Privy Council Appeal No. 6 of 1965

Kepong Prospecting Limited – – – – – – *Appellant*

and

S. K. Jagatheesan and others – – – *Third Parties Appellants*

v.

A. E. Schmidt (since deceased) and Marjorie Schmidt (Widow) substituted for A. E. Schmidt (deceased) – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD OCTOBER 1967

Present at the Hearing:
LORD GUEST
LORD WILBERFORCE
LORD PEARSON
SIR DOUGLAS MENZIES
SIR ALFRED NORTH
[Delivered by LORD WILBERFORCE]

These are two appeals from the judgment of the Federal Court of Malaysia (Thomson P., Barakbah C. J. Malaya and Tan F. J.) which allowed the appeal of A. E. Schmidt from a judgment of the High Court at Kuala Lumpur (Hashim J.). The Federal Court ordered that judgment should be entered in favour of A. E. Schmidt against the appellant Company for a sum equal to one per cent of the selling price of all iron ore sold from certain mines in Johore which sum has been certified to amount to $251,529.50. It was further ordered that the appellant Company should be indemnified by the third parties appellants against their liability to A. E. Schmidt. Since the hearing in the Federal Court, A. E. Schmidt has died and his widow Marjorie Schmidt has been substituted as respondent. References in this judgment to Schmidt are to A. E. Schmidt.

The matters arise out of prospecting permits over certain State land in Johore. The first step in relation to this land was taken in 1953 when Tan Chew Seah (hereinafter called "Tan") applied to the Government of the State of Johore for a prospecting permit for iron ore. He was assisted in the negotiations by Schmidt who was a consulting engineer. A prospecting permit (numbered 10/53) over 1,000 acres of State land at Bukit Kepong was granted to Tan on 25th November 1953. On 2nd December 1953 Tan wrote a letter to Schmidt which contained the following agreement:

> "I hereby agree to ensure that you are paid one per cent of the selling price of all ore that may be sold from any portion of the said land. This is in payment for the work you have done in assisting to obtain the prospecting permit and any work you may do in assisting to have mining operations started up."

On 11th July 1954 Tan executed a Power of Attorney in favour of Schmidt which conferred upon him widely expressed powers to contract for the disposal of any of Tan's mining properties for such consideration and subject to such conditions as Schmidt should think proper.

The appellant Company, Kepong Prospecting Ltd., was incorporated on 27th July 1954 with a view to taking over the benefit of Tan's prospecting permit. Schmidt and Tan were among the first directors of the Company. On 31st July 1954 an agreement (hereinafter referred to as "the 1954 agreement") was made between Tan and the appellant Company. This agreement was executed on behalf of Tan by Schmidt acting under the Power of Attorney. Their Lordships will refer in greater detail to this agreement later. Briefly it provided that the Company should prospect and work the land included in the prospecting permit as well as any additional land comprising the same mining project and it was agreed that the appellant Company should take over the obligation of Tan to pay Schmidt one per cent of the selling price of all ore that might be sold from such land. On 31st July 1954, the 1954 agreement was adopted on behalf of the appellant Company at a meeting of its directors.

On or about 26th September 1955 a further agreement (hereinafter referred to as "the 1955 agreement") was made between the appellant Company of the one part and Schmidt of the other part. This agreement, to which their Lordships will refer more fully hereafter, contained a clause by which the appellant Company agreed to pay to Schmidt 1 per cent of all ore that might be won from any land comprised in the 1954 agreement. The 1955 agreement was signed by Schmidt and the seal of the appellant Company was affixed to it in the presence of Tan and of one D. G. Ironside. The said Ironside signed the agreement as proxy for N. A. Marjoribanks (a director of the appellant Company) under an appointment as such proxy approved by the directors of the appellant Company on 26th September 1955. This appointment was expressed to operate from 1st October 1955 to 31st December 1955.

