

No 16

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

NO. 29 of 1972

ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA

---

B E T W E E N :

HIAP LEE (CHEONG LEONG & SONS)  
BRICKMAKERS LTD. (Plaintiffs)

Appellants

- and -

WENG LOK MINING COMPANY  
LIMITED (Defendants)

Respondents

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RECORD OF PROCEEDINGS

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WILSON FREEMAN,  
6/8 Westminster Palace  
Gardens,  
London, SW1P 1RL

Solicitors for the Appellants.

STEPHENSON HARWOOD & TATHAM,  
Saddlers' Hall,  
Gutter Lane,  
Cheapside, London, EC2V 6BS

Solicitors for the Respondents.

(ii)

No.	Description of Document	Date	Page
	<u>Plaintiffs Evidence (continued)</u>		
8.	Vernon Sibert	15th April 1969	25
9.	Lai Sien Kong (Recalled)	15th April 1969	26
10.	Bachan Singh	16th April 1969	27
11.	Loong Soo Chai	16th April 1969	29
12.	Tan Kim Choo	16th & 22nd & 23rd April 1969	32
13.	Lim Kim Seong	24th April 1969	45
14.	Kong Nam Fatt	24th April 1969	47
15.	Lim Kim Seong (Recalled)	21st July 1969	54
16.	Soong Fah Sang	21st July 1969	55
17.	Tan Chin Tin	21st July 1969	61
18.	Soong Fah Sang (Recalled)	21st July 1969	63
19.	Address by Defendants' Counsel	21st July 1969	63
	<u>Defendants' Evidence</u>		
20.	Markandan	21st July 1969	64
21.	Lee Yew Leong	21st July 1969	65
22.	Karin Bin Ahmad	21st July 1969	65
23.	Roland Edward Stephen Curtis	22nd July 1969	68
24.	K. Thavapragasam	22nd July 1969	73
25.	Wong Foon	22nd July 1969	81
26.	J. B. Ross	22nd July 1969	90
27.	Wong Chong Chow	22nd & 23rd July 1969	97
28.	Judgment	19th March 1971	107
29.	Order	19th March 1971	123

## (iii)

No.	Description of Document	Date	Page
	<u>In the Federal Court of Malaysia</u>		
30.	Memorandum of Appeal	20th May 1971	124
31.	Notes of Argument of Azmi, L.P.	16th & 19th August 1971	132
32.	Notes of Argument of Suffian, F.J.	16th & 19th August 1971	142
33.	Appellants' Written Submission	Undated	150
34.	Judgment of Ali, F.J.	31st December 1971	166
35.	Order	31st December 1971	171
36.	Notice of Motion	11th February 1972	172
37.	Affidavit of Tan Kim Hai	11th February 1972	174
38.	Grounds of Judgment of Ong, F.J.	25th May 1972	179
39.	Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong	7th August 1972	184

EXHIBITS

Exhibit Mark	Description of Document	Date
D24	Twelve photographs, letters from A to L	May 1965
D24A	Ten photographs, lettered from A to J	May 1965
D25	Eight photographs, lettered from A to H	December 1965
	<u>Note:</u> These photographs are separately reproduced	

(iv)

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date
<u>In the High Court in Malaya</u>	
Submission by Defendants' Counsel	23rd July 1969
Written Submission on behalf of the Plaintiffs	Undated
<u>In the Federal Court of Malaysia</u>	
Notice of Appeal	7th April 1971
Notes of argument of Ali, F.J.	16th & 19th August 1971
Respondents' written Submission	Undated
Notes of argument of Ong, F.J.	22nd March 1972
Notes of argument of Gill, F.J.	22nd March 1972
Notes of argument of Ali, F.J.	22nd March 1972
Applicants' written Submission	Undated
Order granting Conditional Leave to Appeal	22nd March 1972

EXHIBITS

Exhibit Mark	Description of Document
AB.1	Licence No. 048701, 1st January to 31st December 1964
AB.2	Licence No. 048955, 1st January to 31st December 1965
AB.3	Plan, prepared by Vallentine Dunne & Co.

(v)

Exhibit Mark	Description of Document	Date
AB.4	Letter, Plaintiffs' Solicitors to Defendants	28th May 1965
AB.5	A.R. Registered card	29th May 1965
AB.6	Letter, Plaintiffs' Solicitors to Defendants	9th August 1965
AB.7	A.R. Registered card	11th August 1965
AB.8	Translation of Chinese daily entries of earth transported	April 1964
AB.9	Statement of Account and translation	15th April 1964
AB.10	Receipt for \$2,439.50 and translation	30th April 1964
AB.11	Translation of Chinese daily entries	April 1964
AB.12	Statement of Account and translation	30th April 1964
AB.13	Receipt for \$1,077.00 and translation	14th May 1964
AB.14	Translation of Chinese daily entries	May 1964
AB.15	Statement of Account and translation	15th May 1964
AB.16	Receipt for \$910.00 and translation	30th May 1964
AB.17	Translation of Chinese daily entries	May 1964
AB.18	Statement of Account and translation	31st May 1964
AB.19	Receipt for \$700.00 and translation	12th June 1964
AB.20	Translation of Chinese daily entries	June 1964
AB.21	Statement of Account and translation	30th June 1964
AB.22	Receipt for \$570.50 and translation	15th July 1964
AB.23	Translation of Chinese daily entries	July 1964
AB.24	Statement of Account and translation	31st July 1964
AB.25	Receipt for \$456.00 and translation	17th August 1964

Exhibit Mark	Description of Document	Date
AB.26	Translation of Chinese daily entries	August 1964
AB.27	Statement of Account and translation	31st August 1964
AB.28	Receipt for \$960.00 and translation	12th August 1964
AB.29	Translation of Summary of stored earth	April to August 1964
AB.30	Translation of Account for transporting earth	30th April 1964
AB.31	Translation of Account for transporting earth	31st May 1964
AB.32	Translation of Account for transporting earth	31st August 1964
AB.33	Bill for photographs	25th May 1965
AB.34	Letter, Plaintiffs' Solicitors to Chun Kwong Photo Studios	26th May 1965
AB.35	Bill for photographs	Undated
AB.36	Letter, Plaintiffs' Solicitors to Chun Kwong Photo Studio	21st October 1965
AB.37	Bill for Photographs	9th December 1965
AB.38	Letter, Plaintiffs' Solicitors to Chun Kwong Photo Studios	10th December 1965
AB.39	Letter, Vallentine Dunne & Co., to Shearn Delamore & Co.	9th June 1965
AB.40	Account to Vallentine Dunne & Co.	30th June 1965
P1	Extract from Mukim Register	
P1A	Extract from Mukim Register	
P1B	Certificate of Title to Lot No.4657 in Mukim of Batu	24th May 1951
P2	Cheque counterfoil for \$2,439.50	30th April 1964
P3	Cheque counterfoil for \$1,077.00	14th May 1964

(vii)

Exhibit Mark	Description of Document	Date
P4	Cheque counterfoil for \$910.00	30th May 1964
P5	Cheque counterfoil for \$700.00	17th June 1964
P6	Cheque counterfoil for \$570.50	14th July 1964
P7	Cheque counterfoil for \$456.00	17th August 1964
P8	Cheque counterfoil for \$952.00	12th September 1964
P10	Field Book	17th May 1965
P14	Cheque for \$2,439.50, with Statement of Account	30th May 1964
P14A	Cheque for \$1,077.00, with Statements of Account	14th May 1964
P14B	Cheque for \$910.00, with Statements of Account	30th May 1964
P14C	Cheque for \$510.50, with Statements of Account	14th July 1964
P14D	Cheque for \$456.00, with Statements of Account	17th August 1964
P14E	Cheque for \$95.00, with Statements of Account	12th September 1964
P15	Statement of Accounts of Tan Chin Teng with translation	30th April 1964
P16	Six vouchers, receipt of loads of earth	15th April 1964
P16T	Translation of P16	
P17	Voucher, receipt of load of earth	9th June 1964
P17T	Translation of P17	
P18	Statement of Accounts of Tan Chin Teng	31st May 1964
P18T	Translation of P18	
P19	Statement of Accounts of Tan Chin Teng	30th June 1964
P19T	Translation of P19	

Exhibit Mark	Description of Document	Date
P20 P20T	Statement of Accounts of Tan Chin Teng Translation of P20	31st July 1964
P22 P22T	Statement of Accounts of Sin Hup Hing Co. Translation of P22	30th April 1964
D23	Letter, Perkhidmatan Kajichnacha Malaysia to Weng Lok Mining Co. Ltd.	19th October 1967
D25	Plan showing working of Gravel Pump Mine	
D26	Licence for Hydraulic Mining with plan	22nd September 1964
D26A	Licence for Hydraulic Mining with plan	5th November 1964
D27	Plan showing working of Gravel Pump Mine	
D28	Record of sales of tin ore	5th January to 1st July 1965
D29	Letter, A.H. Flowerdew & Co., to The Marinya Galian with plan	2nd October 1963



1.

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 29 of 1972

---

ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA

---

BETWEEN :-

HIAP LEE (CHEONG LEONG & SONS)  
BRICKMAKERS LTD. (Plaintiffs)

Appellants

- and -

WENG LOK MINING COMPANY  
LIMITED (Defendants)

Respondents

---

RECORD OF PROCEEDINGS

---

No. 1

In the High  
Court

Amended Writ of Summons

—  
No. 1

Amended this 25th day of October 1965  
pursuant to Order 28 Rule 2 of the Rules  
of the Supreme Court 1957

Amended Writ  
of Summons  
25th October  
1965

Sgd. Siti Norma Yaakob  
Senior Assistant Registrar  
High Court, Kuala Lumpur

AMENDED GENERAL FORM OF WRIT OF SUMMONS

10

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Civil Suit 1965 No. 1264

Between

Hiap Lee (Cheong Leong & Sons) ... Plaintiffs  
Brickmakers Ltd.  
And

Weng Lok Mining Company Limited ... Defendant

The Honourable Dato Syed Sheh Barakbah, P.M.N.  
D.P.M.K., P.S.B, Chief Justice of the High Court in

In the High  
Court

No. 1

Amended Writ  
of Summons  
25th October  
1965  
(continued)

Malaya in the name and on behalf of His Majesty  
The Yang di-Pertuan Agong.

To:-

Weng Lok Mining Company Limited,  
6, Ampang Street,  
1st Floor,  
Kuala Lumpur

WE COMMAND you, that within 8 days after the  
service of this Writ on you, inclusive of the day  
of such service, you do cause an appearance to be  
entered for you in an action at the suit of Hiap  
Lee (Cheong Leong & Sons) Brickmakers Limited.

10

AND TAKE NOTICE that in default of your so  
doing the Plaintiffs may proceed therein and  
judgment may be given in your absence.

WITNESS Siti Norma Yaakob, Senior Assistant  
Registrar of the High Court in Malaya the 17th  
day of September 1965.

Sgd. Shearn Delamore & Co.  
Plaintiffs' Solicitors

20

Sgd. Siti Norma Yaakob,  
Senior Assistant Registrar,  
High Court, Kuala Lumpur.

N.B. - This Writ is to be served within twelve  
months from the date thereof, or, if  
renewed, within six months from the date  
of last renewal, including the day of  
such date, and not afterwards.

The Defendant (or Defendants) may appear  
hereto by entering an appearance (or  
appearances) either personally or by  
solicitor at the Registry of the High  
Court of Kuala Lumpur.

30

A defendant appearing personally may, if  
he desires, enter his appearance by post,  
and the appropriate forms may be obtained  
by sending a Postal Order for \$3.00 within  
an address envelope to the Registrar of  
the High Court of Kuala Lumpur.

If the defendant enters an appearance he must also deliver a defence within fourteen days from the last day of the time limited for appearance. Unless such time is extended by the Court or a Judge otherwise judgment may be entered against him without notice, unless he had in the meantime been served with a summons for judgment.

In the High Court

            
No. 1

Amended Writ  
of Summons  
25th October  
1965  
(continued)

I N D O R S E M E N T

10           The Plaintiffs' claim is for damages to the Plaintiffs' land at Lot No. 3582 Mukim of Batu under EMR 4206 by the escape of water from the Defendants' premises at Lot No. ~~4656 Mukim of Batu~~ No. 4661 held under Mining Lease No. 4390 Mukim of Batu, District of Kuala Lumpur, caused by the nuisance and negligence of the Defendants their servants or agents.

~~DATED THIS 13TH DAY OF SEPTEMBER 1965~~

20                           Sgd. Shearn Delamore & Co.  
                                  Plaintiffs' Solicitors

DATED THIS 25th DAY OF OCTOBER 1965

Sgd. Shearn Delamore & Co.  
Plaintiffs' Solicitors

30           And the sum of \$       (or such sum as may be allowed on taxation) for costs, and also, in case the Plaintiff obtains an order for substituted service, the further sum of \$ (or such sum as may be allowed on taxation). If the amount claimed is paid to the Plaintiffs or agent within four days from the service hereof, further proceedings will be stayed.

40           Provided that if it appears from the indorsement of the writ that the plaintiffs are resident outside the schedule territories as defined in Exchange Control Ordinance 1963, or is acting by order on behalf of a person so resident, or if the defendant is acting by order on behalf of a person so resident, proceedings will only be stayed, if the amount claimed is paid into Court within the said time and notice of such payment in is given to the plaintiffs their advocates and solicitors or agent

In the High Court

No. 1

Amended Writ of Summons  
25th October 1965  
(continued)

This Writ was issued by Messrs. Shearn Delamore & Co. and Drew & Napier, of No. 2 Benteng, Kuala Lumpur whose address for service is at No. 2 Benteng, Kuala Lumpur, solicitors for the said plaintiffs whose place of business is at No. 314 2½ mile, Ipoh Road, Kuala Lumpur.

This Writ was served by me at \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ at the hour of \_\_\_\_\_ 10

Indorsed this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

No. 2

Amended Statement of Claim  
25th October 1965

No. 2

Amended Statement of Claim

Amended this 25th day of October 1965 pursuant to Order 28 Rule 2 of the Rules of the Supreme Court 1957

Sgd. Siti Norma Yaakob  
Senior Assistant Registrar  
High Court, Kuala Lumpur

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR 20

CIVIL SUIT NO. 1264 OF 1965

BETWEEN

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ....Plaintiffs

And

Weng Lok Mining Co. Ltd. ....Defendant

AMENDED STATEMENT OF CLAIM

1. The Plaintiffs are and were at all material times the owners and occupiers of land and premises known as HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS LIMITED FACTORY at 7½ 4½ miles Batu Caves Segambut held under E.M.R.4206 Lot No.3582, Mukim of Batu in the State of Selangor. 30

5.

2. The Defendant is and was at all material times the occupier of land adjacent to the Plaintiffs said land known as Lot No. ~~4656~~ 4661 held under Mining Lease No. 4390 Mukim of Batu, District of Kuala Lumpur.

In the High Court

                      
No. 2

3. The Defendant carries on mining operations on Lot No. ~~4656~~ 4661 under the name of WENG LOK MINING COMPANY LIMITED.

Amended  
Statement of  
Claim  
25th October  
1965  
(continued)

10

4. The Plaintiffs' said land lie at the foot of a half completed bund on the Defendant's land and the boundary between the Plaintiffs' said land and the Defendant's land.

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

20

6. On or about the beginning of March 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.

PARTICULARS OF NEGLIGENCE

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

30

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.

40

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

In the High  
Court

No. 2

Amended  
Statement of  
Claim  
25th October  
1965  
(continued)

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.

8. By reason of the matters aforesaid the Plaintiffs has been 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	10
2.	Loss of 10,000 bricks @ 4¢ per brick	400.00	
3.	Cost of repairs to floor of brick shed	800.00	
4.	Loss of service of brick kiln for one month	<u>1,500.00</u>	
		<u>\$22,576.00</u>	

And the Plaintiffs claim 20

(i) An Injunction to restrain the Defendant by their servant or agents or otherwise from continuing the said nuisance

(ii) Special damages of \$22,576/-

(iii) Damages

(iv) Costs

(v) Such further and other relief as may seem just

Sgd. Shearn Delamore & Co.,  
Plaintiffs' Solicitors

30

Dated this 25th day of October 1965

Sgd. Shearn Delamore & Co.  
Plaintiffs' Solicitors

In the High  
Court

No. 2

This Statement of Claim is filed for and on behalf of the Plaintiffs by Messrs. Shearn Delamore & Co. Advocates & Solicitors whose address for service is No. 2 Benteng, Kuala Lumpur.

Amended  
Statement  
of Claim  
25th October  
1965  
(continued)

No. 3

No. 3

Written Statement of Defendants

Written  
Statement of  
Defendants  
27th October  
1965

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

10

CIVIL SUIT NO. 1264 of 1965

Between

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd.

Plaintiffs

And

Weng Lok Mining Co. Ltd.

Defendant

WRITTEN STATEMENT OF DEFENDANT

1. The Defendant does not admit paragraph 1 of the Amended Statement of Claim.

20

2. The Defendant admits paragraph 2 and 3 of the Amended Statement of Claim.

3. With reference to paragraph 4 of the Amended Statement of Claim the Defendant denies that any bund between land occupied by the Defendant and that occupied by the Plaintiff was at any material time half completed. Any such bunds were fully completed and fully maintained at all material times.

30

4. With reference to paragraph 5 of the Amended Statement of Claim the Defendant denies that it has at any time maintained upon land occupied by it adjacent to the Plaintiff's land any reservoir of water and denies that the Defendant has at any time made any non-natural use of the land occupied by it.

In the High  
Court

\_\_\_\_\_  
No. 3

Written  
Statement of  
Defendants  
27th October  
1965  
(continued)

5. With reference to paragraph 6 of the Amended Statement of Claim the Defendant denies that any water escaped from land occupied by the Defendant onto the Plaintiff's land at the time alleged or at any time by reason of the alleged negligence on the part of the Defendant its servants or agents or from any other reason. The Defendant denies having been negligent as alleged in the particulars of negligence or at all. No bund on land occupied by the Defendant collapsed allowing water to escape onto the Plaintiff's land.

10

6. With reference to paragraph 7 of the Amended Statement of Claim the Defendant repeats paragraph 4 and 5 hereof and denies maintaining any reservoir on its land and denies any escape of water from its land onto the land belonging to the Plaintiff. The Defendant denies any nuisance.

7. The Defendant does not admit the Plaintiffs sustained the loss and damage alleged in paragraph 8 of the Amended Statement of Claim and contends and will contend that if the plaintiff sustained the alleged loss and damage or any of it, it was not caused by the escape of water from land occupied by the Defendant.

20

Dated this 27th day of October 1965.

Sgd. Skrine & Co.  
Defendant's Solicitors

The Written Statement of Defendant was filed by Messrs. Skrine & Co., Solicitors for the Defendant above-named whose address for service is at Kwang Tung Association Building, 44 Jalan Pudu (4th Floor), Kuala Lumpur.

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No. 4

## Amended Statement of Claim

In the High  
Court

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

                      
No. 4CIVIL SUIT NO. 1264 OF 1965Amended  
Statement  
of Claim  
14th April 1969

Between

Hiap Lee (Cheong Leong & Sons)                   ... Plaintiffs  
Brickmakers Limited

And

Weng Lok Mining Co. Ltd.                         ... Defendant

AMENDED STATEMENT OF CLAIM

1. The Plaintiffs are and were at all material times the owners and occupiers of land and premises known as HIAP LEE (CHEONG LEONG & SONS) BRICKMAKERS LIMITED FACTORY at 4½ miles, Segambut held under E.M.R. 4206 Lot No. 3582, Mukim of Batu in the State of Selangor.

2. The Defendant is and was at all material times the occupier of land adjacent to the Plaintiffs said land known as Lot No. 4661 held under Mining Lease No. 4390 Mukim of Batu, District of Kuala Lumpur.

3. The Defendant carries on mining operations on Lot No. 4661 under the name of WENG LOK MINING COMPANY LIMITED.

4. The Plaintiffs' said land lie at the foot of a half completed bund on the Defendant's land and the boundary between the Plaintiffs' said land and the Defendant's land.

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

6. On or about the ~~beginning~~ ~~end~~ of March April 1965 owing to the negligence of the Defendant

In the High  
Court

\_\_\_\_\_  
No.4

Amended  
Statement  
of Claim

14th April 1969  
(continued)

its servant 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.

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. 10
- 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
- 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. 20

8. By reason of the matters aforesaid the Plaintiffs have been put to loss and expense and has suffered damage. 30

PARTICULARS OF SPECIAL DAMAGE

1.	<u>Loss of 9,938 cu.yards of brickmaking earth @ \$2/- per cu.yd.</u>	<u>\$19,876.00</u>
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>

11.

2.3	Loss of 10,000 bricks @ 4¢ per brick	400.00	In the High Court
3.4	Cost of repairs to floor of brick shed	800.00	<u>          </u> No. 4
4.5	Loss of service of brick kiln for one month	1,500.00	Amended Statement of Claim
		<u>22,576.00</u>	14th April 1969 (continued)
		<u>19,713.00</u>	

AND THE PLAINTIFFS CLAIM

10

- (i) An Injunction to restrain the Defendant by their servant 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.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 1969

PLAINTIFFS' SOLICITORS

20

Amended this \_\_\_\_\_ day of \_\_\_\_\_ 1969  
pursuant to Order of Court dated the \_\_\_\_\_ day  
of \_\_\_\_\_ 1969

Senior Assistant Registrar  
High Court, Kuala Lumpur

This Statement of Claim is filed for and on behalf of the Plaintiffs by Messrs. Shearn Delamore & Co., Advocates & Solicitors whose address for service is No. 2 Benteng, Kuala Lumpur.

12.

In the High  
Court

No. 5

Proceedings  
14th April 1969

No. 5

Proceedings

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 1264 OF 1965

Between

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd.

Plaintiffs

And

Weng Lok Mining Co. Ltd.

Defendants

Before Raja Azlan Shah, J.

10

In Open Court,  
Monday, 14th April, 1969

Mrs. Shanta Menon for Plaintiffs

Mr. S.D.K. Peddie for defendants

Mrs. Menon puts in amended statement of claim -  
i.e., paras 6, 7 & 8. Peddie no objection.

Facts - Bundle of Agreement - AB

Photographs - 24A - 24L  
- 25A - 25H

Plaintiff's  
Evidence

No. 6

Tan Kim Hoi  
Examination

No. 6

Tan Kim Hoi

20

P.W.1: TAN KIM HOI, affirmed, states in Hokkien.

Age 34 years, Brick-maker. Living at  
67 Segambut.

Managing-Director of Plaintiffs' Company.  
Carrying on business at Lot 3582 (E.M.R. 4206).  
Title produced (Ex.P1) - condition  $\frac{1}{2}$  brick making.

I have permits to remove brick materials  
from the said area (pp. 1 & 2 of AB).

I purchased my clay to make the bricks from others.

The clay is stored on Lot 3582, 3581, 4657. These are the titles in respect of Lots 3581, 4657 - PLA & PLB.

Lot 4658 to the South is owned by Yew Lian.

My kiln are situated on west side of Lot 3582 (marked in X red).

10 In 1965 I telephoned the defendants' company in respect of their mining water escaping into my land, Lot 3582. I wanted to speak to the Manager of the defendant-company. The receiver claimed to be the kepala of the defendants. He said the manager was not in.

I told this Kepala that mining water had escaped into my land damaging the bricks, the clay and the kiln. I personally saw the flood.

20 I saw the unbaked bricks and the kiln under water. I found there was a bund which has encroached into our land. Witness points to bund in Q on P.3 of AB.

The water escaped from the uncompleted bund which belonged to the defendants on the west side of Lot 3582.

Photograph 24G - shows the bund which had encroached on our land. It was wrongly constructed on our land, by the Defendants. Photograph also shows the half-completed bund with pipes which discharged water into our land.

30 That was the first time I saw the said bund - i.e. in April 1965.

I am in charge of the office. My younger brother is in charge of the kiln. Sometimes I go to the site, once a month, sometimes 20 days once.

The office is at 314, Ipoh Road, Kuala Lumpur.

After I had telephoned the kepala about the damage, he said he would inspect the place and inform the manager.

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Examination  
14th April 1969  
(continued)

In the High  
Court

—  
Plaintiffs'  
Evidence

No. 6

Tan Kim Hoi  
Examination  
14th April 1969  
(continued)

Two-three days later my younger brother told me that he had taken a person from the defendant company to inspect the place. He further told me that that person would report to the defendants and that they would hold a meeting and compensate us. No compensation was offered.

My younger brother calculated the damage.

My elder brother has power to purchase clay. Whenever clay is delivered we would give a document. A copy is kept in our files.

10

1. S/Account. 1.4.64 - 15.4.64 - page 11 of AB.

Page 12 contains receipt of payment signed by their collector Bachan Singh.

Page 11 of AB shows statement of account in respect of purchase of brick-making earth from Lim Kim Seang of Sultan Street, Kuala Lumpur for periods 1.4.64 to 15.4.64.

2. Page 15 of AB shows statement of account for purchase of brick-making earth from Lim Kim Seang for periods 16.4.64 to 30.4.64.

20

Receipt shown on page 16 of AB signed by Lim Kim Seang himself.

3. Page 19 of AB shows statement of account for purchase of brick-making earth from Lim Kim Seang for periods 1.5.1964 - 15.5.1964.

Page 20 shows the receipt signed by Lim Kim Seang.

4. Page 23 shows statement of account for same purchase from same seller for periods 16.5.64 to 30.5.1964.

30

Page 24 is receipt of payment.

5. Page 27 shows statement of account for periods 1.6.64 to 15.6.64.

Page 28 is receipt signed by one Lee "something" (the other two characters not legible).

6. Page 30 shows statement of account for period 1.7.64 to 18.7.64. Page 31 shows receipt of payment signed by Bachan Singh.

7. Page 34 shows statement of account for period 1.8.64 to 30.8.64. Page 35 shows receipt signed by Lee and the other 2 characters not legible.

The Total amount is \$7,113.00

I consulted my solicitors. They sent 2 letters to defendants claiming damages by registered post.

Page 4 - 7 of AB.

Incident took place in April 1965

XXN:

Title related to Tan Cheang Leong, my father. He started it in October 1954. I have been in this area since 1.6.1948.

Defendants started mining in neighbouring lands in 1960 something. I do not know the year.

Before defendants, someone else had mined the land.

Defendants put tailings in that area?

There is a palong belonging to defendants in that area.

Photo 24H shows the pipe.

Photo 24G refers.

Q. The only palong adjacent to your land was operated by previous miner?

A. I deny that.

Q. Who removed tin ore adjacent to your land?

A. At first Ng Seng Huat Tin Mine was carrying on mining operations there. Subsequently they sold it to the defendants.

I do not know who removed the tin ore.

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Examination  
14th April 1969  
(continued)

Cross-examination

10

20

30

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Cross-examination  
14th April 1969  
(continued)

Q. When previous miner worked the area, did he have bund?

A. There was no bund.

When flood occurred I did not report to the Mines Department or the Police.

The bund which encroached on my land was constructed by the Defendants.

I did not illegally obtain clay from adjoining land.

I remember a sikh boy being drowned in an old clay hole. Hole not dug by me.

10

There was no excavator No. 2830 driven by Woo Kow digging holes at this area when this boy was drowned.

Woo Kow was our employee for driving the excavating machine.

There was no bund previously in this area. Previously there was a mining pool in defendants' area. There was no bund in existence there.

Photo 24C shows the area with planks in photo and his land.

20

Photo 24D - depression refers.

The area beyond that depression is my land. (Witness points).

Photo 24G - This area is mine. (Witness draws line in black ) - same as sketch.

In June 1965 I sent a surveyor to the land. He prepared the plan on page 3 of AB.

24-1 refers - The area in the background of line is mine; the area in foreground of line is defendants. (Witness draws line).

30

Photo 25H - shows the bund on the western boundary. To the right-hand side is the other bund. This is my boundary. (Witness draws in red).

This is the kiln (marked X).



There was no mining pool on my land. It was at the boundary.

My land is higher than the neighbouring land. As one comes towards my brickworks, the land becomes slightly higher.

Water was about 3 feet on my land.

Only the western part of my land was under water.

10 Photo 24A - is the kiln. Photo taken in May. Pg.4 of AB refers.

Q. 24G - shows depth of water?  
A. Shows water had subsided.

Flood due to water rushing out of the pipes. 24J - shows road by side of kiln. Water ditches were made by lorry tracks.

In the process of making bricks, all the bricks are good - classified into 3 categories. Bricks not sold are stacked.

20 24K - shows bricks ready but not baked. This represents part of my claim. They cannot be used any more.

24L - shows unbaked bricks.

To 2.30 p.m.

Resumes

In March 1965 defendants constructed the bund which encroached on my land and my younger brother told them that they had made a mistake.

30 Bund constructed to retain water. At the outset water got into our land from defendants' land - and my younger brother informed them about this. Then defendants constructed the bund which later we discovered had encroached on our land. My younger brother informed them about this. One month later my younger brother informed me that water had got into our land and damaged our property. That was in April 1965.

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Cross-examination  
14th April 1969  
(continued)

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Cross-examination  
14th April 1969  
(continued)

It is not true that at one time there was a bund across my land (counsel points on page 3 of AB).

Page 46 of AB refers.

It was only after the flood that we took action against defendants. It was before the survey that we knew the bund had encroached on our land.

- Q. What has done to stop the flooding?  
A. After we had informed them, they stopped discharging water from the pipe. 10
- Q. If that was the case, it would show the figure in the mining output?  
A. I do not know that.  
On 10.1.1966 I swore an affidavit of documents.
- Q. Why are the accounts and receipts not shown in your affidavit?  
A. I think at that time my solicitors did not ask us about them. 20

When I originally filed the statement of claim I claimed \$2/- per cubic yard of brick-making earth. It was based on \$5/- for clay, \$5/- for transport and a lorry can carry 5 cubic yards per load.

