Privy Council Appeal No. 44 of 1970

The Government of the State of Penang and another – *Appellants*

v.

Beng Hong Oon and others – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER 1971

Present at the Hearing:

LORD GUEST
LORD HODSON
VISCOUNT DILHORNE
LORD SIMON OF GLAISDALE
LORD CROSS OF CHELSEA

(*Majority Judgment delivered by* LORD CROSS OF CHELSEA)

This is an appeal by the Government of the State of Penang and the Central Electricity Board of the Federation of Malaya the defendants in the action from an order of the Federal Court of Malaysia made on 9th February 1970 allowing the appeal of the plaintiffs from an order of Mr. Justice Gill made on 19th February 1969 dismissing the action.

The action was started by writ dated 17th April 1962. The first plaintiff Beng Hong Oon is the wife of the second plaintiff Oon Guan Yong. The third and fourth plaintiffs Oon Peh Tchin and Oon Peh Seng are their children. The first plaintiff is the registered owner of the fee simple absolute in possession of land known as Lot 275 (3) situate in Mukim 14 in the northern district of Province Wellesley and at the date of the issue of the writ the four plaintiffs were the registered owners in undivided shares of the fee simple absolute in possession of land known as Lot 275 (1) lying immediately to the south of Lot 275 (3). The plaintiffs claimed that the western boundary of the two lots as conveyed, together with other land, by the East India Company acting on behalf of the Crown to their predecessor in title one Forbes Scott Brown by an indenture dated 10th November 1852 was the line of medium high tide; that since that date a strip of dry land comprising nearly three acres had been formed by the gradual and imperceptible recession of the sea along the western extremity of the two lots; and that that strip of alluvium (now called Lot 808) was as to its northern portion part of Lot 275 (1) and as to the remainder part of Lot 275 (3). The Government

of the State of Penang the first defendant to the action claimed the said strip as its property and had by a lease dated 12th August 1959 demised it to the second defendants who were in possession of the land so demised to them. After the issue of the writ but before the action came on for trial the plaintiffs sold Lot 275 (1) to purchasers who were not added as parties. The first plaintiff said in evidence that the strip of alluvium adjacent to the Lot had been excepted from the sale; but she did not produce the conveyance and Gill J. was not satisfied that the alluvium if in fact vested in the plaintiffs had not been conveyed to the purchasers of Lot 275 (1). As already stated he dismissed the action but his decision was reversed by the Federal Court (Azmi, Lord President, Suffian and Ali F. J J.), which by its order now under appeal declared that the first plaintiff was the owner of the alluvium adjoining Lot 275 (3) and the four plaintiffs together the owners of the alluvium adjoining Lot 275 (1) and gave the plaintiffs certain consequential relief including an order for possession and an award of mesne profits.

The indenture dated 10th November 1852 the true construction of which is in their Lordships' view the vital question in this case was—so far as material—in the following terms:

> " . . . the said East India Company for and in consideration of Companys Rupees Four hundred and Seventy four, Annas One and Pie Six which have been paid to them by the said Forbes Scott Brown Esquire do in pursuance of Act No. IX of 1842, and in virtue of all and every right, title, interest, power and authority whatsoever now vested in the said East India Company, grant, bargain, sell and release unto the said Forbes Scott Brown Esquire his Executors, Administrators and Assigns, all that piece of Land situated in the Division of Bagan Bahroo in the District of Teluk Ayer Tawar in Province Wellesley, bounded and measuring as follows, East by E.I. Company, and Boontah and Ioosoo's grounds Four thousand nine hundred and thirty five feet West by Sea Beach Four thousand and sixty seven feet North by Road one thousand nine hundred and four feet South by Pakir and Che Mohamed's lands Eight hundred and ninety six feet agreeably to the Plan endorsed hereon, certified under the hand of I. Moniot Land Surveyor, Estimated to contain an area of Ninety four square Acres Three Square Rood and Eleven Square Poles together with the appurtenances TO HAVE and TO HOLD the same unto the said Forbes Scott Brown Esquire his Executors, Administrators and Assigns, for ever."

