

9, 1968

No. 18 of 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of CIVIL SUIT No.C/70/63  
of 1963 IN THE HIGH COURT  
IN BORNEO AT KUCHING

AND  
IN THE MATTER of THE LAND CODE, (Chapter 81  
of the Laws of Sarawak)  
Part IV

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AND  
IN THE MATTER of THE ACQUISITION OF K.O.T.  
16178 AND K.O.T. 16179  
OF KUCHING

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
**16 JAN 1969**  
25 RUSSELL SQUARE  
LONDON W.C.1.

B E T W E E N :-

AIK HOE & COMPANY LIMITED  
(Objector) Appellant

- and -

SUPERINTENDENT OF LANDS  
AND SURVEYS, FIRST  
DIVISION (Respondent) Respondent

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CASE FOR THE APPELLANT

1. This is an appeal by leave of the Federal Court of Malaysia at Kuala Lumpur from an order dated the 17th January, 1966, of the said Federal Court (Thomson L.P., Ong J. and Suffian J.) allowing an appeal by the Respondent from an award dated the 13th March, 1965 of the High Court in Borneo at Kuching (Harley J.).

Record  
p.190  
p.187

p.88

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2. The said award awarded to the Appellant as compensation for certain lands acquired under the provisions of Part IV of the Land Code of Sarawak an aggregate sum of \$607,000/- made up

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as to K.O.T. 16178 of the sum of \$306,000/- and as to K.O.T. 16179 of the sum of \$301,000/- and by the said order of the Federal Court the total amount of the award of compensation was reduced to the aggregate sum of \$370,140/- made up as to K.O.T. 16178 of the sum of \$205,760/- and as to K.O.T. 16179 of the sum of \$160,380/- plus the agreed value of the improvements to K.O.T. 16179 namely the sum of \$4,000/-.

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p.88

3. The said award of the said aggregate sum of \$607,000/- represented the full amount of the claim by the Appellant as finally amended during the hearing before the said High Court in Borneo at Kuching, and the point at issue is whether having regard to all the circumstances the Federal Court was entitled to reduce the amount of the sums awarded to the figures as set out in the preceding paragraph.

In  
separate  
folder

4. The Appellant was on the 1st April, 1960, the registered proprietor of two pieces of land, namely Lots 16178 and 16179 in the area of Kuching shown on the plans (Appendix A(i) and B(i) Lots 16178 and 16179 having a total area of respectively 25.72 acres and 17.82 acres which were acquired on behalf of the Government of Sarawak by the Superintendent of Lands and Surveys, First Division, Sarawak (hereinafter called "the Respondent") for the purposes of residential and industrial development and other public facilities in connection with the new Port of Kuching. The procedure for the acquisition of the said land prescribed by Part IV of the Land Code Chapter 81 was duly followed, the date of publication of the notice under section 47 of the Land Code, in respect of the said lots being the 1st April, 1960.

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5. The compensation payable to the Appellant in respect of the acquisition of the said two lots of land is to be ascertained in accordance with the provisions of sections 60 and 61 of the said Land Code which read as follows:-

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Matters "60.--(1) In determining the amount  
to be of compensation to be awarded for  
con- land resumed under this Part, the  
sidered Court shall take into consider-  
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(a) the market value at the date  
of the publication of the  
notification under section 47  
or, if no such notification  
has been published, the  
market value at the date of  
the posting of the  
declaration made under  
section 48;

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(b) any increase in the value of  
the other land of the person  
interested likely to accrue  
from the use to which the  
land resumed will be put;

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(c) the damage, if any, sustained  
by the person interested, at  
the time of the Superintend-  
ent's taking possession of  
the land, by reason of  
severing such land from his  
other land;

(d) the damage, if any, sustained  
by the person interested, at  
the time of the Superintend-  
ent's taking possession of  
the land, by reason of the  
resumption injuriously  
affecting his other property,  
whether movable or immovable,  
in any other manner or his  
actual earnings;

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(e) if in consequence of the  
resumption he is compelled  
to change his residence or  
place of business, the  
reasonable expenses, if any,  
incidental to such change;  
and

(f) any improvement to the land

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made with the prior consent of the Superintendent after the publication of the notification under subsection (1) of section 47 or the posting of the declaration under subsection (2) of Section 48, whichever is the date in respect of which the market value is taken in accordance with the provisions of paragraph (a).

