Privy Council Appeal No. 27 of 1970

Saw Choo Theng and another – – – – – *Appellants*

v.

Sungei Biak Tin Mines Limited – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA, HOLDEN AT KUALA LUMPUR (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5th July 1971

Present at the Hearing:
LORD GUEST
LORD WILBERFORCE
LORD SIMON OF GLAISDALE

[*Delivered by* LORD WILBERFORCE]

This appeal is from the Federal Court of Malaysia (Appellate Jurisdiction) which, by order dated 9th December 1969, allowed an appeal from a judgment of the High Court in Malaya at Ipoh in favour of the appellants.

The appellants are registered lessees of six lots of mining land (numbered 2312, 2311, 3481, 3482, 3483 and 3489) in the Mukim of Sungei Tinggi in the District of Larut and Matang, totalling about 188 acres. These lots they hold under Mining Certificates, which under the Mining Enactment (F.M.S. Cap. 147 section 11 (vii)) are the equivalent of leases until actual leases are granted. By a Memorandum of Sub-lease registered on 21st August 1965, the appellants subleased the lots to the respondents.

The sub-lease, as required by the Mining Enactment, section 36, was in the Form set out in Schedule X to the Enactment with certain additions. The sub-lease provided for payment to the appellants, as sub-lessors, of tribute upon all ore removed from the land at the rate of 15% and contained the following covenants and provisions relevant to this appeal.

> "4. (*a*) That the Sub-lessee shall perform and observe all the conditions expressed in the said Mining Certificates (Photostat copies of which have been taken by the Sub-lessee as it hereby acknowledges) or the Mining Leases to be issued in place thereof.
>
> (*b*) That the Sub-lessee shall work the said land in an orderly skilful and workmanlike manner and subject to the provisions of the Mining Enactment and shall be liable to indemnify the Sub-lessors for any expenses which they may incur, whether as fine inflicted

on them or otherwise, on account of any breach by the Sub-lessee of this condition or any of the express conditions contained in the said Mining Certificates or Mining Leases to be issued in place thereof.

12. That this Sub-lease shall be liable to cancellation at any time at the discretion of the Senior Inspector or the Court upon proof:—

(*a*) . . . .

(*b*) That the Sub-lessee has not worked the land in accordance with clause 4 of this Sub-lease or has by its default rendered the land liable to forfeiture under the Mining Enactment.

15. The Sub-lessors shall be entitled to tap the rubber trees on the said land for their own use until such time as the same shall be required for mining."

It may be noted that the critical clause 4 (*b*) reproduces, with a slight addition, the statutory clause 4 in Schedule X to the Mining Enactment. Clause 12 (*b*) introduces into the sub-leases the combined effect of section 97 (ii) (*b*) and section 100A of the Mining Enactment which enable the Senior Inspector, or, at the request of a party, the Court to cancel a sub-lease in the circumstances stated.

The claim of the appellants was, under the sections last quoted, to have the sub-lease cancelled. The facts upon which they relied were that in or about September 1967 the respondents cut down the budded rubber trees on approximately 60 acres of the land, without the consent or knowledge of the appellants, and planted a commercial crop of tapioca, similarly without the appellants consent or knowledge. At the trial before Chang Min Tat J, the respondents set up a number of defences on the facts; they denied that the rubber had been cut with their permission or at all; alternatively they alleged that it was cut with the consent of the appellants; similarly as regards the planting of the tapioca, which if done at all was said to have been done with the oral permission of one Tan Cheng Hock a co-owner of the land acting as representative of the appellants. In addition the defence contained a denial that the respondents had committed any breach of clause 4 of the sub-lease or had in any way contravened the Mining Enactment.

The learned trial judge, after hearing evidence, rejected all the factual defences. He held that, although the respondents' mining operations could not be carried out without first clearing the land required therefor, the primary, indeed the whole purpose of felling the rubber trees on the 60 acres of land was to prepare it for tapioca planting. He held that the planting of the tapioca was a commercial project carried out by one Gooi Bak Yeow on behalf of the respondents, that this was not authorised by the appellants or by anyone on their behalf, and that the planting of the tapioca was done without Government authorisation and so, to the knowledge of the respondents, involved a breach of the Mining Enactment. He then, as a matter of law, held that the respondents had committed a breach of clause 4 (*b*) of the sub-lease, rendering the sub-lease liable to cancellation at the discretion of the Court. In considering whether the Court should exercise its discretion, he took into account the nature of the respondents' action which he regarded as reprehensibly high-handed. They had in full knowledge set out to commit a deliberate breach of the agreement and of the Mining Enactment to acquire a considerable profit for themselves. They had ignored the rights of the appellants to the rubber trees which was preserved by clause 15 of the sub-lease. Moreover the defence was a tissue of lies and the respondents

had not come to the court with clean hands. He saw no ground in law or equity to relieve the respondents from the claim against them. He accordingly ordered that the sub-lease be cancelled.