- Page 11 AB  
Page 15 AB  
Page 19 AB  
Page 23 AB  
Page 27 AB  
Page 30 & 34 AB 30

Page 39. That includes labour charges. Stored-earth and brick-making earth - Page 36 refers - stored-earth will be mixed with fine sand. The latter includes fine sand.

At the end of August, 1964, stored earth was there. We carried on business between August 1964 and April 1965.

In April 1965 this earth was covered with flood water. 40

Between August 64 and April 1965 I used "B" and "C" type of earth.

Page 33 AB refers.

Lorry can come through this way as shown on 24J or the other way. Beyond the stack of planks there was a deep hole 10 or 20 ft. deep. The earth was dumped there. This hole was there about 10 years. There was water in it. We use it to dump the clay over the water.

10 The flood water brought a lot of sand and when it subsided it covered the clay in this hole.

The whole of the earth was stored on lot 3582. A portion of the earth was washed away. The ones left behind was covered with sand.

24C refers - This shows the clay which was covered with sand.

Photo 25 - taken in December 1965.

20 24G - My earth was dumped on right-hand side as shown in the photograph.

Page 8 AB - Q. Where are the vouchers in statement of account?

Page 11/12 AB. When delivery made, the receipts accompanied the delivery. Receipt written by seller. Receipts made out before I actually paid.

30 Page 13 AB.  
Page 15/16 AB - one load for the 17.4.64.  
Page 17 AB.  
Page 19 AB. 6.5.64 shows 18 loads. But p.17 shows 17 loads.  
Page 21 AB.  
Page 24 AB.  
Page 25/26 AB.  
Page 28 AB.  
Page 32 AB.

To 9.30 a.m.

In the High Court

Plaintiffs' Evidence  
No. 6

Tan Kim Hoi  
Cross-examination  
14th April 1969  
(continued)

In the High  
Court

Plaintiffs'  
Evidence

No. 6

Tan Kim Hoi  
Cross-  
examination  
(continued)  
15th April 1969

Continued on 15.4.1969

I am claiming \$9,900/- for transportation.

Pages 37, 38, 39 AB refers.

Q. My calculation of these accounts is \$977/-?  
A. \$9,000 worth of receipts have been misplaced.

Q. Pages 37, 38 & 39 show 206 loads and not  
1,980 loads?

A. It is more than that. There were other  
receipts which were lost.

These were receipts of the Transport Company. 10  
Page 37 AB refers - Voucher 0307 of 6.4.64 is not  
stated in statement of account on page 8 of AB.

Pages 39 and 32 AB refer.

Voucher 152	on page 39	does not appear on	p.32
" 156	" 39	" " " "	p.32
" 157	" 39	" " " "	p.32
Vouchers 160, 168, 172, 1146	" "	" "	p.32

I disagree that my accounts are not accurate.  
Before I make payments I did not check the vouchers.  
I depended on my clerk. I do not know if the 20  
accounts are correct.

The encroaching bund was made in March 1965.  
Photo 24-I shows where my boundary ran. The  
spillway is on my land. Boundary is between the  
spillway and the nearest shed.

Photo 24F. I see the spillway.

Quite a distance from encroaching bund to spillway.

Q. While the encroaching bund is being con-  
structed you could see the direction it was  
going? 30

A. I do not know.

Q. The encroaching bund is also on Lot 4658?

A. I agree.

Q. What is the purpose of a bund?

A. To store water there.

When this bund was made it was for the purpose of storing water.

We did not write to the defendants to stop constructing the bund.

I have three kilns. Only one was affected by the flood.

I export bricks from my land. Procedure is we deliver them by lorry to the purchaser. We prepare voucher.

10 Q. How do you distinguish between vouchers for exporting bricks and vouchers for purchasing brick-making earth?

A. That will be stated in the vouchers.

I gave instructions to my solicitors to prepare the Statement of Claim. Para. 5 refers. Also para. 6 refers.

Q. Why don't your evidence tally with para. 5 & 6 of the Statement of Claim?

20 A. At the time we saw water was discharged from defendants' land.

My allegation is that water from the pipe flowed into defendants' pool and that water escaped into our land.

Re-XN:

Accounts at pages 8, 9, 10, 13, 14, 17, 18, 21, 22, 25, 26, 29, 32, 33, of AB are kept by my clerk, Khong Nam Huat.

I never checked these accounts.

30 As soon as accounts are approved by the clerk, I made payment.

My accounts are audited by Pillai & Co., Certified Accountants, annually.

Page 12 - AB refers. Cheque No. 998666 dated 30.4.64, payee Lim Kim Seong for payment of first half of April, \$2,439.50 - P2 for identification.

Page 16 - AB refers. Cheque No. 998698 dated

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Cross-examination  
15th April 1969  
(continued)

Re-examination

In the High  
Court

Plaintiffs'  
Evidence

No. 6

Tan Kim Hoi  
Re-examination  
15th April 1969  
(continued)

14.5.1964, payee Lim Kim Seong, payment for second half of April in respect of earth account - \$1,077/- P3 for identification.

Page 20 - AB refers. Cheque No. 052605 dated 30.5.64, payee Lim Kim Seong, payment up to 15.5.64, first half-month, earth account - \$910/-. P4 for identification.

Page 24 - AB refers. Cheque 052548 dated 17.6.64, payee Lim Kim Seong, payment for earth a/c for second half of May \$700/-. Date of cheque dated 17.6.64 post-dated. But receipt issued for 12th June, P5 for identification.

10

Page 24 - AB refers. Cheque 211332 dated 14.7.64, payee Lim Kim Seong, payment for June in respect of earth account; \$570.50 - P6 for identification.

Receipt made the following day because I prepared the cheque on 14.7.64. But collector came on 15.7.64.

Statements of account for June received on 3rd or 4th July.

20

Page 31 - AB refers. Cheque 211426 dated 17.8.64, payee Lim Kim Seong, payment for month of July, in respect of earth account - \$456/- P7 for identification.

Page 35 - AB refers. Cheque No. 229933 dated 12.9.64, payee Lim Kim Seong, payment for August earth account - \$952/- P8 for identification.

I have 3 dumps for depositing brick-making earth A, B, C. A was the dump affected by the flood. B was on lot 3581 on east side. C was on Lot 4657.

30

Between April 1964 to April 1965 I used earth from dumps B and C.

In affidavit of documents I did not disclose the documents appearing in the AB. In June 1965 my town office was renovated and the receipts etc. were scattered about, some were discarded. Some of the vouchers are now available and some not available. Whatever vouchers available I

would make available to my solicitors. When I found the vouchers I brought them to my solicitors.

Ng Seng Huat carried on mining business.

A portion of it was given to Ong Ban Hing to carry on brick-making business.

I was not involved with the inquest regarding the death of the Sikh boy.

10 The excavator driven by Moo Kow was never on defendants' land at any time. Excavator used for mixing the earth.

Photo 25B refers. The fence shows my boundary between my land and Lot 4658. The sand shown there was the encroached bund.

In March 1965 when my younger brother informed me about the water sipping in, I did not inform the defendants because the water was slight. My younger brother had also spoken to the defendants' kepala who had agreed to make a bund.

20 Between August 1964 and May 1965 no clay was dumped in dump A. No lorry travelled there to dump clay.

When I used my lorry for transport I also charged \$5/-

30 Photo 25A. The bund shows the completed bund belonging to defendants (Photo taken in December '65). The pool of water is on defendants' land. I say that it was the water from this pool that had escaped into my land. At time of flood this partition was half completed. Water was discharged into the said pool. Eventually the water escaped into my land through the place where there was no bund.

Photo 25B shows my land. The background shows the completed bund of defendants. At time of flood water was on this part of my land.

Photo 25C shows the completed bund. To its left is the encroaching bund. A major portion between these 2 bunds is my land.

Photo 25H shows the ditch of water belonging

In the High Court

Plaintiffs' Evidence

No. 6

Tan Kim Hoi  
Re-examination  
15th April 1969  
(continued)

In the High  
Court

Plaintiffs'  
Evidence

No. 6

Tan Kim Hoi  
Re-examination  
15th April 1969  
(continued)

No. 7

Lai Siew Kong  
Examination

to defendants.

Photo 24C shows water pipes belonging to defendants. The uncompleted bund is from the said pipes onwards. I say that if there was a bund there defendants' water would not have escaped into my land.

No. 7

Lai Siew Kong

P.W.2: LAI SIEW KONG affirmed, states in English.

Assistant Surveyor with Sharikat Juru Ukor. Before that I was with Vallentine, Dunne & Co. Sharikat Juru Ukor is an associate of Vallentine, Dunne & Co.

10

Page 3 - AB refers. I did the survey on 31.5.1965 and 1.6.1965. I was instructed to pick up the encroachment of mud, sand and water on Lot 3582.

I started work with certified plan of the Survey Department. This is the plan - p.9.

I only found one boundary stone on the North-West. The other four are missing. There was still mud, sand and water on .616 of an acre which was the area encroached. The water was traced right up to the bund on the left of the sketch - on lot 4656 (now is lot 4661).

20

My draftsman, Vernon Sibert, drew the sketch.

There was flooding on lot 4658 - on left hand side of second bund.

I produced the field book - No. 5465 - P10.

Cross-  
examination

XXN: If there are intervening buildings, it will be more difficult to make a survey.

I did a lot of traversing to the survey.

Adjourns.

(Sa) R.A.S.



Resumes.

Photo 24-I refers.

- Q. The bund on the right limits the area of encroachment?
  - A. There is a peg (marked with a red dot of witness) to show the escape of the water. Water came round the bund on its right side. The boundary stone in north-west is missing.
- The encroachment area low-lying.

In the High Court  
 \_\_\_\_\_  
 Plaintiffs' Evidence  
 No. 7  
 Lai Siew Kong  
 Cross-examination  
 15th April 1969  
 (continued)

10 Our main work concerns mining engineers and survey. We were not asked to make a report from the mining engineer's point of view.

I walked along the affected area. I cannot remember anything to indicate a large number of lorries going to that area.

Re-XN:

Re-examination

Photos 24-I refers. I cannot say from this photo the area I had surveyed.

20 Photo 24D refers. The bund on the right was the encroached land.

Released.

No. 8  
 Vernon Sibert

No. 8  
 Vernon Sibert  
 Examination

P.W.3: VERNON SIBERT, affirmed, states in English

Draftsman employed by Sharikat Juru Ukor, an Associate of Vallentine, Dunner (sic) & Co.

In 1965 I was the draftsman of Vallentine, Dunne (sic) & Co.

30 Page 3 of AB. I drew this plan from photo-stats of certified plan obtained from Survey Department P11 identified.

I first drew the boundaries of Lot 3582 from P11. Then I took the details from P10 (surveyor's field book).

In the High Court

Plaintiffs' Evidence

No. 8

Vernon Sibert  
Examination  
15th April 1969  
(continued)

Pages 1, 2 & 3 of P10 don't mean anything to me.

The details which I had are on page 4 - the diagram showing the western part of lot 3582.

The length of the encroached bund on lot 3582 is 40 feet, which is from the end of the bund to the spillway.

Looking at photo 24D.

I now draw in red the boundary stone on the south-west and the area surveyed was beyond that lines.

10

Survey done across the muddy area is indicated by the diagonal line on page 4 of P10.

Survey done beyond lot 3582 right up to Respondents' bund. Water traced to the bund.

Field report does not show a breach in the bund.

From the photo 24G the end of the bund is as marked by me in Red X. Beyond that there is no bund.

20

Cross-examination

XXN:

The tall building in photo 24-I would be at this point on page 3 of AB marked with a circle across the figure 616.

I have never been to the site.

Re-XN: Nil.

No. 9

Lai Siew Kong  
(Recalled)  
Examination

No. 9

Lai Siew Kong (Recalled)

During the survey the bund on the left was there but I did not measure it in relation to the encroached bund.

30

XIX:

Photo 24-I refers.

I did not concentrate much on the left bund.

To 9.30 a.m.

(Sd) R.A.S.

Wednesday, 16th April 1969: (Continued)

No. 10

Bachan Singh

P.W.4: BACHAN SINGH: Affirmed, states in Cantonese.

Age 51 years.

In 1964 I was employed by Lim Kim Seong - selling clay for him.

I knew the plaintiffs in the year 1964 when I went there to sell clay - at Kg. Segambut from January 1964 for two years.

Plaintiffs' lorry transported our clay to their site.

My duties are as a kepala, as a seller and collector.

A lorry-load of clay consists of 5 cubic yards. The price varies, some at \$3.50 per cu.yd., \$4.00 per cub.yd. and \$4.50 per cu.yd.

I was given a voucher by lorry driver and the collection was made 15 days once. At times once a month.

The invoices given by the driver were given to Lim Kim Seong's clerk who would record them in the account books. The statement of accounts were given to Plaintiffs' clerk who would verify them. When everything was correct the plaintiffs would issue the cheques.

I gave receipts which were prepared by our clerk. At times Lim Kim Seong's or his clerk's

In the High Court

Plaintiffs' Evidence

No. 9

Lai Siew Kong (Recalled)

Cross-examination 15th April 1969

No.10

Bachan Singh Examination 16th April 1969

10

20

30

In the High Court

Plaintiffs' Evidence

No.10

Bachan Singh  
Examination  
16th April 1969  
(continued)

signatures appeared on the receipt. At other times when their signatures did not appear, I signed the receipts.

I always went there to collect the money.

Page 12 of AB - that is my signature.

No. 998666 is the cheque number. I wrote the number.

At that time Lim Kim Seong's business was registered but he had not printed his letter-head. At that time he had no chop. All along he had not used his rubber stamps or letter-heads. 10

Page 16 of AB. That is Lim Kim Seong's signature. Receipt No. on top was filled by me. It was the cheque's number.

Page 20 AB. That is Lim Kim Seong's signature. Receipt number is cheque number, filled in by me.

Page 24 AB. I signed the receipt. I asked plaintiffs' clerk to fill in the cheque's number. I was in a hurry to go. 20

Page 28 AB. This is the clerk's signature, Lee Kam Wah. Cheque No. on top written by me. Cheque No. at bottom written by plaintiffs' clerk.

Page 31 AB. That is my signature. Cheque No. written by plaintiffs' clerk.

Page 35 AB. Signed by Lee Kam Wah. Cheque No. written by plaintiffs' clerk.

I have an orchard. Land belongs to Lim Kim Seong. I am still in touch with Lim Kim Seong. I often go to his office and house. 30

Cross-examination

XXN:

No problem finding him.

Clay was taken from Kg. Lanjut Tin - it is a dredge. Lim Kim Seong does not own the dredge. He did not own the land.

We sold clay to so many firms. Lim Kim Seong sold the clay to a few brick kilns. He must keep records. I am not clear why he did not keep proper records.

In the High Court

Plaintiffs' Evidence

No.10

Bachan Singh  
Cross-examination  
16th April 1969  
(continued)

Page 24 and 31 of AB. Receipts at p.12 & p.24 are different. They were from different books. Receipts at pages 24 and 31 were written in English. Lim Kim Seong knew English. His clerk is Chinese.

10 I am illiterate. I simply put the no. there. I learnt only my signature and numerals.

Clay selling went on about 2 years - starting from January 1964. Lim never had a chop, proper receipts and letter-heads.

Re-XN: Nil

Released.

No. 11

Loong Soo Chai

No.11

Loong Soo Chai  
Examination

20 P.W.5: LOONG SOO CHAI, affirmed, states in Cantonese

Age 40 years. No. 10 Sultan Street, Kuala Lumpur.

Photographs - Chun Kwong Photo Studio.

I know plaintiffs.

Pages 40, 42, 44 AB. These are my bills.

I took photos 24 series in May 1965 - middle of May. All in one day.

30 Photo 24A - is the kiln. Ground was wet and there was mud. Water mark on wall of kiln and the rubber. I cannot remember the depth.

Photo 24B is the store near the kiln which is on the left (not visible). The fallen bricks were damaged. They looked like broken mud. They were soft and cracked. Ground where fallen bricks were

In the High  
Court

Plaintiffs'  
Evidence

No.11

Loong Soo Chai  
Examination  
16th April 1969  
(continued)

were wet. Also to its left and where the planks were.

Photo 24C shows a portion of the bund. Also water on the land. Pieces of planks shown are extension of planks shown in photo 24B.

Photo 24D shows two bunds. The bund is slightly longer than the left.

Photo 24E shows general view of the mining pool.

Photo 24F shows the two bunds taken from the other side - taken from high ground shown on right side of 24C. 10

Photo 24G shows two bunds, one on side of the kiln, the other on mining area site.

Photos 24H and I show the two bunds.

Photo 24J shows the wet ground at the kiln.

Photo 24K shows the store and the fallen bricks, same as in photo 24B from another angle. On left is more or less same level as the store.

Photo 24L shows the wet ground of the store. 20

Photo 24H - end of both bunds are before the kiln.

I took photos 25 series in middle of December 1965. I was instructed to take photographs of the long bund on the mining side.

Photo 25A shows the long bund taken from the high ground on right side of photo 24G. At time when 24G was taken the bund was half. At time 25A was taken the bund was completed.

Photo 25B taken from high ground near the mining area. The white thing is sandy ground. The bund shown in background is same as the bund in 24G in the background. 30

I now say that if the bund shown in 25B is the same as the half completed bund in 24G.

Photo 25C shows the completed bund on mining side.

Photos 25D & E show both the bunds. The bund on mining area consist of two colours

Photo 25F shows the 2 bunds, - the one on the mining side shows two colours.

The ditch on left is new. Nothing in 24D.

Photo 25G is about the same.

10 No water between the two bunds when I took photos 25 series as compared with 24I.

Photo 25H - shows the long bund on mining side.

The photo of bund which I took in May 1965 was only up to the dark coloured part of bund as shown in photo 25H.

I now produce the negatives for both the series - 24N & 25N.

XXN:

20 P24A - I say what I can remember and not what I can see from the photograph.

P24J - I do not know if it had been raining the day previously.

P24B - to the right is high ground.

Q. The photo taken in 24D is in the process of construction?

A. I do not know.

Photo 24L - I see the shoe on left side of picture. My shoe was very dirty.

It is like a pond between the two bunds.

30 On photo 24K on left is a path. The Planks on left are slightly on higher ground.

I walked practically over all the area.

In the High Court

Plaintiffs' Evidence

No.11

Loong Soo Chai  
Examination  
16th April 1969  
(continued)

Cross-examination

In the High  
Court

Plaintiffs'  
Evidence

No.11

Loong Soo Chai  
Cross-  
examination  
16th April 1949  
(continued)

Re-examination

No.12

Tan Kim Choo  
Examination

Q. Is there any path which appear that about 2,000 lorries would have gone to this hollow area?

A. I did not pay any attention.

Re-XN:

Photo 24J - This path leads to the depression I talked about.

Released

No. 12

Tan Kim Choo

10

P.W.6: TAN KIM CHOO: affirmed, states in Hokkein.

Age 28 years. Factory Manager and Director of Plaintiffs' Company. Bricks made at Segambut.

Page 3 of AB refers. I make bricks at Lot 3582, 3581. Lot 4657 also belongs to us. Lot 4658 does not belong to us. I use earth for making bricks. I bought them from Lim Kim Seong and others.

Earth purchased and dumped in a hole and after about 6 months they can be used to make bricks.

20

In 1965 I used clay from dumps B and C.

I ordered the clay, brought to the site by our lorries as well as Sin Hup Hing's.

There is a record of each of our lorry.

The vouchers are in triplicate. Original is white, 2nd copy is red and 3rd copy white.

At close of day the red copies are detached from the book and handed to the clerk in the factory for entering in the account books. Two or three days once they are sent to our Ipoh Road Office. The top copy is handed to the seller.



The third copy remains in the book kept by the factory office.

My clerk, Khong Nam Fatt is in charge of the factory.

I keep records.

P.W.1 made payments.

10 In 1964 - from April to August I dumped clay in dump A. After August 1964 I did not dump any more clay there because the dump was full. Size of the dump was about twice the size of the court-room. Depth about 20 feet. Clay is filled in dump A about 3 feet above the surface.

Loss of transport is \$5/- per lorry load of 5 cubic yard of clay.

Pages 37 - 39 AB - Between April '64 and August '64 I bought 1,980 loads of clay - page 36AB.

The transport charges - pages 37 - 39 AB - do not show charges for June and July 1964 and certain other dates.

20 I was only able to trace the invoice of Sin Hup Hine Co. Page 39 AB - Invoice No. 152.

I also charge \$5/- for my own lorry. We follow the practice of other lorries.

In March 1965 I first encountered the defendants. It was because on a certain day in March 1965 at about 4.30 p.m. when I went to our dump A I discovered there was water on our land. It was about 1 ft. high and it had encroached our area for about 40 feet.

30 I went close to examine and I found water had escaped from the defendants' land into our land.

Photo 24G. I now mark in red the dump A. The arrows indicate the direction of water escaping onto my land.

The boundary marked in black drawn by P.W.1 does not correctly show our boundary and he seldom comes to the site.

In the High Court

Plaintiffs' Evidence

No.12

Tan Kim Choo  
Examination  
16th April 1969  
(continued)

In the High  
Court

Plaintiffs'  
Evidence

No.12

Tan Kim Choo  
Examination  
16th August 1969  
(continued)

I now mark in red the correct boundary.

The pole in background of 24G is the North-west boundary of Lot 3582.

I then went to defendants' kongsi which was nearby and informed the kepala about the escape of water onto our land. He said he would view the place and inform the employer. Then I returned to my factory.

At about 5 p.m. on same day, kepala came and I took him round. He said he would inform his employer and have a bund constructed.

10

Two or three days later defendants constructed the encroached bund.

I saw bulldozers at work.

Photo 24D refers.

After one week I found that this bund had encroached into our land as shown in 25B.

I immediately informed the bulldozer driver. Then he stopped work. He said he would inform his employer about this.

20

Two or three days later the said driver constructed the left bund which was as shown in photos 24G & I.

At that stage there was no water on my land. Dump A was full of water.

A month later my factory clerk phoned me at 8.00 a.m. saying that there was another flood and that dump A was under water. The kiln, the store were flooded. The effected kiln is on top of the words "water" on page 3 of AB.

30

I went to the site immediately. I found the store was affected by flood of water about 2ft. - 3ft. deep and a portion of the unburned bricks had fallen as shown in photos - 24K & 24L (when photo taken I had stacked them back).

I went nearer to find out from where the water came and I found an iron pipe belonging to

defendants discharging water as shown in photo 24C. Distance about 100 ft. between the said pipe and the kiln.

I inspected dump A which was under water about 2 ft. deep. The kiln was also about 2 ft.-3 ft. under water. I then phoned P.W.1 who came about half an hour later. We both phoned the defendants' proprietor.

10 Two or three days later a representative from defendants came. I took him round to see area. He said he would inform the company, a meeting would be held and compensation would be paid.

No offer made. P.W.1 saw our solicitors.

Photo 24J - The path shown leads to a spot as marked by a red arrow in photo 24D, which is dump "A".

In the unaffected store there were about 40,000 pieces of unbaked bricks.

20 There are three burnings in a month at this kiln. 70,000 to 80,000 pieces of bricks are baked at each burning. The unbaked bricks are stacked in columns. If long ones, could be 70 to 100 pieces.

There were about 10,000 pieces of unbaked bricks damaged by the flood. Cost of one unbaked brick is 4 cts. Sale price of one baked brick is 6 cts. Average price is 6 cts. per baked bricks.

30 Adjourned to 22.4.1969.

(Sd.) R.A.S.

Before Raja Azlan Shah, J.  
Thursday, 22nd April 1969

In the High  
Court

Plaintiffs'  
Evidence

No.12

Tan Kim Choo  
Examination  
16th August 1969  
(continued)

22nd April 1969

P.W.6: (Continued)

TAN KIM CHOO on former oath:

The damaged bricks could be used. But the cost of re-making would be more than the cost price of the clay.

In the High  
Court

Plaintiffs'  
Evidence

No.12

Tan Kim Choo  
Examination  
22nd April 1969

(continued)

The damaged bricks have to be transported onto a lorry and dumped in order to soften it.

It would be easier to make bricks from clay.

The damaged bricks are abandoned.

Cost of repairs to brick-shed amounting to \$800/-. I had to engage 20 labourers to do 10 days work at \$4/- per head per day - to remove the damaged bricks, to clear the debris, to put sand over the area and also to repair the sets by putting over them. I do not claim for the sand I only claim for labour.

10

Loss of service of brick kiln for one month.

Each kiln is burnt 3 times a month. For each burning we would be covering \$500/- after deducting capital. Each burning lasts 6 - 7 days. After that the bricks are taken out for cooling.

I have 2 other brick factories - at Batu Caves and Rawang Road. I am not in charge of these factories.

XXN:

20

Cross-  
examination

Manager since January 1964, just before the flood. I was then 23 years old.

Before that I was studying at Chung Hwa School, Gombak. I used to visit the kiln then.

I do not know about the mining activities on the adjoining land.

I had a 20 ft. deep hole on my land. It was there when I became manager. I do not know when we started making bricks on that land.

Father now in Hong Kong for a few months already.

30

This hold is between 10 ft. - 20 ft. from the boundary. Between hole and boundary is grass.

Before I became manager, mining was already in operation on the neighbouring land.

I do not know where they discharge the water and tailings.

Between the hole and the boundary there was no bund. There was no bund on any side or in front of my kiln in 1964.

In the High Court

Plaintiffs' Evidence

No.12

Tan Kim Choo  
Cross-examination  
22nd April 1969  
(continued)

Q. Wasn't it just before you filed this case you found where your boundary was?

A. After coming to know our boundary we issued the Writ.

Q. You could not know earlier because the boundary stones were missing?

10 A. I do not know about that.

Q. Everybody thought that the boundary was where the encroached bund was?

A. That is not so.

I have fence on my land. They extended to the boundary. It is not a fact that my fence stopped at the encroaching bund as shown in 25B. That is the only fence.

24D refers.

24G refers. The red line is my boundary. I now say the fence is no longer visible due to grass and water 3 ft. deep.

20

25H refers. That shows my fence.

It follows the line of the encroaching bund. I believe the fence was my boundary.

In fact the new bund is the boundary.

There was little water in the soft hole before the flood. In fact I dumped my earth into that water.

My land was higher than the neighbouring land before they constructed the bund.

30

Q. Your land slopes all the way into Sungei Batu?

A. Not so.

Rain water drains to north-east.

Page 3 AB.

The drain flows to the east.

In the High  
Court

Plaintiffs'  
Evidence

No.12

Tan Kim Choo  
Cross-  
examination  
22nd April 1969  
(continued)

Q. How did the previous miner keep water off your land?

A. I do not know.

There are only two bunds on this area. Both were built in 1965.

Q. Why do you dump your clay in this hole?

A. There was no other place to dump it.

Lot 3582 is 2 acres 5 poles.

Lot 4657 is 5 acres 1 rood 36 poles.

Dump A is within the fenced area.

10

Q. Why did you dump the clay below ground level?

A. Because I can dump more.

Lim Kim Seong supplied me earth from his mining land.

It is not frequent for brick-making earth to come from a mining area.

I never heard about the Sikh boy being drowned.

Q. What was it that destroyed your brick-making earth?

20

A. Wet sand mixed with clay, it cannot turn into good brick - it will break.

Sand covered the place about 2 ft. - 3 ft.

My 23 ft. deep clay is still in the hole. I have an excavator.

Clay is not affected by water.

Clay is filled in dump A about 3 ft. from ground level. That was washed away by the flood.

Length of hole A is about 170 ft. and width is about 100 ft.

30

Clay left in hole for about 6 months, because it has to be softened by rain water. It would be easier to make bricks.

Q. How do you shape the actual brick?  
A. The clay comes out of the mould in long strips.

We chankoled the clay into the mould.

The mixed clay and fine sand is then being churned into 18 pieces of bricks.

Clay is slightly wet.

Clay mixed slightly with water and fine sand. We buy the fine sand and some come from our area.

10

We do not use river sand. That is very expensive.

First the mixed clay and sand would go into a passage where there is a shaft and the earth is pushed out into the mould.

To 23.4. '69.

Wednesday, 23rd April 1969

Visited site of brick-factory and mining area with both counsel and parties.

23rd April 1969

20 XXN: (Continued)

The flood was at even level on dump A, the kiln and the brick-shed. There was a great pool of water. Between the depression there was flat land. At dump A there was a stretch of earth. Dump A was under water.

No high ground above the level of water.

Water flowing slowly towards the direction of kiln.

30

Water about three feet. It receded slowly the following day.

March 1965 flood slightly damaged clay in dump A.

Q. All three dumps are the same?  
A. Dumps B & C are bigger than dump A.

The fillings are the same.

In the High Court

Plaintiffs' Evidence

No.12

Tan Kim Choo  
Cross-examination  
22nd April 1969  
(continued)

In the High  
Court

Plaintiffs'  
Evidence

No.12

Tan Kim Choo  
Cross-  
examination  
23rd April 1969  
(continued)

Dumps B and C are dumped at higher levels.

Size of unbaked bricks is 3" x 4" x 9½".

Page 33 AB refers. I agree with figure 9,938  
c.yds.

Kiln which was affected - at each firing  
there were 80,000 bricks.

The other three - at each firing there  
were 60,000 to 70,000 each.

All the other kilns are burnt twice a month.  
The affected kiln is burnt three times a month.

The affected kiln produced about 240,000  
bricks per month. The others produce about  
360,000 bricks per month. A total of 600,000  
bricks per month.

10

Q. On these figures you seem to produce in  
three months the whole year's production of  
1,800,000 bricks (see p.1 of AB)?

A. The annual production would be within the  
terms of the licence because sometimes the  
rubber wood used for burning would not be  
available and consequently there would be  
less burning.

