

1967/8

1.

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 34 of 1965

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
18 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

SIOW WONG FATT (Defendant) Appellant
- and -
SUSUR ROTAN MINING LIMITED (Plaintiff) Respondent
- and -
KOTA MINING COMPANY LIMITED (Defendant) Pro Forma Respondent

10

C A S E FOR APPELLANT

Record

1. Your Appellant was the First Defendant in the Court of first instance and is hereinafter called the First Defendant. The Respondent was called the Plaintiffs in that Court and is hereinafter called the Plaintiffs. This is an appeal from a Judgment of the Federal Court of Malaysia hereinafter called the Court of Appeal dated the 18th February 1965 in part dismissing and in part allowing an appeal by the Plaintiffs against a Judgment of the High Court in Malaya hereinafter called the Court of First Instance dated the 22nd January 1964. Under the Judgment of the Court of Appeal, it was ordered that the Judgment of the Court of First Instance

20

30

(a) in so far as it dismissed the Plaintiffs' claim against the First Defendant for specific performance or in the alternative damages for breach of an oral contract be dismissed, and

p.168-169

Record

- (b) in so far as it dismissed the Plaintiffs' claim against the First Defendant for compensation under Section 71 of the Contract Ordinance No. 14 of 1950 be allowed (this Provision is hereinafter referred to as Section 71).
- (c) and that accordingly Judgment be entered in favour of the Plaintiffs for the amount of compensation equivalent to all monies spent by the Plaintiffs in relation to the First Defendant's mining land (other than payment to Messrs. Wilkins), such amount to be agreed between the parties and in default of agreement, to be ascertained by the Registrar under Order 36 Rule 57. 10

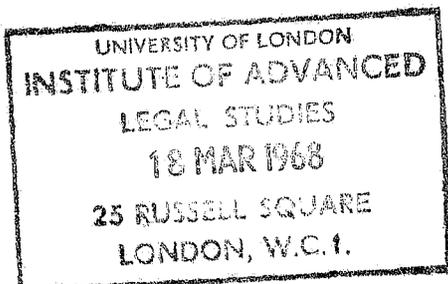
Such Judgment further ordered that the First Defendant do pay to the Plaintiffs one half of the costs of the appeal and of the inquiry before the Registrar, if any, and of the trial in the Court of First Instance. 20

2. Section 71 quoted in the said Order has no counterpart in the English law and is set out hereunder:-

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." 30

p.145
lines 1-4

It is common ground that no cause of action under this Section was pleaded either against the first or the Second Defendant. It is contended by the First Defendant and disputed by the Plaintiffs that the facts to support such a cause of action were neither alleged, investigated and/or proved. A brief reference to a claim for damages under this statutory 40



provision was made both in the opening and closing addresses of Counsel for the Plaintiffs, but no claim was precisely formulated and such references escaped both the attention of Counsel for the First Defendant and the trial Judge who did not deal with any such claim. In the circumstances an immediate examination of the pleadings will not disclose the main issues in this Appeal.

Record

p.31
lines 15-20
p.113
lines 15-20

10

The dispute in a Nutshell

20

30

3. In 1958 the First Defendant had obtained a Prospecting License on the mining land referred to in the Order of the Court of Appeal. The said land was Government land and the expectancy of a successful prospector is in due course to obtain a mining certificate granting him the right to mine the land. Between the granting of the licence and the granting of the certificate the First Defendant was the first party to a chain of written agreements under which the mining rights were beneficially assigned from one party to another, the assignor reserving to himself a tribute on the mineral subsequently to be mined. The last party in the said chain was the Plaintiffs and the second last party was the Second Defendant. The cause of action pleaded against the Second Defendant in this action was for specific performance and, in the alternative, damages for breach of contract to assign such rights. On the first day of the trial under a consent judgment the Plaintiffs were awarded \$30,000 for damages for breach of such contract.

40

4. The cause of action pleaded against the First Defendant and the relief sought was identical to that pleaded against the Second Defendant. The agreement relied upon was verbal and subsequent in date to all of the written agreements. The agreement relied upon by the Plaintiffs was a bilateral agreement as opposed to a multilateral agreement and the existence of the written chain agreements was ignored by the Plaintiffs in their pleading against the First Defendant. On this issue, which was the only cause of action pleaded, the Plaintiffs failed both in the Court of First Instance and

Record

the Court of Appeal, and there has been no cross-appeal. Accordingly nothing arises directly thereon.