The respondents appealed to the Federal Court on the ground (*inter alia*) that the learned judge had erred in law in holding that the respondents had been guilty of any breach of the sub-lease or of any breach rendering the sub-lease liable to cancellation and also that he had wrongly exercised his discretion to order cancellation. The Federal Court allowed the appeal. The main ground for decision was that the expression (in clause 4 (*b*) of the sub-lease) " work the said land " related primarily to mining, certainly not to agricultural user. The (present) respondents might have been guilty of an unauthorised user of the land, but this did not give rise to the remedy of cancellation. There being no legal basis for ordering cancellation of the sub-lease, the Court expressed no views as to the exercise of the trial judge's discretion.

The difference in opinion between the High Court and the Federal Court, which their Lordships now have to resolve, depends ultimately upon the view taken of the meaning of the words in clause 4 (*b*) of the sub-lease " shall work the said land in an orderly skilful and workmanlike manner and subject to the provisions of the Mining Enactment ". These words are taken up in clause 12 (*b*), under which the right for applying for cancellation is claimed to arise: the relevant ground is " that the sub-lessee has not worked the land in accordance with clause 4 of this sub-lease ". It is obvious that the key word in each of these provisions is " work ", and the main question is whether this is to be interpreted generally as covering all operations over the land, or narrowly as restricted to mining work. In either case, clause 12 (*b*) is to be understood, in their Lordships' view, both positively and negatively, *i.e.*, so as to cover not merely failure to work, but work done otherwise than in accordance with the sub-lessees' obligations under clause 4 (*b*).

Before approaching consideration of this problem, some provisions of the Mining Enactment must be referred to: certain of these are incorporated by reference in clause 4 (*b*) of the sub-lease, others may be relevant as a guide to the interpretation of that clause.

Section 14 of the Enactment sets out a series of rights vested in the lessee of mining land. These include:

> " (iii) The right to use such portions of the land as may be required for the purpose of erecting such houses, lines, sheds, or other buildings, or of growing such plants and vegetables, or of keeping such animals and poultry, as may in the opinion of the Senior Inspector be reasonable for the purposes of the mine or for the use of the labourers: "

[It should be noted that the planting of the tapioca could not be justified under this clause because it was inedible and was grown for factory use.]

> " (iv) The exclusive right, subject to the provisions of section 16, sub-section (x), to all timber and other forest produce upon the land, but no right to remove beyond the boundaries of the land for any purpose (excepting only for the extraction therefrom of any metal or mineral ore) any timber or other forest produce or any gravel, stone, coral, shell, guano, sand, loam or clay obtained from the said land, or any bricks, lime, cement or other commodities manufactured from the materials aforesaid except under licence granted under the provisions of the Land Code, or the National Land Code or any Rules made thereunder."

Section 16 sets out a number of covenants and conditions on the part of the lessee to be implied in every mining lease. These include:

"(vi) That the lessee will carry on all his mining operations in a safe, orderly, skilful, efficient and workmanlike manner, and will not cause danger or damage to the owners or occupiers of other lands, and will observe and perform all Rules and orders made or given in pursuance of this Enactment or by virtue of any Rules made thereunder;

(vii) That the lessee will not use or permit to be used any portion of the land for any purposes other than those mentioned in section 14 without the written authority of the Collector."

By section 18 these are binding on sub-lessees and remain binding on the lessees after sub-lease of the land. Section 97 (ii), providing for cancellation of sub-leases in certain circumstances, has already been referred to. Section 120 provides for a fine to be imposed on any person for default "in observing any of the covenants and conditions of his document of title to any mining land as prescribed by this Enactment."

The argument for the respondents, on these provisions, was as follows. The Court, in these proceedings, is not concerned with the contractual rights of the parties, but only with the statutory power of cancellation. The planting of the tapioca, though admittedly irregular, was merely a breach of the implied covenant as to user whose terms are set out in section 16 (vii) of the Mining Enactment. There is a distinction between use of the land, which may extend to such activities as are mentioned in section 14 (iii), and working the land, which is limited to mining operations: section 16 (vi) refers to the latter, section 16 (vii) to the former. The use in section 16 (vi) of the words "in a safe, orderly, skilful and workmanlike manner" link up with similar words in clause 4 (*b*) of the sub-lease, and point to a coincidence between "work the land" in clause 4 (*b*) and "carry on all his mining operations" in section 16 (vi).

In considering this argument, their Lordships would first express agreement with the Federal Court in the view that the dictionary meaning of a word such as "work" is only to be used with caution.