20

During rainy days the rubber wood would not  
be transported.

P. 33 of AB refers.

Q. 9,938 cu. yards of earth can produce 4,074,580  
bricks?

A. Could produce even more because the clay  
has to be mixed with sand.

Q. What % of sand do you use to mix the clay?

A. Three parts of clay to 2 parts of sand -  
sometimes less sand and sometimes less clay.

30

Q. Taking clay from your 3 dumps they can  
produce a minimum of 12 million bricks.

A. I did not count.

Q. Is there anything to show where the clay was  
dumped, either dump A, B or C?

A. My record can show that.

I keep a record for dump A.



This record is kept by my clerk Khong Lam Fatt.

In the High Court

There are 3 copies of all vouchers.

Plaintiffs' Evidence

No.12

Q. Your brother has told us how he has lost the copies kept at the Ipoh Road office? The third copies which are kept at the factory is also lost?

Tan Kim Choo  
Cross-examination  
23rd April 1969  
(continued)

A. Yes.

Q. The original copy is handed to the vendor of the clay. He has also lost his copies?

10

A. I do not know about that.

Different vouchers for the outgoing bricks. We use different sets of books for purchasing brick-making earth and exporting bricks. P.W.1 knows about this.

Lorries dumped earth at one point only. That is possible. Dumping point spreads sideways.

24 J refers. In 1964 when clay was dumped at dump A there were no rubber logs and timbers planks as shown in the photographs.

20

At point where planks are shown in photograph, there was a very slight depression in the mining area and there was a 20 ft. hole.

24 I refers. I drew mark in red the planks shown in 24 J and also in red the dump A.

To 2.30 p.m.

(Sd.) R.A.S.

Resumes.

30

Width 100 ft., length 170 ft. - dump A.

Dump A extends from brick kiln to new bund.

Kiln to new bund is about 100 ft. away.

24 series. Taken as proof that there was an encroachment of the bunds and the affected area.

In the High Court

Plaintiffs' Evidence

No.12

Tan Kim Choo  
Cross-examination  
23rd April 1969  
(continued)

- Q. Why were they taken two weeks after the flood?  
A. They were taken after failure of negotiations for settlement.

Page 4 of AB refers.

- Q. Why no offer of settlement stated in the letter dated 28.5.65?  
A. I did not see this letter.

That letter was written after the photographs were taken.

10

- Q. If flood was in April 1965 you would have known your damage by the end of May '65?  
A. We took time to calculate.

Page 6 of AB refers. Letter dated 9.8.65.

- Q. You still have not stated your damage?  
A. No answer.

The first time I made the claim was on 25.10.'65 - C.S. 1264/65.

I still say that the encroaching bund was first built by defendants.

20

The depression also falls on lot 4658.

The encroaching bund was built in March 1965.

In 1965 Plaintiffs' mine did not stop working. I do not know about the palong but I saw the pipe.

I was at my factory the previous night at 6.00 p.m.

I employed Valentine, Dunne & Co.

I did not make any report to Mines Department or the Police.

30

The next store (behind) to the one flooded is on high level - not flooded.

The store at right angle to kiln (see 24 D) was flooded but there were no bricks stored.

The tall building on 24 D is on lot 3581, it was not affected by the flood. It is on high ground. The new bund did not reach that spot at that time.

There is a ridge on high ground in front of affected kiln, but towards the east the land drops and is on same level.

24 L refers. Store on left refers.

10 That was taken after flood had receded for one month. The floor on high ground.

Flood took place - middle of April 1965.

The factories at Batu Caves and Rawang Road are also known as Hiap Lee.

All orders of clay are purchased in name of Hiap Lee. Paid for by Ipoh Road Office.

Page 39 & 32 of AB refer.

20 "Transporting earth Batu Caves". According to me the earth was transported to the Batu Caves brick-work. I am not clear about this. My clerk can explain.

"Transporting earth New Village" means our brick factory at Segambut.

We are a limited company. As far as I know Pillai & Co. are our secretaries. I am also a Director.

I am not producing any documents to support my claim of \$800/- particular No. 4.

I have a profit and loss account.

Re-Xn:

30 Pl refers.

The bricks are made. People come and buy them.

From one burning it is difficult to prejudge the No. 1 bricks that would be produced.

In the High Court

—  
Plaintiffs' Evidence

No.12

Tan Kim Choo  
Cross-examination  
23rd April 1969  
(continued)

Re-examination

In the High  
Court

—  
Plaintiffs'  
Evidence

No.12

Tan Kim Choo  
Re-examination  
23rd April 1969  
(continued)

Voucher - necessary to have a copy of the voucher at the factory. My clerk kept record of them. In his absence I kept record. This is the record book. P12 for identification.

Record of earth dumped at the 3 dumps is in this book - P13 for identification. This is kept by my clerk.

When I came to factory at 8.00 a.m. on that day the pipe on Defendant's bund was still discharging water.

10

Q. When did you see your solicitors?

A. I do not know.

My solicitors asked the photographs to be taken. Page 41 of AB refers.

Dump A could contain more than 10,000 cubic yards of earth.

We tried to use the clay but they were all mixed with sand.

I employ a lot of labourers. I pay them S/4/- per day for females.

20

The labourers I engaged at the flood-affected brick-store were from outside. They were not my own labourers.

Whatever clay I used would be shown in p.13.

To: 9.30 a.m.

(Sd.) R.A.S.

Thursday, 24th April 1969

In the High  
Court

C.S. 1264/65 (Continued)

No. 13

Plaintiffs'  
Evidence

Lim Kim Seong

No.13

P.W.7: LIM KIM SEONG affirmed, states in English

Lim Kim Seong  
Examination  
24th April 1969

Age 48 years. 103, Jalan Sultan, Kuala Lumpur.

I know the Plaintiffs.

In 1964 I sold clay to them.

I used the name of Wah Hin.

10

Bachan Singh managed my clay business. He collected payment every 15 days. At the end of 15 days or each month a statement of account is sent to him.

I issued receipts for each payment.

In most cases Bachan Singh or my clerk, Lee Chat Wah signed the receipts and sometimes I did.

Page 11 of AB. This is my statement of account for 1st half of April 1964.

Page 12 of AB is my receipt.

20

This is the cheque in question. P 14 (by consent).

Page 15 AB - This is my statement of account for second half of April 1964.

Page 16 AB - This is my receipt signed by me. This is the cheque in question. P 14 (by consent).

Page 19 AB - This is my statement of account for first half of May 1964.

Page 20 AB - This is my receipt signed by me. This is the cheque in question. P 14 B (by consent).

30

Page 23 AB - This is my statement of account for second half of May '64.

In the High  
Court

Plaintiffs'  
Evidence

No.13

Lim Kim Seong  
Examination  
24th April 1969  
(continued)

Page 24 B - This is my receipt written by me and signed by Bachan Singh. This is the cheque - P14 C (by consent).

Page 27 AB - This is my statement of account for month of June 1964.

Page 28 AB - shows my receipt signed by Lee Chat Wah.

Page 30 AB - is my statement of account for 1st half of July '64.

Page 31 AB is my receipt signed by Bachan Singh.

10

This is the cheque - P14 D (by consent).

Page 34 AB is my statement of account for August '64.

Page 35 AB is my receipt signed by Lee Chat Wah. This is the cheque - P14 E (by consent).

I was in Singapore for last 2 - 3 weeks.

I have come in answer to a subpoena served on me 2 days ago.

Cross-  
examination

XXN:

20

I am a miner.

I got the clay from Jinjang. I had a licence to extract clay. I cannot promise to produce it.

I had to look for my records of clay sold.

I also sold clay to others.

Clay business - no letter head. I had a chop. Receipts show no chop. That business is my personal affair.

Q. None of your receipts are numbered?

A. No. It was only a temporary business.

30

Clay business just over a year.

I do not know how many factories the Plaintiffs have.

I do not know where my clay went to.

For each lorry load of clay I was given a chit. This chit was eventually returned to the Plaintiffs when payments are collected.

Re-Xn: Nil.

(To produce clay licence and record)

In the High Court

Plaintiffs' Evidence

No.13

Lim Kim Seong  
Cross-examination  
24th April 1969  
(continued)

No. 14

Kong Nam Fatt

No.14

Kong Nam Fatt  
Examination

P.W.8 KONG NAM FATT affirmed states in Hakka.

10 Age 30 years. Clerk employed by Plaintiffs at brick factory at Segambut since 1960.

As factory clerk my duties are to record out-going bricks, purchase of brick-making earth and firewood, issue invoices, record "kungs", payment of salaries, monthly statement of accounts etc.

20 Order for clay is placed by my employer. In regard to transport, sometimes we used our lorries, sometimes we hired them from Sin Hup Hing, Saw San Swee, Tan Chin Tin.

I knew the numbers of the lorries.

Numbers of lorries - BF 2351, BF 2352, BF 7606, BF 3546, BG 4908, BG 4909, BE 8224, BG 464, BJ 52.

Sin Hup Hing - BK 1046.

Saw San Swee - BL 8386, BL 8691.

Tan Chin Tin - BH 613, BJ 8865.

In respect of our lorries we keep a book for each lorry.

30 Other lorries - I give the original copy from this type of book. When clay arrives, I

In the High  
Court

—  
Plaintiffs'  
Evidence

No.14

Kong Nam Fatt  
Examination  
24th April 1969  
(continued)

give the red copy to the driver. At the end of the day the driver hands the red copy to me. I then made a record of them in P 12. I returned the red copies. I then gave driver a chit containing the date, voucher No., no. of lorry, no. of loads and I signed at foot of it so that it would be handed to his employer. I did not make copies of these chits.

Driver hands the red copies at the end of each day or two days later or a few days later.

10

The red copies are taken to the Ipoh Road office at the end of each day by P.W.6.

Our lorries - each driver is issued with a book. He would write the order in triplicate on our instructions. One order for one lorry load. Driver to go and transport the clay. Top copy given to Vendor. At the end of each day driver would give the red copies to me. Sometimes two days later. I then record from those red copies the date, lorry number, voucher number, number of loads in P 12.

20

The third copy remains in the book, when the book is used up. The completed book is returned to the factory office.

Until now most of the third copies are not traced.

Page 8 of AB - 3.4.'64 lorry No.8865, voucher No. for 7 loads is missing. This statement of account of Tan Chin Teng for transport charges shows the missing voucher No. P 15 for identification. Translation P 15 T.

30

The voucher Nos. are 1864 - 1870.

Page 9 AB - 8.4.64, lorry No. 4909 (our lorry), eight loads, but 10 vouchers. That is my mistake. On 9.4.64 lorry No. 4909 transported 2 loads, voucher No. 0298 - 0299. The 8.4.64 entry should read - 0290 - 0297.

13.4.'64 - lorry Nos. 2351 & 52 (our lorries) - the vouchers cannot be traced.

Page 10 AB refers.

40



15.4.'64, lorry No. 0352 - no such lorry No. Should be 2352 (our lorry). Lorry No. 2351. Lorries Nos. 8224, 2351, 4909 are ours. I have been able to trace some vouchers in respect of lorry No. 2352.

In the High Court

—  
Plaintiffs' Evidence

No.14

Kong Nam Fatt  
Examination  
24th April 1969  
(continued)

The vouchers are 0805 - 0810 - P.16.  
Translation P.16 T.

Page 13 AB. 17.4.'64 - shows 1 load.

10 Page 15 AB - Translation shows 10 loads.  
Original statement shows one load. Total 308 loads is correct.

Page 13 AB - 21 and 24.4.'64 lorry No.464 (our lorry). Vouchers cannot be traced.

25.4.'64 lorry No. 2352 shows 3 loads but 2 vouchers. I have not been able to trace the 3rd voucher. I know it is correct because this has been checked by the clerk in the office.

Page 17 AB - 6.5.64 Total load is 17.

7.5.64 - total load is 22.

20 Page 19 AB shows 18 and 21 loads respectively. In fact on 6.5.64 lorry No. 8224, there were 3 loads, 2 loads recorded on that day, the 3rd load recorded on 7.5.64 (vide voucher 0866). The total load for these 2 days is 39. Statement of account at P.19 AB also shows 39 loads.

9.5.'64 - total load is 4.

Page 21 AB - 19.5.'64 lorry 2351 (our lorry) 2 loads but voucher shows 1284 - 1289 (5 loads). My record shows 1284 - 1285.

30 18.5.'64 shows 8 loads. S/account shows 7 loads.  
19.5.'64 shows 19 loads. S/Account shows 18 loads.  
20.5.'64 shows 7 loads. S/Account shows 9 loads.

Both total same. Corresponding entry does not tally.

23.5.'64 - lorry 8224 (our lorry) shows 2 loads but 3 vouchers. Could have been my mistake. There should be a comma in between. Could have been the driver of lorry 2352 have used book belonging to lorry 8224.

In the High  
Court

Plaintiffs'  
Evidence

No.14

Kong Nam Fatt  
Examination  
24th April 1969  
(continued)

26.5.'64 - total loads bought from my record shows 23. The other part shows on page 22 AB after 27. 5.'64 entry.

Explanation: Drivers of 4908, 2352 & 2351 handed their red copies to me, after I had posted the entries at end of 27.5.'64.

Page 25 AB - 9.6.'64 - lorry 4909 voucher missing. This is the voucher 0986. P17.  
Translation P 17 T.

16.6.'64 - my record shows 10 loads.  
The lorry in question is 7606, voucher No. 1382.

10

29.6.'64 - lorry 2352, 2 loads but one voucher. I cannot trace the other voucher.

To 2.30 p.m.

Resumes.

Page 29 AB - 2.7.'64 total loads 15 made in two entries.

6.7.'64 - 13 loads made in 2 entries.

Page 32 AB.

16.8.'64 - 3 loads and the following shows another load - making a total of 4 loads.  
S/Account shows 5 loads.

20

17.8.'64 - 2 loads. S/Account shows 3 loads.

The difference in the extra 2 loads has been rectified by the Ipoh Road Office, making the correct total of 238 loads instead of 240.  
Payment was made for \$952/- (less two loads).

19.8.'64, lorry 613, 2 loads but one voucher, lorry belonged to Tan Chin Teng. Voucher not traced.

30

23.8.'64, lorry 8865, 3 loads but two vouchers. Cannot trace the other voucher. Lorry belonged to Tan Chin Teng.

24.8.'64 - lorry No. should be 8865 and not 8365. Tan Chin Teng's lorry.

Page 37 AB.

6.4.'64 - voucher 0307 - 0308 refer.  
The entry of voucher 0307 is transferred to entry on 4.4.'64, lorry 1046 in my record appearing at page 8 of AB.

Page 39 AB - "Transporting earth (Batu Caves)" refer. New Village represents the factory at Segambut.

10 Batu Caves represents the factory at Batu Caves.

I am not in charge of Batu Caves factory.

Clay bought between April - August '64 was dumped at dump A. I say it from P 12. Total clay loads is 1,980.

After August '64 we bought clay which was stored at dump B.

20 P13 refers. This shows record of clay in dumps A, B & C and also amount of clay used. This book was compiled after the flood. Object was to determine the amount of damage to dump A caused by the flood.

I compiled the amount of clay used at the various dumps from the lorry commission figures.

From the dumps to the machine, the clay is also transported in our lorries. Driver paid on commission basis at .75 cts. per lorry load.

From vendor of clay to dump - \$100/- per lorry load.

30 These commissions are recorded in the lorry commission book. I am not producing this book. It is not traced.

August '64 - April '65 I did not use clay from dump A. We used clay from dump C.

I saw the flood. That was at end of April '65.

One morning in end of April '65 when I went to work at about 8.00 a.m. I saw water in the store the kiln and dump A area.

In the High Court

Plaintiffs' Evidence

No.14

Kong Nam Fatt  
Examination  
24th April 1969  
(continued)

In the High  
Court

—  
Plaintiffs'  
Evidence

No.14

Kong Nam Fatt  
Examination  
24th April 1969  
(continued)

I immediately phoned P.W.6. He said he would come, I returned to the affected area. I found the kiln and the dump A area were about 2 ft. - 3 ft. under water.

I went up to dump A to have a clear look. I saw water escaping from the mining area belonging to the defendants from west to east.

In 1960 the new bund was not there. It was put up in 1965.

The encroached bund was put up in 1965.

10

Cross-  
examination

XXN:

P.12: I am responsible for it. Most of the entries are made by me.

Page 22 AB - 28.5.'64, lorry 7606 - in my record it shows voucher No. 1361. I wrote that.

Page 21 AB - 23.5.'64, lorry 2352, in my voucher it shows 0877, 1250, 1401 - 1402. Vouchers came from three books.

P 22 AB - lorry 3546, voucher came from 2 books.

20

I agree now that on some occasions my lorry drivers used 2 voucher books on same day.

Voucher books are in 50 pages.

They are serially numbered. I expect them to use the books in serial order.

26.5.'64, lorry 2351 used vouchers 1299 - 1300, 1339 - 1340.

27.5.'64, lorry 3546 used 1341, 1338, 1409.

I agree now that each driver did not use his own voucher book.

30

I am responsible for these vouchers and their safe custody.

Q. You used same voucher system when you exported bricks?

A. We used different vouchers.

We used our own lorries as well as other lorries.

For April '64 the earth was transported in 730 own lorries.

For May '64 earth was transported in 357 own lorries.

For June '64, earth was transported in 102 own lorries.

10 For July '64, earth transported in 93 hired lorries and 21 own lorries.

For August '64, earth transported in 18 own lorries and 220 hired lorries.

When our lorries were not available, we had to hire lorries.

Transport charges are the same.

P 13 refers. Record goes to 1967. I have materials to compile the record up to 1967.

Record starts from 1962.

20 In 1962 it deals with dump C only - shows 5,058 loads. In 1962 there was brick-making. But clay was from dump B. No record to show that in P 13.

In 1963, clay from dump B was used. That is not entered in P 13.

When I joined in 1960, dump B was full up with clay.

There is no record in P 13 to show clay was drawn from dump A & B.

30 From the record - P 13 - clay from Dump C was drawn between August '64 - June '67 and even today.

Yesterday at the site where the excavating machine was at work was dump C.

In 1964 clay was deposited in all 3 dumps.

In the High Court

Plaintiffs' Evidence

No.14

Kong Nam Fatt  
Cross-examination  
24th April 1969  
(continued)

In the High Court

Plaintiffs' Evidence

No.14

Kong Nam Fatt  
Cross-examination  
24th April 1969  
(continued)

For dump C there are 6 pages of entry in P 13.

For dump B there are 3 pages of entry in P 13.

There was no shortage of clay in 1966. Clay transported elsewhere.

Dump A has one solitary page in P 13 and no more.

Looking at dump C in P 13, it shows 15,094 loads.

Total withdrawals shown in the book is 9,196 from dump C. No withdrawals from dumps A and B.

10

I paid all my lorry drivers on commission basis.

In 1964, I put in 1,119 loads of clay in dump C.

For same year I drew 1,346 loads from dump C.

Dump C is a big area.

When I saw the flood I stood on the stack of rubber wood as shown in 24 J (witness points).

Re-examination

Re-XN:

P 13 refers.

20

Period relevant in respect of dump A is April '64 to August '64.

Adjourned to 21st July - 25th July '69.

(Sd.) R.A.S.

No.15

No. 15

Lim Kim Seong  
(Recalled)  
Examination  
21st July 1969

Lim Kim Seong (Recalled)

P.W.7: LIM KIM SEONG (recalled, on former oath):

XN: by Peddie:

Q. You were asked to produce the licence to

30

extract clay and the records of sales of clay to the buyers. Have you got them now?

In the High Court

A. I have not brought them.

Q. Did you have a licence to extract clay?

Plaintiffs' Evidence

A. I did not possess a licence.

No.15

Q. In relation to the clay licence have you been to the landlord?

Lim Kim Seong (Recalled)

A. I was working under contract to the owner, one Mohd. Zainon.

Examination  
21st July 1969  
(continued)

10 Q. Did he have a licence?

A. The owner did have a licence and I have seen that.

Q. Have you made an attempt to produce a copy of his licence?

A. No.

Q. What about your records of sales of clay?

A. I have no record of that.

Re-XN: Nil.

Witness released.

20

No. 16

No.16

Soong Fah Sang

Soong Fah Sang  
Examination

P.W.9: SOONG FAH SANG: affirmed states in Hakka.

Age 37 years, living at 2080 Jinjang North.

Q. What capacity do you hold in the plaintiff Co.?

A. I am a clerk attached to the town office, i.e. 314 Ipoh Road.

Q. What are your duties as clerk in this office?

A. My duties are in charge of accounts, purchase of clay, spare parts and other materials, I keep records of all purchases.

30

Q. How many factories do the plaintiffs own?

A. The plaintiffs have 3 brick kilns, one at Segambut, one at Batu Caves and one at Rawang Road.

In the High  
Court

—  
Plaintiffs'  
Evidence

No.16

Soong Fah Sang  
Examination  
21st July 1969  
(continued)

- Q. Do you keep records of all these three factories?  
A. Yes.
- Q. Do you keep them in one book or separate books?  
A. In separate books.
- Q. Just concentrate on the purchase of clay for Segambut factory. How do you keep accounts for the purchase of clay?  
A. I keep a record of the red vouchers which are sent to me from the kiln. 10
- Q. What do these red vouchers show?  
A. Each voucher indicates that a vehicle load of clay was delivered.
- Q. When you get these red vouchers what do you do with them?  
A. I file them in a file.
- Q. When is payment made?  
A. When the monthly or fortnightly statement of account are received. I would check the accounts with the vouchers. If they are found correct, I would ask the plaintiff to issue a cheque. 20
- Q. By statement you mean like the one on p.11 or AB?  
A. Yes, something like that.
- Q. If you find there are discrepancies then what do you do?  
A. If there are discrepancies I would call for the account books of Segambut factory and compare. 30
- Q. What is P.12?  
A. This is a record of purchase of clay kept by P.W.8 - Ex. P.12.
- Q. Can you tell me who made these red ink markings and when it was made?  
A. The red ink markings in this book were made by me whenever there were discrepancies.
- Q. Between April 1964 and August 1964 from where did you buy your clay? 40



- In the High  
Court  

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Plaintiffs'  
Evidence  
No.16  
Soong Fah Sang  
Examination  
21st July 1969  
(continued)
- A. Within that period the clay was purchased from Lim Kim Seong trading as Fah Hing: (Wah Hing).
- Q. You said these statements were brought to your office. Who brought them to your office?
- A. One sikh by the name of Bachan Singh (P.W.4).
- Q. After you have checked these accounts you asked your boss to issue a cheque and when you got the cheque what did you do?
- 10 A. When the cheque is given to me I in turn gave it to Bachan Singh and obtained a receipt.
- Q. Were the receipts prepared at your office?
- A. The receipts were already prepared as per page 12 of AB.
- Q. Page 12 AB refers. In this receipt there was no chop of Fah Heng. Why didn't you insist on a chop? How did you know that it went to Lim Kim Seong?
- 20 A. The cheque was cross and was written in the name of Lim Kim Seong.
- Q. What was written on top?
- A. That is the number of the cheque (998666) written by Bachan Singh.
- Q. Page 11 AB refers. Look at the statement of account from 1.4.1964 to 15.4.1964. There is a cheque number written on the statement of account. By whom is this written?
- 30 A. On the statement of account the cheque No. and the amount and date were written by me. The relevant receipt is shown on p.12.
- Q. Page 15 AB refers. On page 15 who wrote the cheque number on the statement?
- A. This was not written by me but by another clerk, Loo Hin Nam.
- Q. Page 16 AB refers. Shows the receipt of that payment.
- A. Yes.
- Q. Page 19 refers - is the statement of accounts from 1st May 1964 to 15th May '64. By whom is it written?
- 40 A. The cheque number was written by me. The receipt shown at pg. 20 AB.

In the High  
Court

—  
Plaintiffs'  
Evidence

No.16

Soong Fah Sang  
Examination  
21st July 1969  
(continued)

- Q. Page 23 AB refers. It shows statement of account for 16.5.1964 to 31.5.1964. By whom was the cheque No. written?
- A. Cheque number written by me. Receipt shown on p.24 AB. Cheque No. on receipt written by clerk of Lim Kim Seong.
- Q. Page 27 AB refers. Statement of account for June '64. By whom is the cheque number written.
- A. The cheque number on the statement of account written by me. Receipt at p.28 AB. 10
- Q. In this receipt the cheque number is written twice. Can you tell me who wrote the 1st and 2nd one?
- A. The number on the top was written by Bachan Singh and the bottom one written by our clerk Loo Hin Nan.
- Q. Page 30 AB refers. Statement for 1.7.'64 to 18.7.'64. By whom is the cheque number written on the statement?
- A. The cheque number was written by me. The receipt is at page 31 AB. Cheque number written by me. 20
- Q. Page 34 AB. Statement of account for 1.8.64 - 31.8.'64. Who wrote the cheque number on the receipt?
- A. Cheque number was written by me, on p.35 AB.
- Q. Does your company always use your own lorry to carry the clay from the vendor's place?
- A. Our company not only uses our lorries but also uses other persons lorries. 30
- Q. Can you name the other persons?
- A. Tan Chin Tin, Sin Hup Hin and Saw San Swee.
- Q. These charges or statement of accounts of hire were sent by lorry owners, is it sent direct to you for payment?
- A. Yes.
- Q. Have you been able to trace all these statements from April to August?
- A. Some of the S/Accounts are missing. 40
- Q. P.15 & P.15 T refer. This is S/Accounts from

Tan Chin Tin in respect of April 1964. On 17.4.1964 statement of Account shows 2 loads of bricks were conveyed. In fact for April 1964 only 193 loads of clay were conveyed?

A. This is statement of account from Tan Chin Tin in respect of May 1964 - Exh. P.18 - translation P 18 T. Loads of clay conveyed is 55.

In the High Court

Plaintiffs' Evidence

No.16

Soong Fah Sang Examination  
21st July 1969  
(continued)

10

Q. This is the statement of account for June 1964, from Tan Chin Tin. The total load of clay conveyed is 62. Ex. P19 & translation P.19T.

A. Yes.

Q. Is this the statement of account of Tan Chin Tin for the month of July?

A. Yes.

Q. The total loads that were conveyed to Segambut were 93. Exh. P.20 - translation P.20 T.

A. Yes.

20

Q. The other statements of accounts that I am able to produce are at pp.37, 38 & 39 of AB. They are from Sin Hup Hin in respect of hire charges.

A. Yes.

Q. What are the lorry hire charges in respect of Sin Hup Hin?

A. It was \$5/- per lorry in respect of Sin Hup Hin and in respect of Tan Chin Tin \$5.50.

XN: (by Peddie):

Cross-examination

30

Q. Which company looks after the income tax of your firm?

A. Pillai & Co. are our accountants.

Q. Who is in charge of plaintiff's income tax returns?

A. Loo Hin Nam is in charge of plaintiff's income tax returns.

Q. In the year 1965 you were asked to deal with a query by the income tax department about certain missing vouchers. Is that true?

A. I was not in charge then.

40

Q. Did anybody ask you about missing vouchers in 1965?

In the High  
Court

Plaintiffs'  
Evidence

No.16

Soong Fah Sang  
Cross-  
examination  
21st July 1969  
(continued)

- A. Only lawyer's office was asking for the vouchers and we handed all the vouchers to the lawyers.
- Q. Do you agree that you should have 1,980 vouchers since you say there is a voucher for every lorry load?
- A. Yes, but some have been destroyed after payment has been made and some are missing. After renovation of the office some are destroyed. 10
- Q. P.18 refers. Entry for 4.5.'64 - 10 loads. There are 11 vouchers.
- A. Yes.
- Q. P.17 AB. Would you look at the items on 4.5.'64? There is no voucher number 2362. Why?
- A. May be due to negligence.
- Q. Did you check for errors?
- A. Yes I counted the number of loads.
- Q. Page 21 AB refers. Entry 19.5.'64 - lorry 613 - Voucher 2688 not shown in P.18. On that day Tan Chin Tin carried 9 loads by his lorries Nos. 613 & 8865. In P.18 it shows only 8 loads. 20
- A. Yes.
- Q. Refers to P.26 AB dated 29th June. Voucher Nos. 3476, 3478 - 3480. 3477 is not there?
- A. Yes. But in P.19 it is shown.
- Q. My record (P.12) shows for 29th & 30th June, 13 loads? 30
- A. Page 26 AB shows 10 loads.
- Q. At the bottom of it there is something written in pencil. What is it?
- A. These are charges @ \$5/- to Rawang Road, Batu Caves \$1/-.
- Q. It is significant that your employers are claiming \$5/- to Rawang Road.
- A. It all depends upon the distance.
- Mrs. Menon: No transport charges ever got into P.12. It only deals with purchase of clay.

Peddie:

All the voucher Nos. shown in AB.37 should correspond with the voucher Nos. in P.12. I fail to distinguish the statement of account of Yap Peng Guan and statement of account of Tan Chin Tin.

In the High Court

Plaintiffs' Evidence

No.16

Soong Fah Sang  
Cross-examination  
21st July 1969  
(continued)

Q. I presume you got P.12 for checking. Did you complain that it was not kept in the correct order of date?

A. It was not kept in order. I do not know why.

Q. Can you look at the month of July?

10 A. There are no entries for July. Now I see there is an entry for July.

Q. Is that book kept in the correct order of months?

A. Yes.

Q. Can you look at page 29 of AB the last 4 items? How is it that the two entries came so long after other entries? They must have been entered after the 18th?

20 A. The entries 7th, 5th, 5th, 13th were not entered by the factory clerk. It was entered by me after I checked the statement of account with the red vouchers.

No Re-XN. by Mrs. Menon.