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(2) For the purposes of paragraph (a) of sub-section (1)

(a) if the market value has been increased by means of any improvement made by the owner or his predecessor in interest within two years before the notification was published under subsection (1) of section 47 or, if no such notification was published, within two years before the declaration under section 48 was published, such increase shall be disregarded unless it be proved that the improvement was made in good faith and not in contemplation of proceedings for resumption of the land being taken under this Part; and

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(b) when the value of the land is increased by reason of the use thereof, or of any premises thereon, in a manner which could be restrained by any Court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account.

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Matters  
to be dis-  
regarded  
in deter-  
mining  
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sation

61. In determining the amount of compensation to be awarded for land resumed under this Part, the Court shall not take into consideration -

(a) the degree of urgency which has led to the resumption;

(b) any disinclination of the person interested to part with the land resumed;

(c) any damage sustained by the person interested which, if caused by a private person, would not be a good cause of action;

(d) any damage which is likely to be caused to the land acquired after the date of the posting of the declaration under section 48 by or in consequence of the use to which it will be put;

(e) any increase in the value of the land resumed likely to accrue from the use to which it will be put when resumed;

(f) any outlay on additions or improvements to the land resumed which was incurred after the date of the posting of the declaration under section 48, unless such additions or improvements were necessary for the maintenance of any building in a proper state of repair; or

(g) any improvements to the land made without the prior consent of the Superintendent after the publication of the notification under subsection (1) of section 47 or, if no such notification was published, any

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improvements made without the consent of the Superintendent after the posting of the declaration under section 48."

Under paragraph (a) of section 60(1) the Appellant became entitled to the market value of the land at the date of publication of the notification, namely the 1st April 1960.

6. The Appellant originally claimed as compensation the sum of \$1,306,200 being calculated at a rate of \$30,000 per acre. This claim was subsequently amended to an aggregate figure of \$698,000/- made up as to lot 16178 of the sum of \$384,000 (or \$14,913/- per acre) and as to lot 16179 of the sum of \$314,000 (or \$17,620/- per acre). The Respondent offered the Appellant the sum of \$237,760/- made up as to lot 16178 of the sum of \$121,460/- (or \$4,730/- per acre) and as to lot 16179 of the sum of \$116,300/- (or \$6,530/- per acre) as full compensation for the land and awarded accordingly. 10
- pp. 19 &  
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7. In December, 1964, the Respondent increased his award to an aggregate figure of \$307,778/- represented as to lot 16178 by the sum of \$176,418/- (or \$6,860/- per acre) and as to lot 16179 by the sum of \$131,360/- (or \$7,370 per acre). The Appellant did not accept the award and pursuant to the Land Code required that the matter be referred by the Respondent for the determination of the Court. 20
- p.41 1.26
8. The Statutory Statement required under the provisions of section 57 of the Land Code was filed by the Respondent on the 25th January 1965 together with Appendices "A" - "K" inclusive. The said Appendices include plans showing the location of the land, and, as appears from Appendix "D", lots 16178 and 16179 were two out of a total of 19 lots all of which were the subject of the same acquisition. 30
- pp.28 &  
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- p.1
- pp.7 to 38  
and  
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pp.9 to 11
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9. On the 8th March 1965, the reference came on for hearing before Harley J. sitting with two assessors Messrs. Song Thian Cheok and Yeo Cheng Hoe and at the opening of the said hearing the Appellant's claim was submitted at an aggregate figure of \$698,000/- made up as to lot 16178 of the sum of \$384,000/- (or \$14,930/- per acre) and as to lot 16179 of the sum of \$314,000/- (or \$17,620/- per acre). The value of the improvements to lot 16178 were agreed at a figure of nil and for lot 16179 at a figure of \$4,000/- but the Appellant contended that no separate award for improvements should be made having regard to the terms of the Land Code, the aggregate claim as then made of \$698,000/- being inclusive. It was further agreed between the parties that the figure for the Respondent's award was to be treated as being the amended aggregate figure of \$307,778/- referred to in paragraph 7 above.
10. In the course of the said hearing agreement was reached between the parties on the cost of filling the land, the agreed figure being contained in Exhibit 10. As a result of the agreement on these figures the Appellant's claim as contained in Exhibit 8 was amended by consent to an aggregate figure of \$607,000/- made up as to lot 16178 of the sum of \$306,000/- (or \$11,900/- per acre) and as to lot 16179 of the sum of \$301,000/- (or \$16,900/- per acre). The proceedings on the reference before Harley J. and the said two assessors were therefore conducted on the basis of an award by the Superintendent of a figure of \$307,778/- and a claim by the Appellant of an aggregate figure of \$607,000/-.
11. In the course of the said reference before Harley J. and the said two assessors both parties called evidence. On behalf of the Appellant evidence was given by John Murray Carter A.R.I.C.S., F.A.I., F.R.V.A., M.R.E.V.A., who tendered in evidence a written report and valuation, Exhibit 8, and Mr. Robert Hardie A.R.I.B.A. On behalf of the Superintendent evidence was given by Mr. Ambrose Foo, Dip.U.V. (New Zealand), A.M.N.Z.I.V., and by Mr. Robert Bell Beatty B.Sc. (Glasgow), B.Eng.Sc., A.M.I.C.E.