5. In support of the cause of action referred to in the preceding paragraph, the Plaintiffs pleaded that they had done certain acts in part performance, the principal such act being the building of a road, which was calculated to enhance the value of the mining rights to the person beneficially entitled to such rights. On this issue the learned trial judge said:- 10

p.132-133
lines 37-17

"It is also my opinion on the facts that all the various things done by the Plaintiff company described in the "Particulars of Past Performance" were done by the Plaintiff company on its initiative in anticipation of obtaining a sub-lease in pursuance of the various agreements I have mentioned (these being the written chain agreements referred to above) as stated in the letter of the 27th March, 1962. It is quite true that many of those things were done in the name of the First Defendant, but that I think is according to practice because, so far as the various Government departments are concerned, in such matters as this they would recognise only the holder of a mining permit so that all the applications must be made in the holder's name. 20

I would, therefore, say that the Plaintiff company has failed to substantiate its allegations in paragraphs 5 and 6 of the Statement of Claim, for these reasons I would dismiss the Suit with costs." 30

6. The sole issue now is whether or not the Plaintiffs can recover from the First Defendant all or any of the cost and/or value of such work as compensation under Section 71.

Main Questions in the Appeal

7. The main questions which will arise in this Appeal are:- 40

(a) Whether or not the consent judgment in this action against the Second Defendant for damages for breach of contract to grant a valid sub-sub-lease or an assignment of a sub-lease to work the said mine is a bar to any further proceedings against the First Defendant under Section 71, thereby rendering any further enquiry unnecessary.

10 And if the answer to this first question be in the negative

(b) Whether or not the Court of Appeal were wrong in entertaining any claim under Section 71 in this action, having regard to the state of the pleadings and the course of the trial.

And, if the answer to the second question be in the negative the following further questions will arise.

20 (c) Whether or not the First Defendant enjoyed any benefit from the work done by the Plaintiffs.

(d) Whether or not the First Defendant enjoyed the full benefit of such work or part benefit only, thereby rendering him liable to part only of the compensation due to the Plaintiffs. In this context the further question will arise whether the First Defendant can claim a credit for the \$30,000 received from the Second Defendant.

30 (e) Whether or not the work done by the Plaintiffs was, within the meaning of Section 71, done "lawfully for the First Defendant".

(f) Whether or not the apportionment of costs made by the Court of Appeal can be supported, having regard to the state of the pleadings and the course of the trial.

40 (g) Whether or not the actual order made by the Court of Appeal is sufficiently definitive to enable justice to be done

Record

between the parties. The First Defendant will in the last resort contend that the Order should have been an Order to the Registrar under Order 36 Rule 57 to ascertain the amount and value of the work done by the Plaintiffs to the said mine and the benefit enjoyed therefrom by the First Defendant, limiting the Plaintiffs' claim to the extent of the benefit enjoyed by the First Defendant.

10

Plaintiffs' case against the Second Defendant

8. As appears from Paragraph 7(a) above, it is contended that the Plaintiffs' remedies under Section 71 were exhausted by the judgment obtained by the Plaintiffs against the Second Defendant. In order to establish this contention it is necessary to ascertain precisely what was the subject matter of the action against the Second Defendant and what is the effect of the consent judgment. Furthermore the facts alleged against the Second Defendant in point of time preceded the facts alleged against the First Defendant and form a background to the Plaintiffs' case against the First Defendant.

20

p.4
lines 10-17

9. The first three paragraphs of the Statement of Claim were descriptive of the parties and are common ground.

p.4
lines 18-28

10. The Plaintiffs in Paragraph 4 of the Statement of Claim alleged that, at the request of both the Defendants, the Plaintiffs carried out boring and prospecting operations during the year 1960 which showed that a certain part of the said mining land was rich in iron ore and suitable for mining.

30

p.4-7

11. Paragraphs 5-9 inclusive of the Statement of Claim were pleaded against the First Defendant, but in Paragraph 7 of the Statement of Claim it was alleged that in January, 1962, the First Defendant was granted a Mining Certificate No. 603 in relation to the said mining land.

40

12. In Paragraph 10 of the Statement of Claim, the Plaintiffs set up a written agreement dated the 19th September 1960 made between the Plaintiffs and the two Defendants and this agreement recited the chain agreements referred to in Paragraph 3 above. The Recitals are set out hereunder:-

Record
p.7

"WHEREAS:

10 (1) One Siow Wong Fatt is the holder of Prospecting Permit No. 141/59 issued by the Government of the State of Johore with liberty thereunder to enter on an area of State Land in the locality of Sungei Susur Rotan in the Mukim of Ulu Sungei Sedeli, District of Kota Tinggi in the State of Johore to prospect for iron ore subject to the conditions contained in the said Permit.