In December 1955 an additional prospecting permit numbered 3/55 was granted to Tan in respect of 1,200 acres at Bukit Pasol. From the date of incorporation of the Company until March 1956 prospecting was carried out on the land included in the prospecting permits 10/53 and 3/55. Workable deposits of iron ore were discovered but it became apparent that the appellant Company required additional capital in order to enable it to start mining operations. It was in this connection that the Third Parties appellants became interested in the project. On 4th August 1956 a meeting of the directors of the appellant Company was held which was attended by the Third Party S. K. Jagatheesan and it was resolved that 315,000 shares of $1 each in the appellant Company should be allotted to the said Jagatheesan and his associates. This allotment was carried out. Disputes, however, arose between those originally interested in the appellant Company and the Third Parties Appellants as a result of which an Originating Motion was filed in the High Court at Kuala Lumpur on 25th September 1956 by Lim Ngian Cher a shareholder in the appellant Company. The Third Parties appellants, the appellant Company, and L. A. J. Smith were respondents to the Motion. The relief sought was that the Register of the appellant Company be rectified by deleting the names of the Third Parties appellants and the said Smith as holders of shares. The Motion came before Sutherland J. in March 1957 and, after the hearing had commenced, a compromise was agreed. This compromise was embodied in a Consent Order made by Sutherland J. on 27th March 1957. By this Order it was ordered that the Register of the appellant Company be rectified by deleting the names of the Third Parties appellants and the said L. A. J. Smith as holders of shares registered in their names and that the issue of shares to them be cancelled. The appellant Company was ordered to grant to the Third Parties appellants a sub-lease of the land included in the prospecting permits which had by then been comprised in a mining certificate. The Consent Order contained also as Clause 10 a provision in the following terms:

> "'The agreement between Kepong Prospecting Limited and Tan Chew Seah dated the 31st day of July 1954 whereby 1 per cent of the value of all ore sold from the mining land is to be paid by the Company to Mr. A. E. Schmidt shall be taken over by the Respondents numbered 1 to 7 and 9 but not 8' (namely the Third Party Appellants) 'or their nominees and the Respondents numbered 1 to 7 and 9 but not 8 shall indemnify Kepong Prospecting Limited against all claims which may be made against Kepong Prospecting Limited thereunder.'"

A draft of this Consent Order was approved by the directors of the appellant Company on 27th May 1957 on which date Schmidt was still a director of the appellant Company. He concurred in the approval of the said draft. Schmidt was dismissed from his office as Managing Director of the appellant Company on 19th May 1957 and ceased to be a director on 2nd August 1959. He commenced the present proceedings on 24th July 1959 claiming an account of all the moneys payable to him under the 1954 agreement, the 1955 agreement or one or other of them. The appellant Company, as well as defending this action, counter-claimed against Schmidt alleging breach of his duty as managing director in failing to bring the existence of the 1955 agreement to the notice of the appellant Company's legal adviser and claiming damages to the extent of any sums payable to Schmidt under the 1955 agreement. The appellant Company also issued a third party notice against the Third Parties appellants claiming, under the term in the Consent Order already referred to, to be indemnified by the Third Parties against all liability to Schmidt under the 1954 agreement or the 1955 agreement.

Their Lordships consider first the claim by Schmidt against the appellant Company under the 1955 agreement. The first point taken for the appellant Company was that the 1955 agreement was not validly executed on its behalf. Under Article 101 of the appellant Company's Articles of Association it is required that the seal of the Company should be affixed to any instrument in the presence of at least one director and of the managing director or a permanent director. Tan, who was one of the persons in whose presence the seal was stated to have been affixed, was a permanent director and the critical question was whether D. G. Ironside, who was the other person in whose presence the seal was stated to have been affixed, was a qualified person to act for this purpose. The trial judge, Hashim J., came to the conclusion that the 1955 agreement was not executed in accordance with Article 101. He relied on the fact that the agreement bore the date 26th September 1955 whereas the appointment of Ironside as proxy for N. A. Marjoribanks (a director) did not operate until 1st October 1955. He held that the evidence of Ironside that he must have affixed his signature on or after 1st October was "rather unsatisfactory" and that it had not been made out that the seal of the company had been affixed on or after that date. In the Federal Court a different conclusion was reached and it was held that on the evidence as a whole it was established that the seal was affixed on or after 1st October when Ironside was a qualified person. Before their Lordships it was argued that the Federal Court should not have interfered with the decision of the trial judge on what was essentially an issue of fact and that the latter's finding should be restored. Their Lordships have no hesitation in holding that the Federal Court was entitled and indeed bound to reach a different conclusion from that of Hashim J. Their Lordships accept, as did the Federal Court, that since the date 26th September 1955 appears on the face of the document, that is *prima facie* evidence that the document was executed on that date. They accept also that the onus lies on those who seek to establish that the document was in fact executed on a different date. They consider, however, that the evidence which was available at the trial is such as to establish beyond any doubt that the appellant Company's seal could not have been affixed on 26th September and must have been affixed later than 1st October. In the first place evidence was given by Schmidt, on which he was not cross-examined, that he signed the document on 26th September but that