p.41 1.10

p.41 1.31

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pp.205-224  
p.47 1.17pp.43 to 57  
pp.43 to 49  
50 to 51  
pp.205-224  
pp. 49 & 50  
pp.52 to 57  
58 to 60  
pp. 57 & 58

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- pp.65 to 85 12. The hearing continued on the 9th., 10th., 11th and 12th March, 1965, and at the close of the evidence Harley J. summed up to the assessors in open court. An agreed note of the summing up is included in the record hereof.
- p.86 13. On the 13th March, 1965 the said assessors M/s. Song Thian Cheok and Yeo Cheng Hoe delivered a joint opinion that the amended claim figure of \$607,000/- contained on page 15 of the report of the said John Murray Carter was a fair one, "particularly so when the overall price per acre is \$13,900/-" and on the same date Harley J. gave judgment for the said figure, saying "This case involves a comparison of market prices based on analysis of the evidence. I do not think I can usefully add any general remarks to what I said in my summing up ..... The figure reached by the Assessors is close to what I had in mind....." He made an award accordingly with interests and costs. 10
- p.87 14. From the said award the Respondent appealed to the Federal Court of Malaysia on the grounds set out in the Memorandum of Appeal. 20
- pp.90 to 95 15. At the hearing before the said Federal Court (Thomson L.P., Ong J. and Suffian J.) it was agreed by both Counsel that the sole issue was the market value of the lands in question on the 1st April 1960. It was argued by the Respondent that the valuation of Mr. John Murray Carter was unscientific and misleading on the grounds set out in the Memorandum of Appeal and it was submitted that because the Appellant had failed to prove that the Respondent's award was wrong, the valuation of the Government valuer, namely the aggregate figure of \$307,778/-, should be upheld, alternatively that the Federal Court was at liberty to substitute an increased figure. On behalf of the Appellant it was contended that there was no good ground to set aside the unanimous decision of Harley J. and the said two assessors. 30 40



16. On the 17th January, 1966, Suffian J. gave judgment allowing the appeal to the extent that the award of Harley J. of the aggregate sum of \$607,000/- be varied to an award of an aggregate sum of \$370,140 made up as to lot 16178 of the sum of \$205,760/- and as to lot 16179 of the sum of \$160,380/- plus the agreed value of the improvements for lot 16179, namely the sum of \$4,000/- with which said judgment Thomson L.P. and Ong J. concurred.

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17. In the first half of his judgment Suffian J. considered the case generally, the contentions of the Respondent, the law applicable, and made certain criticisms of the award of the High Court. He then stated that the Court was entitled to evaluate the evidence de novo. The second half of his judgment consists of his evaluation of the evidence and his conclusion.