p.201-202

20 (2) By an Agreement dated the 17th day of June 1958 made between the said Siow Wong Fatt of the one part and Tan Gek Piah and Tan Song Chiang of the other part as varied by a subsequent Agreement dated the 2nd day of December 1958 and made between the same parties Siow agreed with the Tans for the consideration therein mentioned to allow the Tans full licence and authority to enter upon the said area of State Land to search for iron ores and/or other minerals and it was stipulated that if the Tans should find iron ores and/or other minerals on the said State Land and were willing to carry out mining operations on the said land Siow should forthwith apply to the appropriate authorities for the issue to him of a Mining Certificate or Lease and on the issue of the same forthwith execute a valid Sub-lease of the said State Land in favour of the Tans subject to the terms and conditions as to payment of moneys and otherwise in the said Agreement as varied as

30

40 aforesaid contained.

(3) By an Agreement dated the 3rd day of July 1959 and made between the aforesaid Tans of the one part and one Chan Sai Sow

Record

of the other part in consideration of the payment made to and the royalties agreed to be paid to the Tans by the said Chan as therein mentioned the Tans with the written consent of the aforesaid Siow assigned to the said Chan all the benefit of the said Agreements of the 17th day of June 1958 and the 2nd day of December 1958 absolutely.

(4) The said Chan Sai Sow having been appointed a director of the First Party by a Declaration of Trust dated the 4th day of December 1959 and made between the said Chan and the First Party it was agreed and declared that the said Chan should stand possessed of the benefit of the said hereinbefore recited Agreements and of all rights benefits and assets which passed to him under the assignment contained in the Agreement of the 3rd day of July 1959 in trust for the First Party. 10

(5) The First Party has agreed with the Second Party for it to work mine and exploit the said area of mining land comprised in the said Prospecting Permit No. 141/59 for the obtaining of iron ore therefrom for the consideration and on the terms and conditions hereinafter contained." 20

13. The substantive part of this said Agreement provided as follows:-

p.202-205

(a) The Plaintiffs should pay to the Second Defendant \$80,000 by way of advance tribute. \$40,000 was payable on the signing of this Agreement and the balance of \$40,000 was to be paid as soon as a Mining Lease or Certificate shall have been issued in respect of the said Mining Land. Provision was then made for repayment of these advances by a set off against tribute due to the Second Defendants under this Agreement. 30

(b) As soon as a Mining Lease or Certificate shall have been issued in respect of the 40

said mining land and the \$80,000 paid, the Second Defendant undertook to issue an authority in writing to the Plaintiffs authorising them to enter upon the said mining land and to mine and exploit the same for the purpose of obtaining iron ore therefrom.

Record

10 (c) The Plaintiffs should pay to the two Defendants a tribute of \$4,80 for every dry basic ton of iron ore mined or shipped by the Plaintiffs.

(d) There were further ancillary provisions which it is contended are not presently relevant.

14. Paragraphs 11-14 inclusive averred that the Plaintiffs were at all times willing to complete but that the Second Defendant had repudiated the said Agreement.

p.7-8

20 15. In Paragraph 15 of the Statement of Claim the Plaintiffs relied on a second supplemental Agreement in writing, also dated the 19th September 1960 whereby, according to the Pleading, it was agreed that in consideration of the Plaintiffs entering into the main Agreement, the Second Defendant would use its best endeavours to procure in favour of the Plaintiffs the execution of an assignment of a valid underlease of the mining land, and if a mining title or some derivation thereof by underlease should be
30 issued direct to or should be assigned to the said Chan Sai Sow the Second Defendant would direct the said Chan to execute an underlease or an assignment of an Assignment of an Underlease (as the case may be) in favour of the Plaintiffs.

p.8

p.206

16. In Paragraph 16 of the Statement of Claim the Plaintiffs averred that the Second Defendant had repudiated this supplemental agreement.

p.8

40 17. In Paragraph 17 of the Statement of Claim the Plaintiffs contended that in the circumstances it would be proper to order specific performance both of the Main and the Supplemental Agreement.