it could not be sealed on that date because Tan, whose signature was necessary as that of a permanent director, was absent from Kuala Lumpur. He said that he himself left Kuala Lumpur for a few days and did not return until 2nd October and that it was on the next day, namely 3rd October, that Tan came to him at his office upon which he (Schmidt) telephoned to Ironside and the three of them (Schmidt, Tan, Ironside) went to the office of the Company's secretary where the document was sealed. The secretary of the appellant Company, one Leong, gave evidence substantially confirming the evidence of Schmidt. He was sure that the document was sealed not on 26th September but during the first week in October. N. A. Marjoribanks also gave evidence that Tan was not present at the meeting on 26th September. Quite apart therefore from the evidence of Ironside (which was in fact consistent with that of the other witnesses) there was ample material to show that the seal could only have been affixed after 1st October 1955, at a date when Ironside was qualified to sign as a proxy director.

Apart from the question as to the validity of the execution of the 1955 agreement, the appellant Company submitted that Schmidt was not entitled to sue upon it for a variety of reasons. In the first place it was said that there was no consideration given by Schmidt for the obligation undertaken by the appellant Company. The consideration expressed in the 1955 agreement was (by clause 1) as follows:

> " The Company shall in consideration of the services rendered by the consulting engineer for and on behalf of the Company prior to its formation after incorporation and for future services pay to the consulting engineer one per cent. . . . "

Their Lordships agree with the Federal Court in holding that this establishes a legally sufficient consideration moving from Schmidt. They accept that the services " prior to its formation " cannot amount to consideration. No services can be rendered to a non-existent company, nor can a company bind itself to pay for services claimed to have been rendered before its incorporation. The inclusion of this ineffective element, however, does not prevent the other two elements, or one of them, from constituting valid consideration, and both of them, in their Lordships' opinion do so. Services rendered after incorporation but before the date of the agreement, can under the law of Malaysia, validly amount to consideration for an agreement to pay, since section 2 (d) of the Contracts Ordinance (No. 14 of 1950) expressly provides for this; in point of fact there is no doubt that such services were rendered . As regards future services their Lordships would hold if necessary that the clause should be understood as meaning that Schmidt as consulting engineer agreed to make his services available in the future if required by the company. Sufficient consideration is therefore established.

Secondly, it was said that the agreement was void for uncertainty because it was stated that the tribute of one per cent should be calculated " on the selling price of the ore as shown in the company's records ". Their Lordships do not agree with this contention. This is clearly a case where an expression on the face of it possibly lacking in definition can be attributed a certain meaning by evidence, and in fact and in result there was no difficulty in showing what price was referred to in the clause.

Thirdly, it was contended by the appellant Company that Schmidt was not entitled to recover the full amount stipulated in the 1955 agreement because of a statement made by him at a meeting of directors on 1st March 1956. At this meeting, as recorded in the Minutes, Schmidt informed the directors that he would accept one per cent tribute on the F.O.B. price of the ore, less export duty and the barge contract rate, in settlement of the company's obligation under the agreement between him and the company dated 26th December [*sic*] 1955. There was some conflict of evidence as to the circumstances in which this statement was made but in any event their Lordships consider that it amounted to no more than a voluntary offer by Schmidt which was never accepted by the appellant Company and which never assumed contractual force.

Fourthly, it was submitted on behalf of the appellant Company that the 1955 agreement was discharged by novation by the Consent Order of 27th March 1957. Their Lordships need say no more with regard to this submission than that Schmidt was not a party to the Consent Order and that they are fully satisfied, after consideration of the evidence regarding Schmidt's knowledge of the making of the Order, that there is no basis for this contention. They are of the same opinion with regard to an alternative submission that Schmidt by his conduct in acquiescing to or approving (on behalf of the appellant Company) the Consent Order, had estopped himself from relying upon the 1955 agreement.