No. 17

Tan Chin Tin

No.17

Tan Chin Tin  
Examination

P.W.10: TAN CHIN TIN: affirmed, states in Hokkein

35 years of age, 21, St. Thomas Road, 3½ mile Ipoh Road, Kuala Lumpur.

30 I am supplier of building materials and other things and also hire out lorries Nos. BJ 8865 and BH 613.

Q. Do you know the plaintiffs?

A. Yes I know them in connection with business. I buy bricks from them.

In the High  
Court

Plaintiffs'  
Evidence

No.17

Tan Chin Tin  
Examination  
21st July 1969  
(continued)

- Q. Have you had at any time hired out your lorries to them?  
A. Yes.
- Q. What do they hire your lorries for?  
A. For transporting clay from Jinjang to Segambut.
- Q. Any other places?  
A. Also to Rawang Road and Batu Caves.
- Q. What are your charges for transport of one lorry load from Jinjang to Segambut?  
A. \$5.50 per lorry load. 10
- Q. How do you collect it?  
A. Our lorry drivers will take vouchers from the factory for each load carried by them.
- Q. To whom is it handed over?  
A. This voucher is handed over to my clerk. At the end of the month my clerk will prepare a statement of account and the same is handed to the office of Hiap Lee.
- Q. You keep a copy of the statement you send to the plaintiffs with you?  
A. Yes. I keep all the statements and I do not know where they have gone to. 20
- Q. Refers to P.15 of AB for April. Does it correspond with your copy of P.15?  
A. Yes. This is a copy.
- Q. I also produce the counterfoils of P.15, 18, 19 & 20 in respect of transport charges.  
A. They are books with the translations for April, May, June and July - marked P.21 and translation P.21 T. 30
- Q. For August only statement in your book reads - Hiap Lee Construction Co. in respect of hire-charges for August.

Court: It is not applicable here.

- Q. Has there been any adjustment for errors?  
A. Whenever there were any differences they would come for rectification.

No. 18

Soong Fah Sang (Recalled)

P.W.9: SOONG FAH SANG: (recalled, on former oath)

In the High Court

Plaintiffs' Evidence

No.18

Q. These are statements of accounts I received from Sin Hup Hin Co. in respect of April, May, August, 1964.

Soong Fah Sang (Recalled) Examination 21st July 1969

A. This appears at pp.37 - 39 of AB - marked as P.22.

10 No XN: by Peddie.

Case for Plaintiffs.

No. 19

Address by Defendants' Counsel

Peddie addresses:

In the High Court

No.19

Address by Defendants' Counsel 21st July 1969

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.

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

We have an extortion action brought against us and we have been sued large sum of money. If this claim is for trespass we would not have been here all these days.

30 Your Lordship will realise that my pleadings were governed by plaintiffs' pleadings. Plaintiffs' pleadings were bund not strong enough, collapsed and caused flood. The Plaintiffs' statement of claim has no resemblance to the claim. The Pleadings in the Pacific Tin case was borrowed and applied here.

According to the evidence there was a pipe that discharged the water. We have been forced to

In the High Court

go to court and defend our claim and condemn them in costs.

No.19

Address by Defendants' Counsel  
21st July 1969  
(continued)

That is the reason why I spent quite some time going through the accounts and if our case is held for a ransom then it will be necessary for the court to realise the disorder of the accounts in this action.

Adjourned to 2.30 p.m.

Defendants' Evidence

No. 20

No.20

Markandan

10

Markandan Examination

D.W.1: MARKANDAN S/O PARAMASIVAM: affirmed, states in English. Ag. Dy. Director of Meteorological Service, Malaysia. Office now in P.J.

In 1965 the office was at old air-port.

Q. Among the functions of your department, do you keep daily record of weather?

A. Yes.

Q. Are they accurate?

A. Yes. Our equipments are the same as those used in the United Kingdom.

20

Q. Can you produce record for periods February to June 1965?

A. Daily figures and total rainfall for the month - marked D.23.

Q. Would you say they are in any way exceptionally high? During the months of March & April?

A. In March it was below average and in April it was 2.92" above average for April month.

Q. Can you look at the end of April on the 23rd, 26th and 30th of April 1965?

A. Those were the highest days of rainfall but not exceptionally high.

30

Witness released.

Mrs. Menon objects to the production of fresh photographs under Order 37.r.1(d). Objection overruled and allows the photographer to be called.



No. 21

Lee Yew Leong

D.W.2: LEE YEW LEONG affirmed, states in Cantonese.

57 years old, 160 Jalan Bandar, K.L.  
Photographer.

Q. Do you know the defendant Mr. Wong? And his mine?

A. Yes. I know his mine in Segambut.

10 Q. Did Mr. Wong ever ask you to take photographs of his mine?

A. Yes. I produce the 10 photographs D 24A - J Negatives - D.24 NA - J. These were taken in August 1965.

Q. But the endorsement shows 12/10/65 and the bill shows February 1966.

A. I cannot remember.

D 24 A - shows the water pool and the lily plants taken from West to East.

D 24 B - It is section of the close-up view.

D 24 C - Taken from high ground.

D 24 D - Taken from North-West.

D 24 E - Is the same as D 24 B and taken from High ground - from South-West.

D 24 F - Close-up view of D 24 A.

D 24 G - Shows land to the East of the bund.

D 24 I - Taken from the North looking into the water-hole.

D 24 J - Shows the bund and buildings to the right.

30 Q. Did you take other small size photographs?

A. Yes, but I have not brought the negatives so I cannot say if I have taken those pictures.

Witness released.

No. 22

Karim Bin Ahmad

D.W.3: KARIM BIN AHMAD: affirmed, states in Malay.  
41 years, presently unemployed, living in Bahau.

In the High Court

Defendants' Evidence

No.21

Lee Yew Leong  
Examination  
21st July 1969

No.22

Karim Bin  
Ahmad  
Examination

In the High  
Court

Defendants'  
Evidence

No.22

Karim Bin Ahmad  
Examination  
21st July 1969  
(continued)

- Q. What were you doing in 1965?  
A. I was employed by A.H. Flowerdew & Co. as surveyor.
- Q. Apart from surveying what other work did your firm do?  
A. Apart from surveying the firm also made plans.
- Q. Did the firm work for Weng Lok Mining Co.?  
A. Yes.
- Q. Did they do work for them at Segambut?  
A. Yes. 10
- Q. Did you yourself do any work for the defendant Co.?  
A. Yes, I personally went to do some work.
- Q. What type of work were you asked to do?  
A. I was asked to check the tailing area, to take the level of that area.
- Q. Apart from that area did you take levels of any other area?  
A. I went to see the drain, the level of water and I took level up to Sungei Batu River. 20
- Q. You covered also lots 3582, 4658 & 1391?  
A. Yes. I started with lot 2072, 3582, 4658, 1391 and along the river to Sungei Batu.
- Q. Can you tell us your level for lot 3582?  
A. Level at lot 3582 is 101.08, i.e. one foot above the starting point.
- Q. What is the level for lot 4658?  
A. 102.15.
- Q. Level at lot 1391?  
A. 100.42. 30
- Q. Level at Sungei Batu?  
A. 81.67.
- Q. Starting from lot 4661 and going eastwards to Sungei Batu what is the lie of the land?  
A. The land slopes downwards towards the direction of Sungei Batu.
- Q. Can you tell us the difference in levels between 3582 and Sungei Batu?

A. About 20 feet.

Q. Does the land also slope from North to South?

A. Slopes to the North.

Q. Is there any slope to 1391 or is it level?

A. In between 3582 and 1391 it is slightly higher.

Q. From the levels you have taken in which direction would the natural water flow be?

A. Water will flow down to Sungei Batu.

10 Q. Water will cross all the lands and flow to Sungei Batu?

A. Yes.

Q. If there is 3 feet of water on 3582 how much of water will there be on Sungei Batu?

A. The level of water will be 23 ft. in Sungei Batu.

XN: by Mrs. Menon:

Q. When did you take these level readings?

20 A. I took them in 1965 but cannot remember the date.

Q. When did you leave Flowerdew & Co.?

A. I left them in July 1967.

Q. When you left the company did you take any records with you, which you prepared?

A. I did not take any records.

Q. Can you tell me how you produced that record from Flowerdew & Co.

A. I got this from the Towkay.

30 Q. Does it indicate that it was your work?

A. This was done by me.

Court: Who prepared the plans?

A. Office workers.

Q. You only took levels?

A. Yes.

Q. Can you confirm that this is the plan?

A. I cannot say.

In the High Court

Defendants' Evidence

No.22

Karim Bin Ahmad  
Examination  
21st July 1969  
(continued)

Cross-examination

In the High Court

Defendants' Evidence

No.22

Karim Bin Ahmad  
Cross-examination  
21st July 1969  
(continued)

Q. You cannot say whatever evidence you have given is true?  
No answer.

Court: Where did you start your level reading from?

A. From 2072.

Q. Does that indicate the point you started?

A. Yes.

Q. From there where did you move to the right or to the left?

A. From there I moved to lot 4661 to the North. 10

Q. You said from lot 3582 it is about 20 ft.?

A. Yes.

Q. If there is 3 ft. of water in Lot 3582 there should be 23 ft. of water in Sungei Batu. Are you talking in terms of rain?

A. Yes, in terms of rainfall.

Q. If it rains and if there is 3 ft. of water in lot 3582 there will be 23 ft. of water in Sungei Batu?

A. Yes. 20

Q. Can you confirm that the writings were reproduced by you on the plan?

A. Yes.

Q. Whose signature is on the plan?

A. Mr. Ross's.

Q. What actually happened to Flowerdew & Co.?

A. Company went into liquidation.

Plan marked D.25.

Adjourned to 9.30 a.m. 22.7.69

30

No.23

Roland Edward  
Stephen Curtis  
Examination  
22nd July 1969

No. 23

Roland Edward Stephen Curtis

D.W.4: ROLAND EDWARD STEPHEN CURTIS: affirmed, states in English. Present address: 2 Ceylon Road, K.L. Associated member of chartered Engineers, member of Institute of Mining and

Metallurgy. I was Senior Inspector of Mines, South Zone, Selangor, Negri Sembiland and Malacca.

In the High Court

Defendants' Evidence

No.23

Roland Edward  
Stephen Curtis  
Examination  
22nd July 1969  
(continued)

- 10 Q. As such the defendant's mine came under your jurisdiction?  
A. Yes.
- Q. Before a miner starts work he has to submit to your department a mining scheme for consideration?  
A. Yes.
- 10 Q. Does he show the tailings area?  
A. Yes.
- Q. In the case of hydraulic mining is it correct to say that the use of water is inevitable?  
A. Yes.
- Q. Does the Department people come to the site and make investigations?  
A. Yes.
- 20 Q. Does the department check the site for retention of water?  
A. Yes.
- Q. If there are no natural features, i.e., high ground how do you retain water?  
A. It requires a bund.
- Q. If a Miner has submitted his scheme to your department, does your department carry out investigations?  
A. Yes.
- 30 Q. Can you give some idea of the frequency with which the mining department would make investigations?  
A. It depends. Sometimes an inspector will be there every two weeks or every two months.
- Q. If your official saw water escaping what action will your office take?  
A. We will try to stop the flow of water.
- Q. Now coming to defendant's mining lease No. 4661, did you at any time have occasion to visit the mine?  
A. Yes.

In the High Court  
 —  
 Defendants'  
 Evidence  
 No.23  
 Roland Edward  
 Stephen Curtis  
 Examination  
 22nd July 1969  
 (continued)

- Q. When was that?  
 A. I recall it was in the early part of January '65.
- Q. On your visit were things in order or requiring attention?  
 A. As far as I can recollect things were in order except that there was a second canal which had not been shown on the hydraulic licence and I asked that the licence be amended accordingly. 10
- Q. Is this the permit and the plan for the mining operations?  
 A. Yes. Ex. D.26 - marked for identification.
- Q. Having inspected the mine, do you minute the result of your inspection?  
 A. Not exactly. If I visit the mine with the Mines Inspector (Tan Wee Kiat) he makes the minutes. He is no longer with the department.
- Q. When you went there was nothing to indicate the danger of a possible escape of water?  
 A. There was nothing to indicate danger. 20
- Q. I would like you to explain the re-circulation system of the mine?  
 A. The water pump supplies water to the monitors and the gravel pump takes up this water and pours it into the dumping area where it is returned to the water pump to pump in again to the monitors. So it goes on.
- Q. What is the main reason for using a re-circulating system?  
 A. 30
- Q. Can you say if two palongs were used or one of them?  
 A. There are two palongs shown. Palong 1 is a secondary palong. Palong 2 is for re-circulation of water.
- Q. Can you remember any bunds existing in this area in 1965?  
 A. I cannot remember exactly.
- Q. Did you know the depth of water?  
 A. I had no idea.

Q. Can you look at photograph D 24 J? In the absence of a bund what would have happened?

A. In January 1965 there must have been a bund somewhere in this area.

Q. Refers to 24 C & G. On the left side there is a pipe. Can you tell us what is the purpose of it?

A. The purpose of the pipe is to pump sand and water to construct the bund. This pipe will discharge sand, slime and water.

10

Q. Look at the plan of Lot No. 3582. Can you indicate where the pipe is on p.3 of AB?

A. It is at the southern cornerstone of lot 3582 at a point marked X in red on p.3 of AB.

Q. Looking at the pipe, would that pipe be capable of producing flood water 3 ft. deep on the adjoining area?

A. I do not think so.

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Q. Did you receive in your department any complaint of flooding in this area at the end of April 1965?

A. I do not remember any. I do not know if they have recorded anything in the mine file.

XN: (Mrs. Menon)

Q. Before mining lease is issued is it not usual to have a survey carried on?

A. Yes it is to be surveyed and if necessary boundary stones should be put up.

30

Q. You stated that a mining assistant and the Inspector of Mines visit the area for checking. Is there a rule when they have to go?

A. It is at the discretion of the Mining Assistant and the Inspector of Mines but they have to visit at regular intervals.

Q. If they have failed to visit is there any method of checking?

A. Yes. The Inspector of Mines will be checking on the mining Assistant and Senior Inspector of Mines will be checking on the Inspector of mines.

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In the High Court

Defendants' Evidence

No.23

Roland Edward  
Stephen Curtis  
Examination  
22nd July 1969  
(continued)

Cross-examination

In the High  
Court

Defendants'  
Evidence

No.23

Roland Edward  
Stephen Curtis  
Cross-  
examination  
22nd July 1969  
(continued)

Moreover, every visit is to be recorded with the report.

Q. When the Mining Inspector finds that the level of water has risen he will ask for a bund to be put up. Is that correct?

A. Yes.

Q. If there was in fact a bund at a later stage it should have been requested by the Mines Assistant because the level of water has risen, to put up a bund by the miner and the Mining Assistant would record this in his book?

A. Yes.

Q. You visited the land on 25.1.'65 but you did not remember the existence of any bund?

A. I cannot remember.

Q. Would you have recorded it anywhere?

A. One normally records if one sees something wrong. If things are all right one does not record individual items.

Q. You are now looking at photograph 24 C. Do you remember the pipe and bund?

A. Not at all. It is five years ago and in the area probably there are 300 to 400 mines and I cannot recall the details.

Q. During your visit did you go to lot 4661?

A. I think I must have gone up to 4662 but not up to 4661.

Q. So you would not be able to say what the place would look like?

A. I would not know.

Q. This pipe discharging slime and sand would it be used for discharge of tailings?

A. Yes, it could be used for discharge of water, slime and sand.

Q. Can it be used for discharging water in greater volume?

A. I should have a 9" or 10" pipe discharging something like 2,000 gallons per minute.

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Q. And if this pipe discharges from 6 a.m. to 6 p.m. it could discharge a lot of water?  
 A. Yes.

Q. You said that if you saw the level of water rising and if your assistants thought it necessary to put up a bund, you would not cancel the licence?  
 A. It depends on circumstances. If the mining was causing damage we will cancel the licence. If it is a piece of vacant land then we will ask them to build a bund. In this case the mine should have been ordered to stop until they built the bund.

In the High Court

Defendants' Evidence

No.23

Roland Edward  
 Stephen Curran  
 Cross-examination  
 22nd July 1969  
 (continued)

Q. And this will be shown in your records?  
 A. Yes.

Q. Would the licence state that a bund is necessary?  
 A. Yes.

Q. But in this case there was no such condition?  
 A. No.

Re-XN: About the water hole adjoining lot 3582, this is the previous mining permit. It is a certified true copy of the previous mining permit belonging to one Ngee Seong Fatt - marked D.27 for identification.

Re-examination

Q. Is the adjoining water hole used as a tailing area?  
 A. Yes.

Q. Please look again at Ex. D.26 item No.6. Does it not talk about not raising the bund?  
 A. This is a standard condition. If he builds he must raise the bund on the inside.

Witness released.

No. 24

K. Thavapragasam

D.W.5: K. THAVAPRAGASAM: affirmed, states in English. Inspector of Mines, Tapah.

No.24

K. Thavapragasam  
 Examination

Q. Before being transferred you were Inspector of Mines, K.L. North?

In the High  
Court

Defendants'  
Evidence

No.24

K.Thavapragasam  
Examination  
22nd July 1969  
(continued)

- A. Yes, from February 1964 to July 1965
- Q. As Inspector of Mines K.L. North does Segambut area come within your jurisdiction?
- A. Yes.
- Q. In the Mines Department before one starts mining, does he submit a scheme?
- A. Yes.
- Q. Does this apply if he wants to use land for dumping?
- A. Yes. 10
- Q. In dumping tailing the deposit of water is involved?
- A. It is correct.
- Q. Is the Mines Department concerned with making sure that the water will not escape to the adjoining land?
- A. Yes.
- Q. If the Mines Department received a scheme from the miner is there any investigation carried out before it is approved?
- A. Before it is approved somebody inspect the land. 20
- Q. Is there any application in this case?
- A. An application was made sometimes in May 1962.
- Q. Did somebody from the Department go and check?
- A. Yes, they did in February 1962. Inspection was carried out on 15th February by an Inspector of Mines.
- Q. Do the minutes show whether the scheme was approved?
- A. Yes, the scheme submitted was approved on 15th June 1962. 30

Court: What was the applicant's name?

A. An application was made on behalf of Weng Lok Mining Co. Ltd. by Flowerdew & Co.

Q. In view of the proposed user, has the department to check provisions for retaining water within the mining area?

A. The Department checks for the retention of water and slime. 40

Q. For purposes of retention are natural features such as high ground etc. taken advantage of?

A. Yes, they take advantage of natural features.

Q. If there are no natural features what does the miner do?

A. He has to build bunds and conserve the water.

Q. Who does these investigations?

A. The Inspector of Mines or his assistants.

Q. If on one of these inspections if you see there is a danger of water escaping what action will be taken by the department?

A. If there is danger of water escaping action will be taken to reduce the level of water.

Q. Does that file with you show if any such action has been taken?

A. If any action has been taken it would be minutes in the file.

Q. Can you look at D.27?

A. It is certified true copy issued by the Mines Dept. of the licence issued to Ngee Seng Fatt from 25.10.1969 to 25.10.1960.

Q. That licence refers to period before Weng Lok Mining came to this area?

A. Yes.

Q. Can you see D.26?

A. It is the permit issued to Weng Lok Mining from 21.8.64 to 20.8.'65.

Q. How many palongs in that case?

A. There are two palongs. Prior to D.26 this Mining Lease was issued to the miner D.26A.

Q. For what purpose was the previous miner using lot 3582?

A. Unfortunately the Mines Department has no record of land outside the mining lease.

Court: I would like to clarify lot 3582 on D.26 i.e., the present Mining Lease?

A. It is not marked on the plan but the boundary stones are there.

Q. Can you mark the boundary stones please?

A. The boundary stone now marked in black on D.26.

In the High Court

Defendants' Evidence

No.24

K.Thavapragasm  
Examination  
22nd July 1969  
(continued)

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In the High  
Court

Defendants'  
Evidence

No.24

K.Thavapragasam  
Examination  
22nd July 1969  
(continued)

- Q. Was the previous miner (D.27) using adjoining land for tailings area?  
A. Yes.
- Q. Produce D 24 J. Is that the photograph of the tailings area of Weng Lok Mining?  
A. Both the areas are used as approved tailing area.
- Q. Looking at the photograph land slopes towards the East. If this area is used for tailing is there any provision necessary to retain water escaping to the adjoining land?  
A. In this present condition yes because of the nature of the ground water will flow to the East.
- Q. You see there are two bunds here. Do you remember when the one in the left was constructed?  
A. Sometime between March and June 1965. I mean the one on the left in the photograph.
- Q. What about the one on the right? Was it built during or before your time?  
A. I cannot say that. I think it was built before my time.
- Q. Refers to D.26. Does it show the mining uses a circulating system?  
A. There is a system of re-circulation. The miner takes the water from the river and use it for mining and then water goes to the tailing area and from there it goes to the spillway and here in this instance mine No.2 is using that water again. In this respect it is re-circulation.
- Q. Why is this method used for leading water back into mine No. 2?  
A. This is normal. If the miner is short of water he brings it back to the spillway.
- Court: Is it not done when there is shortage of water?  
A. Yes.
- Q. Was there a visit by Senkr Inspector Curtis in January 1965? Was there any minutes made?  
A. The minute says tailings area of this mine was inspected and found to be in order.

- Q. Tailings area of D.26 is whole of the area?  
A. Yes.
- Q. On the 2nd of March 1965 was there another inspection?  
A. Here again there was a small error on my part. I made the visit on 2nd April '65 not 2nd of March.
- Q. What did you find on 2nd April?  
A. I found a bund on the Eastern boundary referred to as left bund.
- Q. What did you do?  
A. I left instructions to build a bund.
- Q. Were you in any way dissatisfied with the bund?  
A. I discovered the eastern boundary has encroached into lot 3582.
- Q. Have you got measurements of the alleged encroachment?  
A. They have estimated. .61 of an acre and we are prepared to accept.
- Q. You visited again on the 19th of April. On your visit did you find anything?  
A. The miner in attempting to speed up building a bund had installed a pump to pump tailings.
- Q. Why was this done?  
A. This was to build a new bund along the correct boundary which has been discovered.
- Q. Have you found any further encroachment?  
A. No.
- Q. Refers to 24 O & G. At the left-hand side there is. Do you know what that pipe is used for?  
A. This pipe is to carry sand and tailings to build a bund.
- Q. Is that the boundary?  
A. The bund as shown is the correct boundary.
- Q. Does the file show when the new bund was completed?  
A. In fact tailings area was completed in June as reported to me by one of my assistants.

In the High  
Court

Defendants'  
Evidence

No.24

K.Thavapragasam  
Examination  
22nd July 1969  
(continued)

In the High  
Court

Defendants'  
Evidence

No.24

K.Thavapragasam  
Examination  
22nd July 1969  
(continued)

- Q. You saw this pipe in use. Was it capable of producing a flood of 3 ft. of water on the adjoining land?
- A. I cannot see it producing that much water.
- Q. If there had been any danger of flooding would you have stopped it?
- A. Yes.
- Q. Quite apart from 3 feet of water it produce feet of sand on the adjoining land. Is that possible? 10
- A. It depends on from where you take your count. It is difficult for me to answer. It so happens that the mine hole has encroached on this land and it could be 15 - 20 ft. deep.
- Q. What you are saying is that if there is a 20ft. hole sand will fill in but what we are told is 3 ft. of clay was washed away and in its place 3 ft. of sand was deposited. Is it possible? 20
- A. No. For one foot of sand there should be 10 feet of water assuming that the land is flat.
- Q. Do you think the discharge from that pipe is capable of washing away 3 ft. of clay?
- A. Practically impossible.
- Q. In the month of April or May where there any complaints received from the plaintiffs or anybody else?
- A. No. 30
- Q. During your visits were you satisfied the way mining operations were conducted?
- A. In this area I had no cause for complaint.
- Q. Where you satisfied there were adequate precautions against the state of water?
- A. Yes.
- Q. Apart from this unintentional escape of water were there any escape of water from the defendant's mine?
- A. No. 40

XN. by Mrs. MenonIn the High  
Court—  
Defendants'  
Evidence

No.24

K.Thavapragasam  
Cross-  
examination  
22nd July 1969

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Q. All the tailings were going on to lot 4661.  
So the tailings will be on the same level?

A. Yes.

Q. You had instructed an outlet to be put in  
when you visited on 2.4.65?

A. Yes.

Q. How do you account for the encroachment on  
the other land? Was there any bund to stop  
it?

A. No.

Q. Can you check your records and say when the  
right bund was built?

A. There is nothing on record.

Q. Court: Can you give the approximate size of  
the mine hole?A. It was about 20 to 25 ft. deep and about 6 to  
7 acres in extent.

20

Q. When you went to the site on 2.4.65 you found  
the miner building the left bund. Was that  
on your instructions?

A. Yes, but not on my instructions.

Q. Would you instruct the bund to be made to  
stop escape of water to the adjoining land?

A. Yes.

Court: The Miner himself had discovered that he  
had encroached when he was constructing the  
right bund?

A. Yes.

30

Q. Look at photograph 24 I and show us the mine  
hole on the encroached land?A. At this stage it is difficult to say because  
it is built up. Shows it to the Court.Q. The original licence was issued before your  
time to dump tailings on this?

A. Yes.

Q. The original miner was using 4661 as tailings  
area. The second application comes asking  
for the same area for dumping. Would you

In the High  
Court

Defendants'  
Evidence

No.24

K.Thavapragasam  
Cross-  
examination  
22nd July 1969  
(continued)

- allow these people to continue using this area for tailings as before?
- A. Yes.
- Q. Refers to D.26: The licence issued on 21.8.64 to 20.8.65. That was the time defendants were authorised to dump tailings from two mines. During this period they had extra tailings to dump in the same area and yet the Mines Department did not think it necessary to have an extra bund? 10
- A. We made sure that there was enough free-board (a minimum of 3 feet above water).
- Q. You gave instructions to build a bund on the left side?
- A. This was thought of because the level of water was going to rise and a further spillway was necessary.
- Q. When you visited the site did you ask the miner why he was building the bund?
- A. I assumed that the boundary might have been wrong. 20
- Q. The discharge of water, slime and sand for 8 hours would have brought the level of water considerably?
- A. No, because there is considerable outlet of water.
- Q. Would you not say that then the water has already risen to a certain level the water level will rise?
- A. No, it will go out through the outlet. 30
- Q. This is on your assumption that the land is higher?
- A. I made sure that the water will not go to the adjoining land.
- Q. You verified that .61 acre was the area encroached. That area would be in between the boundary of 3582 and the buildings?
- A. Yes.
- Q. You say the buildings were not affected at all?
- A. Yes. 40



Re-Xn:In the High  
Court

Q. My learned friend put to you about the starting of the second palong. On the 14.9.64 was there a visit made by the D.S.I.M. and I.M. to the tailings area?

Defendants'  
Evidence

No. 24

A. There was a visit on 9.9.'64.

K.Thavapragasam  
Re-examination  
22nd July 1969

Q. By free-board as I understand is a minimum of 3 ft. of earth above the level of water to prevent escape?

10

A. Yes.

No. 25

Wong Foon

No. 25

Wong Foon  
Examination

D.W.6: WONG FOON: affirmed, states in Cantonese. 47 years of age, living at 2, Jalan Tengiri, Bungsar Road. I am the Mine Manager for Weng Lok Mining Co.

Q. Were you mine manager in 1963, 64 & 65?

A. Yes.

20

Q. As manager which mine were you looking after?

A. Segambut mine.

Q. Can you tell us your mining lease Nos.

A. M.L. 4390 and M.C. 1310.

Q. M.L. 4390 is 4661 & 4662.

A. Yes.

Q. During the course of his mining had your Co. put up any mining installations?

A. Yes.

30

Q. How did the previous miner work? Was it by hydraulic mining?

A. Yes.

Q. Had he taken any steps to keep water from escaping?

A. Yes.

Q. What had he done?

A. He was using a re-circulating system for keeping water.

In the High  
Court

Defendants'  
Evidence

No.25

Wong Foon  
Examination  
22nd July 1969  
(continued)

- Q. Had he done anything to keep water in his own land and from keeping it from escaping to the neighbouring land?
- A. Previous miner had bunds.
- Q. Refers to D 24 J. How many bunds do you see?
- A. Two bunds.
- Q. Do you know who built the bund on the left?
- A. The left bund was already there. We only raised the height of the bund.
- Q. Would you look at photos 24 C, D, G & H? 10  
Do these photos show the bund?
- A. Yes, this was constructed by us as a safety bund.
- Q. What about the right bund?
- A. Right bund was also in existence before. I do not know who constructed it. Must be the previous miner.
- Q. When you started these mining operations what was the area lying between the two bunds? 20
- A. It was a mining hole.
- Q. Do you know where the land boundary was from the mining lease?
- A. No. I did not know where our boundary was. After it was surveyed by Flowerdew & Co. We found the boundary.
- Q. Do you know where the boundary is?
- A. Between the two bunds.
- Q. The bund that you built was how far away?
- A. About 20 ft. from the boundary.
- Q. Before the survey where did you think the boundary was? 30
- A. Before it was surveyed I was under the impression that the boundary was on the right bund.
- Q. You mentioned that the previous miner has been using the re-circulating system. Were you using the re-circulating system?
- A. Yes.
- Q. Why did you use the re-circulating system?