p.9

Record

18. In Paragraph 18 of the Statement of Claim the Plaintiffs contended that if the Second Defendant was not in a position to carry out the above agreements, such Defendant was liable for damages to the Plaintiffs including the loss of the profits of the mining of the said land.
- p.10 19. In the Prayer, the Plaintiffs accordingly claimed specific Performance and alternatively damages and finally such further and other relief as to this Honourable Court may seem fit. 10
- p.11 lines 8-16 20. By way of Defence, the Second Defendant in Paragraphs 2 and 3 thereof denied that the Plaintiffs had carried out any boring and prospecting operations in 1960 and alleged that these operations were carried out by the Second Defendant.
- p.11 lines 17-38 21. In Paragraph 4 of the Defence the Second Defendant admitted the Main Agreement dated 19th September 1960.
- p.12 lines 12-34 22. In Paragraphs 7, 8 and 9 of the Defence the Second Defendant alleged that the Plaintiffs had acted in breach of the Main Agreement, had repudiated it and said it was no longer binding on the Second Defendant. The grounds relied upon were that the Plaintiffs had failed and refused to pay the second instalment of \$40,000. 20
- p.12 lines 34-42 23. In Paragraph 10 of the Defence the Second Defendant admitted the making of the Supplemental Agreement, but alleged in Paragraph 11 thereof that it was an implied term of this agreement and a condition precedent to their liabilities thereunder that the Plaintiffs should have observed the conditions of the Main Agreement which they had failed to do. 30
- p.13 lines 20-26 24. In Paragraph 13 of the Defence the Second Defendant alleged that both the Main and Supplemental Agreements were illegal by reason of the fact that they contravened the provision of Section 31 of the Johore Mining Enactment and are null and void for uncertainty. 40

Record
p.13
lines 27-37

25. In Paragraph 14 of the Defence, the Second Defendant alleged in the further alternative that upon the true construction of the Main and Supplemental Agreements it was impliedly or expressly provided that the due performance of the Second Defendant's obligation was subject to the condition that a valid sub-lease or underlease or some other derivative title shall have previously been vested in the Second Defendant or in a certain Chan Sai Sow and no such title had so vested.

10

26. On these pleadings as between the parties, the case went to trial and the action by the Plaintiffs against both Defendants came on for hearing before Azmi J. on the 10th November 1963. On this day Counsel for the respective parties announced that there had been a settlement, and the following Order was made.

"By consent it is ordered that:-

20

Second Defendant do pay the Plaintiffs sum of \$30,000 in full and final satisfaction of Plaintiffs' claim thereon. It is further ordered that in the event of Plaintiffs obtaining right to work for the mine referred to in this action, Plaintiffs would pay Second Defendant a tribute as set out in the main agreement dated 19th September 1960, entered into between Plaintiffs and Second Defendant, and stipulations thereunder will be binding on the Plaintiffs and the Second Defendant. It is further ordered that the Second Defendant do pay the Plaintiffs half of the said sum of \$30,000 within 15 days of the date hereof and the balance of \$15,000 within 30 days of the date hereof.

p.25
lines 15-36

p.26
lines 1-9

30

No order as to costs between Plaintiffs and Second Defendant."

40

27. On these issues and on the effect of the above consent judgment, the First Defendant's comments are set out in Paragraphs 28-31 inclusive hereunder.

Record

28. The apparent inadequacy of the sum paid in full and final settlement in no way affects the scope of the judgment. The same results would follow if the sum paid had been \$350,000 or \$3,500,000.

29. The damages received were in respect of the Second Defendant's loss of the profits of mining the said land. In estimating such profits it is necessary to make an appreciation of the market value of the ore likely to be won from the said mine. This is the credit column. On the other side would be the debit column listing the expenses of operating the mine. If no road had been built the debit column would have been increased by the cost of building the said road. If, as was the case, the road had been built, this item disappears from the debit column, so that in effect the Plaintiffs would have enjoyed the benefit of such work. 10

30. The Defences alleged do not precisely affect the First Defendant. In the last resort, the Second Defendant assumed liability for breaches of the Main and Supplemental Agreements and the Plaintiffs accepted an agreed sum in satisfaction. 20

31. In this context, the First Defendant relies on two statements made by Counsel for the Plaintiffs in the course of the trial against the First Defendant.

p.29
lines 25-31

(a) "That makes Second Defendant beneficial owner of the lease. At page 66 (page 201-205 Record) Second Defendant as beneficial owner enters into an agreement with Plaintiffs, granting Second Defendant rights to sub-lease to Plaintiffs in return for payment of two sums of \$40,000 and promise of tribute." 30

p.147
lines 15-17

(b) "Writ issued on 17th September 1962. I think Appellant (Plaintiffs) lost the right against Kota Mining Co. (Second Defendant) when the claim was settled."

The second statement was made when Counsel for the Plaintiffs was arguing the case in the Court of Appeal and the First Defendant contends that 40

this is an admission that the settlement of the cause of action for breach of contract precluded any further claim under Section 71.

