

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

HIAP LEE (CHEONG LEONG & SONS)
BRICKMAKERS LIMITED
(Plaintiffs) Appellants

- and -

WENG LOK MINING COMPANY
LIMITED (Defendants) Respondents

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CASE FOR THE APPELLANTS

1. This is an Appeal from a Judgment and Order of the Federal Court of Malaysia (Azmi, Lord President, Suffian F.J. and Ali F.J.) dated the 31st day of December 1971, which allowed an appeal by the Respondents from a Judgment of the High Court in Malaya at Kuala Lumpur (Raja Azlan Shah, J.) dated the 19th day of March 1971, whereby the Respondents (hereinafter called "the Defendants") were held liable in negligence, and under the rule in Rylands v. Fletcher and for nuisance, for the escape of water from a reservoir on their land, on to the Appellants' (hereinafter called "the Plaintiffs") land, and whereby the Plaintiffs were awarded \$3,000/- general damages and costs. pp.167-170
pp.107-122

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2. The Plaintiffs (a brick-making company) were at all material times the owners and occupiers of land and premises known as Lot 3582. The Defendants (a mining company) owned and occupied land adjacent to the Plaintiffs' known as Lot 4661 and on which they carried on mining operations. The Plaintiffs' premises lay at the foot of a half completed bund on the Defendants' land and at the boundary between the Plaintiffs' land and the Defendants' land.

3. In their Amended Statement of Claim, the Plaintiffs claimed as follows:- pp.9-11

"5. The Defendant at all material times maintained upon the land aforesaid by means of the half completed bund a reservoir of water

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of such size that if the said water escaped therefrom it was likely to injure the Plaintiffs' land. The maintenance of the said reservoir constituted a non-natural use of the Defendants' land.

6. On or about the beginning end of March April 1965 owing to the negligence of the Defendant its servants or agents by not completing the bund, the half completed bund could no longer contain the reservoir of water and the aforesaid reservoir burst and the water therefrom escaped and damaged the Plaintiffs' land. 10

PARTICULARS OF NEGLIGENCE

(a) Failed to complete the bund to contain the reservoir of water

(b) Failed to inspect and see that the discharge of water would not be in excess of the capacity of the reservoir

(c) Failed to guard against the breaking of the reservoir having the knowledge or means of knowledge that such a disaster might take place; regard being had to the condition of the bund at the material time 20

(d) The Plaintiffs say that the principles of the doctrine of "res ipsa loquitur" apply to this case

7. Further or alternatively the said reservoir was of such dimensions and the volume of water impounded therein was of such a volume that the said water if it escaped therefrom was likely to injure the Plaintiffs' land. By reason of the escape of the said water aforementioned the Defendant is liable as for a nuisance. Plaintiffs suffered damage. The Defendant is also liable as for a nuisance. 30

8. By reason of the matters aforesaid the Plaintiffs have been put to loss and expense and has suffered damage.

PARTICULARS OF SPECIAL DAMAGE

	1. Loss of 9,938 cu-yards of brickmaking earth @ 2/- per cu-yd.	₹19,876.00
	1. <u>Loss of 1,980 lorry loads of brickmaking earth</u>	<u>₹ 7,113.00</u>
	2. <u>Costs of transportation at ₹5/- per lorry load</u>	<u>9,900.00</u>
10	2.3 Loss of 10,000 bricks @ 4¢ per brick	400.00
	2.4 Cost of repairs to floor of brick shed	800.00
	4.5 Loss of service of brick kiln for one month	<u>1,500.00</u>
		<u>₹22,576.00</u>
		<u>₹19,713.00</u>

AND THE PLAINTIFFS CLAIM

- 20 (i) An Injunction to restrain the Defendant by their servants or agents or otherwise from continuing the said nuisance
- (ii) Special damages of
~~₹22,576/-~~ ₹19,713.00
- (iii) Damages
- (iv) Costs
- (v) Such further and other relief as may seem just."