- A. Without the use of re-circulating system we could not have got water for our pump.
- Q. Shown D 26. If something were done to obstruct the outlet what would happen to your mining operations?
- A. There would be nothing to obstruct.
- Q. Supposing sand and clay were obstructing what would have happened? We were told that some 3 ft. of sand was moved. Is it possible?
- 10 A. It is not possible.
- Q. If water escaped from your land on to the neighbouring land what would happen to your re-circulating system?
- A. It would not escape because we have the safety bund to hold the water.
- Q. Did water ever escape from your mine?
- A. Yes when it was in excess.
- Q. We are talking about the flood. What would happen if there is a flood?
- 20 A. If it does happen the Mines Department will stop us.
- Q. At the end of April 1965 did 3 ft. of water escape from your land to the neighbouring land?
- A. There was no such escape of water.
- Q. It is also said that sometime at the end of April a complaint was made by the plaintiffs of flood. Is it true?
- A. No, there was no complaint from the plaintiffs.
- 30 Q. Sometime during the plaintiffs' evidence there was a reference made to a car No. What is your car No.?
- A. Yes, I had a company car Borgward No. BG 6230.
- Q. When was it purchased?
- A. In the year 1963.
- Q. Did you use it?
- A. Yes.
- Q. Have you had discussions with any of the plaintiffs' witnesses about settlement?
- 40 A. No.

In the High Court

Defendants' Evidence

No.25

Wong Foon Examination  
22nd July 1969  
(continued)

In the High  
Court

Defendants'  
Evidence

No.25

Wong Foon  
Examination  
22nd July 1969  
(continued)

Q. In the course of mining where is the ore sent to?  
A. Eastern Selting and we get certificates of sale.

Q. During the months of March, April and May were you getting certificates of sale for ore?  
A. Yes.

Q. In fact you have certificates for mine No.1 and mine No. 2 in regard to record of sale of tin ore from January to June 1965?  
A. I produce certificate - marked D.28.

10

Q. Looking at the dates of these certificates

On 2nd of April 1965	you had for	29.19	pukul	
19th	"	"	22.86	"
3rd of May	"	"	35.89	"
17th	"	"	18.98	"
29th	"	"	29.07	"

Mine No. 1

1st of April	"	"	24.17	"
16th	"	"	19.23	"
1st of May	"	"	21.9	"
14th	"	"	14.30	"
17th	"	"	28.48	"
18th	"	"	13.45	"

20

Q. Your ore production continued during the months of April and May?  
A. Yes.

Q. Court: What does that go to show?

A. To show that the production was uninterrupted. 30

Q. As mining manager were you daily on the mining area?  
A. Yes.

Q. Can you see the plaintiff's land from your area?  
A. Yes.

Q. Would it be possible to see lorries if they were being used from your land?  
A. I did not see.

Q. If they had used lorries would you have seen it?

A. If it is far away I cannot see.

Q. I am talking about the area between the two bunds?

A. In fact there was no lorry used in that place.

Q. During the 5 month period in 1965 there must have been nearly 2,000 lorry trips?

A. I have not seen any lorry going there.

In the High Court

Defendants' Evidence

No.25

Wong Foon Examination  
22nd July 1969  
(continued)

10 Q. What are the working hours of the mine?

A. From 6 a.m. to 10 p.m.

Q. Between 6 a.m. to 10 p.m. what happens?

A. The engine will stop working.

XN: by Mrs. Menon:

Cross-examination

Q. In your evidence you stated that at that time you did not know where your boundary was?

A. In the year 1962 I did not know where the boundary was.

20 Q. When was the land surveyed by Flowerdew & Co.?

A. Sometime in August 1965.

Q. Until August 1965 you did not know where your boundary was because that area was a mine hole?

A. I do not know.

Q. You say that the whole area was surrounded by a pond?

A. Yes.

Q. You did not get any complaint about water escaping from your mine into plaintiff's land from March '65 to April '65?

30 A. No.

Q. Can you tell me why you started building a bund on the left in April 1965?

A. The left bund was a safety bund.

Q. Can you explain why it was necessary to build a safety bund in April 1965?

A. The right bund is lower so we had to construct a higher bund on the left side which is known as a safety bund.

In the High  
Court

Defendants'  
Evidence

No.25

Wong Foon  
Cross-  
examination  
22nd July 1969  
(continued)

- Q. Why?  
A. Because we had to stop water from the water hole for use by the water pump.
- Q. You were using this water for the No. 2 pump since 1964?  
A. Yes.
- Q. Why was it necessary in April to build a bund there?  
A. So that it would be more safe.
- Q. You also said that you raised the height of the right bund? Why did you do that? 10  
A. It was also for the same reason.
- Q. Around the month of March you thought it fit to raise the height of the right bund and in April you put up another bund on the left called the safety bund?  
A. Yes.
- Q. Refers to 24 D. Looking at 24 D can you draw on the plan where the boundary led to?  
A. Boundary marked by witness in black. 20
- Court: I think it is in evidence that the real boundary is about 10 ft. from the left bund.  
A. Yes.
- Q. Your boundary stops at the spillway shown on the right bund and then stops?  
A. This is an outlet for the rain water.
- Q. Refers to 24 I. Can you tell me who built that spillway?  
A. It was built by us.
- Q. Was this also built in March when you raised the height of the bund? 30  
A. I cannot remember when it was built but it was done by us.
- Q. As manager where are you seated most of the time?  
A. I go round the place once a day. Sometimes I am in the kongsi after the inspection if everything is in order. Sometimes I will be at the mine.

Q. From the kongsi can you see the brick factory?  
 A. No I cannot see.

In the High  
 Court

Q. So you cannot see what is taking place in the  
 factory?  
 A. That is correct.

Defendants'  
 Evidence

No.25

Adjourned to 2.30 p.m.

Wong Foon  
 Cross-  
 examination  
 22nd July 1969  
 (continued)

10

Q. You told the court that when you were at the  
 kongsi you could not see the plaintiff's  
 factory?  
 A. Now I say I can see the roof of the factory.

Q. What was your purpose in visiting the tailings  
 area once a day?  
 A. To inspect the place in order to make sure  
 everything is in order. This is part of my  
 duties.

Q. Did you find time to do anything else?  
 A. I would inspect the bund, the outlet of water  
 and other matters pertaining to my work.

20

Q. Refers to D.24 E. From this photograph can  
 you tell me where you stood to inspect all  
 these?  
 A. I do not stand in any particular place but I  
 go round walking on the bund.

Q. You inspected the place walking on the bund  
 wherever there was one?  
 A. Yes.

30

Q. How did you tell us this morning that you have  
 not seen any lorries when you could not have  
 seen any lorries come.  
 A. I did not see any lorries.

Q. It is not possible for you to see any lorries  
 from your kongsi?  
 A. In fact there were no lorries. I have not  
 seen any lorries in the course of my inspection.

Q. In the course of your inspections have you  
 seen one Tan Kim Choo (P.W.6) a director of  
 the plaintiffs' Co.?  
 A. I do not know P.W. 6.

Court: You say you did not meet any of the plaintiffs'

In the High  
Court

Defendants'  
Evidence

No. 25

Wong Foon  
Cross-  
examination  
22nd July 1969  
(continued)

- representatives?  
A. No.
- Q. Have you any time visited the plaintiffs' brick factory at Segambut?  
A. I have been there when one sikh boy was drowned.
- Q. Do you know anybody in the factory?  
A. I do not anybody in the factory.
- Q. You remember the Inspector of Mines inspected your tailing area and instructed you to build a spillway in the bund. When was it? 10  
A. In the middle of March, April and July the Inspector of Mines visited the place.
- Q. When the Inspector of Mines asked you to build a spillway, did you do it?  
A. Yes. That was in the month of April or May.
- Q. Refers to 24 I. Where was the spillway you were asked to build?  
A. Agrees to spillway into another water hole as shown in 24 I. 20
- Q. Before this was built how did water flow?  
A. It flowed in from the other ditch.
- Q. In the re-circulating system don't you have to wait for a period before the water becomes clean?  
A. It is not necessary for the water to be clean.
- Q. You said you raised the height of the bund on the right. Can you tell me how?  
A. I used medium-sized bulldozers to heighten the bund. 30
- Q. In the process of heightening the right bund did you push the sand to the right bund?  
A. I did not know the place belonged to them.
- Q. Did the plaintiffs complain to your kepala regarding this?  
A. I do not know anything about it.
- Q. Why did you suddenly raise the height of the bund after having used it for several years?  
A. Because the tailings have gone into the pool



and therefore had to raise the height of the bund.

Q. In other words the level of water had risen and so you had to raise the bund in March 1965?

A. Yes.

Q. In April '65 you started on the left bund. How did you build this bund?

A. By means of water pump.

10 Q. You said this bund was built for safety purposes?

A. Yes.

Q. Did you keep records of water level in the tailing area?

A. I know about the level of water by daily inspection. I do not keep records.

Q. Are you in charge of the sale of tin ore?

A. Sometimes I did sell and sometimes the General Manager!

20 Q. You have given us a record of the sales?

A. Yes.

Q. You do not know anything about the sale of tin ore?

A. I know but I do not keep record.

Q. When did you become aware of the plaintiffs' claim against your company?

A. I came to know in the month of June 1965. That was the time when we received a letter from the Plaintiffs.

30 Q. When you came to know about this matter you went to examine the place?

A. Yes.

Q. You just told the court that you went there only when the Sikh boy died. Now you say you did go there?

A. I went there with my 1st and 2nd kepala to inspect the place.

Q. What you told the court about your visit only on two occasions is not true?

In the High Court

Defendants' Evidence

No.25

Wong Foon  
Cross-  
examination  
22nd July 1969  
(continued)

In the High Court

Defendants' Evidence

No.25

Wong Foon  
Cross-examination  
22nd July 1969  
(continued)

Re-examination

A. I did not go over to the plaintiffs' area but I inspected our place.

Q. Was this letter from the plaintiffs sent to you?

A. It was sent to our company.

Q. In June you went to examine where the damage has been done in April?

A. After the receipt of the letter we knew what the matter was and then the investigation was made.

10

Re-XN: by Mr. Peddie:

Q. You were asked if you have seen those lorries. Did you see any tyre marks left by the lorries?

A. There were no lorries to see.

Q. Is there any regulation that the bund must be of a certain height above the water level?

A. Usually the bund is about 3 feet above water level.

Q. When you started heightening the bund was it already above the water level?

A. I observed that it was only 2 ft. above water level so I increased the height. The lowest was 2 ft. above water level.

20

Q. Refers to 24 C. Did you at any time have greater depth of water than that on that piece of land?

A. Only when it rains it is more than that. It is seldom above the mark shown in 24 C.

No.26

J. B. Ross  
Examination

No. 26

J. B. Ross

30

J. B. ROSS: (D.W.7) affirmed, states in English. 55 years, Civil Engineer, Room 208, Kwang Tung Association Building, Pudu, Kuala Lumpur.

Q. Were you formerly proprietor of the firm of Flowerdew & Co.?

A. Yes.

Q. What are your qualifications?

A. I am a Bachelor of Science, University of Edin.,

and a fellow of the Institute of Civil Engineers.

In the High Court

Defendants' Evidence

No.26

J. B. Ross  
Examination  
22nd July 1969  
(continued)

Q. What type of work you do now?  
A. Civil structural and consultative engineering.

Q. You know the defendant mining Co.?  
A. Yes.

Q. Did they consult you in relation to the mining of this land in Segambut?  
A. Yes.

10 Q. Do you know that before a miner can start work he has to get the scheme approved.  
A. Yes.

Q. Do you know who prepared the mining scheme?  
A. The mining scheme was prepared in my office.

Q. Did you see the site before signing?  
A. Yes.

Q. Did you know if the land had been mined before?  
A. Yes.

20 Q. Left over from the previous mine, where there any water holes?  
A. Yes, there were areas of water.

Q. Were there any bunds?  
A. Yes.

Q. Can you say which bunds were there when you went to prepare the mining scheme? Please see photographs 24 I and 25 D.  
A. Refers to 25 D. The bund on the right hand side was there when I went to prepare the scheme.

30 Q. When did you visit the mine?  
A. I visited the mine many times. In this case I have visited the mine regularly throughout 1965.

Q. You also did the previous mining scheme.  
A. Yes, the previous miner before Weng Lok Mining also employed me.

Q. Under the scheme you did for Weng Lok this

In the High  
Court

Defendants'  
Evidence

No.26

J. B. Ross  
Examination  
22nd July 1969  
(continued)

- area was used for tailing purposes?  
(Refers to D.26 & 26A).
- A. Yes.
- Q. Can you tell us what this scheme involved?
- A. The areas indicate the path of the affluent (sic) from the mine carrying tailings to the tailing area and they return for discharge afterwards.
- Q. Can you tell us what happens to the water afterwards?
- A. In a mine that water is returned as far as possible for re-circulation. 10
- Q. You surveyed the area for purposes of the scheme?
- A. Yes.
- Q. Are you satisfied the water was kept within the boundaries for the purpose of mining lease?
- A. Yes, I am satisfied.
- Q. Do you know what distance the water was travelling?
- A. About  $\frac{1}{4}$  mile, i.e., the farthest point from the palong. 20
- Q. What will be the pressure at the end of the travel?
- A. There is no pressure at all because it is flowing above the earth.
- Q. What happens to the sand?
- A. The sand is deposited in the tailings area.
- Q. Will the sand travel a great distance?
- A. The heavier particles are deposited first and the lighter ones are carried further. 30
- Q. If the return is blocked what would happen?
- A. They would have to stop for shortage of water.
- Q. If the water escapes?
- A. Mining will have to stop because there will be no circulation.
- Q. Refers to 24 C & 24 G. What is the purpose of the pipe on the left side?
- A. The purpose is to convey sand with the water.

Q. Using this type of pipe how far can you take sand?

A. The sand would not go sideways.

Q. Would it be possible for that type of pipe within 2½ hours to produce 3 ft. of water on .616 of an acre?

A. Not within 2 hours.

Q. How long would you think this will take?

A. At least it would take 20 hours or more.

In the High Court

Defendants' Evidence

No.26

J. B. Ross  
Examination  
22nd July 1969  
(continued)

10 Q. Court: Again that will depend on the water already on the land.

Peddie: That is not their case. They say all of a sudden water came and flooded.

Q. If we have an area 170' x 100' and 3 feet of clay on top of it, can you calculate the water needed to wash it off?

A. For producing a jet of water to wash it away it would require 500,000 gallons of water. The amount of clay is about 1,900 cu.yds. and it would take four days to wash this away.

20

Q. The clay is washed away and 3 ft. of sand is up in its place?

A. It could not happen. If the water is travelling sufficiently fast it would take the sand and slime with it.

Q. Within 24 hours 3 ft. of clay disappeared and in its place 3 ft. of sand appears.

A. I have never heard of such a thing.

30

Q. Is that pipe capable of doing it?

A. No. It is only a discharge pipe and has not got that amount of pressure.

Court: What is the measure of the pipe?

Peddie: 8" pipe.

Q. In order to produce 3 ft. of sand in 24 hours what volume of water would be required?

A. If you multiply that volume of water by 10 to 12 times you will get about 30 ft. high water to wash it away.

In the High  
Court

Defendants'  
Evidence

No.26

J. B. Ross  
Examination  
22nd July 1969  
(continued)

Q. There is a hole 170' x 100' x 20' and lorries are bringing clay to dump into it. Is it possible to fill that hole by tipping from lorry at one point only?

A. No. By tipping over at one edge we cannot fill the rest of the hole.

Q. Do you think you can fill in 1980 loads in a period of 5 months?

A. I do not think so.

Q. What effect would water have on clay?

A. Water has very little immediate effect on clay. 10

Q. Will it have any permanent damaging effect?

A. It will affect eventually the clay on the surface but not at the bottom.

Q. What will be the effect if there is 3 ft. of sand?

A. It would not permeate the clay. The sand could be scraped from top.

Court: Would water permeate clay? 20

Witness: Not so much.

Q. What would be the effect if 3 ft. of clay would have been washed to the re-circulating area?

A. It will have to go somewhere and would clog the circulating system.

Q. If you know the length and breadth of the hole and the volume, can you calculate the height?

A. Yes. 30

Q. Did you at one time have a surveyor by the name of Karim bin Ahmad (D.W.3)?

A. Yes.

Q. Did you at one time ask him to take some levels?

A. Yes, in August 1965.

Q. Did he take these levels?

A. Yes.

Q. Do you have them?  
A. Yes. D 25 referred to.

In the High  
Court

Q. Can you look at the level given for lot 3582 on the Western side and the level at Sungei Batu?

Defendants'  
Evidence

A. Yes.

No.26

Q. Assuming there is 3 ft. of water on lot 3582 what would be the level of water in Sungei Batu?

J. B. Ross  
Examination  
22nd July 1969  
(continued)

A. Between 20 to 23 ft.

10 XN. by Mrs. Menon:

Cross-  
examination

Q. If you have hole 170' x 100' x 20' and a lorry bringing clay tips over on one side of the dump what happens?

A. It builds up a pile.

Q. If it was piled up it would be more than 15.78 ft. Do you think the lorry cannot tip more than 15.78 ft.

A. If the load can be spread.

20 Q. You think the sand can be brought  $\frac{1}{4}$  mile and discharged without much pressure for making the bund.

A. It does require little pressure. It is a question of velocity of water.

Q. For the sand to be pushed through the pipe there should be continuous pressure of water.

A. Sand is not pushed but it is carried through suspension for more than quarter of a mile.

30 Q. Assuming that there has been an escape of water won't the water bring with it sand?

A. Yes.

Q. This sand would be deposited wherever water stays?

A. Yes.

Q. You said sand deposited on the clay will not affect the clay? If sand had gone all round still you may get something from the middle?

A. Yes.

40 Q. In 1962 you did the scheme for the previous miner. Was it the first time the land was mined?

A. I do not remember.

In the High  
Court

Defendants'  
Evidence

No.26

J. B. Ross  
Cross-  
examination  
22nd July 1969  
(continued)

- Q. When you did the scheme for the previous miner did you go into the place to do the survey?  
A. Yes. I did actually survey by going into the lot to see the boundary stones.
- Q. You are sure there was no encroachment?  
A. I am not aware of that.
- Q. Subsequently you surveyed for the defendant Co.?  
A. Yes.
- Q. Again you were not aware of any encroachment?  
A. We were only aware of the existence of water but we did not know the encroachment. 10
- Q. You excluded the water hole because it was not within your boundary?  
A. Yes.
- Q. Your plan should have shown the survey which you did?  
A. Yes.
- Q. You stated that in 1962 when you did the scheme there was the right bund on the site?  
A. Now I say I cannot recall. 20
- Q. When did you go in 1965 to do some work for the defendants?  
A. We did some work in January 1965 in connection with the renewal of licence and survey of many lots including this particular lot No. 4661.
- Q. You have been a number of times and you particularly recall that you saw the right bund in January.  
A. I saw it much earlier than that. 30
- Q. Is there anything other than what you can recall to indicate that the bund was built before August 1965?  
A. We have a letter here dated 5.10.63 addressed to the Inspector of Mines for amendment of hydraulic mining which shows the bund.
- Q. If the Mines Department have no evidence of the existence of the bund it means there was no bund?  
A. When you say bund, it is an artificial one. 40



Q. So in 1963 that plan would not indicate that there was a bund?

A. That does not show there was a right bund. Refers to D.29. The blue line indicates the bund or ground of sufficient height for retention of water.

In the High Court

Defendants' Evidence

No.26

Q. When the Mining licence was issued to the original miner in 1962 was there any condition that the bund should be built?

J. B. Ross  
Cross-examination  
22nd July 1969  
(continued)

10 A. There may be a necessity for a bund this year but there may not be a necessity for it next year.

Q. A place where there is no bund this year they may require a bund next year?

A. Yes.

Q. If they have tailings to be deposited for two mines next year probably there may be a necessity for a bund to be built?

A. Yes.

20

No. 27

Wong Chong Chow

No.27

Wong Chong Chow  
Examination

D.W.8: WONG CHONG CHOW: affirmed, states in English. Age 49 years, 70 Jalan Tingiri, Kuala Lumpur. Registered specialised steel structure works contractor for P.W.D. ever since 1945.

Q. Are you a miner?

A. Mining is not my occupation but my family has been doing it since 1.1.1964.

30

Q. Does your manager report to you with regard to occurrences in the mine?

A. Ever since I took over as Managing Director the manager Wong Soon keeps me informed of things.

Q. Did you get any complaint that water crossed your boundary?

A. No.

Q. Now you know your mining operations encroached on the neighbouring land?

A. Yes.

In the High  
Court

Defendants'  
Evidence

No. 27

Wong Chong Chow  
Examination  
22nd July 1969  
(continued)

- Q. When did you find that out?  
A. It is in late 1964.
- Q. When did you discover finally?  
A. That was after Flowerdew & Co. had surveyed in 1965.
- Q. After that what did you do for the boundary?  
A. I had instructed to construct the new boundary into our area.
- Q. Did you start building the new bund on anybody's instructions? 10  
A. I did it on my own accord.
- Q. Were you building new bund to stop water from going into lot 4658?  
A. Yes.
- Q. Before you started building a new bund have you had water on lot 4658?  
A. Yes.
- Q. Where did you think the boundary was before you got the complaint?  
A. We thought the boundary was as per the mines record. 20
- Q. Were you told of any complaint by the plaintiff that there was an encroachment on his land until May 1965?  
A. No.
- Q. Before 1965 was there any complaint about flooding?  
A. No.
- Q. Did you at any time go to plaintiffs and arrange to settle with them? 30  
A. No.
- Q. Did you discuss with any of the plaintiffs' people?  
A. No.
- Q. In fact you produced the sale records yourself (D.28)?  
A. Yes. Those are records for sale of ore from January to June 1965.

Q. Did the Mines stop producing any time during these months?

A. No, it never stopped.

Q. You are in the habit of making calculations?

A. Yes.

Q. On the basis of their book Ex. P.13 page 5 (in and out record of clay) using the figures in there you have calculated the number of bricks which they were allegedly producing?

10 A. Yes.

Q. In 1965 between January and May they used 1346 cu.yds. of clay in dump C.

A. Yes.

Q. How many bricks would that produce?

A. Each cubic yard produces 410 bricks (3 parts earth and 2 parts clay).

Q. In 1965 they purchased 1,980 lorry loads of clay. How many bricks will that be - (9,900 cu.yds)?

20 A. 6,700,000 bricks.

Q. From Dump B how many bricks?

A. 34,400,000 bricks.  
From dump C 51,300,000 bricks.

Q. A total of 92 million bricks and their annual licence is for 1,800,000 bricks.

A. Yes.

Q. How many years stock of production have they got?

30 A. Total stock from dumps A, B & C will produce 92,400,000 bricks. Also they have used up from 1962 to 1967 in accordance with their licence 1,800,000 annually. In 6 years they will produce 10,800,000 bricks.

Q. How many years production have they purchased clay for?

A. For 51 years.

In the High Court

Defendants' Evidence

No.27

Wong Chong Chow  
Examination  
22nd July 1969  
(continued)

Adjourned to 9.30 a.m. 23.7.'69

In the High  
Court

Defendants'  
Evidence

No. 27

Wong Ohong Chow  
Examination  
23rd July 1969

D.W.8 (WONG CHONG CHOW) continued on former oath:

Q. Refers to 24 C. Do you know the diameter of the pipe?

A. 8" pipe.

Q. What type of pump was used?

A. It was a gravel pump.

Q. What was the horse power of the pump?

A. h.p. is 250.

Q. Given the diameter and the h.p. of the pump can you calculate the volume of water discharged?

10

A. Yes.

Q. What would be the normal working capacity for over a period of 24 hours?

A. For 24 hours with an 8" pipe is 20,000 cu.yds. for the month.

Q. 20,000 cu.yds. is 540,000 cu.ft. per month and therefore it will discharge 18,000 cu.ft. as the daily discharge assuming there are 24 working days.

20

A. Yes.

Q. What is it mixed of?

A. Water, slime and sand.

Q. What are the working hours?

A. 16 hours.

Q. During the 16 hours a day how many cu.ft. of tailings would be discharged?

A. 1,125 cu.ft. of tailings.

Q. We have been told the measurement of encroachment area was .616 acre i.e. 26,800 sq.ft.

30

A. Yes.

Q. We have been told that this area is flooded by 3 ft. Can you calculate the volume of tailings in that area?

A. The tailings would be 80,500 cu.ft. of water.

Q. From the volume of water you can calculate the number of days it would take for the discharge of so much water?

A. To produce 80,500 cu.ft. of water it will take 3 days.

In the High Court

Q. In order to take 3 ft. of sand along it will take more than 3 times that quantity of water.

Defendants' Evidence

Court: .616 acre is the area of encroachment.

No.27

Does it include the brick kiln and the sheds.

Wong Chong Chow

A. Yes. The affected area includes the kiln and the shed.

Examination

23rd July 1969

(continued)

XN. by Mrs. Menon:

Cross-examination

10 Q. Are you able to say how much water is used for the purpose of working your mine?

A. That is to be worked out.

Q. Do you say that there were other pipes discharging slime and water?

A. Yes.

Q. Can you tell me the nature of the complaint from the plaintiffs?

A. The outlet of water flooded into the monsoon drain was the nature of the complaint.

20 Q. Picture (24 series) shown to witness.

Is the drain shown in any of the photographs.

A. D.24 H shows the monsoon drain. This drain is for the discharge of water from all those lands to Sungei Batu.

Q. This ditch you have shown in D 24 H - does it extend to the plaintiff's land?

A. It is completely outside the right bund, i.e. in this photograph there is no question of the drain at all.

30 Q. The complaint was that water from your area (refers to D 24 H) went over these heavy bunds and flooded the adjacent land.

A. No.

Court: What was the nature of the complaint?

A. That a flood of water encroached on his side of the land.

Q. Shown 24 I - from this photograph can you tell me was this the only spillway or other spillway?

40 A. This was the only spillway.

In the High  
Court

—  
Defendants'  
Evidence

No.27

Wong Chong Chow  
Cross-  
examination  
23rd July 1969  
(continued)

Q. Shown 24 I & 24 H - there is a ditch line.  
What is it for?

A. It is to help water circulation into the  
water pump.

Q. Refers to 24 D & 25 H. Would you say it  
refers to the same place and one taken a  
bit further in. Can you show me the ditch  
in between the two bunds?

A. In this photograph I cannot see ...

25 series taken in December.

24 series taken in October.

10

Q. I put it to you there was no such ditch in  
December and you put it in.

A. No.

Q. Who was the man who made the complaint in  
1964?

A. Yap Kah Yoo was the man.

Q. Did you take any remedial action?

A. There was no urgent action necessary in this  
case so I did not take any action at all.

20

Q. Your manager said that in March 1965 the bund  
had to be raised. Can you tell me why?

A. Raising bund is a regular thing. It is like  
a weekly affair. The slime and sand will be  
spread over the tailings area.

Q. Can you explain how the water does not rise?

A. Water level never rises.

Q. The Engineer says that if more sand and slime  
is deposited level of water rises?

A. No answer.

30

Q. At any time can you say the actual height of  
the bund has to be changed according to the  
level of the tailing area?

A. Yes.

Q. In March 1965 you raised the height of the  
bund. So you would agree with me that there  
was some necessity at that stage to raise the  
height of bund?

A. It was necessary for us.

- Q. To remedy the monsoon drain you did not take any action but you heightened the bund. You built the spillway to take the water out and it is through the spillway water went into the bund. You told the court you did not take any action in March '65 but you thought that the bund should be raised?
- A. Yes.
- 10 Q. How many times you visited your mine?  
A. Weekly I go round the mine.
- Q. Do you take the level of water?  
A. There is no necessity to take the water level.
- Q. Who attends to the heightening of the bund?  
A. There is a maintenance gang called tailing gang going round everyday to attend to the bund. Wherever they find it short of depth they raise it.
- 20 Q. You said men go round 16 hours a day to see if the level of sand is the same?  
A. Yes.
- Q. Are you going to produce any record to show that the men recorded these things?  
A. I cannot produce them now.
- Q. In April 1965 you thought fit to construct the left bund. Can you tell me why?  
A. Yes, we came to know that we had encroached into the neighbouring land.
- 30 Q. How did you know? The owner never made a complaint?  
A. When I had a complaint I checked all the boundaries. I instructed Flowerdew & Co. to survey the land.
- Q. You started building the bund in April 1965, but Flowerdew started the survey only in August 1965. How do you co-relate your evidence.  
A. I was looking to the safety of the land.
- 40 Q. When you put up the left bund you were on your own land but before that were you uncertain about your own land?  
A. Our basic working was after getting the records from the surveyor.

In the High Court

—  
Defendants' Evidence

No.27

Wong Chong Chow  
Cross-  
Examination  
23rd July 1969  
(continued)

In the High Court

Defendants' Evidence

No.27

Wong Chong Chow  
Cross-examination  
23rd July 1969  
(continued)

- Q. I put it to you after heightening the bund you were informed that you were encroaching on the neighbouring land. Then you put up the bund to stop water escaping into the plaintiffs' land?
- A. No.
- Q. Have you visited the neighbouring land before?
- A. That was the first time.
- Q. You were giving a lot of calculations and opinions. I asked you one question. There is a sand bund. Water has risen by 3 ft. and gone over to the side. Water later subsides. 10
- A. I do not think it is correct to say it subsides. When it comes out of the bund it will go whichever direction is low.
- Q. In what way does the water subside?
- A. It depends on the quantity of water.
- Q. Suppose one foot of water?
- A. It will carry over little sand. 20
- Q. Looking at photograph 24 G as compared to 25 B, what is the marked portion in block?
- A. I cannot identify.
- Q. Mr. Wong you visited this place every week yet you cannot identify this lump of sand?
- A. I see the lump of sand.
- Q. Do you admit that substantial amount of water has gone over it?
- A. I agree that water has gone over the bund.
- Q. Have you been in the brick-making business? 30
- A. No.
- Q. Do you have any connection with the brick-making business?
- A. No.
- Q. You said 92,000,000 bricks can be produced which will be 51 years' stock?
- A. Yes.
- Q. You were shown dump B and C when you visited the site?
- A. I saw only one dump. 40



Q. Can you tell me the height of the dump of clay?

A. The height varies all over the place.

Q. During your case you have been producing plans, photographs, record of sales, licence etc. Were you informed by your solicitor that you were required to file in an affidavit of documents? Did you file an affidavit of documents?

