

16, 1969

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No.5 of 1968

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)

Appellant

- and -

CHOONG SAM, Intervener (added
by Order of Federal Court
dated 17th July 1967)

First Respondent

- and -

LEE CHIM YEE and CHAN HON
PENG (f) as Executors of the
Estate of Chan Phooi Hong
Deceased.

Second Respondents

- and -

TONG SWEE KING (f) as Execu-
trix of the Estate of Ho Kok
Yew deceased.

Third Respondent

C A S E FOR FIRST RESPONDENT

A

1. This is an Appeal from a Judgment and Order of the Federal Court of Malaysia dated the 17th July 1967 whereby the said Federal Court ordered that the First Respondent and the Second Respondents be substituted for the Third Respondent as Appellants in the Federal Court Civil Appeal No.X4 of 1967 and that the Third Respondent be transposed as the Second Respondent in the said Federal Court Civil Appeal.

p.133

2. The Federal Court Civil Appeal No.X4 of 1967,

- pp. 53 & 54 in which the Third Respondent was the original appellant, was on appeal against a Judgment and Order of the High Court in Malaya at Ipoh dated the 9th December 1966 dismissing an action brought by the Third Respondent against the Appellant and the Second Respondents. In that action (Civil suit No.304 of 1964) the Third Respondent alleged that the Appellant was guilty of a breach of an agreement entered into between the predecessors in title of the Appellant, the Second Respondents and the Third Respondent on the 22nd October 1931, and claimed inter alia specific performance of that agreement. A
- p.3
- pp. 55 & 56 The Third Respondent entered a Notice of Appeal against the said Judgment and Order of the High Court in Malaya but prior to the hearing agreed with the Appellant to compromise the said Appeal, which she thereupon discontinued or purported so to do.
- p.81
- pp. 57 & 58 Thereafter the First Respondent applied to the Federal Court to be allowed to intervene in the appeal as appellant in place of the First Respondent or alternatively that the Second Respondents might be made appellants to which the Second Respondents consented. The Federal Court allowed the application by its said Judgment and Order of the 17th July 1967, holding that the First Respondent had a legal interest in the subject matter of the litigation and was an aggrieved person whose legal rights had been defeated or circumvented by the concerted action of the Third Respondent and the Appellant. B
- p.133
- p.127, 11.A4-B2
p.131, 11.B1-B8 3. The principal questions that arise for determination in this Appeal are whether the Federal Court rightly so held and whether it was entitled to make the order that it did. C
- pp.15 to 20 4. The agreement of the 22nd October 1931, upon which Civil Suit No.304 of 1964 was brought, related to a group of mining lands in the Mukim of Blanja (listed in a Schedule) and was made between Pegang Prospecting Company limited, Ho Man and Ho Kok Yew, who were respectively the lessee, sub-lessee and sub-sub-lessee of certain of those lands and the predecessors in title of respectively the Appellant, the Second Respondents and the Third Respondent. D
- p. 15, 1. D3 to
p. 16, 1. A7 The agreement recited that the sub-sub-lessee

was working all the lands comprised in the Schedule as one mine, known as the Khong Heng Kongsu Mines, and that the sub-lessee and the sub-sub-lessee had with the lessee's approval applied for an aggregation permit in accordance with section 20 of the Mining Enactment 1928 in respect of the said lands, the working of which had been described for the purposes of the application as the Kacha and Menelai Comprehensive Mining Scheme, and it provided for the direction and manner in which the said Mine was to be worked.

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5. It was the case of the Plaintiff in Civil Suit No.304 of 1964 (the Third Respondent in this Appeal) that upon a proper construction of the agreement of the 22nd October 1931 the Appellant was obliged to grant sub-leases to the Second Respondents, and they in turn to grant sub-sub-leases to her, of certain lands in the vicinity of the said Mine which the Appellant has acquired by the grant to it of mining leases. The Second Respondents were willing to grant sub-sub-leases to the Third Respondent if they were given the necessary sub-leases by the Appellant, but the Appellant had refused to grant such sub-leases.

p.14

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p.37

6. The agreement of the 22nd October 1931 contained inter alia the following provisions:-

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

p.17, l.B10 to
p.18, l. A4.