Their Lordships reach the conclusion, in agreement with the Federal Court, that the appeal of the appellant Company against the respondent Marjorie Schmidt must fail for the reason that Schmidt was entitled to the account claimed by him under the 1955 agreement and to payment of the money found due on that account.

There remains the claim of the appellant Company for indemnity against the Third Parties appellants. This indemnity is claimed by virtue of clause 10 of the Consent Order which has been set out above. This clause in terms refers to the 1954 agreement and the first submission on behalf of the appellant Company was that if it was liable at all to Schmidt it was so liable under the 1954 agreement which in terms is covered by the indemnity clause. It becomes therefore necessary to consider whether this is correct. The 1954 agreement was, as has been stated, made between Tan (acting by Schmidt as his attorney) of the one part and the appellant Company of the other part. It was argued that Schmidt had no power under the Power of Attorney to enter into the agreement on behalf of Tan, but their Lordships find no difficulty in holding that the Power of Attorney was amply wide enough in its terms to permit this. The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] A.C. 847 at page 853 and *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446 at page 468. But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of *jus quaesitum tertio*. Their Lordships are of opinion that the appellant Company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law. It is true that section 2 (*d*) of the Contracts Ordinance gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paragraphs (*a*), (*b*), (*c*) and (*e*) support the English conception of a contract as an agreement on which only the parties to it can sue. Reference was made to certain Indian decisions on the Indian Contract Act on which the Malaysian Contracts Ordinance is based. These were *Subbu Chetti v. Arunachazam Chettiar* (1930) 53 Madras 270 (where however it was said that the balance of authority is in favour of the view that a stranger to the contract cannot without more sue to enforce it) and *Khirod Behari Dutt v. Man Gobinda* A.I.R. 1934 Calcutta 682. But other decisions in a contrary sense were cited which appeared to their Lordships to be more authoritative: their Lordships refer to decisions cited in *Subbu Chetti v. Arunachazam Chettiar* (u.s.) and in Pollock and Mulla on the Indian Contract Act, 6th Edition, pp. 21 ff. and to two decisions so recent as 1957 (*Protapmull Rameswar v. State of West Bengal*

61 C.W.N. 78 and *Babu Ram v. Dhan Singh* A.I.R. 1957 Punjab 169). These, in their Lordships' view, confirm that the law was correctly stated by Sir John Beaumont C. J. in the Bombay case of *National Petroleum Co. Ltd. v. Popatlal* A.I.R. 1936 Bombay 344. In a passage, which though strictly *obiter*, was based on a full argument and consideration of the cases, the learned Chief Justice expressed the view that *Khirod Behari Dutt v. Man Gobinda* (u.s.) was opposed to established principle and authority. An argument on this legal issue was, so their Lordships were informed, submitted to the Federal Court: no reference to it appears in their judgment and their Lordships must assume that they did not accept it. The appellants failed to persuade their Lordships that they were wrong.

The 1954 agreement was therefore, in their Lordships' opinion, not enforceable by Schmidt against the appellant Company, and it is in the light of this that consideration must be given to Clause 10 of the Consent Order.

Before approaching its construction, it is necessary to restate the circumstances in which this agreement was made. By his letter of 2nd December 1953, Tan had agreed with Schmidt " to ensure that you are paid one per cent of the selling price of all ore. . . ." By this letter, Tan undertook no obligation himself to make any payment, but he was to ensure payment by another viz. the persons or Company eventually extracting the ore. The 1954 agreement between Tan and the appellant Company contained a recital of this obligation; and the operative clause (Clause 4) was evidently drafted in compliance with it. It read: " the Company shall take over the obligation of the Permit Holder [Tan] to pay A. E. Schmidt one per cent of the selling price of all ore "—and extended the area to which the obligation should relate. This agreement was tabled at the first meeting of the Directors of the appellant Company held on 31st July 1954: the relevant minute reads:

> " The copy of agreement dated 31st July 1954 *between Mr. Tan Chew Seah and Mr. A. E. Schmidt and the Company* was tabled. It was resolved that the same be adopted. Notice of the agreement has been given to Mr. A. E. Schmidt and he accepts it in so far as it relates to his dealings with Mr. Tan Chew Seah."

