choong Sam, the Appellant firstly abovenamed, and so as to enable him to enter upon and work the lands covered by such subleases and sub-subleases in accordance with the terms of his Agreement with the Estate of Ho Kok Yew deceased dated July 27, 1964: 10 20

AND IT IS DECLARED that Choong Sam, the first Appellant, is entitled to specific performance of his said Agreement with the Estate of Ho Kok Yew deceased either by the representative of the said Estate the Respondent secondly abovenamed or by the Registrar of this Court as the case may be, so long as the Mining Leases and sub-leases and sub-subleases over the said lands shall be renewed of continue in force: 30

AND IT IS DIRECTED that the Collector of Land Revenue, Batu Gajah, do make the appropriate memorials and entries on the Register of Mining Titles in respect of the said lands to give effect to the terms of this Order:

AND IT IS ORDERED that the Order of the High Court of the 25th day of October, 1965 as varied by the Order of the 9th day of December, 1966 be and is hereby discharged: 40

AND IT IS ORDERED that the right of the Respondent firstly abovenamed to remain on and mine such part of the said lands as it had entered upon be and is hereby terminated:



AND IT IS ORDERED that the Respondent firstly abovenamed do deliver up possession of the said lands it had entered upon to the Appellant firstly abovenamed on or before the 31st day of August, 1970:

In the  
Federal Court  
of Malaysia

No. 20

Order of  
Federal Court  
23rd July 1970  
(continued)

10 AND IT IS ORDERED that the Respondent firstly abovenamed do pay over to the Appellant firstly abovenamed on or before the 31st day of August 1970 the nett proceeds of sales of ore won from lots 44407, 44409 and 30286 as undertaken by the Respondent firstly abovenamed and set out in the Order dated 25th October, 1965:

AND IT IS ORDERED that there be liberty to all parties to apply generally:

20 AND IT IS ORDERED that the Respondent firstly abovenamed do pay to the Appellant firstly abovenamed and the Appellants secondly abovenamed, the costs of this Appeal and the costs in the High Court, except that as to the costs of the Appellants secondly abovenamed in the High Court they shall be limited to the extent stated in the Order of Court dated the 9th day of December, 1966:

AND the Court certifies for two Counsel for the Appellant firstly abovenamed both here and in the Court below:

AND IT IS LASTLY ORDERED that the sum of \$500/- (Dollars five hundred only) deposited in Court by the Appellants as security for costs of this Appeal be paid out to the Appellants.

30 GIVEN under my hand and the seal of the Court this 23rd day of July, 1970.

(L.S.)

Sgd:  
.....  
CHIEF REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.

In the  
Federal Court  
of Malaysia

No. 21

ORDER OF FEDERAL COURT GRANTING CONDITIONAL  
LEAVE TO APPEAL TO HIS MAJESTY THE YANG  
DI-PERTUAN AGONG

No. 21

Order of  
Federal Court  
granting Condi-  
tional Leave  
to Appeal to  
His Majesty  
the Yang di-  
Pertuan Agong  
17th August,  
1970

Coram: ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT,  
MALAYA;  
GILL, JUDGE, FEDERAL COURT, MALAYSIA;  
YONG, JUDGE, HIGH COURT, MALAYA.

THIS 17TH DAY OF AUGUST, 1970 IN OPEN COURT

O R D E R

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UPON MOTION made unto the Court this day by Dato Eusoffe Abdoolcader (with him Mr. N.T. Rajah) of Counsel for the Respondents firstly abovenamed in the presence of Mr. Chinn Swee Onn (with him Mr. T.K. Sen) of Counsel for the Appellant firstly abovenamed and Mr. V.L. Kandan of Counsel for the Appellants secondly above-named and the second Respondent being absent though served AND UPON READING the Notice of Motion dated the 4th day of August 1970 and the Affidavit of Lee Wan Seng sworn on 4th August 1970 and on 14th August 1970, the Affidavit of Choong Sam affirmed on 13th August 1970 and the joint Affidavit of Lee Chim Yee and Chan Hon Peng affirmed on 14th August 1970 and filed herein AND UPON HEARING the submissions of Counsel aforesaid:

20

IT IS ORDERED that leave be and is hereby granted to Pegang Mining Co. Ltd., the Respondents firstly abovenamed to appeal to His Majesty the Yang di-Pertuan Agong from the Judgment of the Federal Court dated 23rd July 1970 upon the following conditions:-

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- (1) That the Respondents firstly abovenamed do within three 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 the Appellants in the event of the Respondents firstly abovenamed not obtaining an Order granting them final leave to appeal or of His Majesty the Yang di-Pertuan

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Agong ordering the Respondents firstly abovenamed to pay to the Appellants the costs of the appeal as the case may be; and

- (2) That the Respondents firstly abovenamed do within the said period of three 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.