The plan endorsed on it showed an irregularly shaped area of land. The northern boundary is a stretch of road the length of which in feet is given in four figures 172, 608, 353 and 771 representing the lengths of successive stretches of road running from east to west which add up to the total of 1,904 feet mentioned in the indenture. The easternmost stretch of 172 feet starts from the point where the boundary of the East India Company's land to the east of the land conveyed abuts on the road. The westernmost stretch of 771 feet starts from the end of the stretch of 353 feet and runs to the point at which the road ended and the Beach—whatever that may mean—began. From the north-east corner of the land conveyed the boundary line runs southwards for a distance of 1,514 feet made up of five stretches of 394, 106, 204, 490 and 320 feet. Along the east side of this boundary line are the words "East India Company". At the end of the southernmost stretch of 320 feet the boundary runs westwards for 1,253 feet made up of stretches of 236, 156, 36 and 825 feet and then turns south again and runs south for a distance of 2,168 feet made up of two stretches of 1,758 and 410 feet. Along the south side of this boundary as it runs westwards for the 1,253 feet are written the names Boontak and Ioosoo and these persons were

no doubt also the owners of the land lying to the east of the 2,168 feet. The successive lengths of the whole eastern boundary add up to the 4,935 feet mentioned in the indenture. At the southern end of the last 410 foot stretch of this boundary the boundary line runs westwards for 554 feet then southwards for 240 feet and finally westwards again for 102 feet. No names are written underneath these stretches of boundary but they add up to the 896 feet mentioned in the deed and no doubt represent the boundary between the land conveyed and lands owned by Pakir and Che Mohamed. The western end of the 102 foot stretch corresponds to the western end of the 771 foot stretch of road on the northern boundary and no doubt represents the point at which the boundary of Pakir and Che Mohamed's lands ended and the Beach—whatever that may mean—began. Finally the western boundary is marked by a straight line joining these two points against which are written two measurements of 618 and 3,449 feet—adding up to the 4,067 feet mentioned in the indenture—and on the western side of which is written the word "Beach". Inside the space enclosed by these boundary lines is written the estimated area of the land conveyed—namely 94 square acres 3 roods and 11 poles.

In the years 1891 to 1893 a surveyor named Kelly acting under the provisions of the Boundary Ordinance 1884 surveyed the land comprising Mukim 14 and his plan (Exhibit D.12) was published in June 1895. It appears from it that by that date the land conveyed by the Indenture of 10th November 1852 had been subdivided into Lots, one of which was numbered 275. Marking stones had been placed—whether by Kelly or at some earlier date does not appear—at various points along the western boundary of the lands in the Mukim—including one in the middle of the western boundary of lot 275. The western boundary formed by drawing lines from marking stone to marking stone ran in approximately a straight line and along the west of that line was written the word "Sea". Kelly's map provided no evidence that by that date any alluvium had been formed along the western boundary of the Mukim owing to the recession of the sea.

A later Government plan published in 1924 shows between the straight line indicating the western boundary of Lot 275 and the area marked "Sea" a strip, consisting presumably of alluvium, of from about 75 to 100 feet in breadth. A still later Government plan published in February 1935 shows that by that date Lot 275 had been subdivided into three lots and that the alluvium along its straight western boundary had increased to a width of about 116 feet.

In April 1938 the first plaintiff came to live in a house on Lot 271 (1) which lies about a quarter of a mile to the South of Lot 275 and has lived there ever since. The lot ran down to the sea and had been fenced by the previous owner— the fencing enclosing part of the alluvium formed on the seaward side of the lot. She was forced to leave her house during the Japanese occupation. On her return in November 1945 she found that the alluvium had increased and it has gone on increasing since then. She estimated that the increase in the alluvium adjacent to Lot 271 (1) between 1938 and 1962 was at least 50 feet.

The first plaintiff acquired Lot 275 (3) by a Conveyance dated the 26th June 1947. The plaintiffs became the owners of Lot 275 (1) by a number of Conveyances executed between June 1940 and August 1942. All these conveyances described the property conveyed by them respectively as compromised in Indenture No. 4276—*i.e.*, the indenture of 10th November 1852. The plaintiff said that the position with regard to the alluvium adjacent to Lot 275 (1) and (3) was the same as it was with regard to the alluvium adjacent to Lot 271 (1)—namely that there was a

substantial quantity of alluvium there when the properties were acquired and that the alluvium steadily increased. In 1949 the first plaintiff—on her own behalf and on behalf of the members of her family who were co-owners with her of Lot 271 (3)—applied for and was granted Temporary Occupation Licences by the Penang Government in respect of the alluvium adjacent to Lots 271 (1) and (3). These Licences were renewed each year until 1958. In 1955 she challenged the title of the Government to the alluvium adjacent to Lots 275 (1) and (3). On 12th August 1959, as has been stated, the Government leased the alluvium in question—which had by then been surveyed, constituted Lot 808, and was nearly 200 feet in breadth—to the second defendants. At the date of the issue of the writ it was they and not the plaintiffs who were in possession of the strip of alluvium in dispute.