10 A. No.

Q. All these documents were in your possession yet you did not care to file one?

A. No answer.

Q. You were afraid that if these are filed you will find certain irregularities and you wanted to surprise the plaintiffs at the trial. Was that your intention?

A.

20 Q. Refers to D 28. You did say that if the alleged flood had taken place the output of ore would have been affected by a substantial drop?

A. That you cannot take into account because the washing may be on the last day of the month and the sale may be on the next day of the month.

Q. I would like to know if you have got vouchers of sale showing from January right up to June.

A. Yes.

30 Q. From January to May you have signed vouchers from Eastern Smelting but from 4th of May to 19th May you have only an ordinary voucher. Can you tell me why this statement for the month of May was not signed?

A. Eastern Smelting issued several copies. This particular copy which was not signed I was not aware of?

Court: What are the dates of the statements?

A. 4th May to 19th May.

40 Q. You did not give us any of these statements but we served every voucher and documents?

A. You can always ask Eastern Smelting to verify that.

In the High Court

Defendants' Evidence

No.27

Wong Chong Chow  
Cross-examination  
23rd July 1969  
(continued)

In the High Court

Defendants' Evidence

No.27

Wong Chong Chow  
Cross-examination  
23rd July 1969  
(continued)

Q. Mr. Wong, I put it to you that in March 1965 you received a complaint from the plaintiff Co. about seepage of water to their land? Did you receive that complaint?  
A. I remember it was in March. It was a letter addressed to the Mining Co. by the plaintiffs' solicitors.

Q. As a result of this complaint your manager raised the bund and put up a left bund. Water escaped causing damage to the clay dump, brick kiln and brick-shed. There was a complaint. There were some negotiations for settlement. Nothing came through, so this matter came to court? 10  
A. You talk about negotiations but I deny there was nothing.

Re-examination

Re-XN: (by Mr. Peddie):

Q. You have been asked to prepare certain photographs two of them being 24 D and 25 D. Can you compare 24 D and 25 D both above the ditch line? Then you have 24 H and 25 E again both cutting the ditch line. 24 E and 24 G also as taken in December not showing the ditch line. 20

A. Yes.

Q. Did owner of the neighbouring land bring any proceedings against you?

A. No.

Q. Refers to 24 G and 24 E. You see in both these photographs there are a few posts sticking up. Can you tell us who put up those posts? 30

A. Yes, the post sticking out in 24 G beside the big building.

Q. In 24 I you see the building and the post?

A. Yes.

Q. Why are these posts there?

A. I cannot remember.

Q. Do you know who put those posts there?

A. I do not know who put them there. 40

Q. Refers to 24 F, Is it correct to say the new

- A. bund is lined up with one of those posts?  
Yes.
- Q. When did you know bund on the right was there?  
A. Only when we came to court.
- Q. When did you know that their case was that it was the discharge from this pipe that caused the flood?  
A. Only when we came to court.
- Q. As far as these damages are concerned we were getting particulars of their damages claim right up to last Saturday morning.  
A. Yes.
- Q. What is the purpose of Eastern Smelting certificates?  
A. We were selling ore to Eastern Smelting and they have to pay us for the amount shown.

In the High Court

Defendants' Evidence

No.27

Wong Chong Chow  
Re-examination  
23rd July 1969  
(continued)

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Case for the defendants

No. 28

Judgment

No.28

Judgment  
19th March 1971

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IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 1264 OF 1965

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Plaintiffs

And

Weng Lok Mining Company Ltd. ... Defendants

JUDGMENT OF RAJA AZLAN SHAH, J.

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This is an action by the plaintiffs for damages caused to their land and premises in consequence of the escape of water from the defendants' reservoir of water which had burst when the half completed bund on the defendants' land could no longer contain the reservoir of water.

The plaintiffs' case is that they are and were

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

at all material times the owners and occupiers of land and premises known as Lot 3582 adjacent to the land owned and occupied by the defendants. The defendants were carrying on mining operations on their land known as Lot 4661. The plaintiffs, on the other hand, were brickmakers. The plaintiffs' premises lie at the foot of a half completed bund on the defendants' land and at the boundary between the plaintiffs' land and the defendants' land. The plaintiffs claimed that on or about the end of April 1965 owing to the negligence of the defendants, their servants or agents by not completing the bund, the half completed bund could no longer contain the reservoir of water and the aforesaid reservoir of water burst and the water therefrom escaped and damaged their land. They contended that the defendants had failed to guard against the bursting of the reservoir when they had the knowledge or means of knowledge that such a disaster might occur, regard being had to the condition of the bund at the material time, and further or alternatively, that the said reservoir was of such dimensions and the water impounded therein was of such a volume that the said water if it escaped therefrom was likely to injure the plaintiffs' land and premises. They also claimed that the defendants were liable for nuisance. 10

In their defence, the defendants claimed that the plaintiffs were not the owners and or occupiers of the said land and premises (Lot 3582) and denied that the bund between the land occupied by them and that occupied by the plaintiffs was at any time half completed. They averred that such bund was fully completed and fully maintained at all material times. They also denied that they had at any time maintained upon their land adjacent to the plaintiffs' land any reservoir of water and 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 and damage or any of it sustained by the plaintiffs were not caused by the escape of water from land occupied by the defendants. They also denied nuisance. 20 30 40

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

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

10 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 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.

20 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.

30 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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The plaintiffs are bringing their claim under the heads of negligence, the principle in Rylands

In the High  
Court

No.28

Judgment  
19th March 1971  
(continued)

v. Fletcher<sup>(1)</sup> and nuisance. They also pleaded that the principle of res ipsa loquitur applies. It is to be noted that there is, on the facts, a clear case of trespass to land. But since the plaintiffs are not claiming under this head, I will refrain from expressing any view.

Since the plaintiffs are claiming under three heads, I find it convenient to deal first with the claim under the head of negligence. The principle is clearly laid down in Donoghue v. Stevenson<sup>(2)</sup> by Lord Atkin at p.581: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to me - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." 10 20

The standard of care which the defendants should have exercised is stated by Lord Reid in The Wagon Mound (No.2)<sup>(3)</sup> at page 512: "If a real risk is one which would occur to the mind of a reasonable man in the position of defendants' servant and which he would not brush aside as far fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense." 30

In the local case of the Pacific Tin Consolidated Corporation v. Hoon Wee Tim<sup>(4)</sup> the Federal Court held that the degree of care taken must be commensurate with the risk.

In this instant case, the fundamental issue is: what caused the escape of water onto the plaintiffs' land thereby damaging their brickworks' premises. 40

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(1) (1866) L.R. 1 Ex. 265 (2) (1932) A.C. 562  
(3) (1966) 3 W.L.R. 498 (4) 1967) 2 M.L.J. 35

It is the plaintiffs' contention that the escape of water was caused by the half-completed bund which could no longer retain the water, which was discharged by the pipe into the reservoir, and as a result of which the plaintiffs' land was flooded under 3 feet of water. The defendants, however, put in evidence that everything was satisfactory and that there was nothing to indicate the possibility of water escaping onto the plaintiffs' land when the Mining Inspector inspected the area about eleven days before the alleged flooding; and that the Mining Department would not have permitted the use of the land without adequate provision to retain water within the boundary. But the defendants later admitted the existence of the half completed bund and the escape of water but contended that the escape was negligible as to cause the damage claimed by the plaintiffs. I find the defendants' contention hard to believe. It has been admitted by the defendants (R.E.S. Curtis) that the pipe is capable of discharging about 2,000 gallons of water per minute and that there were other pipes discharging water and slime into the tailing area which was then used for the two mines (evidence of Wong Chong Chow, D.W.8). Furthermore, Mr. Markandan (D.W.1) the Acting Deputy Director of Meteorological Science, Malaysia, gave evidence that the rainfall in that month of April was 2.92 inches above average for April and that the highest rainfalls recorded during that month were on the 23rd, 26th and 30th April 1965, the time of the alleged incident. Mr. Wong Chong Chow (D.W.8), in cross-examination, admitted that he had received a complaint from the plaintiffs in March about the seepage of water onto the plaintiffs' land and that he had not taken any action except in raising the height of the bund and that in April he thought it necessary to construct the left bund because he realised that they had encroached on the neighbouring land. He further said that if water had risen by 3 feet and gone over the side, it will go to whichever direction is low and subsequently agreed that water had gone over the bund. 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 water further escaping onto the plaintiffs' land and

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

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In the High  
Court

No.28

Judgment  
19th March 1971  
(continued)

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 Thin v. Pacific Tin Consolidated Corpn.<sup>(5)</sup> 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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I will now proceed to deal with the second issue, that is, whether this instant case falls under the rule laid down in Rylands v. Fletcher<sup>(6)</sup> Blackburn J. in delivering the judgment of the Court of Exchequer Chamber said: "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damages which is the natural consequences of its escape." To make the defendants liable under this rule it must be proved that he made a "non-natural use" of the land, and the rule does not apply unless there has been an escape from the land of the defendants to a place outside his control: see Read v. Lyons & Co. Ltd.<sup>(7)</sup> By "non-natural use" of the land it means that there must be "some special use bringing with it increased danger to others, and (which) must not merely to the ordinary use of the land or such a

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(5) (1966) 2 M.L.J. 240 @ 251

(6) (1866) L.R.1 Ex.265; (affirmed) (1868)L.R.

3H.L.330

(7) (1945) K.B. 216 affirmed (1947) A.O. 156



use as is proper for the general benefit of the community": see Rickards v. Lothian.<sup>(8)</sup> This expression is highly flexible and the courts have sought to interpret it in accordance with contemporaneous needs. As Lord Porter on page 176 said: "... each seems a question of fact subject to a ruling of the judge as to whether ... the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as ... non-natural may vary according to those circumstances." With regard to the duty of care of miners towards their neighbour under this rule Ong, F.J. (as he then was) in the local case of Pacific Tin Consolidated Corporation v. Hoon Wee Thin<sup>(9)</sup> said: "In my view, natural user of their property does not imply that miners had carte blanche to carry on their mining operations in any manner they think fit, however hazardous to their neighbours."

In the instant case, the relevant question to be determined are first, whether the defendants had, for their own purpose, brought onto their land and kept and collected anything likely to do mischief if it escapes; secondly whether that was a non-natural use of their land; and lastly, if it does whether the damage suffered by the plaintiffs were the natural consequence of its escape.

The thing alleged to have escaped and damaged the plaintiffs' brick kiln, stores and their dump A was the escape of water from the defendants' reservoir. It is not disputed that before the defendants came there was already on the land the reservoir of water. Some previous miner had built the reservoir for their mining purposes. There was also an encroachment of the plaintiffs' land by the previous miner. The defendants admitted that there was water escaping onto the plaintiffs' land before the alleged incident. In order to stop further escape of water, and to retain the water for their mining operations, the defendants raised the height of the right bund since the water level in the

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

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(8) (1913) A.C. 263 @ 280

(9) (1967) 2 M.L.J. 35 @ 43

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

reservoir had risen due to tailings falling into the reservoir. For this purpose too, they constructed the left bund which was half completed when the alleged incident occurred. All this time the defendants were innocently mistaken about the correct boundary and contended that the encroachment of the plaintiffs' land was due to this innocent mistake. The area of encroachment was 0.616 of an acre. It was put in evidence that the mining hole had encroached on the plaintiffs' land about 20 - 25 feet deep and about 6 - 7 feet in extent (evidence of D.W.5) that is, between the boundary and the buildings on the plaintiffs' land.

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The Inspector of Mines (D.W.5) gave evidence that the previous miner had used the adjoining land as a tailing area, and that since the flow of water is to the east it was necessary to build a bund to retain the water. When the defendants discovered that they had encroached on the plaintiffs' land they speeded up building the left bund by installing a pump to pump tailings. Besides this pump, there were also other pipes discharging slime and water. A spillway was also built to help the water circulation into the water pump. Before the spillway was built water flowed from other ditches.

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The Mine Manager (D.W.6) also gave evidence that water is bound to escape when in excess, and contended that if flood occurred mining work will stop. He gave evidence that mining output was regular and normal. To support this D.W.8 produced sale records for the period January to June 1965. I find this piece of evidence without substance. It is most peculiar that, if there had been a regular sale for the month of May, as the defendants contended, the sale certificates for that month had not been signed by either the buyer or the defendants themselves. To my mind, this goes to show that there is in fact no output of tin for the month of May. Unless the defendants could furnish further evidence to support their claim, I am inclined to think that this is evidence to prove the incidence of the flood.

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Under the rule in Rylands v. Fletcher, the defendants would be liable if they collect or accumulate water which if it escapes causes

In the High  
Court

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No.28

Judgment  
19th March 1971  
(continued)

10 damage to the plaintiffs. The reservoir of water  
was already there when the defendants came. But  
there is sufficient evidence to show that the  
defendants did collect and accumulate it for their  
mining purposes. The defendants gave evidence  
that they built the left bund not only to stop  
further escape of water but also to retain it for  
their mining purposes. They were practising what  
is called a re-circulating system which necessi-  
tates the accumulation of water. The question is  
whether this was a non-natural user of their land.  
To be non-natural user "it must be some special  
use bringing with it increased danger to others,  
and must not merely be an ordinary use of the land  
or such a use as is proper for the general benefit  
of the community".(8) The Defendants already knew  
that there was a seepage of water onto the  
Plaintiffs' land. They also knew that the level  
of water in the reservoir had risen, and had to  
20 raise the height of the right bund. They later  
constructed the left bund but it was half  
completed. Having a half-completed bund with pipes  
discharging water and slime into it clearly brings  
with it increased danger to the plaintiffs,  
especially so when the defendants knew that the  
water level had risen and that there was a  
previous seepage of water and that there was  
evidence that the rainfall for that April was  
heavier than was normally experienced for the month  
30 of April. As Ong, F.J. in the Pacific Tin  
Consolidated Corporation v. Hoon Wee Thim said:  
"... non-natural user of their property does not  
imply that miners had carte blanche to carry on  
their mining operations in any manner they think  
fit, however hazardous to their neighbours." In  
that case, the appellants, for the purpose of  
their dredge mining operations maintained on their  
lands large ponds separated from each other by  
intermediate bunds. By means of spillway the  
40 flow of water from one pond to another was  
regulated and the water level of each pond was  
maintained as desired. The lands being situated  
in an inclined valley, with a drop of some 60  
feet, step ponds had to be constructed well  
above ground level. A large breach in the bund  
between the two large ponds (which together  
held nearly 550,000,000 gallons of water) caused  
such a violent outflow from the higher pond to

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(8) per Lord Moulton in Rickards v. Lothian

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

the other on the lower level, that the combined volume of water broke through the perimeter bund, causing extensive damage to life and property in the low-lying lands adjacent to ponds. In the Federal Court, the Lord President said: "... the said bund was put to uses for which the appellants knew, or ought to have known, that it was unsuitable and hazardous to their neighbours. I also find as a fact that the bund was put to a non-natural user when it was made to hold water in great quantities instead of slimes." In the instant case, 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 defendants 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 causing damage thereto. 10

The fact that the level of water was not given in evidence is of little effect to the plaintiffs' claim. Though the actual date of the happening was not given, it does not defeat the plaintiffs' claim since there is overwhelming evidence to show that there was an escape of water causing damage to the plaintiffs' land. The surveyor (P.W.2) gave evidence that there was still mud, sand and water on the 0.616 of an acre of the encroached area, and that the water was traced up to the bund on the left of the sketch - on Lot 4661, that is, the defendants' land. This survey was done about a month after the alleged flood. The presence of water on the plaintiffs' land is further corroborated by the photographs 24C, 24G and 24F taken sometime in the middle of May. 20

These photographs too showed that there was still water on the plaintiffs' land. The defendants' plea that though there was an escape of water, the escape was negligible to cause the damage as alleged by the plaintiffs is without substance. 40

D.W.4, Mr. Curtis, gave evidence that the pipe was capable of discharging 2,000 gallons of water per minute and D.W.5 also said that though Lot 4661 was originally used as tailing area for one mine, from 21st August 1964 to 20th August 1965 it was used as tailing area for two mines. D.W.8 also gave evidence that there were other pipes discharging slime and water into the tailings area. D.W.1 then gave evidence that the highest days of rainfall were at the end of April. If my opinion, 50

these go to prove that an escape of water in a big volume was most probable and in fact did happen. Furthermore, the defendants' admission in constructing the left bund as a safety bund and which bund was left half completed goes to prove that the danger of water escaping and flooding the plaintiffs' land was evidence to the defendants by the end of April. In the circumstances, the plaintiff succeeds in making out a case under the rule in *Rylands v. Fletcher*.

In the High Court

—  
No.28

Judgment  
19th March 1971  
(continued)

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The plaintiffs had also claimed that the defendants are liable in nuisance. To be liable in nuisance, it must be proved that the defendants had interfered with the plaintiffs' enjoyment of their land. It is the essence of nuisance that there must be an invasion of the plaintiffs' interest in the enjoyment of their land, and this invasion of interest may either be intentional or negligent activity on the part of the defendants. In other words, the defendants may be held to have committed the tort of private nuisance (as is the case here) "when (they are) held responsible for an act indirectly causing physical injury to land or substantial interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable." (see *Street's Law of Torts*, 4th Edition, page 215). In the instant case, the defendants admitted that they already had water on the plaintiffs' land when they came there. Some previous miner had worked on the land before the defendants came. As such, there was an invasion of the plaintiffs' interest by the previous miners and the defendants as successors had continued the said nuisance without taking any steps to put an end to it. As Viscount Maugham in *Sedleigh Denfield v. O'Callaghan*(10) said at p.894: "In my opinion, an occupier of land 'continue' a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take reasonable means to bring it to an end though with ample time to do so; he 'adopts' it if he makes any use of the erection, building bank or artificial contrivance which constitutes the nuisance." The right bund was also found to have encroached on the plaintiffs' land; and since they had made use of

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

this bund they had therefore 'adopted' the nuisance because as the defendants said, they then constructed the left bund when they realised that 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 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.

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The plaintiffs claimed both special and general damages. The terms 'special damage' and 'general damage' are used in contradistinction. Both may be pleaded, but the proof and quantification differ. To adopt the words of Bowen, L.J. in Ratcliffe v. Evans (1892) 2 Q.B. 524 at 528: "Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term 'special damage', which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see Ashby v. White(11). In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiffs' rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiffs' claim to be compensated,

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(11) 2 *Ld. Raym.* 938; 1 *Sm. L.C.* 9th ed.p.268

for which they ought to give warning in their pleadings in order that there may be no surprise at the trial." Viscount Dunedin said, in Admiralty Commissioners v. S.S. Susquehanna (12) at p.661: "If there be any special damage which is attributable to the wrongful act that special damages must be averred and proved, and, if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question.

In the High Court

No.28

Judgment  
19th March 1971  
(continued)

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The Plaintiffs gave the following particulars of special damage:

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|----|--|--------------------------|
| 1. | Loss of 1,980 lorry loads of brick-making earth. | \$7,113/-                |
| 2. | Costs of transportation at \$5/- per lorry load  | \$9,900/-                |
| 3. | Loss of 10,000 bricks at 4¢ per brick            | \$ 400/-                 |
| 4. | Cost of repairs to floor of brick shed           | \$ 800/-                 |
| 5. | Loss of service of brick kiln for one month      | <u>\$1,500/-</u>         |
|    |  | <u><u>\$19,713/-</u></u> |

I will deal with each of them in that order.

1. Loss of 1,980 lorry loads of brick-making earth, \$7,113/-

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Mr. Tan Kim Hoi (P.W.1) the Managing Director of the Plaintiff Company gave evidence that there were three dumps (A, B and C) for depositing the brick-making earth (clay) and that it was Dump A which was affected by the flood. Prior to the flood, the Company had dumped all the clay in Dump A. The clay completely filled Dump A and came up to a height of 3 feet from the ground.

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Mr. Tan Kim Choo (P.W.6), the Factory Manager and Director of the Plaintiff Company, testified that he bought the clay from one Lim Kim Seong (P.W.7) and others. Lim Kim Seong was called as witness. I find him an unsatisfactory witness. When first called, he said that he had licence to extract clay but when recalled, he gave an

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

entirely different statement: that he had no licence and that he was working under contract to another person who was said to have a licence. He kept no records of the sales of clay.

Plaintiffs' accounts and records suffered from substantial omission. The Plaintiffs' clerk at the brick factory, Mr. Kong Nam Fatt (P.W.8) calculated the amount of clay in Dump A from the commission (at 75¢ per lorry load) paid to the lorry driver. The commissions paid were said to be recorded in the 'commission book'. But this 'commission book' was never traced. 10

When a lorry load of clay arrived, three copies of the record were made out. The first copy was sent to the plaintiffs' office at Ipoh Road, the second copy was given to the vendor and the third copy was retained in the plaintiffs' brick factory. Notwithstanding that three copies of each delivery were made out, the plaintiffs failed to trace many of them. 20

As for the accounts, P.W.1 said he never checked the accounts of the plaintiff company. The accounts were far from satisfactory, even P.W.1 admitted "I do not know if the accounts are correct."

The clay was said to be tipped into Dump A at one point of the dump. Dump A was situated in a rather inaccessible part of the plaintiffs' land. If 1,980 lorries had in fact gone there, there was little evidence of that on the land except a small track. Also Mr. J.B. Ross (D.W.7), a Civil Engineer, testified to the difficulties of filling the dump from only one tipping point. 30

As to damage to the clay, P.W.6 admitted that water itself would not affect the clay. But he claimed that the top 3 feet of clay was washed away by the flood and that sand covered the dump to about 2 - 3 feet. D.W.7 said it was not possible for the flood to wash away 3 feet of clay in the dump. Moreover, he said that sand would not permeate the clay and the sand could be scrapped off. 40

In these circumstances, I find that plaintiffs have failed to prove that (i) 1,980 lorry loads of clay were in fact dumped into Dump A (ii) such clay



was damaged by the flood.

In the High  
Court

2. Cost of transportation at \$5/- per lorry  
load, \$9,900/-

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No.28

Judgment  
19th March 1971  
(continued)

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Though the plaintiff company uses both their own lorries as well as hired lorries, they claimed \$5/- per lorry. The omissions in the accounts and records stated in the preceding section similarly affect this claim which is intimately connected with the claim for 1,980 lorry loads of clay.

Since there was one voucher for each lorry used, there should be 1,980 vouchers. Both P.W.8 (the clerk at plaintiffs' brick factory) and P.W.9 (the clerk at plaintiffs' Ipoh Road office) testified to the loss and destruction of vouchers. This claim was for \$9,900/- and P.W.1 admitted that \$9,000/- worth of vouchers were lost.

20

Not only was there no proof that 1,980 lorries were used, there was not even proof that any lorries used were for carrying clay to the dump and not bricks from the factory. This claim fails.

3. Loss of 10,000 bricks at 4/- per brick, \$400/-

P.W.6 gave evidence that 10,000 pieces of unbaked bricks were damaged by the flood. He said that these damaged bricks could be used again, but that would cost more than to make fresh ones.

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There was no proof that 10,000 pieces were damaged, this being the estimate of P.W.6. The photographs indicated some damage but did not show the extent of damage or the number of bricks damaged. Some unbaked bricks could very possibly be damaged by the flood, but plaintiffs have not proved their claim. I disallow this claim with some reluctance.

4. Cost of repairs to floor of brick shed, \$800/-

40

P.W.6 testified that the cost of repairs to the brick-shed amounted to \$800/-. He said that this was only for labour charges. He said he employed 20 outside labourers for 10 days at \$44/- per person to remove the damaged bricks and debris and covered the floor with sand. However,

In the High  
Court

—  
No.28

Judgment  
19th March 1971  
(continued)

this claim was unsupported by any documents. No proof of this expenditure was tendered. In these circumstances, plaintiffs fail in this claim too.

5. Loss of service of brick kiln for one month,  
₹1,500/-

P.W.6 testified that each kiln was burnt three times a month and that each burning would bring in ₹.500/- profit. From these facts, he claimed ₹.1,500/- for the loss of the service for one month of a kiln damaged by the flood. 10

There was no proof of any damage to the kiln. Even if there was damage, there was no proof that the kiln was rendered unfit for burning for one month. Moreover, there were no accounts to substantiate the claim of ₹500/- profit per burning. The claim fails.

The Plaintiffs fail in each of the five claims for special damages, these claims were characterised by the poor quality of evidence tendered and the general lack of proof. 20

I come now to general damages. Since the defendants' liability is established (under negligence, the Rule in Rylands v. Fletcher and nuisance), the plaintiffs are entitled to general damages. As stated earlier, the law presumes general damages once liability is established and the quantification of such damages is for the court. Taking all the circumstances into account, I award general damages of ₹3,000/- and costs.

Sd: RAJA AZLAN SHAH. 30

(RAJA AZLAN SHAH)  
Judge, High Court,  
Judge.

Kuala Lumpur,  
19th March 1971.

Mrs. Santha Menon for the plaintiffs.

Mr. S.D.K. Peddie for the defendants.

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IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

In the High Court

CIVIL SUIT NO. 1264 OF 1965

No.29

Between

Hiap Lee (Cheong Leong & Sons) ... Plaintiffs  
Brickmakers Limited  
And

Order  
19th March 1971

Weng Lok Mining Co. Ltd. ... Defendants

BEFORE THE HONOURABLE MR. JUSTICE RAJA AZLAN SHAH

THIS 19th DAY OF FEBRUARY 1971      IN OPEN COURT

O R D E R

10      THIS SUIT coming up for hearing on the 14th, 15th, 16th days of April, 1969, 22nd, 23rd and 24th days of April, 1969 and on the 21st, 22nd and 23rd days of July, 1969 in the presence of Mrs. Santha B. Menon of Counsel for the Plaintiffs and Mr. S.D.K. Peddie of Counsel for the Defendants AND UPON READING the Pleadings herein AND UPON HEARING the evidence and arguments of Counsel aforesaid IT WAS ORDERED that this suit do stand adjourned for Judgment and the said Suit coming

20      on for Judgment this day in the presence of Mrs. Santha B. Menon of Counsel for the Plaintiffs and Mr. S.D.K. Peddie of Counsel for the Defendants IT IS ORDERED that the Defendants do pay to the Plaintiffs a sum of Dollars Three thousand (\$3,000/-) being general damages AND IT IS FURTHER ORDERED that the costs of this suit be taxed by the proper officer of this Court and be paid by the Defendants to the Plaintiffs.

30      Given under my hand and the Seal of the Court this 9th day of February 1971.

Sgd: Abu Bakar bin Awang  
SENIOR ASSISTANT REGISTRAR  
HIGH COURT  
KUALA LUMPUR.

In the Federal  
Court

No.30

Memorandum of  
Appeal  
20th May 1971

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT  
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellants

And

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Respondents

(In the matter of Civil Suit No. 1264  
of 1965 in the High Court in Malaya at  
Kuala Lumpur

10

Between

Hiap Lee (Cheong Leong &  
Sons) Brickmakers Ltd. ... Plaintiffs

And

Weng Lok Mining Co. Ltd. ... Defendants)

MEMORANDUM OF APPEAL

Weng Lok Mining Co. Ltd., the Appellants  
abovenamed appeal to the Federal Court against the  
whole of the decision of the Honourable Mr. Justice  
Raja Azlan Shah given at Kuala Lumpur on the 19th  
day of March 1971 on the following grounds:-

20

1. The learned trial Judge was wrong in holding  
that the fundamental issue was what caused the  
escape of water onto the Plaintiffs' land thereby  
damaging their brickwork premises. The funda-  
mental issues were first whether there had been  
any escape of water during the course of the  
Defendants mining operations or whether there had  
been water on the Plaintiffs' land before the  
Defendants commenced mining and second whether  
the water on the Plaintiffs' land had caused any  
damage to the Plaintiffs.

30

2. In rejecting the Defendants' contention that  
any escape of water was negligible and did not

cause damage to the Plaintiffs the learned trial Judge failed to take into account the fact (which he himself found) that there was no evidence whatsoever of damage suffered by the Plaintiffs and that the lack of such evidence corroborated and supported the Defendants' contention. The grounds advanced by the learned trial Judge as the reason for rejecting the Defendants' contention offer no reason for rejecting it.

In the Federal  
Court

—  
No.30

Memorandum  
of Appeal  
20th May 1971  
(continued)

10. 3. The learned trial Judge in stating that DW8 had admitted receiving a complaint in March relating to seepage of water failed to consider the whole of the evidence given by the said witness relating to the complaint. The evidence read as a whole established that the Plaintiffs made no complaint prior to the 28th May 1965.
- 20 4. The learned trial Judge's opinion that, since the left bund was half completed and there was a complaint of an escape of water earlier, the Defendants ought to have realised the likelihood of water further escaping fails to take into account the fact that work was begun on the construction of the left bund before any complaint of escape had been made and that the work was begun because it had been realised that there was and had for some time been an encroachment by the Defendants into the Plaintiffs land so that the left bund was necessary to put an end to the encroachment. The only method whereby the encroachment could be
- 30 5. In holding that the Defendants had not taken adequate provision to safeguard further escape of water onto the Plaintiffs' land when they knew that there was already an escape and by having a half completed bund the Defendant ought to have realised that there was a greater risk of flooding due to rain the learned trial Judge

(a) failed to bear in mind that the escape of water had occurred before construction of the left bund was begun.

(b) failed to bear in mind that the escape

In the Federal  
Court

No. 30  
Memorandum of  
Appeal  
20th May 1971  
(continued)

had been caused by mutual mistake as to the correct boundaries.

(c) that the mistake as to boundaries had been caused by the activities of the persons mining the Defendants' land before the Defendants did so.