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18. The Appellant respectfully submits that this appeal raises two questions.

- (1) Was the Federal Court justified in the circumstances of the case in making its own evaluation of the evidence and substituting its own opinion for that of the High Court, and
- (2) if so, was its evaluation and opinion wrong in law or principle?

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19. On the first question, the Appellant submits that the test to be applied is well established. It was expressed by Dixon C.J. in Commonwealth of Australia -v- Milledge, 90 C.L.R. 157 at p.159 as follows:

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"On a question of valuation an appellate tribunal is not justified in substituting its own opinion for the opinion of the court below unless it is satisfied that the court below acted on a wrong principle of law or that its valuation was entirely erroneous." The Appellant submits that this principle is of particular importance where (as here) knowledge of the circumstances and of the district may have an important bearing on the conclusion

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reached (see Narsingh Das -v- Secretary of State for India) 1924 52 L.R. Indian Appeals 133 (P.C.)

20. (a) Six main points of criticism of the High Court award can be discerned in the judgment of Suffian J. The first two were as follows:-

p.166 1.36 (i) "Both the Superintendent and the owners in arriving at their respective estimated market value of these two lands, took into consideration their industrial potentialities. 10

Here in this Court, Counsel for the Superintendent further submitted, and I agree with him, that a valuer must also take into account the possibility that the lands might never be required or might not be so required for a considerable time." 20

p.168 1.28 (ii) "Counsel for the Superintendent submitted and I agree that the owner's valuer Mr. Carter had allowed for costs but not for unforeseen costs, contingencies, and profit for prospective purchaser buying to develop."

p.67 1.6 (b) The Appellant submits that these two criticisms arise from a misunderstanding of the method of valuation adopted by the Appellant's valuer, Mr. Carter. Mr. Carter based his valuation on the evidence of sales of comparable land in the vicinity. As Harley J. stated in his summing up, "Both sides are fully in agreement that that is the basis of all the figures which we have to consider." Where the price to be applied to the subject lands is derived from actual transactions any element of uncertainty as to when development may take place is allowed for in the price derived from the transactions, and does not need to be taken into account again. This factor, and the factors of unforeseen costs, contingencies, and developer's profit, may all 30 40

enter into a valuation by the "residual method" but Mr. Carter was not employing that method.

21. (a) The third point of criticism of the High Court award made by Suffian J. was as follows:-

10 "Mr. Carter was of the opinion that these two lots being 43.54 acres in area were more viable than small lots and the proposition that small lots are worth more per unit of area than large lots was a fallacy in the development market. Mr. Carter may be right as regards large parcels situate in a densely populated area where there is a large capital surplus, but in my judgment he could not be right as regards these two lots situate as they are in the town of Kuching with a population of only 50,000 people. Common experience has shown that in areas where there is a small population the price per unit of area for a large parcel is less than the price per unit of area for a small parcel."

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p.168 1.33

(b) The Appellant submits as respects this criticism that the learned judge was not justified in introducing his own opinion on the matter. Mr. Carter expressly raised this question in his report, and his evidence upon it was not seriously challenged. The learned judge should have accepted the evidence particularly in view of the fact that many of those concerned in the High Court proceedings had local knowledge.

30 22. (a) The fourth point of criticism of the High Court award made by Suffian J. was as follows:-

"The prospective buyer of these lands for which sub-division permission had not been applied for or granted would also have to take into account that such permission might be refused or delayed and would accordingly adjust his price to cover this risk."

p.169 1.26

40 (b) The Appellant submits as respects this criticism that it is an inescapable inference from the High Court proceedings that all concerned in those proceedings assumed that no difficulty over

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sub-division would arise. As many of those concerned in the proceedings had local knowledge it was wrong of the learned judge to substitute his own view.

23. (a) The fifth point of criticism of the High Court award made by Suffian J. was as follows:-

p.169 1.40

"If a prospective purchaser had to consider the question of fill, as was admitted by Mr. Carter, then allowances must be made not only for the cost of fill as was done but also for interest on such cost and on the cost of development over an uncertain period."

