

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

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B E T W E E N
HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS
LIMITED (Plaintiffs)
Appellants

- and -

WENG LOK MINING COMPANY LIMITED (Defendants)
Respondents

C A S E F O R T H E R E S P O N D E N T S

Record

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1. This is an appeal by the Appellants, Hiap Lee (Cheong Leong & Sons) Brickmakers Limited from an Order of the Federal Court of Malaysia (Azmi, Lord President, Suffian and Ali F.JJ.) dated 31st December 1971 allowing an appeal by the Respondents from a judgment of the Honourable Mr. Justice Rajah Azlan Shah given on the 19th March 1971 whereby he had awarded the Appellants damages of \$3,000 and costs.

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2. The Appellants and the Respondents owned neighbouring lots of land in the Mukin of Batu, district of Kuala Lumpur. The Appellants are brickmakers. The Respondents, as did their predecessors in title, carry on mining operations. The Appellants alleged that the Respondents had maintained upon their land by means of a half completed bund a reservoir of water and that this reservoir burst in April 1965 and thereby water escaped onto the Appellants' land. By their Amended Statement of Claim the Appellants contended that the Respondents were liable in negligence, under the rule of Rylands v. Fletcher (1868) L.R.3 H.L.330, and in nuisance. The Appellants claimed damages and alleged five heads of special damage. The Respondents disputed that

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the water had come onto the Appellants' land in the manner they described and denied liability. The Respondents further disputed the special damages alleged and contended that any damages to which the Appellants were entitled should only be nominal. The Respondents averred that the relevant bund, described as the left bund, was being constructed because the Respondents had discovered that their operations included the accumulations of water encroached onto the Appellants' land and it was necessary to construct a safety bund to limit the water accumulated by the Respondents to their own land and thereby prevent such encroachment.

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3. The learned Judge found that the water escaped over the half completed left bund causing flooding of the Appellant' land. He found that there was a reservoir present on the land when the Respondents came into possession and that their predecessors in title had created such reservoir and had encroached onto the Appellants' land. He further found that the half completed left bund was being constructed so as to stop encroachment and to retain water. There was no evidence adduced by the Appellants to the effect that the Respondents were not constructing the left bund with reasonable speed and efficiency and the learned judge made no such finding. He nevertheless held that the Respondents were negligent in failing to complete the left bund and in leaving such bund half completed when they should have known that heavy rain would cause water to go over the bund. He further held that the "left bund was a non-natural user when it was made to hold water when it was still half completed...." and that accordingly the Respondents were liable for the escape under the rule of Rylands v. Fletcher. He further found that another bund, described as the right bund, had been present when the Respondents came to the land. The learned Judge held that "The right bund was also found to have encroached on the Plaintiffs' land; and since they had made use of this bund they had therefore 'adopted' a nuisance because as the Defendants said they then constructed the left bund when they had encroached on the Plaintiffs' land. The Defendants are also liable for the damages caused by the flood from the reservoir of water on the Defendants' land. The reservoir of water which was

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contained by the half completed bund was an offending condition which would threaten to be a nuisance if the water escaped". He accordingly held that the "offending condition" did become a nuisance when the water in fact escaped. He therefore found for the Appellants on liability on all three grounds.

10 4. The learned Judge then exhaustively examined the Appellants' claim for damages. He was not satisfied that any of the heads of special damage had been established and accordingly approached the issue of damages upon the basis that the Appellants had not established any special loss. Against this finding there was no appeal by the Appellants. There was no allegation of diminution in value of the land. The learned Judge nevertheless held that, because the law presumed general damages once liability was established, quantification of such damages was at large for the Court. He awarded general damages of \$3,000 and costs. P.118

30 5. Upon appeal to the Federal Court, the judgment of the Court was given by Ali F.J. The Court held that whilst there was clear evidence of flooding on the Appellants' land, there was insufficient evidence to justify the finding that the water had probably escaped from the Respondents' land. In a short judgment, Ali F.J. said that the Appellants' evidence "failed to establish any of the liabilities alleged" and the Court allowed the appeal with costs. The learned Judge did not specifically deal with the further contentions of the Respondents in their memorandum of appeal, and, in particular:- P.166