The trial judge—Gill J.—gave three separate reasons for dismissing the action. 1. That by applying for and accepting the Temporary Occupation Licences the plaintiffs were estopped from asserting that the Government which granted them had no title to the alluvium at the date or dates on which they were granted. 2. That the plaintiffs had not established that the recession of the sea and the consequent formation of the alluvium—or at all events its formation in the years before 1938 when the first plaintiff came to live in the neighbourhood—had been "gradual and imperceptible". 3. That under the indenture of 10th November 1852 the western boundary of the land conveyed was not the line of medium high tide.

1. *The estoppel point.*

The estoppel in the opinion of the judge arose because of section 116 of the Evidence Ordinance 1950 which is in the following terms:

> "No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

This section is in the same terms as and was clearly taken from s.116 of the Indian Evidence Act 1872. In the case of *Dukhimoni Dasi v. Tulsi Charan* (1912) Indian Cases 513 the High Court of Calcutta construing the section of the Indian Act held that the fact that the second limb of the section which deals with the position of a licensee contains no words corresponding to the words "during the continuance of the tenancy" which occur in the first limb showed that a person who came on the land by the licence of the person in possession was estopped from denying the latter's title not simply during the period in which he stayed in possession under the licence but for ever. Gill J. followed that decision but in the Federal Court Azmi the Lord President (with whose judgment Suffian F.J. agreed) and Ali F.J. held that a licensee was not estopped by the section after he had given up possession under the licence and that the Indian decision was based on too narrow a construction of the words of the section. In their Lordships' opinion the view of the Federal Court on this point was right. In the case of *Terunnanse v. Terunnanse* [1968] A.C. 1086 the Board had to construe s.116 of the Ceylon Evidence Ordinance, which is also in the same terms as the corresponding section in the Indian Act. Their Lordships pointed out that the Indian Evidence Act 1872, which was drawn by Sir James Stephen, was intended to reproduce in a concise form the English law of evidence as it then existed and that its provisions should if possible be construed in a manner consistent with the English law. There is no doubt that under English

law as it stood in 1872 and stands today there was and is no difference as regards the matter in hand between a tenant and a licensee. Each is estopped from denying the title of the person from whom he accepted the tenancy or licence so long as he remains in possession under it but each is permitted to deny that title as from the time that he is no longer in possession under it. Counsel for the appellant was unable to suggest any plausible reason for drawing the distinction between tenant and licensee for which he contended and in their Lordships' opinion the mere fact that the words "during the continuance of the licence" do not appear in the second limb of the section does not afford a sufficient ground for construing the section in the way in which it was construed in the case of *Dukhimoni Dasi v. Tulsi Charan.* The person who is not permitted to deny his licensor's title is a person who "came upon" the land under the licence and those words themselves suggest that he is still upon the land. It is true that the Ceylon Ordinance with which the Board was concerned in the *Terunnanse* case contained a section not present in the Malaysian Ordinance stating specifically that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or any other law in force in Ceylon such question shall be determined in accordance with the English law of Evidence for the time being. But although the Board in that case referred to that section as affording additional support for the view which they had expressed that the Ordinance should be construed in the light of the English law their decision was not based upon the presence of the section and would, their Lordships think, have been the same in its absence.