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(b) The Appellant submits that this criticism stems from the misunderstanding of Mr. Carter's method referred to in paragraph 20 (b) above.

24. (a) The sixth point of criticism was:-

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p.172 1.4

"I agree also with the submission that it is for the owners to prove that the award was inadequate."

(b) The Appellant submits that this point is wrong in law. The question for the High Court under the Land Code is not whether the Superintendent's award is correct, but the amount of compensation to be awarded in accordance with the provisions of the Code.

p.173 1.21

25. (a) Suffian J. further stated that although the Judge's award was a question of fact, it was not a "hard fact" but "a finding of fact which is really an inference from facts specifically found" (per Viscount Simonds in Benmax -v- Austin Motor Co. Ltd. 1955 A.C. 370) the facts specifically found being the agreed prices of land sold in the neighbourhood and the amounts awarded to other resumed lands; and while an appellate court should not lightly differ from the finding of a trial judge which turned solely on the credibility of a witness, the same consideration does not apply with regard to

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a finding of a specific fact which is really an inference from facts specifically found."

(b) The Appellant submits that Suffian J. misapplied the principle in Benmax -v- Austin Motor Co. Ltd. 1955 A.C. 370. A valuation case where expert witnesses give evidence is eminently a case where the credibility of witnesses is involved (see e.g. Ruddy -v- Toronto Eastern Railway Co. 1917 33 D.L.R. 193 (F.C.))

10 26. (a) Suffian J. further stated that:-

"In determining whether or not the Judge had reached the right inference this Court would have been greatly assisted if he had complied with section 66 by stating the grounds for his award and in the absence of such grounds this Court is entitled to evaluate the evidence de novo, as was done in Chow Yoong Hong -v- Tai Chet Siang 1960 M.L.J. 130."

p.173 1.36

20 (b) The Appellant submits that the Judge's reasons are sufficiently apparent from his judgment read with the clear definition of the issues in his summing up. The Appellant will draw attention to the fact that the Federal Court itself did not think it necessary to give reasons qua reasons for its award.

30 27. On the first question in this appeal, namely whether the Federal Court was justified in substituting its own opinion for that of the High Court, the Appellant submits therefore that the Federal Court was not justified in so doing, there being no error of law or principle in the award of the High Court. The Appellant further submits that the Federal Court failed to give weight or sufficient weight to the fact that the Judge and Assessors in the High Court heard and saw the witnesses, and decided the case with knowledge of the circumstances and of the district.

40 28. If, contrary to the foregoing submission, the Federal Court was justified in evaluating the evidence de novo and in arriving at its own opinion the Appellant submits that the said evaluation and opinion are wrong in law and/or

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principle for the following reasons:-

(1) The evaluation was made on the basis that the onus was on the Appellant to show that the Respondent's award was inadequate. The Appellant repeats the submission that such basis is wrong in law.

(2) The evaluation was made on the basis that "land" and "improvements" are to be valued separately, and the award is so expressed. The Appellant submits such basis is wrong in law. In the circumstances of this case the Land Code only requires one value to be found.

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(3) The evaluation was made on the assumption that the points of criticism of the High Court award made by Suffian J. and referred to in paragraphs 20, 21, 22 and 23 above were valid. In particular the evaluation was made on the assumption that small lots are worth more per unit of area than large lots and that permission to sub-divide might be refused or delayed. The Appellant repeats the submission that these criticisms were unfounded.

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(4) In analysing the market transactions Suffian J. relied to a material extent on transactions which had been rejected as evidence by both sides and on transactions affected by factors which vitiated them as evidence.