Record

The Plaintiffs' Case against the
First Defendant

10 32. The First Defendant has already contended that logically the Second Defendant should have been the First Defendant and vice versa. It is further contended that the logical continuation of the pleading would have been for the Plaintiffs to have set up and relied upon a subsequent verbal agreement under which there was a novation made multi-laterally pursuant to which the First Defendant agreed to assign the mining rights directly to the Plaintiffs upon the Plaintiffs agreeing multi-laterally to pay the tributes to which the respective parties were severally entitled. If then the Plaintiffs proved the novation, but it was further established that 20 for some extraneous reason such as illegality the Plaintiffs had lost the profits of the novations, the Plaintiffs might have protected themselves by pleading and obtaining some ancillary relief under Section 71. The Plaintiffs could have further protected themselves by alleging in the further alternative that if contrary to their contention there was no novation, they then relied upon and sought to enforce against the Second Defendant the said 30 Main and Supplemental Agreements. Likewise they might in appropriate circumstances have claimed ancillary relief against the Second Defendant under Section 71. As will be seen this was not the course pursued.

40 33. As already stated in Paragraphs 9-10 above, the first three paragraphs of the Statement of Claim were descriptive of the parties and Paragraph 4 thereof alleged that in 1960 the Plaintiffs, at the request of both Defendants had carried out boring and prospecting operations on the said mining land.

34. Paragraph 5 of the Statement of Claim sets up the alleged verbal agreement with the First Defendant and because of its significance it is

Record

quoted

p.4-5
lines 29-12

"Because neither the First Defendant nor the Second Defendant had the means nor the experience nor the skill to carry out mining operations and because the Plaintiff company was a company well experienced in mining and with substantial capital backing it was orally agreed between the Plaintiff company and the First Defendant in a series of conversations on or about the Chinese New Year 1961, that in consideration of the Plaintiff company taking such steps as were necessary to enable the First Defendant to obtain a mining licence or certificate and to assist him in preparation for mining generally the First Defendant would, if and when he was granted a mining lease or certificate of the said mining land forthwith grant to the Plaintiff company a mining sub-lease of the said mining land for the remainder of his term subject to a tribute to be paid by the Plaintiff company to the First Defendant."

10

20

35. As a result of a request for particulars, the following further details were given:

p.22

- (a) In order to establish the verbal agreement, the Plaintiffs relied upon interviews on or about 13th or 14th February 1961. At the second of these interviews the Plaintiffs undertook to build the said road on the strength of the First Defendant's promise set out in Paragraph 5 above. 30
- (b) The Plaintiffs further relied upon an interview on the 10th or 11th October 1961 at which the First Defendant confirmed his said promises; and a final interview on the 15th October 1961 which took place after the First Defendant had first inspected the progress that had been made in constructing the said road.
- (c) The amount of tribute to be paid by the Plaintiffs to the First Defendant was 50 cents for every one ton of iron ore exported and was to be paid on completion of each shipment. 40

(d) The sub-lease to be granted was to be identical to the terms of the Mining Certificate save only as to the amount of tribute and as to the term thereof and in the form of Form (iv) at Schedule 1 to the Mining Enactment No. 69.

Record

10 36. In Paragraph 6 of the Statement of Claim the Plaintiffs relied upon certain acts done in part performance so as to render enforceable the said verbal agreement. The principal act relied upon was the building of the said road. The First Defendant proposes to postpone details of any further work until the moment comes to challenge the precise Order made by the Court of Appeal in accordance with Paragraph 7(g) above.

p.5-6
lines 20-41

20 37. Paragraphs 7 to 9 inclusive of the Statement of Claim recite facts upon which the Plaintiffs contend they are entitled to specific performance of the verbal contract and, in their Prayer, the relief claimed against the First Defendant is identical to that claimed against the Second Defendant.

p.6-7
lines 42-17

38. As will be seen from the above, there had as yet been no mention of the said chain Agreements. Thereafter in the Statement of Claim the Plaintiffs turned back the clock and set up the chain agreements, under which they subsequently obtained judgment against the two Defendants.

30 39. In Paragraph 3 of the Defence, the First Defendant denied each and every allegation in Paragraph 5 of the Statement of Claim set out above.

p.16
lines 15-20

40 40. In Paragraph 5 of the Defence, the First Defendant pleaded that the facts alleged to have been done by the Plaintiffs in part performance of the verbal agreement were taken on the Plaintiffs' own initiative in anticipation of obtaining a sub-lease in pursuance of their Agreements mentioned in Paragraph 10 and 15 of the Statement of Claim and referred to in paragraphs 11, 12 and 14 above.

p.17-18
lines 38-12

41. Both these issues were decided in favour of

Record

the First Defendant, both in the Court of First Instance and the Court of Appeal.