2. *The alluvium point.*

Gill J. held that the onus was on the plaintiffs to show affirmatively that the recession of the sea and the formation of the alluvium had throughout been gradual and imperceptible and that they had not discharged that onus. The Lord President was inclined to agree with the judge on the question of the onus while Ali F.J. disagreed with him. But all members of the Federal Court agreed that even on the assumption that it was for the plaintiffs to show that the recession of the sea had throughout been gradual and imperceptible they had discharged that onus. Their Lordships do not find it necessary to express any view on the question of onus. That question would be relevant in a case where there was no evidence as to the manner in which the alluvium had been formed or where the evidence was so evenly balanced that there is no preponderance of probability. But in this case there is a substantial quantity of evidence in the form of the various survey maps to which reference has been made and the oral evidence of the first plaintiff. The question is whether in the light of that evidence it is on the balance of probability more likely or less likely than not that the formation of this alluvium was throughout gradual and imperceptible—the latter word meaning, of course, that the increase in the area of dry land could not be perceived as it was occurring, not that it could not be observed at some later date to have in fact occurred. If that question can be answered, no question of onus arises. It was conceded by the appellants that the evidence of the first plaintiff showed that the part of the alluvium which had been formed in the years from 1938 to 1962 had been formed gradually and imperceptibly. They contended, however, that it had not been shown that the alluvium which was formed between the date of the publication of Kelly's plan in 1895 and 1938 had been formed in the same way. But where the evidence suggests as it does here (*a*) that the alluvium constituting Lot 808 at the date of the issue of the writ had come into existence in the period 1895 to 1962 and (*b*) that the substantial part of it which came into existence between 1938 and 1962 was formed gradually and imperceptibly then in the absence of any evidence to the contrary the reasonable inference to

draw is that the part of the alluvium which was formed between 1895 and 1938 was formed in the same way. What is called in the Law of Evidence the " presumption of continuity " applies not only prospectively but also retrospectively (see Cross on Evidence 3rd edition pp. 28/29 and 35). Their Lordships therefore agree with the Federal Court on this point also.

3. *The Construction of the Indenture of 10th November 1852*

Each side called a surveyor to give evidence on the question whether the western boundary of the land conveyed as drawn on the plan was what is called in the language of surveyors a " natural feature " boundary or a " right line " boundary. Their Lordships doubt very much whether this evidence was admissible at all, but it is not necessary to express a concluded opinion on the point; because the appellants' surveyor, whom the judge regarded as the more reliable of the two, admitted in cross-examination that he could not say whether the western boundary on the plan was a " natural feature " boundary or a " right line " boundary. The main reason given by Gill J. for holding that the western boundary of the land conveyed by the Indenture of 10th November 1852 was not a fluctuating boundary running along the line of medium high tide but a fixed boundary running along the straight line 4,067 feet in length shown on the plan was that he thought that it had been laid down by the Court of Session in the case of *Magistrates of Musselburgh v. Musselburgh Real Estate Co. Ltd.* (1904) Sc.L.R.247 that there was a distinction to be drawn between " sea shore " and " sea beach " as words descriptive of a boundary, and that while the former did the latter did not denote *prima facie* the line of medium high tide. He further thought that the *Musselburgh* case had gone to the House of Lords and that the House had affirmed the decision of the Court of Session. In the Federal Court the Lord President referred to the view expressed by Gill J. as to the meaning of " sea beach " but though he presumably rejected it he did not give any reasons for doing so. Ali F.J. also rejected the view of Gill J. as to the meaning of " sea beach "; but his reason for doing so was partly at least because he, like Gill J. thought that the *Musselburgh* case had gone to the House of Lords and that he thought that the House had decided it on different grounds without approving the distinction between the meaning of " sea shore " and the meaning of " sea beach " which he supposed the Court of Session to have drawn. It appears that on this aspect of the case the Courts below may have been misled by an inaccurate entry in Stroud's Judicial Dictionary 3rd ed. Vol. 4, p.2678. In fact, the Court of Session in the *Musselburgh* case did not draw any distinction between " sea shore " and " sea beach " as words descriptive of a boundary and that case never went to the House of Lords. The case reported in [1905] A.C. 491, though between the same parties is a different case.