10 AND IT IS ORDERED that the application of the Respondents firstly abovenamed for suspension of execution of the Judgment of the Federal Court dated 23rd July 1970 pending disposal of the appeal to His Majesty the Yang di-Pertuan Agong be and is hereby dismissed with costs:

20 AND IT IS ORDERED that possession of the mine be handed over, and the nett proceeds of sale of ore held in trust by Messrs. Evatt & Co., be paid over, to Choong Sam, the Appellant firstly abovenamed upon his giving security by Bankers Guarantee in the sum of \$350,000/- (Dollars Three hundred and Fifty thousand) only:

30 AND IT IS ORDERED that the Respondents firstly abovenamed be entitled at its own expense to station at the mine or mines on the lands referred to in the Order of Court dated the 23rd day of July 1970, a representative who may inspect the books of account relating to the expenditure incurred in operating the said mine or mines thereon, the quantity of ore produced therefrom and the amount realised from sales of such ore and inspect the production of ore therefrom, the ore produced, the removal of such ore for sale and every wash-up of every palong and jig recovery of ore:

40 AND IT IS FURTHER ORDERED that the Appellant firstly abovenamed do give the Respondents firstly abovenamed full written notice of each and every wash-up of the palongs and of each and every sale of such ore at which the Respondents firstly abovenamed shall have the right to be present by representative and to have copies of every sale invoiced and of every monthly return made to the Mines Department:

AND IT IS LASTLY ORDERED that there be liberty to apply.

GIVEN under my hand and the seal of the Court this 17th day of August, 1970.

(L.S.) Sd: Hj. Mohd. Azmi. b. Dato. Hj. Kamaruddin  
CHIEF REGISTRAR, FEDERAL COURT, MALAYSIA.

In the  
Federal Court  
of Malaysia

No. 21

Order of  
Federal Court  
granting Con-  
ditional leave  
to Appeal to  
His Majesty  
the Yang di-  
Pertuan Agong

17th August,  
1970

(continued)

In the  
Federal Court  
of Malaysia

No. 22

ORDER GRANTING FINAL LEAVE TO APPEAL TO HIS  
MAJESTY THE YANG DI-PERTUAN AGONG

No. 22

Order granting  
Final Leave to  
Appeal to His  
Majesty the  
Yang di-Pertuan  
Agong

2nd November,  
1970

Coram:      ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT,  
                 MALAYA;  
  
                 GILL, JUDGE, FEDERAL COURT, MALAYSIA;  
  
                 ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 2ND DAY OF NOVEMBER, 1970

O R D E R

10

UPON MOTION made unto the Court this day by Mr. N.T. Rajah of Counsel for the Respondents firstly abovenamed in the presence of Mr. Chinn Swee Onn of Counsel for the Appellant firstly abovenamed, and Mr. R.S. Sodhy of Counsel for the Appellants secondly abovenamed and the second Respondent being absent though served AND UPON READING the Notice of Motion dated the 8th day of October 1970 and the Affidavit of Christopher Sharp sworn on the 1st day of October 1970 and filed herein AND UPON HEARING the submissions of Counsel as aforesaid:

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IT IS ORDERED that final 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 the 23rd July 1970.

GIVEN under my hand and the seal of the Court this 2nd day of November, 1970.

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( L.S. )

Sgd:.....?

DEPUTY REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.



IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 1 of 1971

ON APPEAL FROM  
THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

PEGANG MINING COMPANY LIMITED  
(formerly known as PEGANG  
PROSPECTING COMPANY LIMITED)

Appellants

- and -

1. CHOONG SAM
2. LEE CHIM YEE AND CHAN HON  
PENG (f) AS EXECUTORS OF  
THE ESTATE OF CHAN PHOOI  
HOONG DECEASED
3. TONG SWEE KING (f)  
AS EXECUTRIX OF THE ESTATE  
OF HO KOK YEW (DECEASED)

Respondents

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RECORD OF PROCEEDINGS

(VOLUME 1)

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