42. The First Defendant contends that the course of the trial is material for the reasons set out in Paragraph 6 above. An over-all picture of this can be obtained by reading that part of the Judgment of Lord President Thompson in the Court of Appeal which appears on pages 153 to 163 in this Record. The subsequent part of the judgment deals with the Plaintiffs' claim under Section 71 and can be dealt with after a fuller examination of the proceedings in the Court of First Instance and the Court of Appeal, relevant to this cause of action. 10

The Plaintiffs' claim under Section 71

43. The First Defendant contends that the Plaintiffs in their Statement of Claim could not have obtained relief against either the First Defendant or the Second Defendant under Section 71 by merely stating that, in the alternative, they were entitled to damages under Section 71. Whether this claim was to be made against either or both Defendants, such claim should have been split into the component parts, and the following averments should have been made:- 20

- (a) that on or between certain dates the Plaintiffs had done work which was not intended to have been done gratuitously and particulars of such work should have been included in the Statement of Claim or delivered contemporaneously. 30
- (b) the value of such work should also have been set out and itemised. Such values would have been in the exclusive knowledge of the Plaintiffs and no enquiry thereon would have been necessary.
- (c) that the work relied upon had been done lawfully for the relevant Defendant.
- (d) that the relevant Defendant was now enjoying the benefit of such work. 40

The Plaintiffs might have supported their case by facts appearing on Discovery including Interrogatories.

Record

10 44. On a proper pleading the First Defendant could have obtained particulars of the facts relied upon to establish that the work done was lawfully done for the First Defendant and further of the facts relied upon to establish that the First Defendant was enjoying the benefit of such work. In the light of such particulars, the First Defendant would have had the opportunity to have marshalled his evidence to refute such facts.

45. After the consent judgment against the Second Defendant, the First Defendant on a proper pleading could have amended his defence and pleaded as follows:

20 "It is denied that the said work was not to be gratuitous. The Plaintiffs intended to do the said work gratuitously in the event of their obtaining from the Second Defendant the beneficial rights to the said mining land in accordance with the said Main and Supplemental Agreement, or, alternatively, damages in lieu thereof; and that in the events which have happened the Plaintiffs have obtained such damages."

30 46. Further it is contended that the First Defendant could have alleged in the further alternative that the Second Defendant was a co-beneficiary of such work and have served a third party notice claiming contribution from the Second Defendant.

47. The notes of the trial judge relating to the Opening of Counsel for the Plaintiffs appears on pages 26-35 of the Record. Twelve authorities were cited. The only reference to a claim under Section 71 is the following note:

40 "Even if there was no contract to grant sub-lease, we should get substantial damages under Section 71 of the Contract Ordinance 1950. Section 71 compensation

p.31
lines 17-19

Record

for work not intended to be gratuitous."

48. It is conceded that the Plaintiffs did set up a case that this work was done lawfully for the First Defendant in that it was done at his request and in part performance of the verbal contract set out in Paragraph 5 of the Statement of Claim. On the other hand it is contended that the Plaintiffs did not rely on any other facts to support this allegation in the event, which happened, that this part of their case was not accepted. Further the Plaintiffs never alleged that the First Defendant was enjoying the benefit of this work. On the contrary, the Plaintiffs asserted that the Second Defendants were the beneficial owners of the mining rights - see Paragraph 31(a) above. Further the form of the consent judgment under which they agreed to pay tribute to the Second Defendant supports the view that it was common ground that the First Defendant was not the beneficial owner.

p.29
lines 21-24

p.36-55

49. The principal witness for the Plaintiffs was one Chua Siew Cheng who stated that she had been a director of the Plaintiffs since their incorporation and it is she who is alleged to have made the verbal agreement with the First Defendant. Her evidence departed from the particulars given under Paragraph 5 of the Statement of Claim in relation to tribute. She said:

p.38
lines 22-25

"Altogether we had to pay \$4.80 for every ton. \$4.80 was for Kota Mining Company, Tan Hai Mining, Chan Sow Sai and First Defendant."

In support of her evidence concerning the verbal agreement she produced a Minute from the Minute Book of the Plaintiffs and it is the First Defendant's contention that this was not a genuine document. If this contention be correct, the First Defendant contends that this is a material circumstance in the course of the trial when deciding what departures the Plaintiffs should be permitted to make from their pleaded case.

50. The evidence of the First Defendant was that the only enjoyment he received from the said mine was the tribute to which he was entitled under his original agreement.

Record
p.98
lines 24-32

51. The closing address by Counsel for the Plaintiffs is reported on pages 113-116 of the Record. The only reference to a Claim under Section 71 is the following:-

10 "As regards to claim, three alternatives on evidence:

p.113
lines 15-21

(1) If there was no contract at all we are entitled to money we have spent - see Section 71 of Contracts Ordinance, if road built for First Defendant."