The words " shore " or " beach " as ordinarily used do not mean only the land lying between the lines of medium high and low tide. They cover also land which is washed by the ordinary spring tides and often land which is only washed, if at all, by exceptionally high tides but which nevertheless is in character more akin to the " foreshore " than to the " hinterland ". As ordinarily used neither word has a precise meaning and opinions might well differ as to whether a particular patch of ground consisting of sand and pebbles interspersed with sparse vegetation should more properly be described as part of the " shore " or " beach " or part of an adjoining field. It is more likely than not that a word used to describe a boundary in a legal document has a precise meaning and it is well settled that the word " sea shore " when used to describe the boundary of land comprised in a conveyance means *prima facie* the foreshore (see *Scratton v. Brown* 4 B. and C. 485: *Mellor v. Walmesley*

[1904] 2 Ch. 525 [1905] 2 Ch. 164). Their Lordships see no reason why the same *prima facie* meaning should not be attributed to the word " sea beach ". Scots Law draws no distinction between the two expressions (see *Cameron and Gunn v. Ainslie* (1848) 10 D. 446) and their Lordships have not been referred to any case which suggests that there is any distinction between them in English law. In the *Musselburgh* case the feu charter which had to be construed had granted to the defendants' predecessors in title land which was described as " bounded on the north by the sea beach ". The defendants contended that under this grant they were the owners of the foreshore but the Court held that the land granted to them ended where the sea beach began—namely at the line of medium high tide. It was not suggested that the words " sea beach " meant anything other than the foreshore or that there was any difference in meaning between " sea beach " and " sea shore ". Such a contention would indeed have been contrary to *Cameron and Gunn v. Ainslie,* which was cited by Counsel for the defendants in that case. So if the Indenture of 10th November 1852 had simply said that the land conveyed was bounded on the west by " the sea beach " it would have been clear that the boundary was the line of medium high tide. But in the Indenture the land conveyed is not simply described as bounded by the " sea beach ". It is also described by reference to the length of the boundary and to its delineation on the plan. It is, of course, well settled that if the boundary of the land conveyed is the line of medium high tide the mere fact that the acreage of the land conveyed is given and that the position of the line of medium high tide at the date of the conveyance can be established—whether or not it is delineated on a plan—will not prevent land which subsequently becomes dry land through the gradual and imperceptible recession of the sea from being added to the land conveyed. (See *A.G. of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd.* [1915] A.C. 599 at 612.) But what the appellants say here is that the wording of the conveyance and the plan show that the western boundary was not a fluctuating boundary along the line of medium high tide but a fixed boundary along the line on the plan. If the boundary had been intended to be simply the line of medium high tide there would—it is argued—have been no need to draw any western boundary on the plan. Further it is argued that it is in the highest degree unlikely that the points at which the road ended on the north and the physical boundary between the land conveyed and Pakir and Che Mohamed's land ended on the south coincided with the line of medium high tide or that that line ran in a dead straight line between those points. Although there is nothing to show affirmatively that the points at which the road ended on the north and the physical boundary between the land conveyed and Pakir and Che Mohamed's land ended on the south were not precisely on the line of medium high tide or that that line did not run in a dead straight line between those points their Lordships agree that it is unlikely that this was so. But it is at least equally unlikely that the two points in question coincided with the beginning of what would have been described in ordinary parlance as the sea beach or that the division between what was and what was not in ordinary parlance sea beach ran in a straight line. Yet it is clear that whatever " sea beach " means no part of it was to pass under the conveyance. Further if the approximate acreage of the land conveyed was to be calculated it was necessary to establish approximately where the western boundary ran and quite natural to draw it in on the plan without thereby indicating that the line represented a fixed boundary like a fence which the grantee could not cross without committing a trespass. So far as appears no one in 1852 had the possibility of alluvium in mind and it is their Lordships' think most unlikely that the Crown was intending to retain any land between the land conveyed and the foreshore. So in their Lordships' opinion there is no

sufficient ground for attributing to the words in the indenture " bounded on the west by the sea beach " any meaning other than their *prima facie* meaning in a legal document, namely, " bounded on the west by the line of medium high tide ". In support of his submission that the western boundary of the land conveyed by the Indenture of 10th November 1852 was not the line of medium high tide Counsel for the appellants relied strongly on the case of *Mellor v. Walmesley* above referred to. The facts there were that by an indenture dated 30th July 1864 one Nicholas Blundell conveyed to James Mellor the predecessor in title of the plaintiff Mellor

> " All that piece of land situate on the seashore at Blundellsands in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto 93 yards or thereabouts, on the eastern boundary 93 yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively 77 yards or thereabouts, and containing in the whole 7,161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road of 15 yards in breadth to be called 'Burbo Bank Road', on or towards the north by Blundellsands Road, and on or towards the west by the seashore, which piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan drawn on the back of these presents, and therein marked with the letter A."