(d) that the construction of the left bund was the only method open to the Defendants to put an end to an encroachment which had not originally been caused by them and which they had only just discovered. 10

(e) that the evidence showed that the bund was not left half completed but had only reached the stage of half completion when the Plaintiffs' complaint was received and was subsequently fully completed as soon as it was possible to complete it.

6. In holding there was sufficient evidence to show the Defendants had been negligent to exercise the duty of care towards the Plaintiffs the learned trial Judge misdirected himself as to the true facts of the case. 20

7. In holding that the fault lay with the Defendants in not completing the left bund when they knew 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 the learned trial Judge

(a) failed to appreciate the true reason for the construction of the left bund. 30

(b) failed to appreciate that there was no evidence to show that the left bund was left half completed as opposed to having reached a stage of half completion at the date of the Plaintiffs' complaint.

(c) failed to appreciate that the completion or non-completion of the left bund was not the cause of the escape of water which had been caused by the activities of a previous miner. 40

(d) failed to appreciate that all evidence

directed to the reason for construction of the left bund established that its construction instead of being evidence of negligence was evidence of efforts by the Defendants to put an end to an encroachment of which they had become aware and that in consequence his grounds for holding the Defendants negligent were untenable.

In the Federal  
Court

—  
No.30

Memorandum of  
Appeal  
20th May 1971  
(continued)

10 8. In holding the left bund a non-natural user when made to hold water when still half completed the learned trial Judge failed to appreciate

(a) that the left bund was not intended to hold water before it was fully-completed and could not do so.

(b) that the left bund was in process of construction across an already existing pool of water and could not eradicate the offending part of the pool before it was completed.

20

(c) that there was not at the time of the complaint a user of the left bund because it was not yet ready for use.

9. In holding there was overwhelming evidence to show that there was an escape of water causing damage to the Plaintiffs' land the learned trial Judge

(a) failed to direct his mind to distinguishing between whether there was evidence to prove a new escape arising out of the Defendants' activities or whether the evidence merely established the presence on the Plaintiffs' land for a considerable period of time of water originally brought thereon by a previous miner.

30

(b) failed to appreciate that the evidence given by PW2 as to the encroachment showed that it lay between the two bunds but did not establish it had at any time proceeded beyond the right hand bund.

40

(c) failed to appreciate that the evidence afforded by the photographs was of no

In the Federal  
Court

—  
No.30

Memorandum of  
Appeal  
20th May 1971  
(continued)

value since they did not show the water in the photographs had originated from the mine and had not been caused by rainfall or by other means and the same photographs afforded evidence that there had not been flooding as alleged by the Plaintiffs.

(d) failed to take into account the evidence given by witnesses that it was impossible that flooding of the magnitude described by the Plaintiffs could have occurred. 10

(e) failed to appreciate that his own findings that there was no evidence as to damage were completely inconsistent with this finding.

10. In holding that the Defendants plea that any escape was negligible to cause the damage alleged by the Plaintiffs was without substance the learned trial Judge failed to appreciate that his own findings that there was no evidence of damage fully upheld the Defendants' contention and proved it to be sound. 20

11. The evidence relied upon by the learned trial Judge to prove an escape of water in a big volume was most probable and in fact did happen was all evidence led by the Defendants and if read in its entirety does not support the finding of the learned trial Judge but in fact supports the defence contention that the escape of water alleged by the Plaintiffs did not occur and could not have occurred. 30

12. The learned trial Judge's repeated statement that the left bund was left half completed is not supported by any evidence. The learned trial Judge's failure to understand the true impact of the evidence relating to the construction of the left bund led him to wrong findings of fact.

13. In holding the partial construction of the left bund proved that the danger of water escaping and flooding the Plaintiffs' land was evident to the Defendants by the end of April the learned trial Judge failed to appreciate the real reason for which the left bund was being constructed namely the prevention of further encroachment. 40



14. By reason of his erroneous interpretation and construction of the facts the learned trial Judge erred in holding the Plaintiffs had made out a case under the rule in Rylands v. Fletcher. The learned trial Judge further failed to take into account the fact the escape was caused by the acts of the previous miner and that there was no evidence prior to May 1965 to show the Plaintiffs objected to the presence of the water.

In the Federal  
Court

—  
No. 30

Memorandum of  
Appeal  
20th May 1971  
(continued)

10. 15. The learned trial Judge's statement that the Defendants admitted that they already had water on the Plaintiffs' land when they came there is not borne out by the evidence and is a patent impossibility since it involves a finding that the Defendants had placed water upon the Plaintiffs' land even before they had entered upon their own land. The admission made by the Defendants was that there was already water on the Plaintiffs' land when the Defendants began mining that water  
20 having been placed or brought upon the Plaintiffs' land by a previous miner.

16. In relying upon the passage from Sedleigh Denfield v. O'Callaghan the learned trial Judge failed to appreciate that what the Defendants made use of was an existing mining hole filled with water so as to form a pool and not any erection, building, bank or artificial contrivance. The Defendants did not, therefore, make use of anything which constituted a nuisance and were  
30 not, therefore, within the principle relied on by the learned trial Judge. The learned trial Judge further failed to consider the fact that, if the pool of water was a nuisance the Defendants did not continue its user but upon discovery took reasonable means to bring it to an end.

17. The learned trial Judge in holding the right bund a nuisance and its user to have been adopted

40 (a) failed to consider that at no time did the Plaintiffs complain of the right bund as being a nuisance nor did they claim its presence as giving them any cause of action.

(b) failed to appreciate that upon discovery the Defendants did not continue user of the right bund but took reasonable steps to bring the user to an end.

In the Federal  
Court

—  
No. 30

Memorandum of  
Appeal  
20th May 1971  
(continued)

18. In holding the reservoir of water contained by the half completed bund was an offending condition which would threaten to be a nuisance if the water escaped the learned trial Judge failed to appreciate that the left bund had nothing to do with the escape or non-escape of water. The water had escaped and been upon the Plaintiffs' land long before the construction of the left bund. At the time of the complaint the left bund did not contain or purport to contain any reservoir of water.

10

19. In holding that the law presumes general damages and awarding ₹3,000/- general damages to the Plaintiffs the learned trial Judge:-

(a) failed to appreciate the true nature and extent of the legal presumption referred to and the restrictions and qualifications on it.

(b) failed to appreciate that the claim was one of a tort in relation to land and that the principles applicable to the damages to be awarded on such actions are long established and consist in awarding the diminution of the value of the land.

20

(c) failed to appreciate that there was no evidence of any diminution in the value of the land.

(d) failed to appreciate that there was no evidence whatsoever that the Plaintiffs had suffered any damage whatsoever.

30

(e) failed to take into account the fact the sole complaint made by the Plaintiffs related to the presence of water on their land and that there was no evidence to show that the said water could not and had not dried up leaving no residual damage.

(f) failed to take into account the fact the Plaintiffs had produced no evidence to show they had suffered any loss by reason of inability to use the land and that there was evidence to show the Plaintiffs

40

were still not using the land when the action was heard.

In the Federal Court

—  
No.30

Memorandum of Appeal  
20th May 1971  
(continued)

20. In awarding the Plaintiffs the costs of the action the learned trial Judge failed to take into account the fact that the greater part of the hearing was occupied in refuting claims for damages made by the Plaintiffs and that he had found in favour of the Defendants in relation to all those claims.

10 21 . The learned trial Judge failed to consider the fact that the evidence taken as a whole showed that the Plaintiffs on becoming aware of the fact that there had been an encroachment upon their land, sought by means of the action to extort monies from the Defendants and thereby obliged the Defendants to defend the action. The evidence showed that there was no escape of the magnitude relied upon by the Plaintiffs and that there was no damage as alleged by the Plaintiffs. The claim was throughout fictitious and the award of general damages and costs penalises the Defendants for having successfully defended themselves against a fictitious claim.

20

Dated this 20th day of May, 1971.

Sgd. Skrine & Co.-----  
Appellants' Solicitors.

30 This Memorandum of Appeal is filed by Messrs. Skrine & Co., whose address for service is at Straits Trading Building, No. 4 Leboh Pasar Besar, Kuala Lumpur, Solicitors for the Appellants abovenamed.

In the Federal Court

No. 31

Notes of Argument of Azmi, L.P.

No. 31

Notes of Argument of Azmi, L.P. 16th August 1971

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellants

And

Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd. ... Respondents

10

(In the matter of Civil Suit No. 1264 of 1965 in the High Court of Malaya at Kuala Lumpur

Between

Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd. ... Plaintiffs

And

Weng Lok Mining Co. Ltd. ... Defendants)

Coram: Azmi, Lord President Suffian, Federal Judge, Ali, Federal Judge.

20

Kuala Lumpur 16th August, 1971.

Peddie for Appellants

Mrs. Menon for Respondent.

Notes of Argument recorded by Azmi, L.P.

Peddie: Both Counsel have filed written submissions. I am amplifying facts as found by trial Judge. Having come to know appellant started to build the left bund.

30

Judge made wrong approach to "left bund".  
Left bund not completed when flood started.  
Judge totally misunderstood the position  
that the bund was started and not completed.

In the Federal  
Court

—  
No.31

He was wrong in concluding - he misinter-  
preted the position.

Notes of  
Argument of  
Azmi, L.P.  
16th August  
1971  
(continued)

I suggest that Court should consider on basis  
there was no left bund. It was unintentional  
trespass and remedial action was taken by the  
appellant.

10

We concede that water from our land went into  
respondent's land but we do not concede that  
damage was caused by the water.

Page 26 - put to Respondent straightaway that  
there was no bund and we were not aware of  
the true boundary.

Eventually P.W.6 was left to make admission to  
that effect - page 46.

20

Everybody was in error as to the true boundary.  
Judge's finding based on pleadings but I submit  
he was wrong based on "left bund."

Question of negligence

Judgment - page 159.

Page 88 - Bottom.

Sd. Azmi

Adjourned to 19.8.71  
9.30 a.m.

19.8.71

19th August  
1971

30

Counsel as before.

Peddie: (In answer to Ali F.J.)

Basis of claim on not completing the bund.  
There is no such thing as flooding of 3 feet.  
If so, we have to say it came from land.

Sd. Azmi.

In the Federal Court

No.31

Notes of Argument by Azmi, L.P. 19th August 1971 (continued)

Mrs. Menon: They disputed that left bund was built to stop encroachment. Sd. Azmi.

Peddie continues:

Judge found it was highly probable that there has been an escape. Sd. Azmi.

Mrs. Menon: } Judge held there was escape of water. Sd. Azmi.

Peddie: I shall refer to judgment on which no dispute. Page 170D- "In my opinion these go to prove that an escape of water in a big volume was most probable and in fact did happen."

10

He based this finding on not accepting the evidence given by the defence.

Therefore faulty.

Facts: Dispute as to boundary - P. 160E Again page 166F- "All this time the defendants were innocently mistaken about the correct boundary."

Page 160E - Not disputed previous miner worked on land. 20

Repeated in 171B.

Judge found some previous miner crossed the boundary.

P.160F

P.166D- encroachment by previous miner.

171C - As such there was an invasion of the plaintiffs' interest by the previous miners ... "

Judge says we continued the nuisance.

30

P.160F .....

P.167B -building of right bund.

P.171E - Found we adopted the nuisance

P.166F - All this time the defendants were innocently mistaken about the correct boundary .."  
Again at page 160F.

160G - "In order to stop further escape of water, the defendants constructed the left bund".

Evidence of Assistant Mining Officer -  
He knew in April words "in order to stop further escape."

In the Federal  
Court

—  
No.31

Notes of  
Argument by  
Azmi, L.P.  
19th August  
1971  
(continued)

10

166E - "In order to stop further escape of water, and to retain the water ... due to tailings falling into the reservoir."

We accept it - note bund built for a dual purpose.

See page 392 - Defendants' land lot 4661.

Plaintiffs' - to right of W.H. (Water Hole).

Area - Flow of water.

See page 182 - showing the bunds.

20

Plaintiffs' water - Lot 3582.

To go back to Judge's finding -

Page 167B - "When the defendants discovered that they had encroached on the plaintiffs' land ..."  
This was in April.

Page 168A - Defendants built left bund for dual purposes.

Judge's finding page 163E - Curtis.

30

Page 84 - B - only reference to 8" or 10" - purpose to discharge.

P.W.8 - page 112F - actually said of the actual pipe.

No evidence of flood previous night.

In the Federal  
Court

No.31

Notes of  
Argument by  
Azmi, L.P.  
19th August  
1971  
(continued)

It was said by Plaintiffs by 8.30 a.m. there was already 3 feet of water.

According to evidence at page 113 - it would take 3 days to fill up the water.

I submit Judge was wrong in stating at page 163E that Curtis' evidence was to effect that the pipe is capable of discharging 2,000 gallons .....

Another finding made by Judge - important to us is that Defendant used the circulating system if mine is short of water. (See page 161C and 168B). In re-circulating system - it cannot overflow unless there is a fast supply of water. 10

The only way it can overflow is to get fresh water. We called evidence of the mining department to show that there was no additional influx of water.

See page 319 - shows water.

321 - These are water holes.

20

323

Plaintiffs ask Court to accept that the water has raised - p. 323

This is plaintiffs' key photo.

Photograph B. 333 - land slopes down photo and away from background which is plaintiffs' land.

Exh D 24 - p.319 = The pipe mentioned in evidence is the one seen on left of photo.

No rain to add water to raise it 3 feet over plaintiffs' land.

30

Refer 338 : to maintain 3 feet for 24 hours on plaintiffs' land means 27 feet on Sg. Batu. Therefore land slopes all way towards Sg.Batu.

Building to right on page 338 belongs to another person, -  
No complaint from that person.



Mining department has received no complaint -

Not the police.

No photographs shown.

Flood alleged in March - photo in May.

We accept area 6.6 acres.

P.W.2 and P.W.3.

Page 245 Vol II - Note "Bund" area to right - high

Page 182

Page 320 (Photo)

10 Log (X) is on higher level and yet the buildings next to the piece of log were flooded.

Counsel admits this higher ground.

P. 9 of Respondents' submission.

See page 326

Plaintiffs' case clay was carried away.

Judge found special damages not proved.

See pages 173 - 174 Vol. I.

Judge should have considered from that finding if the whole action was fictitious.

20 We admit we committed unintentional trespass.

(Left bund left - in March or April).

Page 161B

D.W.5 - 88 - 89 bottom - G - H

89E

Alleged incident of flooding - date never established - judge said so.

Plaintiffs' solicitors saying in May water flooded. Then in March as to date of flood.

April.

Sd. Azmi

In the Federal Court

\_\_\_\_\_  
No.31

Notes of  
Argument by  
Azmi, L.P.  
19th August  
1971  
(continued)

In the Federal  
Court

—  
No. 31

Notes of  
Argument by  
Azmi, L.P.  
19th August  
1971  
(continued)

Short adjournment. Sd. Azmi.

Peddie: Other grounds which Plaintiff could have had. I would just ask this Court will note that new course of action taken now.

Esso's case.

e.g. page 11 of Respondent's written submissions. So that we would have had new defence and evidence.

Present basis - failure to complete bund.

Judge's finding on negligence.

10

164 from B - F failure in not completing bund - method of constructing not criticised nor the time taken.

My submission that finding cannot stand.

168D

169D

170D

If appropriate time for erection of left bund.

Also wrong on law on Rylands v. Fletcher.

See my written submission on law page 5.

Rickards v. Lothian - 1913 A.C. 263.

20

Nuisance

Page 171C - He said we are liable because we continued nuisance.

171E "adopted" the nuisance.

171F

Submit Judge was wrong because he omitted to consider that we took steps to remedy the situation.

See page 5 of submission on law in  
Sedleigh Denfield v. O'Callaghan - 1940 A.C. 880 30  
Smith & Ors. v. Great Western Railway Company -  
42 T.L.R. 391.

Therefore Judge was wrong in law.

On the facts Judge was wrong on the law.

Assuming I was wrong on law this Court should set aside the damages.

Page 16 of Respondents' submission -

Judge's judgment on damages.

Page 172B - See my submission on law page 1.

Ashby v. White is on defamation.

Proof of damage is essential.

10

On defamation damages is presumed.

On other tort - you must prove some loss suffered.

If he failed, he would get only nominal damages.

Plaintiff failed to prove any damages.

Costs \$7,000/-.

So plaintiffs got \$7,000/- in a case they have lost.

20

If I were right - order as to costs was wrong. We should have the costs. We have been blackmailed.

At the time they came to Court, the left bund was already finished.

They came to Court in September 1965 and we have finished the bund in June.

Page 1 of the Respondents' submission - ingenious attempt to support order of costs.

I ask the Court should allow this appeal with costs.

30

Sd. Azmi

In the Federal  
Court

—  
No. 31

Notes of  
Argument by  
Azmi, L.P.  
19th August  
1971  
(continued)

In the Federal Court

No.31

Notes of Argument by Azmi, L.P. 19th August 1971 (continued)

Mrs. Menon: Peddie concedes there was further escape until left bund completed.

If that is so 1st ground fails.

Therefore Judge was right in saying there was escape of water.

What was purpose of building left bund?

Bund started in 1965.

Lot 4658 - Page 182.

Sd. Azmi

12.50 p.m.

Adjourned to 2.30 p.m.

Sd. Azmi

10

2.30 p.m. Counsel as before.

Mrs. Menon: On question whether the bund was for safety or otherwise.

See page 28G bottom.

44G - 45A - F - incident leading to construction of left bund.

Page 95D

Page 245 VOL.2.

D.W.5 page 87

What is relevant at end of April?

20

- 1) Mining was going on.
- 2) Pipe was discharging water.
- 3)
- 4)

Page 75E - rainfall highest but not exceptionally high.

Page 316 - April rainfall 13.96".

Page 36 - P.W.2.

Page 113 -G.

P.W.5

Page 317 (D. 24)

Mining voucher.

Defendants should have realised danger of water and should therefore have stopped mining.

Page 167 - Judge found that mining operation stopped and this supports Plaintiffs' contention there was flood which stopped mining operations.

In the Federal Court

No.31

Notes of Argument of Azmi, L.P. 19th August 1971 (continued)

10

Damages.

Neville vs. London "Express" Newspaper Ltd. - 1919 A.C. 368, 392.

Winfield on Tort (8th Edition).

P. 699.

General damages could be based on inconvenience, loss of revenue.

I have set out in my written submission

I have set the authority in support of grounds and assessment of damage.

20

Costs:

Even if this Court should have held the view that we are entitled to nominal damages we should still have the costs. Sd. Azmi.

Peddie: I wish only to refer to Mayne on Damages (12th Edition) para. 10 (2nd para.)

"Torts actionable per se and torts actionable only on proof of damage ....."

C.A.V.

Sd. Azmi.

30

Messrs. Skrine & Co. for Appellants.  
Messrs. Shearn Delamore & Co. for Respondents.

In the Federal Court

No. 32

Notes of Argument of Suffian F.J.

No.32

Notes of Argument of Suffian F.J. 16th August 1971

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

(Kuala Lumpur High Court Civil Suit No. 1264/65)

Between

Weng Lok Mining Co. Ltd. ... Appellant/Defendant

And

10

Hiap Lee (Cheong Leong & Sons Brickmakers Ltd. ... Respondent/Plaintiff

Coram: Azmi L.P., Suffian & Ali, F.JJ.

NOTES OF SUFFIAN, F.J.

Monday 16th August, 1971

Peddie for appellant.

Mrs. Menon for respondent.

Peddie addresses:

Left bund irrelevant from point of view of liability. Failure to complete irrelevant.

20

Defendant took remedial action as soon as encroachment discovered.

Concede that water came from our land to plaintiff's.

Everybody was mistaken as to boundary.

Water there all the time - unwitting trespass - did not cause any damage.

Bund did not break.

Plaintiff did not in evidence make out case set out in pleadings.

30

Water there all the time - existing state of affairs - no sudden escape of water - and no damage caused to plaintiff.

April - June: left bund begun in April and completed in June.

At most plaintiff should get only nominal damages.

We flooded only vacant land. We did not flood buildings.

10 Adjourned to Thursday a.m.

Thursday, 19th August, 1971, in K.L.

Coram: Azmi L.P., Suffian & Ali, F.JJ.

Continued from 16.8.71.

Counsel as before.

Peddie continues address:

Flood in fact never happened.

Plaintiff says there was a sudden happening.  
Defendant says no flooding at all.

20 Defendant concede there was water on plaintiff's land.

Plaintiff says bursting caused by half completed bund - defendant says left bund has nothing to do with it.

Plaintiff's case is based on his pleadings and defendant met that case. If plaintiff had case on other grounds, he should have so pleaded and defendant would have met his case.

Defendant admits there was water on plaintiff's land.

30 Defendant built left bund to contain water and to prevent water going to plaintiff's land. (Mrs. Menon says - defendant did not admit bund built to contain water, but built to stop encroachment).

In the Federal Court

—  
No.32

Notes of  
Argument of  
Suffian F.J.  
16th August  
1971  
(continued)

19th August  
1971

In the Federal Court

No.32

Notes of Argument of Suffian F.J. 19th August 1971 (continued)

Judge found highly probable there was an escape. (Mrs. Menon refers to P.167G, 169F).

No finding by judge as to depth of water.

Judgment p.170D.

Judge did not say he accepted plaintiff's evidence - all he said he disbelieved defendant's.

160E.

Judge made following uncontested facts -

- 1. Uncertainty about boundary;
- 2. Defendant innocent; 10
- 3. Previous miner before defendant, p.171B.
- 4. Previous miner had crossed boundary, p.160F-166D-171C;
- 5. Previous miner had constructed right bund, P.160F-167B, 171E.
- 6. Defendant thought right bund was the boundary, 166F.
- 7. Area under water was thought by defendant to be part of the mining lease - 160F.
- 8. 160G, 166E, 167B - left bund constructed 20 by defendant to stop water, 168A - defendant's evidence.

Curtis's evidence p. 84 about pipe size and judge's finding p. 163E - our pipe is only 8", not 9" or 10".

Our evidence, DW8's, p. 122C to 113 - our pipe is 8" and is worked 18 hours a day. Evidence of volume was not challenged.

Previous evening no flood. In morning mine started work at 6 a.m. and yet plaintiff says at 8.30 a.m. there was 3 ft. of water on his land. It would have taken 3 days to produce that quantity of water. So Curtis's evidence is wrong. 30



Judge has not studied the whole of the evidence,

P. 161C.

P. 168B.

Circulating system - car radiator - fountain - same water used throughout - cannot overflow unless more water added. So defendant calls meteorological witness - to show quantity of rain not sufficient to cause overflow. And no other evidence of additional source of water.

10

Judge found we used circulating system because of shortage of water.

P. 319, P.321, P.323 show water holes - not vast reservoirs.

P. 323 shows area which plaintiff says was flooded under 3 ft.

333

319 pipe there was used to construct left bund - plaintiff says it produced water to flood his land up to 3 ft. Water discharged by pipe was used in circulating system - same water throughout.

20

P. 338 If 3 ft. of water on plaintiff's land for 24 hours, there would have been 27 ft. of water in Sg. Batu to the east. Neighbour's land would also have been flooded - and there was no complaint from him.

Defendant received no complaint until solicitor's letter in May.

Plaintiff surveyed in June.

30

Flood supposed to have been in April.

Photos taken in mid-May.

Damage not quantified by plaintiff until October following year. Then they amended. Whole of it failed.

Defendant concedes encroachment.

In the Federal Court

—  
No.32

Notes of  
Argument of  
Suffian F.J.  
19th August  
1971  
(continued)

In the Federal  
Court

—  
No.32

Notes of  
Argument of  
Suffian F.J.  
19th August  
1971  
(continued)

Surveyor PW2 & 3. P.245.

P.182.

P.320 - loose planks are on lower level than rubber logs. Planks not washed away because of higher ground - plaintiff's counsel admitted it, p. 9 of her written submission.

Defendant says if 3 ft. of water on plaintiff's land, planks (p.326) would have been washed away and yet they were not.

Plaintiff says - 3 ft. of their clay was all of it washed away - so there was a current. And yet planks and logs not washed away. 10

Dump A a figment of the imagination - required 1,500 lorries - witness says no dump A - and no 1,500 lorries. Judge considered it and threw out plaintiff's claim as it was not proved. P.173.

Judge chucked out plaintiff's claim for damages - he should have considered whether or not his whole claim was false. 20

No reliable evidence to show there was 3 ft. of water.

Never flood since. Because area sealed off by left bund completed in June. Started, judge found, 161B, in March or April. DW5, p. 88-9, said bund started on 2 April and finished in June.

Date of flood not definite - end of March or early April. Solicitors' letter 28th May says our land is now flooded.

Defendant was told of trespass - he tried to correct it by building left bund - he speeded up work, p. 86. 30

Plaintiff says defendant had a reservoir which burst - defendant says no. Defendant need only deal with the case as brought against it.

(Brief adjournment)

Peddie continues:

Plaintiff must be held to his pleadings. If his pleadings had been different, our defence would have been different.

1956 A.C.218, H.L. case.

Study reasons for judge's finding:

10 (1) Defendant negligent (p.164) - because defendant had not completed left bund. As I have submitted, left bund irrelevant - we had to build it, we built it, method and time of construction never criticized.

(2) Rylands v. Fletcher - p.168D, 169D, 170D - left bund blamed for flooding - again cannot stand. Wrong in fact; wrong in law also (p.5 my written submission). Rylands v. Fletcher does not apply if damage caused by 3rd party. Mutual error re boundary - previous miner put bund on wrong boundary and he was at fault.

20 (3) Nuisance, p.171C - judge does not say defendant created but only continued the nuisance. 171E- defendant adopted the nuisance. 171F- but the half completed bund did not contain anything - defendant aware of wrong boundary and took step to rectify it. P.5 of my written submission on law. Passage relied on by judge, P. 171D is in defendant's favour; defendant did not know of nuisance.

Damages

30 Court should allow defendant's application against damages.

Judge presumed damages - cannot be done in this case. Ratcliffe v. Evans (1892) 2 Q.B. 524 was defamation case and not applicable here.

P. 16 of Mrs. Menon's written submission.

See my written submission, first page.

Judge awarded \$3,000 general damages (having dismissed claim for special damages) - costs have been taxed at \$7,000 - so plaintiff got \$10,000 for a claim he had lost.

In the Federal  
Court

—  
No.32

Notes of  
Argument of  
Suffian F.J.  
19th August  
1971  
(continued)

In the Federal  
Court

—  
No.32

Notes of  
Argument of  
Suffian F.J.  
19th August  
1971  
(continued)

Plaintiff entitled only to nominal damages.

If defendant had to pay only nominal damages, he should then get the whole of the costs. Defendant entitled to defend this fraudulent claim.

Mayne & MacGregor on Damages, 12th edition, para.206 - see my written submission on the law, p. 2.

Defendant finished bund in June - plaintiff issued writ in October - and whole of his claim was disallowed - he should be ordered to pay costs. 10

Mrs. Menon for respondent addresses:

Peddie concedes there was water on plaintiff's land - so ground of appeal No. 1 fails - and judge right to say issue was what caused flooding.

Defendant denied bund was uncompleted.

Defendant denied escape of water which later he admitted in court.

There were no admissions of fact at trial to narrow issues. 20

Defendant never said there was already water on plaintiff's land.

Plaintiff's pleadings did not mention 3 ft. of water - he was not concerned with volume.

Left bund completed in June when defendant did not know of encroachment.

So left bund was for safety, not to stop encroachment which was not discovered until later.

Right bund not put up by previous owner - not so. 30

P. 245 - that bund mostly on Lot 4658, so could not have been put there by previous owner of defendant's land.

87F - they require the bund to retain the water.

Work on right bund necessary in March - then found in wrong place - so left bund started.

In the Federal Court

End April - mining continued.

No.32

P. 75D.

Notes of  
Argument of  
Suffian F.J.  
19th August  
1971  
(continued)

P. 316.

In May there was no sale of tin. Defendant could have stopped mining until the completion of the left bund.

10 They stopped mining in May when the flood occurred - late April, P. 167F.

Left bund was wholly responsible for the flooding.

We do not raise new claim - we go on as in particulars on p. 20.

Damages

1919 A.C. 368.

20 Defendant has trespassed, but plaintiff makes no claim on trespass. Plaintiff says defendant's water has escaped into our land - we claim on negligence and nuisance.

Law presumes damages.

Even if we cannot prove damages, we are entitled to nominal damages - but here we have proved some damages though we have not been able to quantify them.

Winfield on Torts, 8th edition, p.699.

Judge right to award \$3,000 because plaintiff had suffered damages but failed to quantify them.

1967 2 M.L.J. 9, 18.

30 Bingham's Cases on Negligence, 2nd edition, p.445.

Plaintiff had 3 kilns, 2 continued work, only one was out of commission - we tried to prove special damages but failed.

In the Federal Court

No.32

Notes of Argument of Suffian F.J. 19th August 1971 (continued)

Costs

We are entitled to costs - because of defendant's attitude - they should have admitted liability and left quantum to the courts.

Peddie replies:

Mayne on Damages, 12th edition, para.10(2).

C.A.V.

(Signed) M. Suffian.

Friday, 31st December, 1971, in K.L.

Coram: Suffian, Ali & H.S. Ong, F.JJ.

10

Federal Court Civil Appeal 34/71

Peddie for appellant.

V.T. Nathan for respondent.

Reserved Judgment of the Court delivered by Ali.

Order: Appeal allowed with costs here and below.  
Deposit to appellant.

(Signed) M. Suffian.

No.33

Appellants' Written Submission

No. 33

Appellants' Written Submission

20

The facts essential to this appeal and the evidence establishing these facts are as follows (references to pages are Volume I unless otherwise stated)

1. The plaintiffs were brick manufacturers carrying on business on EMR 4206 Lot 3582, EMR 4203 Lot 3581 and O.T. No. 12841 Lot 4657, Exhibits P1, P1A and P1B. Pages 227-232 Vol.2.