Even if the dictionary meaning were more precise than it actually is ("to bestow labour or effort upon" O.E.D.) it would still be necessary to bear in mind, indeed to attribute great weight to, the fact that we are here dealing with a technical enactment, which to a large extent provides its own vocabulary. It is necessary to consider the whole of it in order to see whether indications can be found pointing decisively, or by a clear balance, in favour of the narrower or the wider meaning, or whether, as may be possible in so long a document, the choice is left in doubt.

It is clear, in the first place, that "work" and "use" mean different things. All work may involve use, but the contrary is not true—this is shown by section 14 (iii) which gives examples of use not involving work. But this proposition does not of itself establish that "to work" means "to mine" or "to carry on mining operations on", as the respondents contend. This equivalence if it exists must be separately shown. In their Lordships' opinion the appellants succeeded in showing that, on linguistic considerations drawn from comparisons of language in the Mining Enactment, this cannot be done. If "to work" merely means "to mine", they ask, why should the Enactment not say so? When, in fact, the Enactment wishes to refer to actual mining operations, it does so by using such words as "mine" (section 81, section 126, contrast section 128), "mining operations" (section 79 (i)), "working the mine" (section 79 (iii), section 83 (ii)), "carrying on mining operations upon

any land" (section 118). Certainly these references occur for the most part (though not exclusively) in a part of the enactment headed "The Regulation of Mining Operations" (Part IX sections 77–94)—so concerned with mining in a strict sense, but they still cast some light, in their Lordships' opinion, upon the meaning of "work" in the more general portions of the Act which is, in any case, to be read as a whole. The *prima facie* conclusion from a reading of the Enactment is that in clause 4 (*b*) neither is "the land" a synonym for "the mine" or "the minerals", nor is "work" a synonym for "mine". Nor, in the same line of argument, is any conclusive argument to be derived from a comparison of section 16 (vi) of the Enactment with clause 4 (*b*) of the sub-lease. The presence of a (substantially) common list of adjectives ("safe", "orderly" etc.) does not prove the identity of "carry on all his mining operations" with "work the land". On the contrary, the divergence of language seems to point to a difference of content in the two provisions, and to show that working the land is not limited to mining operations.

Thus far the issues have been considered linguistically, and their Lordships conclude that the balance is in the appellants' favour. But there are other arguments of substance which tilt it further in the same direction.

In the first place, it seems clear, even on the respondents' argument, *i.e.*, on the basis that "working the land" relates only to the conduct of mining operations, that these must include not merely the extraction of ore, but such operations as clearing the surface of the land preparatory to the process of extraction. But it would seem illogical and arbitrary that such acts as cutting down rubber trees should or should not amount to a breach of clause 4 (*b*) of the sub-lease according to whether they were done as part of the conduct of mining operations or were unconnected therewith. In their Lordships' opinion the whole purpose of clause 4 (*b*), in requiring an orderly working of the land, must have been to ensure that such operations as the sub-lessees conducted on the surface should be regulated and controlled so as not to exceed what should be reasonably required to enable their mining operations to proceed. There are good reasons for this: first, the sub-lessors have an interest in ensuring that the sub-lessees concentrate their effort and their labour force on the operations of mining rather than disperse them on other activities: secondly, if the rubber trees were to be cleared prematurely, before the sub-lessees were ready to commence mining in the area cleared, fresh vegetation would grow up, necessitating fresh clearing operations, thus adding to the time and expense required before minerals could be won: thirdly under clause 15 of the sub-lease the sub-lessors retain an interest in the preservation of the rubber trees on the land until such time as they are required for mining. All of these considerations point, in their Lordships' opinion, towards a construction of "work the land" more extended than that for which the respondents contend, and one which would cover any operations over the land.

Finally it appears to their Lordships that, on the respondents' argument, and on the interpretation of clause 4 (*b*) of the sub-lease which was accepted by the Federal Court, namely that the respondents committed no breach of clause 4 (*b*), the appellants would have no remedy, by indemnity or otherwise, against the respondents, yet might themselves be liable to a fine under sections 18 and 120 of the Mining Enactment. Such a surprising result is avoided by the wider interpretation of "work the land".

Their Lordships' therefore, on the whole, are of opinion that the interpretation accepted by Chang Min Tat J. was correct. On the

question whether he exercised his discretion correctly, their Lordships have already stated that the Federal Court expressed no opinion. The respondents in their printed case have not invited their Lordships to review the trial judge's decision on this point, and their Lordships are of opinion that it is not open to their Lordships to do more than to decide the point of legal interpretation referred to them.

Their Lordships will advise the Head of Malaysia that this appeal be allowed and the judgment of Chang Min Tat J. restored. The respondents must pay the appellants' costs in the Federal Court and before the Board.

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In the Privy Council

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SUNGEI BIAK TIN MINES LIMITED

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