The plan showed a rectangular piece of land with the exact dimensions given in the parcels written on it and also showed a strip of land some 10 feet wide intervening between the western boundary of that rectangular piece of land and a thick black wavy line beyond which were written the words " Sea Coast ". The evidence established that the wavy line was the high water mark of ordinary spring tides in 1864; that exceptionally high spring tides sometimes washed over part of the rectangular plot: and that the line of medium high tide lay some 400 feet further to the west. Between 1864 and 1902 the sea had gradually and imperceptibly receded so that by the latter date a substantial quantity of land on the west side of the rectangular plot was never covered by it. In 1902 the defendant who derived title under Blundell enclosed part of this land and the plaintiff brought the action for a declaration that his land was bounded on the West by the foreshore and for consequential relief. In the Court of first instance Swinfen Eady J. held that when the conveyance of 30th July 1864 said that the land conveyed was bounded on the west by the seashore seashore was used in its strict sense of " foreshore " and that the western boundary was the line of medium high tide. This was no doubt inconsistent with the dimensions stated in the conveyance and with the plan; but it was the description of the land as bounded on the west by the seashore which governed the matter and this description could not be cut down by erroneous statements as to dimensions or quantity or by any inaccuracy in the plan. In the Court of Appeal Romer L.J. took the same view as Swinfen Eady J., Vaughan Williams L.J. and Stirling L.J. on the other hand held that the conveyance of 30th July 1864 did not pass to the purchaser any land to the west of the rectangular plot though the vendor having stated that the land was bounded on the west by the " seashore " he and his successors in title were estopped from making any use of the land to the west of the western boundary of the rectangular plot which would interfere with the plaintiff's access to the sea. In deciding that the conveyance did not pass any land to the west of the rectangular plot Vaughan Williams L.J. relied on the fact that the dimensions stated in the parcels were not an addition to what had been

previously adequately described—so as to be capable of rejection if inconsistent with it—but were themselves part and parcel of the description of the land conveyed—namely a piece of land on the seashore of certain dimensions. Stirling L.J. on the other hand rested his judgment on the fact that it was shown that at the date of the conveyance there was land belonging to the vendor between the foreshore and the western boundary of the rectangular plot. The fact that there was there such a conflict of eminent judicial opinion shows that the case was a difficult one; but their Lordships think that the arguments which could be advanced in that case for the view that the boundary was not fluctuating but fixed by reference to the dimensions and the plan were very much stronger than they are in this case. The rectangular plot was clearly not situated on the foreshore. Therefore when the conveyance spoke of it as " situate on the seashore " either " seashore " was being used in a popular and not a legal sense—so that the whole argument for the plaintiff would fall to the ground—or the word " on " meant only " near to " or, at the best for the plaintiff, " adjoining ". But the fact that there was admittedly a strip of land between the plot and mean high water mark and that the plan referred to in the conveyance actually showed a gap was a very strong argument for saying that if " seashore " was used in the strict sense " on the seashore " meant simply " near to the seashore " and " bounded by the seashore " merely that the seashore was not far away to the west. On that footing there would be no conflict betwen the conveyance and the plan and what was conveyed would be the plot defined by the dimensions which formed part of its description. So as their Lordships see it to hold in the instant case that the western boundary of the land conveyed by the indenture of 10th November 1852 was the line of medium high tide is not in any way inconsistent with the decision in *Mellor v. Walmesley*. The appeal should therefore be dismissed. But as the plaintiffs failed to establish that they were still the owners of the alluvium adjacent to Lot 275 (1) at the date when the action came to trial their Lordships think that the Federal Court ought not to have granted them any relief in respect of the part of the alluvium adjoining Lot 275 (1) even though Counsel for the defendants raised no objection to its being granted. The order made by the Federal Court should therefore be varied by confining the declaration of ownership to a declaration that the first plaintiff is owner of the alluvium adjoining Lot 275 (3). The first plaintiff is no doubt entitled to be granted consequential relief on the basis of that declaration but the limitation of the declaration of ownership to part of the alluvium will involve alterations in the parts of the order of the Federal Court dealing with the consequential relief. Their Lordships are not in a position to advise precisely what changes in the wording of that part of the order ought to be made and so the order on this appeal should be confined to a declaration of ownership. It may be that the parties will be able to agree the consequential relief to which the first plaintiff is entitled as a result of the declaration in her favour but the order should contain a liberty to either party to apply to the High Court for a further order defining the appropriate consequential relief in the event of there being any dispute between the parties with regard to it. The appellants must pay to the respondents their costs of the appeal to the Board. Their Lordships will report their opinion to the Head of Malaysia accordingly.