30 4. In their defence, the Defendants denied that the bund between the land occupied by them and that occupied by the Plaintiffs was at any time half completed, and averred that such bund was fully completed and fully maintained. They denied that they had at any time maintained upon their land adjacent to the Plaintiffs any reservoir of water or that they had

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made any unnatural use of their land. They also denied that any bund had collapsed allowing water to escape onto the Plaintiffs' land and that they or any of their servants or agents had been negligent. They contended that the alleged loss or damage or any of it sustained by the Plaintiffs was not caused by the escape of water from their land and also denied nuisance.

5. Ten witnesses (P.W.1 to P.W.10) gave evidence for the Plaintiffs. At the close of the Plaintiffs' case, Counsel for the Defendants said:-

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p.63, 11.15-
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"What I must make clear is that it is no part of our case that we never had any water on any part of Plaintiffs' land. We admit we did have water on their land. The presence of this water was caused by an unfortunate error as to the correct boundary.

We say the volume of water was negligible and in no circumstances should it have caused the damage as claimed."

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Eight witnesses (D.W.1 to D.W.8) gave evidence for the Defendants.

pp.107-122

6. The Judgment of Raja Azlan Shah, J. was delivered on the 19th March 1971. The learned Judge first set out the contentions of the parties in their pleadings. He also found as follows regarding the situation of the land of the two parties and their operations on it:-

p.108,1.46-
p.109,1.44

"There was a dispute as to the correct boundary between the two said lands because the boundary stones were all missing except for one. It is not disputed that some previous miner had worked on the land before the Defendants came. The Defendants contended that in the course of the mining by the previous miner the boundary had been crossed and the right bund had been constructed, and that when the Defendants came onto the land they were sure that the right bund marked the boundary and that the area which was subsequently covered by water was part of the mining lease. Besides the right bund there was also a previous mining hole. The Defendants admitted that there was water on the Plaintiffs' land. In order to stop further escape of water, the Defendants

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constructed the left bund. This was necessary because the right bund was lower. A spillway was then constructed as an outlet for rain water because before the spillway was constructed water flowed from other ditches.

10 The height of the right bund was also raised. This was necessary because tailings had gone into the pool, thereby increasing the level of water. The left bund which was constructed sometime in March or April was meant to retain the water. To construct the said bund, a gravel pump was used to carry sand and tailings. It is admitted by the Defendants that at the material time the left bund was half completed

20 The Defendants practised a system called the circulating system. This system is normally used if the miner is short of water. By this system the miner takes the water from the reservoir and uses it for mining. Then the water goes into the tailing area and from there it goes into the spillway, and in this instant Mine No.2 uses that water again. Other pipes were used to discharge the water, sand and tailings. It is contended by the Plaintiffs that it was this water from these pipes which had flowed into the Defendants' pool and escaped onto the Plaintiffs' land through the place where there was no bund. Had there been a completed bund, the Plaintiffs contended the water would not have escaped onto their land, thereby damaging their brick-kiln, the sheds used for storing bricks and dump A."

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7. The learned Judge then proceeded to deal with the Plaintiffs' three heads of claim in negligence, under Rylands v. Fletcher and in nuisance. With regard to negligence, he concluded that the fundamental issue was what caused the escape of water onto the Plaintiffs' land thereby damaging their brickworks premises. The learned Judge went on to review the evidence and especially the evidence of D.W.1 (Mr. Markandar), D.W.4 (Mr. Curtis) and D.W.8 (Mr. Wong Chong Chow) and came, it is submitted correctly, to the following conclusion:-