20 52. Once again, the First Defendant contends that there has been no attempt to split this claim into its component parts. There is no indication of the facts relied upon to establish that the road was built "for the First Defendant" in the event of the Court holding that there was no verbal agreement to assign the Mining Right or a request to build the said road. Further there were no supporting allegations that the First Defendant had enjoyed the benefit of the said work.

30 53. On 2nd January 1964, Azmi J. gave judgment for the First Defendant and this judgment is in the Record. The trial judge did not deal with the claim under Section 71 nor did he comment on the Minute referred to in Paragraph 48 hereof.

p.117-134

54. The Plaintiffs appealed and relied upon eight separate grounds of appeal. The first seven grounds relate to the finding on the verbal agreement. The final ground relates to the claim under Section 71 and is quoted below:

p.136-138

40 "8. In the further alternative, the learned Trial Judge should have held that if there was no oral agreement which he found, the Plaintiffs were entitled to compensation amounting to the cost of building a road and other expenditure

p.138
lines 7-14

Record

set out in evidence against the First Defendant within the terms of Section 71 of the Contracts Ordinance No. 14 of 1950."

It is observed once again that this claim is not split into its component parts.

55. Until this moment, the First Defendant has in this case excluded any reference to the further work alleged to have been done by the Plaintiffs. It is contended that any such specific details were not material when considering their right to specific performance of the verbal agreement set up in paragraph 5 of the Statement of Claim. If specific performance were ordered, all such items would have been for the account of the Plaintiffs. Further if the Plaintiffs were confined to their remedy for loss of profits from the mining of the said land, no such expenditure would have been directly recoverable. The Plaintiffs would have been entitled to damages based on estimated profit and loss accounts and the useful expenditure already made would have proportionately reduced the loss and thereby increased the profit. 10 20

56. Attention is now called to Paragraph 1(c) above and it will be observed that the Court of Appeal excluded the sum paid by the Plaintiffs to Messrs. Wilkins as an item recoverable from the First Defendant as compensation under Section 71. It is contended that this payment was within the meaning of the Order of the Court of Appeal "monies spent by the Plaintiffs in relation to the First Defendant's mining land." The reason for excluding this item of expenditure was that the Court of Appeal did not accept the fact that the First Defendant enjoyed the benefit of this work. If the said Order is to stand it would be open to the Plaintiffs to produce other items of expenditure in relation to the First Defendant's mining land and claim that such sums were recoverable from the First Defendant, regardless of the fact that the First Defendant did not enjoy any benefit therefrom. Accordingly it is contended that in any event the Order is too wide. 30 40

57. In his opening address to the Court of Appeal Counsel for the Plaintiffs referred to the Minute Book produced by the said Chua Siew Cheng and said:-

Record

"Unless this was forged, there must have been some promise made by the First Respondent (First Defendant)."

p.148-149
lines 37-2

10 the Court of Appeal held that there was no such promise, the judgment of Thompson, L.P. containing the following passage:

p.162
lines 35-46

20 "There is, however, room for doubt as to whether the Record of this Resolution was made on the date which appears on the face of it. It is pasted on the very first page of the unpaginated volume in which it occurs, an operation which could have been carried out at any time. Moreover it occurs only nine pages prior to a Resolution purporting to authorise the lodging of the caveat of the 26th June, 1962, and it is difficult to suppose that Miss Chua should not have come across it at that stage at the very latest had it been then in existence and in the position it now occupies in the book."

30 58. After hearing the Appeal, the Court of Appeal made the Order set out in Paragraph 1 hereof, and the grounds for in part allowing the Appeal and for making their apportionment of costs appear in the judgment of Thompson, Lord President. This judgment contained the following passages.

40 "Now, it has never been denied that during the course of their relations with Mr. Siow Susur Rotan spent a great deal of their own money. Some of it was spent on taking steps that were necessary before the State would grant Mr. Siow his lease; most of it was spent on things, particularly the making of the road to the mining site, which were necessary, or at any rate highly desirable, for the profitable development of the mine, though I would pause here to observe that

p.164
lines 12-27

Record

in my view a sum of some \$2,000 that was spent on obtaining a mining scheme from a firm of engineers by the name of Wilkins does not fall within either of these categories because the evidence as to what use, if any, was ever made of this scheme is far from clear."