(*Dissenting Judgment by* VISCOUNT DILHORNE)

On the construction to be placed upon the Indenture of 10th November 1852 I am unable to agree with the conclusion reached by the majority of their Lordships. I agree that there is no valid reason for giving a different meaning to the words " sea beach " to that given to the words " sea

shore ", and that if the Indenture had simply said that the land conveyed was bounded on the west by the sea beach, it would have been clear that the boundary was the line of medium high tide. To construe this Deed in this way appears to me to involve ignoring an important part of the description of the land conveyed.

The Indenture describes that land in the following terms:

> " all that piece of Land . . . bounded and measuring as follows, East by E.I. Company, and Boontah and Ioosoo's grounds Four thousand nine hundred and thirty five feet West by Sea Beach Four thousand and sixty seven feet North by Road one thousand nine hundred and four feet South by Pakir and Che Mohamed's lands Eight hundred and ninety six feet agreeably to the Plan endorsed hereon, certified under the hand of I. Moniot Land Surveyor, Estimated to contain an area of Ninety four square Acres Three Square Roods and Eleven Square Poles . . ."

This description is to be contrasted with the description of the land conveyed which was considered in *Mellor v. Walmsley* [1905] 2 Ch 164, which was as follows:

> " All that piece of land situate on the seashore at Blundellsands . . . and measuring in front thereto 93 yards or thereabouts, on the eastern boundary 93 yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively 77 yards or thereabouts, and containing in the whole 7,161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more or less, which same piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road . . . on or towards the north by Blundellsands Road, and on or towards the west by the seashore, which piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan."

Swinfen Eady J. held that the deed contained an adequate and sufficient definition, with convenient certainty, of what was intended to pass by it " namely, all the land between the Burbo Bank Road and the seashore, or foreshore, in the strict and legal sense and meaning ". He went on to say that where the deed contained such an adequate and sufficient definition any erroneous statement as to dimensions or quantity or any inaccuracy in the plan would not vitiate that definition.

On appeal Vaughan-Williams L. J. did not agree that the case was:

> " one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition. The dimensions in this case, to use the words appearing on p.247 of Sheppard's Touchstone, are an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration."

I regard the dimensions stated in the Indenture of 1852 as an essential part of the description of the land conveyed. Without them it could not, I think, be said that the Deed contained an adequate and sufficient description of what was intended to be conveyed. The deed would simply say that the land was bounded on the east by E.I. Company and Ioosoo's land, on the west by the sea beach, on the north by the road and on the south by Pakir and Che Mohamed's lands.

The measurements of the boundaries are given with great precision, in feet, and not as in *Mellor v. Walmsley* in so many yards " or thereabouts ". In this case the land conveyed and measured was stated to be " agreeably to the plan certified under the hand " of a surveyor. In *Mellor v. Walmsley* the land granted was " more particularly delineated in the plan ".

In this case as in *Mellor v. Walmsley* the dimensions were not an addition to something which had already been certainly described and defined but were part and parcel of that definition.

In my opinion the Indenture of 1852 was intended to convey and did convey a piece of land with boundaries of the precise length specified and as shown on the plan.

I find confirmation for this view in the fact that the western end of the road along the north of the land conveyed formed the north-west corner of the land conveyed. I think that it is most improbable that that road had been constructed so that it ended at the line of medium high tide. If that had been done, part of the road would have been frequently washed by the sea. The probability is that the road ended at the commencement of the beach, using the word in the sense that it is generally used. If it did so, there must have been an area of land not conveyed between the line of medium high tide and the western boundary of the land conveyed.

For these reasons I would have advised allowing the appeal.

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In the Privy Council

THE GOVERNMENT OF THE STATE OF PENANG AND ANOTHER

v.

BENG HONG OON AND OTHERS

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