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"In the circumstances, I am of the opinion that since the left bund was half completed and that there was a complaint of an escape of water earlier, the Defendants should, as reasonable men, have realised that there is a likelihood of

p.111,1.44-
p.112,1.24

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water further escaping onto the Plaintiffs' land and causing damage. The Defendants had not taken adequate provision to safeguard such further escape of water onto the Plaintiffs' land when they knew that there was already an escape of water on the said land, and by having a half completed bund they ought to have realised that there is a greater risk of flooding due to rain, and as Gill J. (as he then was) said in Hoon Wee Thim v. Pacific Tin Consolidated Corpn. (5) at page 251: "In a tropical country such as Malaya a heavy shower can certainly not be held to be an act of God" as to afford a defence to the Defendants. There is sufficient evidence to show that the Defendants had been negligent to exercise the duty of care towards the Plaintiff as laid down in Donoghue v. Stevenson (supra). The fault lies with the Defendants in not completing the left bund when they knew that the level of water in the reservoir had risen, and in leaving the left bund half completed when they should have known that a heavy rain would cause the water to go over the bund, thus flooding the adjoining area. I therefore hold that the Plaintiffs' claim under negligence succeeds."

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With regard to the claim under Rylands v. Fletcher, the learned Judge first laid down the conditions of liability and proceeded to discuss whether they were met in this case. He held, it is submitted correctly, that the "left bund was a non-natural user when it was made to hold water when it was still half completed and at a time the Defendant knew that the level of water in the reservoir had risen; and that the Defendants should have known that a heavy rainfall should cause the level of the water to rise and flow over the bund to the Plaintiffs' land and cause damage thereto." The learned Judge also held that there was overwhelming evidence to show that there was an escape of water causing damage to the Plaintiffs' land, and referred in particular to the evidence of the surveyor (P.W.2), the photographs 24C, 24G and 24F, Mr. Curtis (D.W.4), D.W.8 (Mr. Wong Chon Chow) and D.W.2 (Mr. Markandar).

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p.116,
11.12-19

p.116,
11.24-26

p.117,1.11
p.118,1.4

With regard to nuisance, the learned Judge held that the Defendants had continued and adopted the nuisance commenced by their predecessors. He continued:-

10 "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 contained by the half completed bund was an offending condition which would threaten to be a nuisance if the water escaped. The water did escape and as Lord Atkin in Sedleigh Denfield v. O'Callaghan (supra) on page 896 said: "It is probably strictly correct to say that so long as the offending condition is confined to the Defendants' own land without causing damage it is not a nuisance, though it may threaten to become a nuisance. But where damage has accrued the nuisance had been caused." I therefore hold that the Defendants are liable. Accordingly the Plaintiffs' claim under negligence Rylands v. Fletcher and nuisance succeeds."

20 8. With regard to damages, the learned Judge held that the Plaintiffs had failed to prove the five items of special damage which they pleaded. Having regard to all the circumstances, he awarded them ₹3000/- in general damages and costs. p.118,1.22-
p.122

9. The Defendants appealed to the Federal Court on numerous grounds, but substantially against the trial Court's findings of fact necessary to establish liability under each of the three heads of liability. pp.124-131

30 10. In the oral argument before the Federal Court, Counsel for the Defendants conceded that "water from our land went into Respondents' land". In their written submissions to the Court, it is stated "A claim to establish rights and for nominal damages could not have been resisted and there would have been judgment by consent with negligible costs." p.133, 11.11-
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p.166,11.3-6

40 11. The Judgment of the Federal Court was delivered by Ali F.J. The learned Judge accepted that the appeal basically attacked the trial Judge's findings of fact necessary to establish liability. The Judge, it is submitted wrongly, rejected the lower Court's finding of fact in relation to the escape of water. He said:- pp.167-170

p.169,11.31-
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"So far as his finding on escape was based on inferences drawn from evidence of witnesses and photographs I am not prepared to agree that there was overwhelming evidence in the sense that the flood on the Respondents' land could

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only be caused by water escaping from the Appellants' land. In my view it is important to know the height of water level in the mining pool on or before the date of the flood. Without such evidence the possibility or probability of the flood being caused by water flowing from other places or directions cannot be disregarded. Indeed, in this case the Appellants sought to invite such a suggestion by calling evidence to show that the amount of water which they used for their circulating system was not sufficient to cause the flood even if it escaped. It was in this context they admit that there was water on their land."