- 40 (a) the contention that the learned Judge failed to have regard to the fact that the left bund was in the course of construction with a view to preventing encroachment and
- (b) the submission that in the absence of any special damage or any allegation of diminution in value of the land or other damage the learned Judge should have only awarded nominal damages and should in consequence have awarded the Respondents the costs of the action. P.170
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6. The principal submissions of the Respondents are :-

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(i) The Federal Court was right in holding that there was insufficient evidence that the water which was undoubtedly on the Appellants' land escaped from the Respondents' land. The judgment of the Federal Court, albeit short, was right in holding that the evidence of the Appellants was insufficient to establish any liability upon the Respondents. The detailed contentions of the Respondents are contained in their written submission to the Federal Court and were presumably accepted by that Court 10

(ii) The existence of the half completed left bund was essential to the reasoning of the learned Judge upon liability on all three grounds. No inference adverse to the Respondents should have been drawn from either the construction of this bund or from its half completed state. The purpose of the construction of the bund was to prevent encroachment of water onto the land of the Appellants, although as a necessary corollary it would have the effect of retaining water by confining it to the Respondents' land. There was no evidence that the Respondents were failing to complete such bund within a reasonable period of time or were constructing it without reasonable skill or care. Accordingly, even if the finding of the learned Judge that the water did escape over the half completed bund were right, he should not have held that the presence of such bund gave rise in the circumstances to liability in negligence, under the rule of Rylands v. Fletcher, or in nuisance. There was no evidence upon which he could have properly found that the Respondents were negligent in failing to complete the left bund. He should not have held that the construction of the left bund was a non-natural user of land in so far as the bund was made to hold water when still incomplete. The purpose of construction of the bund to prevent encroachment and retain water within 20 30

10 the proper confines of the Respondents' land made the retention of some water during construction inevitable, and the bund was not deliberately used for the retention of water when still only half completed. The learned Judge should further not have held that the presence of the half completed bund was an offending condition giving rise to liability in nuisance if the water escaped. The Respondents were taking steps to abate the existing nuisance created by their predecessors in title and the acts taken in abatement should not have been regarded as giving rise, prior to completion, to an offending condition.

20 (iii) In the absence of any special or other actual damage, the learned Judge should not have held that the Respondents were liable to the Appellants. Alternatively he should not have awarded the Appellants more than nominal damages. He held that there was insufficient evidence to support the claim for special damage, and it was not alleged in evidence that there was any diminution in the value of the land or other actual damage. If damages were appropriate, it is a proper case for the award of nominal damages only. If nominal damages had been awarded, then in the circumstances of this case in the proper exercise of his discretion the learned Judge should have ordered the Appellants to pay the costs of the action.

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7. WHEREFORE the Respondents submit that the appeal should be dismissed for the following among other

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R E A S O N S

- (a) BECAUSE the decision of the Federal Court was right and ought to be upheld.
- (b) BECAUSE the Respondents should not have been held liable in negligence or under the rule of Rylands v. Fletcher or in nuisance.

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- (c) BECAUSE the Appellants suffered no damage and the Respondents should not have been held liable to the Appellants in damages or, alternatively should not have been held liable for more than nominal damages.

Alternatively, the Respondents submit that the decision of the Federal Court should be varied to the extent of ordering that there be judgment for the Appellants for nominal damages and that the Appellants should pay the costs of the action for the following 10

REASON

BECAUSE the Appellants suffered no actual damage and should not have been awarded general damages of \$3,000 or any sum other than nominal damages

ROBERT ALEXANDER

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No.29 of 1972

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BRICKMAKERS LIMITED Appellants

- and -

WENG LOK MINING COMPANY LIMITED
Respondents

CASE FOR THE RESPONDENTS

STEPHENSON HARWOOD & TATHAM,
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Respondents Solicitors.