This suggests that the 1954 agreement was at the time regarded as enforceable by Schmidt. Later, in 1955, it appears that Mr. Marjoribanks, the Company's legal adviser, thought that as a tidying up operation the 1955 agreement should be executed, and it is minuted, on 26th September, as a supplementary agreement. That agreement recited Clause 4 of the 1954 agreement and recited further that " it is deemed advisable that the Company should enter into this supplementary agreement with the Consulting Engineer ". The operative Clause 1 contained a direct obligation on the part of the Company to Schmidt to pay him the one per cent. The relation between Clause 4 of the 1954 agreement and the 1955 agreement may be variously described. The Federal Court considered that the 1954 agreement established an obligation to pay one per cent to Schmidt which was lacking the element of enforceability by Schmidt: the 1955 agreement merely added this element. It was in this sense supplementary to it. It may, alternatively, be considered as superseding the earlier obligation: in support of the latter alternative it may be asked what force could be left to Clause 4 after the conclusion of the 1955 agreement: the Company had discharged its obligation to Tan to take over the latter's obligation by the agreement it made with Schmidt.

With this in mind, Clause 10 of the Consent Order must be construed. The Clause commences by a reference to the 1954 agreement, mentioning it specifically and accurately by date and parties. This enabled counsel for the Third Parties to argue, as he forcefully did, that it was not necessary or proper to look beyond the 1954 agreement: the Clause was unambiguous and the only obligation assumed by the Third Parties related to the 1954 agreement: consequently, since Schmidt had (as has been shown) no rights

under that agreement, the indemnity did not arise. The duty to indemnify only related, it was said (and this must follow if the argument is correct) to any claim which Tan might make against the appellant Company.

This argument appears at first sight plausible enough but, in their Lordships' view, it does not survive a more careful scrutiny of the clause. After the reference to the 1954 agreement, the Clause continues " whereby one per cent of the value of all ore sold from the mining land is to be paid by the Company to Mr. A. E. Schmidt ".

These words have no intelligible meaning if the scope of the clause is confined to the 1954 agreement: under that agreement the Company assumed an obligation to Tan; the words quoted on the other hand contemplate the existence of an obligation from the Company to Schmidt. These words make it impossible to read the Clause as referring to the 1954 agreement literally and alone: indeed it would be unreal to do so since, as has been stated, the 1954 agreement had been supplemented (on one view) or superseded (on another view) by the 1955 agreement so as to produce a direct obligation by the Company to pay Schmidt the one per cent. On the other hand to read the Clause as a whole as referring to the 1954 agreement as so supplemented or superseded makes it consistent and intelligible. Their Lordships therefore are of opinion that the Third Parties are obliged to indemnify the appellant Company against Schmidt's claim.

Since the appellant Company is entitled to this indemnity, the counter-claim against Schmidt in respect of his alleged negligence in not bringing the 1955 agreement to the Company's notice does not arise, but in any event there is no substance in this claim.

The result is that the appeal of Kepong Prospecting Co. Ltd. should be dismissed and the appellant Company should pay the respondent's costs of the appeal. The sum of money which their Lordships understand has been lodged in Court should be applied towards payment of the amount due to the respondent under this judgment and the case remitted to the High Court at Kuala Lumpur for any necessary direction. The appeal of the Third Parties appellants should be dismissed: they should indemnify the appellant Company against any costs payable to the respondent on this appeal and against the appellant Company's costs of their appeal against the respondent the latter to be taxed as between solicitor and client. They should pay the appellant Company's costs (to be taxed as between party and party) incurred in relation to the appeal by the Third Parties appellants.

Their Lordships will report their opinion to the Head of Malaysia accordingly.

3×102—I Dd. 175074 80 10/67

In the Privy Council

Kepong Prospecting Limited
and
S. K. Jagatheesan and others

v.

A. E. Schmidt (since deceased) and
Marjorie Schmidt (Widow) substituted for
A. E. Schmidt (deceased)

DELIVERED BY
LORD WILBERFORCE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1967