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Ali F.J. then dealt with the justification of miners having water on their land and said:-

p.170,11.1-
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"Up to a point there would be justification for the view that they were maintaining some sort of reservoir or pool on their land. Miners have to have water for their circulating system; otherwise it would be extremely difficult or uneconomical for them to extract the ores from the earth. The evidence of the senior inspector of mines would fairly suggest that this is normal mining practice. Were it otherwise mining operations would always be exposed to claims for damages by owners of neighbouring lands. The principle in Smith v. Kenrick (4) I think, was designed to prevent such claims. The decision in Hoon Wee Thim v. Pacific Tin Consolidated Corporation (supra) was more in line with that reached in Baird v. Williamson (5). The two English cases cited served as illustrations in the judgment of Lord Cairns, L.C. in Rylands v. Fletcher (supra). (See also the judgment of Lord Cranworth). The learned trial Judge in Hoon Wee Thim's case (supra) also referred to these illustrations. In all the cases just referred to, the facts leading to the findings of liability or non-liability were beyond dispute. Here high sounding words were used in the Respondents' Statement of Claim to make it appear that the facts were substantially the same. But the poor quality of the Respondents' evidence at the trial failed to measure up to these words. I would sum it all up by saying that the Respondents' evidence failed to establish any of the liabilities alleged against the Appellants."

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12. Being aggrieved with the Federal Court's Judgment, the Plaintiffs applied for leave to appeal to His Majesty the Yang di-Pertuan Agong. The Federal Court (Ong C.J., Gill F.J. and Ali F.J.) gave leave and recorded their reasons in a judgment delivered by Ong C.J. on the 25th May, 1972. They gave four reasons for giving leave:-

pp.173-178

pp.179-184

- 10 (a) Because the Federal Court had not given adequate reasons for reversing the findings of the trial Court;
- (b) Because findings of fact should not be interfered with on appeal except in very exceptional circumstances;
- (c) Because the Judgment of the Federal Court appears to lay down new law in so far as miners are concerned in the application of the Rylands v. Fletcher rule;
- 20 (d) Because the Defendants had conceded liability and the entitlement of the Plaintiffs to nominal damages through their Counsel.

13. The Appellants respectfully submit that this appeal should be allowed with costs and the Judgment of the High Court be restored for the following among other

R E A S O N S

1. BECAUSE the trial Judge was right in holding that the Respondents were liable in negligence, under the rule in Rylands v. Fletcher and in nuisance.
- 30 2. BECAUSE the trial Judge correctly held that the Respondents were negligent in not completing the left bund.
3. BECAUSE the trial Judge was right in holding that the left bund was a non-natural user when it was made to hold water when half completed.
4. BECAUSE the trial Judge was right in holding that there was overwhelming evidence that there was an escape of water from the Respondents' to the Appellants' land which caused damage to the latter's land.
- 40 5. BECAUSE in any event, the Respondents admitted

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through their Counsel that water had escaped from their land onto the land of the Appellants.

6. BECAUSE the Respondents were liable in nuisance and their Counsel so conceded.
7. BECAUSE the award of \$3000/- general damages by the trial Judge was correct having regard to all the circumstances.
8. BECAUSE the Federal Court ought not to have interfered with the trial Court's findings of fact.
9. BECAUSE of the reasons given by Ong C.J. on 25th May, 1972 when granting leave to appeal to His Majesty the Yang di-Pertuan Agong. 10

EUGENE COTRAN

No.29 of 1972

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

HIAP LEE (CHEONG LEONG & SONS)
BRICKMAKERS LIMITED (Plaintiffs)
Appellants

- and -

WENG LOK MINING COMPANY
LIMITED (Defendants) Respondents

CASE FOR THE APPELLANTS

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