(5) In quoting the figures for the accepted awards Suffian J. accepted as the true comparable the figure awarded for the land alone without taking into account in each case the overall figure of compensation paid, particulars of which appear in Exhibit 6. The prices per acre derived from analyses of the overall figures are as follows:-

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p.201

Lot 16180	1.26 acres	\$10,365
Lot 16181	0.85 acre	\$11,294
Lot 12287	2.44 acres	\$ 7,000
Lot 11240	0.93 acre	\$ 7,250
Lot 4097	1.6 acres	\$18,250
Lot 11239	0.87 acre	\$ 7,340

	Lot 4098	2.37 acres	¥19,560
	Lot 181	0.44 acre	¥10,000
	Lot 182	0.52 acre	¥12,230
	Lot 183	0.5 acre	¥24,820
	Lot 184	0.5 acre	¥16,530
	Lot 185	0.5 acre	¥10,000
	Lot 4729	18.93 acres	¥ 5,100
	Lot 6868	3.37 acres	¥ 5,935
	Lot 5736	5.43 acres	¥ 7,365
10	Lot 4415	2.50 acres	¥12,126
	Lot 16688	1 acre	¥13,265

The awards and settlements varied from ¥5,100 to ¥24,820 per acre.

The Appellant repeats the submission that separate valuation of "land" and "improvements" is wrong in law.

20 (6) In assessing the evidential value of the awards and settlements, Suffian J. took the view that an award could be accepted as correct if it was a large award. He took no apparent account of the fact that an award, whatever the amount, is not a sale in open market, or of the admission by the Respondent's valuer that "I did consider some awards low" (see Agreed Note of Judge's Summing-up, Record page 82) and that the "awards were taken from 1958 figures" (see Agreed Note of Judge's Summing-up, Record page 84).

p.54 1.4

30 (7) In general, that the evaluation was based on incomplete and inaccurate examination of the evidence.

29. The Appellant therefore submits that the opinion and award of the Federal Court should not be allowed to stand.

30. After hearing Counsel the Federal Court ordered that no costs should be paid by either party in respect of the proceedings in the High Court, and that the Respondent (Appellant in this appeal) should pay the Appellant (Respondent in this appeal) the taxed costs of the appeal.

40 31. The Appellant was granted Final Leave to Appeal to His Majesty The Yang Di-Pertuan Agong by Order of the Federal Court of Malaysia dated

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p.190

the 4th day of July 1966.

32. The Appellant humbly submits that this appeal should be allowed, that the judgments and order of the Federal Court of Malaysia should be set aside, that the award of the High Court should be affirmed (or in the alternative that His Majesty in Council should make such increased award as seems just) and that the Respondent be ordered to pay the Appellant his costs of this appeal, of the appeal in the Federal Court and of the proceedings in the High Court, for the following among other

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## R E A S O N S .

1. Because in a valuation case the Federal Court was not justified in evaluating the evidence and forming its own opinion in the absence of an error of law or principle in the award of the High Court.

2. Because there was no error of law or principle in the award of the High Court.

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3. Because the criticisms of the High Court award made in the judgment of Suffian J. were unfounded.

4. Because the Federal Court misapplied the principle in Benmax -v- Austin Motor Co. Ltd. 1957 A.C. 370.

5. Because the Federal Court failed to consider whether or not the advantage enjoyed by the Judge and Assessors in the High Court by reason of having seen and heard the witnesses could not be sufficient to explain or justify the conclusion they reached.

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6. Because the Federal Court failed to consider whether or not the knowledge of the circumstances and of the district enjoyed by the Judge and Assessors could not be sufficient to explain or justify the conclusion they reached.

7. Because the Federal Court was wrong to

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conclude that there were no grounds given for the High Court award.

8. Because the evaluation of the evidence and opinion of the Federal Court was wrong in law and principle.

DAVID WIDDICOMBE

G. STARFORTH HILL

No.18 of 1966

IN THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL

ON APPEAL FROM

THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of CIVIL SUIT No.  
C/70/63 of 1963 IN THE HIGH COURT  
IN BORNEO AT KUCHING

AND

IN THE MATTER of THE LAND CODE  
(Chapter 81 of the Laws of  
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AND

IN THE MATTER of THE ACQUISITION OF  
K.O.T. 16178 and K.O.T. 16179  
OF KUCHING

B E T W E E N :

AIK HOE & COMPANY LIMITED  
(Objector) Appellant

- and -

SUPERINTENDENT OF LANDS AND  
SURVEYS, FIRST DIVISION  
(Respondent) Respondent

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C A S E  
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