C

D

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-sub-leases granted or here-

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

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p.19

Plan A7(11)

7. The lands listed in the Schedule to the agreement of the 22nd October 1931 included lands leased to the Appellant by Mining Leases Nos.8899 and 11543, which were separated by the permanent way and reserved lands along a railway line (the Ipoh-Tronoh Railway Reserve). The lands the subject of Mining Leases Nos.8899 and 11543 had become worked out on the surface, but the interjacent lands had become available for mining after the closure of the railway line, and mining leases over them had been granted to the Appellant.

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The lands in respect of which those new mining leases had been granted to the Appellant were described in the Third Respondent's Further Amended Statement of Claim dated the 7th July 1964 as

p.13, 11.A6 to B5

(a) a section of the former Ipoh Tronoh Railway Reserve, approximately $18\frac{1}{2}$ acres in area;

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

C

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

The Third Respondent alleged inter alia that the Appellant's applications for mining leases in respect of those lands were made in reliance and were expressly based upon the agreement of the 22nd October 1931 and that the lands applied for were required for future extension of the existing mines.

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The relief asked for by the Third Respondent in the action was as follows :

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

p.13, 1.C9 to
p.14, 1.B7

(ii) an order that the First Defendant Company /the Appellant/ do execute valid and registrable subleases in favour of the Second Defendants /the Second Respondents/ in accordance with the terms of the said agreement of 22nd October 1931 in respect of

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(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 Lot 30286 held under Mining Certificate No.3256;

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

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(v) an order that the Second Defendants do in turn execute sub-sub-leases over the lands set out in (ii) above in favour of the Plaintiff /the Third Respondent/ in accordance with the terms of the said agreement of 22nd October 1931;"

8. The Appellant in its Further Amended Defence dated the 14th August 1964 pleaded inter alia that the agreement of the 22nd October 1931 had lapsed by effluxion of time and/or by repudiation and acquiescence by the other parties to the agreement, that alternatively the other parties to the agreement being in breach the Appellant was no longer bound by it, and that in any event if the agreement was still valid and subsisting it did not impose upon the Appellant the obligation to grant the subleases claimed.

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p.32, 1.D7 to
p.33, 1.9

p.33, 11.D2 to
E1

The Second Respondents in their Defence dated the 24th December 1964 pleaded that they had always been ready and willing to do everything in their power to fulfil their obligations to the Third Respondent but had been unable to do so because the Appellant had refused to adhere to its obligations as set out in the Statement of Claim.

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p.37

pp.63 to 65

pp.66 to 68

pp.69 to 70

p.69,1.B3 to
p.70,1.5.

p.70,11.9 & 10

9. The interest of the First Respondent in the subject matter of the litigation arose under an agreement in writing dated the 1st July 1963 made between the Third Respondent and himself whereby he was given the right for 12 months to enter upon and work the lands comprised in Mining Leases Nos. 8899 and 11543 in consideration of the payment of tribute. The agreement was renewed on the 1st July 1964 for a further 12 months. On the 27th July 1964 what had also been tacitly agreed between them for over a year past was reduced to writing in the form of a letter from the First Respondent to the Third Respondent which was in the following terms:

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

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

The Third Respondent signed this letter in confirmation. Paragraph 2 referred to, the new mining leases.

10. Civil Suit No.304 of 1964 had been instituted by the Third Respondent at the request of the First Respondent in order to enforce the claim to work the new lands which the Appellant had acquired but which it was excluding from the agreement of the 22nd October 1931. Before commencing proceedings the following agreement had been made between the First Respondent and the Third Respondent

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"IPOH: 12th July 1963

pp.71 & 72

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

Dear Madam,

Khong Heng Kongsí, Papan

This is to confirm my undertaking to you
 as follows:

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

I confirm: Yours faithfully,
 (Sd) Tong Swee King (Sd) CHOONG SAM.
 Tong Swee King
 as Managing Partner Khong Heng Kongsí Papan. "

11. On the 9th December 1966 the High Court in Malaya (Ali,J.) gave judgment dismissing the suit. The learned Judge held that clause 4 of the agreement of the 22nd October 1931 (which he considered the only material clause) could not be regarded as a definite or completed agreement. Even if there was any agreement between the parties it was no more than an agreement which contemplated the

pp.45 to 52

p.50, ll. 8 & 9
 p.51, ll. B6 to B9

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execution of a further agreement between them, which further agreement would be the sub-leases.

pp.55 & 56

12. By Notice of Appeal dated the 6th January 1967 the Third Respondent appealed to the Federal Court against the whole of the said decision.

p.60,11.B5 to C4

13. On the 9th March 1967 the Third Respondent informed the First Respondent that as a result of negotiations which without reference to him she had conducted with the Appellant she had decided not to proceed with the appeal.