59. The First Defendant contends that the fact that the Lord President was enabled to exclude from the scope of legitimate compensation under Section 71 the sum of \$2,000 spent on obtaining a mining scheme from a firm of engineers by the name of Wilkins was merely a matter of coincidence for no attempt had been made by the First Defendant to examine this or other items as potentially providing the Plaintiffs with a remedy under Section 71. It is contended that if this remedy is still available to the Plaintiffs it must be pursued in a further action. It is further contended that these words illustrate that the Order actually made is too wide for it does not restrict the quantum of the compensation to the benefit being enjoyed by the First Defendant. 10 20

60. The Lord President continued,

"But in both categories the money was spent for Mr. Siow in the sense that when it was spent only Mr. Siow had any standing in relation to the land and it was spent with his knowledge, even though it be true as he alleged that he did not know whether Susur Rotan or Kota (it could not have been anybody else) was spending it. It was not spent gratuitously because Susur Rotan clearly had no intention that anybody else should have the benefit of it for nothing. And the person who has enjoyed the benefit is Mr. Siow. The money had to be spent by somebody to transform Mr. Siow's prospects and then his lease into a profitable mining proposition, it had to be spent by somebody at some time, and it seems a matter of ordinary common sense that the fact that it had been spent and did not have to be spent in future must have affected the 30 40

p.164
lines 28-50

nature of Mr. Siow's subsequent arrangements with Siow Wong Fatt Mining Company Limited, and Kota. In the circumstances it seems clear that Mr. Siow must pay compensation under Section 71."

Record

10 The First Defendant contends that the obligation to pay compensation under Section 71 does not fall upon the person who had the legal title to such rights at the time the work was done, the more especially when it was common ground that at the time of such work, the legal owner was under an obligation to transfer such rights to a third party. Nor is it the fact that the Plaintiffs got nothing for their work. They obtained full compensation from the Second Defendants for being deprived of the value of such mining rights, which they could the more profitably enjoy because the road had been built. Nor would the fact that the road had been
20 built put the First Defendant in a better bargaining position with his assignee. On the contrary it would render him liable to further damages should he fail to meet his obligations.

30 61. It is further contended that the Lord President was wrong in concluding that this relief could be given to the Plaintiffs without a formal amendment because the practice of the Courts in England has been to consider and deal with the legal results of pleaded facts, though the particular legal result alleged is not stated in the Pleadings. It is contended that whether any such work was lawfully done for the First Defendant is a question of fact. Whether or not it was intended to be gratuitous is a question of fact and whether or not the First Defendant enjoyed the benefit of such work is a question of fact and none of these facts were pleaded or properly investigated at the trial. In
40 particular the First Defendant relies upon the contentions set out in Paragraphs 28-31 of their Case.

p.167
lines 11-17

62. The First Defendant therefore humbly submits that this Appeal should be allowed and that the judgment of the Appeal Court dated the 13th February 1965 be reversed and the judgment of the

Record

Trial Judge be restored or alternatively that the judgment of the Appeal Court be varied by Ordering the Registrar to ascertain the amount and value of the work done by the Plaintiffs to the said mine and the benefit enjoyed therefrom, by the First Defendant, limiting the Plaintiffs' claim to the extent of the benefit enjoyed by the First Defendant and that there be a general review of the costs awarded by the Court of Appeal for the following, among other, reasons. 10

R E A S O N S

1. BECAUSE the work done by the Plaintiffs to the said mining land was done for the purpose of enhancing the Plaintiffs' rights under the two written Agreements both dated 19th September 1960 made with the Second Defendant and the Plaintiffs have received from the Second Defendant a sum in full satisfaction of such rights.
2. BECAUSE the Court of Appeal were wrong in entertaining any claim by the Plaintiffs under Section 71, having regard to the state of the pleadings and the course of the trial. 20
3. BECAUSE the First Defendant did not enjoy any benefit from the work done by the Plaintiffs.
4. BECAUSE, in the alternative, the First Defendant only benefited in part from such work and accordingly should only be partly liable; and no proper enquiry was investigated as to the extent, if any, of such benefit. 30
5. BECAUSE the work done by the Plaintiffs was not, within the meaning of Section 71, done lawfully by the Plaintiffs.
6. BECAUSE the apportionment as to costs made by the Court of Appeal cannot be supported having regard to the state of the pleadings and the course of the trial. 40

7. BECAUSE the actual Order made by the Court of Appeal is not sufficiently definitive to enable justice to be done between the parties.

Record

IAN BAILLIEU

No. 34 of 1965

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

SIOW WONG FATT
(Defendant) Appellant

- and -

SUSUR ROTAN MINING LIMITED
(Plaintiff) Respondent

- and -

KOTA MINING COMPANY LIMITED
(Defendant) Pro Forma
Respondent

C A S E F O R A P P E L L A N T S

60253
Fos. 134

LIPTON & JEFFERIES,
Princes House,
39, Jermyn Street,
London S.W.1.
Solicitors for the Appellant.