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p.75

On the same day she wrote to the solicitor whom the First Respondent had appointed to act for her in the proceedings instructing him to withdraw the appeal. A copy of the letter was simultaneously sent to the Registrar of the Federal Court.

pp.197 & 198

On the 15th March 1967 the Third Respondent and the Appellant entered into a formal agreement whereby the Third Respondent accepted from the Appellant payment of \$10,000/-" as an ex-gratia payment in full settlement of all her claims against the company /the Appellant/ without any admission of liability on the part of the company" and agreed in consideration thereof to withdraw the appeal and not to prosecute the matter further against the Appellant in any proceedings.

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p.81

On the 24th March 1967 the Third Respondent served on the Registrar of the Federal Court and on the parties to the action a Notice of Discontinuance of the appeal.

pp.57 & 58

14. The First Respondent commenced THE PRESENT PROCEEDINGS by Notice of Motion in the Federal Court dated the 24th March 1967 applying "that either the name of the Appellant on the record /i.e. the Third Respondent in the present Appeal/ be substituted by the name of Choong Sam /the First Respondent in the present Appeal/ or that of the Second Respondents /the Second Respondents also in the present Appeal/ substituted in her place and in either case the Appellant be added as a Respondent to the Appeal."

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pp.59 to 62

In his affidavit in support sworn on the 23rd March 1967 the First Respondent set out the short history of the matter and alleged collusive conduct on the part of the Third Respondent and the Appellant "designed to destroy the rights of the

p.61,11.1 & 2

D

Second Respondents".

- A The Second Respondents, in the affidavit of Chan Hon Peng dated the 27th March 1967 filed on their behalf, stated that they were adversely affected by the Judgment and Order of the High Court of the 9th December 1966 and that, since they had a direct legal interest in the pursuit of the claim and the appeal, they were prepared to be substituted as appellants in the appeal if the Court deemed it expedient. pp.83 & 84
15. The Appellant, in an affidavit of Lee Wan Seng, the chairman of its Board of Directors, sworn on the 29th March 1967 and filed on its behalf, alleged inter alia that the First Respondent had no legal interest in the subject matter of the suit, that if he had any such legal interest he should have joined in the suit originally as co-plaintiff and that by not so doing he had abandoned any rights he might have had. pp.85 to 87
p.85, l.B2 to p.86, l.A8
- B The Appellant, in a second affidavit of Lee Wan Seng dated the 26th April 1967, and the Third Respondent, in an affidavit sworn by her on the 28th April 1967, both denied in identical terms that there had been any "collusive conduct" between them with regard to the discontinuance of the action. They had merely "reached an amicable arrangement". p.89
pp.90 & 91
p.89, l.A1 to B6 and
p.91, l.A6 to C2
p.89, l.A8
- C 16. On the 2nd May 1967 the First Respondent's application was heard by the Federal Court, which on the 17th July 1967 by a majority decision (Barakbah, Lord President, Malaysia and Ong Hock Thye, Judge, Federal Court; Azmi, Chief Justice Malaya dissenting) ordered that the First Respondent and the Second Respondents be substituted for the Third Respondent as Appellants in the Federal Court Appeal and that the Third Respondent be transposed as the Second Respondent in that appeal. pp.93 to 109
pp.111 to 132
p.133
- D 17. The principal Judgment in favour of the majority decision was delivered by Ong Hock Thye F.J. who held, it is submitted correctly, that the First Respondent had not merely a commercial but a legal interest in the subject matter of the suit and of the appeal and was entitled to the relief that he claimed. Having reviewed the authorities, the learned Federal Judge thus summarised the position in the present case. pp.119 to 130

p.126,1.B10 to
p.127,1.4

"In the instant case, far from being unable to disclose a legal interest, the applicant has shown that, in the event that clause 4 obliges the respondent company to sublease the inter-jacent new mining lands, the appellant would in turn be bound by her contract with the applicant to renew annually his right to work these lands till exhaustion of the ore contents. The rights of the appellant against the respondent company to work the lands, even if the second respondents were bought out, would prima facie be specifically enforceable. So would the applicant's rights against the appellant. Once it is held that the appellant has such rights the applicant's own rights cannot be denied. If this substantive right can be passed over in cavalier fashion by describing it as a "commercial interest", then I confess I do not know where to draw the line between a legal right and a commercial interest."

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p.127,11.A7 to B2

The First Respondent was clearly an aggrieved person whose legal rights had in effect been defeated or circumvented by the Third Respondent and the Appellant "acting in concert to cut the ground from under his feet". So far as the Third Respondent was concerned she should be held to her contract to leave the conduct of the litigation in the hands of the First Respondent. "Any other course would be unconscionable by reason of her own conduct". So far as the Appellant was concerned none of its objections raised any further obstacle to the making of the order applied for.

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p.128,11.C4 to
C10

p.130,11.B8 to
B10

C

pp.131 & 132

Barakbah (L.P.Malaysia) delivered a concurring Judgment.

pp.111 to 117

p.112,11.B7 to
B10

p.117,11.A2 to
A5

Azmi (C.J.Malaya) in his dissenting Judgment held that although the Third Respondent had a contractual right against the First Respondent under his contract dated the 1st July 1964, he was not entitled to be added as a party in place of the Third Respondent since he had merely a commercial interest and "a decision of the court one way or the other would only affect his pocket".

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pp.165 & 166

18. On the 29th September 1967 the Federal Court of Malaysia (Azmi C.J. Malaya, Ong F.J. and Azlan Shah J) by a majority (Asmi C.J. and Azlan Shah J; Ong F.J. dissenting) granted the Appellant conditional leave to appeal to the Judicial Committee of the Privy Council.

Ong F.J., in his Grounds of Dissenting Judgment, expressed the view, which it is submitted is the right one, that there were no grounds upon which in the proper exercise of the judicial discretion, leave to appeal ought to have been given.

pp.169 to 171

On the 8th January 1968 the Appellant was granted final leave to appeal to the Judicial Committee of the Privy Council.

p.167

A 19. The First Respondent respectfully submits that this Appeal should be dismissed and the said Judgment and Order of the Federal Court of Malaysia dated the 17th July 1967 should be affirmed and the Appellant should be ordered to pay the costs of this Appeal, for the following, amongst other

R E A S O N S

1. BECAUSE the First Respondent had a legal interest in the subject matter of the suit and of the appeal and was entitled to be added or substituted as an appellant.

B 2. BECAUSE the Second Respondents had a legal interest in the subject matter of the suit and of the appeal and it was right that they should be added or substituted as appellants.

3. BECAUSE in bringing the suit and in proceeding to appeal the Third Respondent was acting also on behalf of the First Respondent and had no authority to compromise or abandon the appeal without reference to him.

C 4. BECAUSE in spite of the purported abandonment of the appeal by the Third Respondent, the Federal Court was entitled in the circumstances to provide for its continuance by a substitution of the First and Second Respondents as appellants.

D 5. BECAUSE the purported settlement of the appeal by the Appellant and the Third Respondent was a collusive arrangement designed to circumvent or defeat the legal rights of the First and Second Respondents and it was proper to prevent this by allowing the intervention of the First and Second Respondents as appellants.

6. BECAUSE the majority Judgments of the Federal Court were right for the reasons therein stated.

DINGLE FOOT, Q.C.

MONTAGUE SOLOMON

No. 5 of 1968

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ON APPEAL FROM THE FEDERAL
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B E T W E E N :

PEGANG MINING COMPANY LIMITED
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Appellant

- and -

CHOONG SAM, Intervener (added
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Second Respondent

- and -

TONG SWEE KING (f) as Execu-
trix of the Estate of Ho Kok
Yew deceased.

Third Respondent

CASE FOR FIRST RESPONDENT

Graham Page & Co.,
St. Margarets Mansions,
49-55 Victoria Street,
Westminster,
London, S.W.1.