2. The defendants were miners occupying Mining Lease 4390 Lot 4661 which is adjacent to the plaintiffs' Lot 3582. Amended Statement of Claim page 14 Vol. I para. 2 defence page 17 2 para.
3. Before the defendants started work a previous miner had already worked their land. This is stated as a fact by the Judge Vol. I page 160 para. E and is supported by the evidence of FW1 Page 26 para. E page 26 para. G and 27A DW4 Page 84F and D27 DW5 Page 86F 87A 87D 91G DW7 Page 103E and by Exhibit D27 Vol. 2 Page 354.
4. As a result of the previous miner's activities there was, when the defendants started work, confusion as to the respective boundaries, the boundary stones being missing. The Judge so found Page 160E. It was also in evidence that this previous miner had encroached on the plaintiffs' land and had a reservoir there and had a mining hole there. This the Judge also accepted Page 166C - 167B, 168A. The relevant evidence is FW1 Page 30E FW2 Page 36E, 37C EXAB 39 Vol. II page 225 FW6 Page 48A, 48D-49A DW4 Page 84F and D27 Vol. II page 354 DW5 Page 87D, 88A, 89A, 90B, 91C, 91F, 92D DW6 93E-94F, 97C-E, 98E DW7 page 103E-G, 108C-D, 108G DW8 Page 110B-G, 110B-G, 116A-C.
5. This evidence also showed that the defendants subsequently became aware of the encroachment and started to build what was called in the proceedings the left bund i.e. the bund which followed the true boundary. The object was to stop the encroachment. It is said they also did it to retain water for their use and this is true but it was not a case of retaining new water but of confining existing water within its proper limits.
6. At the time this case starts you have now an old bund left by the previous miner which the defendants have heightened and you have partly completed the new bund to prevent encroachment.
7. In this state of affairs the defendants suddenly get a letter from the plaintiff's solicitors. This is Exhibit AB4 Vol. II page 183.

In the Federal  
Court

—  
No. 33

Appellants'  
Written  
Submission

(continued)

In the Federal  
Court

—  
No.33

Appellants'  
Written  
Submission

(continued)

Significant features are (a) it is dated 28th May 1965 (b) it refers to the land as "now flooded" (c) it says the extent of the damage is not yet worked out (d) it makes no reference to any breaches of bunds. This is followed by AB6 Vol.II page 185 and its features are (a) date is 9th August 1965 (b) damages are still not quantified (c) the area encroached is referred to as at 9th June 1965.

8. After these demands came the claims. Vol.I page 14-16. Features are (a) para. 5 which talks of the defendants retaining a reservoir by means of a half completed bund which is quite untrue as the defendants never tried to maintain the half completed (or left) bund could retain water at that time (b) para. 6 which says there was an escape at the beginning of March 1965 (c) para. 6 which says the reservoir burst and the water escaped (d) para. 6 alleges failure to complete the bund but it had, of course, only just been begun (e) particular of negligence (f) alleged breaking of the reservoir (g) para. 7 alleged escape of water (h) particulars of special damage were pleaded (i) the writ was dated 25th October 1965 by which time the damage should have been known (j) damages claimed were \$22,576. 10 20

At this stage the allegation is that the left bund is meant to retain water, is inadequate for the purpose and bursts so that water escapes. 30

9. The plaintiffs later amended their claim. Vol. I pages 19-21. The feature distinguishing the amended claim from the original are (a) para. 6 where the flood was now put at the end of April 1965 (b) particular No. 1 of the original claim's special damage went and was replaced by two new items (c) damages claimed were now \$19,713. 40

These facts Nos. 7, 8 and 9 showed (a) great confusion as to the date of the alleged flood (b) great confusion as to the damage suffered (c) unanimity as to the cause of the damage i.e. failure to complete the left bund with consequent breakage and escape of water. The first two seem



to show something seriously wrong with the action and the grounds of complaint giving rise to a suspicion the claim is not genuine.

In the Federal  
Court

—  
No.33

Appellants'  
Written  
Submission

(continued)

10 When it comes to the evidence we have first  
PW1 who says there was an escape of water Page 24A  
and and escape from the uncompleted bund Page 24D  
and says also there was a pipe discharge Page 24E.  
He puts the incident in April 1965 Page 26C and  
says he made no reports Page 27B. He then says  
the flood was due to water rushing out of the  
pipes (Page 28D) (but remember his pleadings).  
He then elaborated on the escape Page 33 A-C  
when asked to explain his pleadings. In re-  
examination he repeated the escape of water  
Page 25F. Next we have the photographer PW5 and  
he works in the middle of May Page 41C which  
tallies with the demand letter but not PW1.  
PW6 said the pipe was discharging water Page 46A  
said he made no report Page 54E said the flood  
20 was in mid-April, Page 55A PW8 says the flood  
was at the end of April Page 63B and says water  
was escaping Page 63D.

30 The case was now in the position that on  
dates varying between mid-April and mid-May  
there had been a flood and that it was caused by  
an escape of water or by pipes discharging water  
onto the plaintiffs' land. The discrepancies  
earlier noted were now being multiplied causing  
further suspicion as to the bona fides of the  
claim and these suspicions were reinforced by the  
complete failure to report the disaster to anyone.  
One point on which the plaintiffs' witnesses  
agreed was the depth of the flood. PW1 said  
3 feet Page 28C PW5 referred to photographs for  
water marks Page 41D PW6 said 2-3 feet Page 46  
paras. A and B PW8 said 2-3 feet Page 63C. This  
evidence can be shown to be false. Take first  
the photographs which are the Ex 24 series.

40 Photo A is meant to show water beside the kiln  
but remember (a) it was taken in mid-May, i.e. at  
least two and possibly four weeks after the flood  
(b) there are holes showing in the roof and a  
large gap below the roof on the right through  
which rain can enter (c) neither the pipe in the  
foreground nor the pieces of wood nor the walls of  
the kiln show any water mark or mud.

In the Federal  
Court

—  
No. 33

Appellants'  
Written  
Submission

(continued)

Photo B is meant to show damaged bricks but neither the wood in the foreground nor the supporting poles for the shed show any water mark nor do the bushes on the right show any of the debris you would expect after a flood.

Photo C shows the area between the two bunds. Here note the loose timber which has not been washed away (although 3 feet of clay is said to have gone) and shows no water marks. Again the bushes show no flood debris. The water covers the encroachment area where we concede encroachment. 10

Photo D again shows the area between the bunds where we admit encroaching. Again the reeds in the foreground and the sides of the two bunds give no indication of a flood.

Photo E is taken facing towards the two bunds and again shows no flood damage or debris whatsoever on the vegetation.

Photo F is from the same angle as E but closer to the bunds and again shows no flood damage or debris. 20

Photo G is of the area where we admit encroaching. Again the sand in the foreground shows no flood debris nor does the vegetation.

Photo H is of the encroached area. It is important because the flood damage is alleged to have occurred to the right of the right bund. There are one or two small pools of water but only such as one would expect to occur naturally on ground of this nature. The land on the right in this photograph does not belong to the Plaintiffs but to another person who made no complaint whatsoever of flooding but who must inevitably have been affected if the plaintiffs' land had been flooded as they alleged. The buildings said to have been flooded are in the centre and the high ground between the encroached area and these buildings are clearly visible. 30

Photo I again shows the area we admit encroaching on and again shows the high ground between the pool and the building. There is no evidence of flood damage or debris. 40

Photo J is said to show residual flood waters beside the kiln but (a) there are storm clouds showing and the quantity of water taken with the nature of the land is quite consistent with rain (b) none of the wood visible shows any water or mud marks whatsoever (c) the supporting post on the left shows no water mark.

In the Federal  
Court

—  
No.33

Appellants'  
Written  
Submission

10 Photo K is meant to be of damaged bricks but (a) some damaged bricks are obviously inevitable during manufacture (b) the bricks show no flood debris (c) the post on the extreme right shows no water mark and the posts on the left show none (d) the trench on the left contains no water.

(continued)

Photo L is meant to show mud from the flood on the floor of the brick shed. Here note the extreme cleanliness of the shoe on the left. Note also the lack of any water mark and remember mud would be inevitable in and around a brick manufactory.

20 The Judge referred to three of these photographs namely C, G and F (Page 170A) as showing there was still water on the plaintiffs' land but it must be remembered this was in the area where the defendants admitted encroachment and were building the second bund to prevent it.

30 There was, therefore, no evidence to support the bare statements that the flood was 2-3 feet deep. There was no complaint to any responsible public authority or the police. There were no photographs taken at the time. The photographs produced did not support the contention. No evidence was forthcoming to show damage suffered which the Court could accept. This again is cause for suspicion which becomes certainty when other evidence (and independent evidence) is examined. PW2 said the flooding was on the left hand side of the second bund Page 36G which is the area where we admit encroachment. The buildings the plaintiffs said were damaged were to the right of  
40 the bund and not the left. The same witness Page 37B, C and E spoke of the encroached area as being low lying and as being limited by the right bund. PW3 said Page 38C that the muddy area was on Page 4 of P10 which is now Vol.II page 245. This diagram shows the flooded area surveyed came nowhere near the buildings and the

In the Federal  
Court

No.33

Appellants'  
written  
Submission

(continued)

claim has always been that the survey by PW2 and PW3 delineated the area encroached. DW1 page 75 negated the possibility of exceptional rain causing a flood or contributing to a flood and produced the rainfall figures Vol.II page 316 Figures for the beginning of March (the first flood date alleged) show practically no rain and figures for the end of April (the date now put forward) show no exceptional rain. The Judge referred to the evidence of this witness Page 163F but left out that part of his evidence that said the rainfall was not exceptionally high Page 75E. DW3 then gave evidence to show the ground levels in the relevant area which showed a sloping of the land towards the East i.e. from the defendants' land downwards over the plaintiffs' land Page 77A to 78A so that if the plaintiffs' story were true that they had 2-3 feet of water on their land, which they said was the level of water Page 51A flowing slowly towards the kiln Page 51B and receded the next day Page 51B the result would have been 23 feet of water at Sungei Batu which is the river off the Ipoh Road on the Segambut Road i.e. there would have been extensive flooding over a wide area to maintain this water on the plaintiffs' land. There was no evidence of flooding affecting anybody but the plaintiffs. DW4 inspected this mine in January 1965 Page 80F and found things in order with nothing to indicate danger of a possible escape of water Page 81B. He was referred to the pipe alleged to have caused the damage and showed that the purpose of this pipe was construction of the left bund Page 82A and stated he did not think that the pipe could have produced the alleged flood waters Page 82C Under cross-examination he stated that if anything had been wrong, it would have been recorded Page 83D DW5 said the mining scheme had been approved Page 86A that the mine was found in order in January 1965 Page 88E that he went again on 2nd April 1965 and found it in order Page 88F (this visit possibly being the cause of the plaintiffs switching the date of the flood from March to April and being only four weeks before the flood at the most) that he went again on 19th April Page 89B and found the new bund under construction this bund being built because the encroachment had been discovered Page 89A and that there was then no danger of flooding Page 89G (this visit is at most about 10 days before the alleged flood and

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all is in order). He also explained what the pipe alleged to have caused the flood was being used for i.e. construction of the new bund Page 89C and D and that he could not see the pipe producing the alleged flood, Page 89F. He said that in his visits to the mine he had no cause for complaint Page 90E. He said again at page 91D-E that a new bund was being built in April to prevent an encroachment which the miner had discovered. He said Page 92F that he made sure water would not go to the adjoining land and in relation to the area encroached stated positively the buildings were not affected Page 92G DW6 gave the working hours of the mine Page 97B as 6 a.m. to 10 p.m. and this is important because it was said the flood was discovered early in the morning Page 45G at a time when the mine had only been working about 2 hours and this period of working is then important for determining whether the pipe could have caused the damage. DW7 said he was satisfied the water was kept within the boundaries Page 104D (there being of course a mistake as to the boundaries) explained the use of the pipe complained of Page 105A and that it could not have caused the flood Page 105B and C and also G.. Page 106A. He confirmed the evidence of DW3 as to the effect on other areas of having 3 feet of water on the plaintiffs' land. DW8 gave the figures to show it was impossible for the pipe to have the alleged effect Page 112C to 113C

In the Federal Court

—  
No.33

Appellants'  
Written  
Submission

(continued)

Here were witnesses saying there was nothing to indicate any possibility of flooding and that it was impossible that the flood could have been caused as alleged and also saying the extent of the flood was not as great as alleged being confined to the area of admitted encroachment. This was not all. This mine used a re-circulating system because it was short of water Page 81C and D Page 88B - D, 194G, 195A. Page 104C. If there had been a flood with escape of water and carriage of mud and sand the mine could not have gone on working Page 104B-G. Page 111A-B. Exhibit D 28. The Judge did not accept the evidence the mine never stopped because the statements for 4th to 19th May were not signed by Eastern Smelting and held that non-signature showed the mine had in fact stopped in the absence of other evidence from the defendants Page 167E-G.

In the Federal Court

No.33

Appellants' Written Submission

(continued)

He overlooked several things namely first that the vouchers Vol. II page 366, 367, 368 for Mine No. 1 and pages 381, 382, 383 and 384 are all on genuine Eastern Smelting letter head so that, unless it is suggested that that company was aiding in misleading the Court, the mere absence of signature does not go far especially when 366, 367, 381 and 384 are all marked as being copies; second that the voucher 368 is signed and finally and most important of all the corroborating evidence he wanted given by the plaintiffs themselves Page 54D What better corroboration could there be than the evidence of the plaintiffs.

10

It was in this state of things that the Court was asked to test whether the action was genuine or brought for extortion purposes taking advantage of the unknown encroachment. This was no mere afterthought by the defendants and was put forward by the cross-examination and when the defence was opened and before the defence witnesses were called Page 74C-75A and again in the closing submission for the defence Page 120F, 122B-G, 126A Page 132A-E, 133A-E. The Judge made no finding on this submission.

20

The defence contention is that there was an inadvertent trespass and that, upon discovery, steps were at once taken to rectify. We have already referred to the evidence showing a start was made on the left bund in April 1965 and there is evidence to show it was completed in June 1965 Page 89F.

30

Having reviewed the facts and shown the nature of the proceedings, it is necessary to see what the Judge did with the case and why the appellants say he went wrong.

The Judge starts by stating the nature of the claim Page 159B and he states it as formulated in the pleadings i.e. bursting of a reservoir because the half completed bund could not contain the water. There was no evidence of bursting nor was there any evidence to say the half completed bund was intended to retain water before its completion. It never had contained water and there was no suggestion in the evidence that it had ever done so. The Judge repeats the basis of the plaintiffs' claim Page 159E 160A but not once does he

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perceive the inherent fallacy which arises from the fact the left bund never had retained water so that the presence or absence of that bund and its completion or non-completion were irrelevant as a cause of any damage. The water on the plaintiffs' land preceded the left bund as can be seen from the presence of the right bund to retain it.

In the Federal  
Court

—  
No.33

Appellants'  
Written  
Submission

(continued)

10 The Judge next stated as a fact the dispute  
over the boundary Page 160F the working by the  
previous miner Page 160E and then the contentions  
of the defendants without saying whether he accepted  
or rejected them. He then made a patent misstatement  
of fact Page 161A when he said the defendants  
"constructed" the left bund. At the time material  
to the action they had not constructed it but were  
only in the process of constructing it and it was  
completed only after the alleged flood. He repeated  
this error Page 161B in saying the left bund was  
20 constructed in March or April and was meant to  
retain water. Construction was begun in March or  
April but only completed in June and it is patently  
obvious it could not retain water until completed.  
The Judge's inability to understand the true  
position in relation to the left bund led him into  
errors he made in his judgment.

30 The Judge next restates the plaintiffs'  
contentions Page 161E but does not state that  
these contentions were totally different from those  
advanced in the pleadings and as stated in the  
first paragraph of his judgment, nor does he deal  
with the fact the plaintiffs' evidence was directed  
to one pipe and one pipe only nor with the fact  
there was no escape from behind the left bund  
because water had always been on the land  
between that bund and the right bund.

40 At page 163A appears the Judge's statement  
of what he thought to be the fundamental issue in  
the case and the framing of that issue is so much  
at variance with the issues which were actually  
being fought that he inevitably lost his way.  
His issue is so framed that it (a) assumes  
escape and (b) assumes damages. The defendants  
were saying there had been no escape but a long  
standing encroachment and that there had been no  
damage. The Judge therefore never got down to  
dealing with the issues which were actually  
involved. This error made by the Judge is the

In the Federal Court

No. 33

Appellants' Written Submission

(continued)

subject matter of the first ground of appeal. If he never correctly directed himself as to what the issues were, it was impossible that he could come to any correct finding on what were the real issues.

The Judge next stated Page 163D that the defendants admitted the escape of water but this was not so. They admitted a long standing encroachment which is a completely different thing from an escape which implies something happening suddenly and once and for all and he then went on to give reasons for refusing to accept the defence contention that the "escape" did not cause the damage claimed his reasons forming the second ground of appeal where it is pointed out his refusal to award any of the special damage claimed because none of it had been provided corroborates and supports the defence contention while the reasons he gave did not bear scrutiny. He first referred to DW4 having admitted the pipe (meaning the one the plaintiffs complained of) was capable of discharging 2,000 gallons of water per minute. DW4 did not say that. The evidence the Judge refers to is at Page 84A where he says this discharge can be achieved by a 9" or 10" pipe but the one the plaintiffs were talking about was 8". Page 112C and its capacity was given by DW8 and never queried. He next referred to there being other pipes discharging water and slime into the tailing area which was then used for two mines and refers to the evidence of DW8. The actual evidence of DW8 is at page 113E and he does not say other pipes were discharging into the tailing area but answers in wide and general terms a question put to him in equally wide and general terms. As can be seen from Vol.II Pages 347, 350 and 353 the defendants' mining activities covered a considerable area and showed spillways and pipings and other tailings areas nowhere near the plaintiffs' lands. The Judge next refers to the evidence of DW1 but omits the vital passage already referred to that the rainfall at the end of April was not exceptional. He then goes on to refer to further evidence by DW8 which he says constituted an admission of receipt of a complaint of seepage in March 1965 but he did not read the evidence properly. The evidence in question is at page 188F and read as a whole shows the witness was talking of the complaint made by

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solicitors letter. The letter is in evidence Vol.II Page 183 and is dated 28th May 1965 and not March. The witness had made an error in the month which should have been of no consequence since the precise date of the complaint was fixed by the letter and was not open to confusion or lapses of memory after a period of years. This error forms the basis of the third ground of appeal. The same thing is true of the next alleged admission by DW8 that water had gone over the bund. The evidence is at Page 117A-B where he was being asked about sand shown in photos Vol.III Page 323 and Page 340 and the word "bund" then appears instead of the word "sand". It is sand that is being talked about all the way through. This is a patent error in transcription of the notes.

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The next passage forms the fourth ground of appeal and appears at Page 164B where the Judge gives it as his opinion that since the left bund was half completed and there had been an escape earlier the defendants should have realised the possibility of further escape. As shown, the evidence of DW8 does not admit earlier escape and, of course, this expression of opinion fails to appreciate the true purpose for which the left bund was being built namely to stop an encroachment which had already occurred. The left bund had nothing to do with foreseeing further possible escapes. It was to prevent encroachment and because the encroachment already existed there was nothing which could be done about it before the left bund was fully completed. The left bund had to be built across the encroaching water and that had to take time to complete. This also forms the answer to the next comment by the Judge which is the subject matter of the fifth ground of appeal. He says Page 164C-D the defendants had not taken adequate provision to safeguard further escape of water and by having a half-completed bund they ought to have realised there was a greater risk of flooding due to rain. It is perhaps not surprising that neither the Judge nor the plaintiffs suggested what else the defendants could and should have done when they found what had happened. The water was there. It had to be cut off and enclosed within the defendants' boundaries. How was that to be done? Only by means of a bund along the true boundary. Bunds cannot be made over night especially when

In the Federal Court

No.33

Appellants'  
Written  
Submission

(continued)

In the Federal  
Court

—  
No. 33

Appellants'  
Written  
Submission

(continued)

the making of them involves traversing across pools of water already formed. The defendants decided the best way to make the bund was to use the pipe which was an accepted method. Nobody thought of suggesting they should have tried some other way. They had to build a bund across a pool of water and used a method likely to prove fastest and most efficient. They could not, however, produce immediate dry land in the encroached area. The reference to flooding due to rain made by the Judge is of no relevance because nobody ventured to suggest rain was the cause of the alleged flood and the evidence of DWI and rainfall figures show this not to be a cause. In fact the defence led the evidence for the purpose of showing that rain as a factor could and should be ignored and not for the usual purpose of trying to show Act of God. 10

The appellants next join issue with the Judge in the sixth and seventh grounds of appeal when he says Page 164E to G that the defendants had been negligent in not completing the left bund and in leaving the left bund half-completed. When the true facts relating to the left bund are kept in mind it is quite clear that there is no maintainable cause of action in relation to it. It was not a previously existing bund which was incomplete or which had failed but was a completely new bund under construction for the purpose of preventing the continuance of the encroachment. There was no suggestion in the evidence of "leaving it half-completed". The fact was that it had only reached a stage of half completion when the complaint was made. The Plaintiffs did not complain that the process of construction was not fast enough. In fact the plaintiffs knew all along that this left bund had never retained water and could not at that stage or construction retain it and the claim based upon a failure of the left bund to retain it was a completely misconceived claim from the outset. If negligence was to be alleged, it should have been an allegation of failure to verify the proper boundary before starting work but no such allegation was made. If it had been the defences would have been different and would certainly have included defences of contributory negligence, waiver and the like. The fact that such defences could be argued makes it impossible to allow an amendment to allege such negligence now as the Court does not have the evidence before it to enable a just adjudication upon the issue. Because of the 20 30 40 50

failure to appreciate the true object of the left bund and to appreciate the true significance of its being only half completed, the finding of negligence cannot be sustained because the grounds for finding it are erroneous.

10 When one comes to examine the judgment where it deals with the claim in nuisance one finds the Judge stating as facts the whole of the defendants' contentions. He states there was already a reservoir before the defendants came Page 166D and that the previous miner had encroached Page 166D. He states the escape of water before the alleged incident Page 166E. He states the steps taken to prevent further escape including construction of the left bund Page 166E and F and also states the half completion of the left bund when the alleged incident occurred Page 166F. He states the innocent mistake as to the boundary Page 166F. He states the area of encroachment Page 166G. He accepts the evidence of DW5 as to the need of the previous miner to have a bund (the right bund) Page 167B and his evidence that when the encroachment was discovered by the defendants they speeded up construction of the left bund Page 20 All these findings were entirely in favour of the defence and entirely against the case put forward for the Plaintiffs. He repeated the finding that there was an existing reservoir Page 168A. He spoke of a seepage of water at Page 168C 30 but there was no evidence of any such seepage and the facts, as he himself found them, established not a seepage but an existing encroaching pool of water. He went on to speak of a half completed bund as bringing increased danger Page 168D but this was not so since the left bund had nothing to do with the danger at that time. The escape had occurred before the left bund was ever begun. The fact the left bund would eventually retain water was at the material time irrelevant. 40 The only relevance of the left bund was that it showed steps taken by the defendants to alleviate a nuisance or trespass when they found they had committed one. Again it must be emphasised that the left bund could not be completed at a moment's notice and that it was inevitable that the encroachment should continue till it could be completed. This is true of all alleviation of nuisance. The transgressor has to have a reasonable time to correct his tort and nobody ever

In the Federal Court

—  
No.33

Appellants'  
Written  
Submission

(continued)

In the Federal  
Court

—  
No. 33

Appellants'  
Written  
Submission

(continued)

suggested in this action that the defendants did not correct the encroachment within a reasonable time of becoming aware of it.

At page 169D the learned Judge stated the left bund was a non-natural user when it was made to hold water when still half completed and this forms the eight ground of appeal. The left bund was not made to hold water when still half-completed - The water was already there before it was even begun. It was never suggested it was intended to hold water before completion and such a suggestion is ridiculous. He then went on to state there was overwhelming evidence to show there was an escape causing damage. There was no such evidence. All the evidence indicated no escape beyond the original encroachment and no damage. The very absence of evidence of damage must surely be the strongest indication of no escape and the Judge rejected all evidence as to damage. The evidence was consistent only with the plaintiffs having taken advantage of the unintentional encroachment which both parties had just discovered to put forward a false and fictitious claim. The Judge's reference to "overwhelming evidence" forms the ninth ground of appeal. The Judge was confusing the presence of water on the plaintiffs' land (which was admitted) and did not realise that its presence gave no evidence of any fresh escape beyond the original encroachment. We have already examined the Judge's reasons for saying there was a fresh escape Page 170D and shown that they were based upon a mistaken interpretation of the evidence. The Judge shows his misunderstanding of the facts when he refers (Page 170D) to the left bund being "left half completed". There was no evidence to show it was ever "left" after its construction began and the whole evidence shows that once it was begun it was proceeded with until it was completed. On the facts the Judge was wrong in holding Rylands and Fletcher applied as the defendants did not cause an escape but came upon a nuisance resulting from an escape which had occurred before their time. As seen from Rickards v. Lothian in the citation of case law, Rylands and Fletcher did not apply to the facts of this case and the finding based upon it was wrong in law.

The Judge next considered the case from the

aspect of nuisance. Here again he repeated the finding there was water on the plaintiffs' land before the defendants came and that it had been put there by the previous miner Page 171B. He stated as a fact that there had been an invasion of the plaintiffs' rights by the previous miner and that the defendants had continued the nuisance Page 171C. Unfortunately in applying the law in relation to continuing a nuisance the Judge did not go into the special position in law of those who are unaware that there is a nuisance and that they are continuing it. Had he done so and had he then considered the fact that the defendants, upon becoming aware of the nuisance, took immediate steps to abate it as required of them by the law he must have found the defendants not liable in nuisance because the nuisance had been created by the acts of a third party. Relevant cases are in the citation of case law.

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The remainder of the judgment is taken up with consideration of the damages claimed, all of which were rejected. The only important parts for the purposes of this appeal are found at Page 172B to 173A and in particular the quotation from *Ratcliffe v. Evans*. When we look at the award of general damages Page 176D and E it is apparent the award was made on the basis the Court could presume general damages and it was certainly not intended to be an award of nominal damages. The Judge thought that the passage from *Ratcliffe v. Evans* enabled him to award general damages even in the absence of proof that any had been sustained. As seen from the citation of case law, the Judge was wrong in law and should never have made this award. The plaintiffs might have sued to establish their right and to get nominal damages but did not do so. They elected to claim substantial damages so obliging the defendants to defend themselves. The defendants defended themselves successfully against the claims advanced and yet found themselves condemned to pay \$3,000 and the costs of the action since taxed at \$7,314.70 i.e. they were ordered by reason of their success in defending themselves to pay \$10,314.70 to the plaintiffs. This is obviously a remarkable price to pay for success and again the result is contrary to all case law as set out in the citation of law which shows that in a case such as this where the plaintiffs

In the Federal  
Court

No. 33

Appellants'  
Written  
Submission

(continued)

In the Federal Court

No.33

Appellants' Written Submission

(continued)

elected to put forward substantial claims which were all rejected, costs should have been given to the defendants. 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. It was the unsuccessful plaintiffs alone who were the cause of the course the proceedings took by reason of the nature of the claims they brought and by their insistence upon being paid substantial damages none of which were substantiated.

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The appellants contend that upon a proper application of the facts found by the Judge in relation to the encroachment having been caused by the previous miner and in relation to the defendants' lack of knowledge that such an encroachment had taken place and their steps to abate taken when the encroachment was discovered the finding should have been in favour of the appellants and the action should have been dismissed with costs. The law on which the appellants rely as being applicable to the facts of this action is set out in the citation of law.

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No.34

Judgment of Ali, F.J. 31st December 1971

No. 34

Judgment of Ali, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellants 30

And

Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd. ... Respondents

(In the Matter of Civil Suit No. 1264 of 1965 in the High Court in Malaya at Kuala Lumpur

Between

Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd.	... Plaintiffs	In the Federal Court
And		No. 34
Weng Lok Mining Co. Ltd.	... Defendants)	Judgment of Ali, F.J. 31st December 1971 (continued)
Coram: Azmi, Lord President Suffian, F.J. Ali, F.J.		

JUDGMENT OF ALI, F.J.

10 This is an appeal from the judgment of the High Court, Kuala Lumpur, whereby the appellants, a mining company, were held, liable for negligence, liable under the rule in Rylands v. Fletcher,<sup>(1)</sup> and liable for nuisance for the escape of water from a reservoir on their land. The respondents, a brick-making company or firm, were awarded 20 ~~83,000/-~~ in general damages and costs. Their claim for special damage amounting to ~~819,713/-~~ in respect of five items of loss was dismissed. The reason for the dismissal was stated by the learned trial judge in these words:

"... these claims were characterised by the poor quality of evidence tendered and the general lack of proof."

The claim for injunction, apparently, was also dismissed. This appeal is against the whole of the decision of the trial court.

30 From the grounds of appeal, it would seem clear to me that the appeal is substantially against the trial court's findings of fact necessary to establish liability under each head of tort just referred to. Our attention was drawn to the oral evidence of witnesses and the various photographs on which those findings were clearly based. Appellants' counsel criticised some passages from the judgment which reflect those findings. Our task in this dispute was made even more difficult by the fact that both counsels could not see eye to eye as to the real issues of facts involved for the consideration 40 of the trial court. The arguments relating to

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(1) (1868), L.R. 3 H.L. 330

In the Federal  
Court

No. 34

Judgment of  
Ali, F.J.  
31st December  
1971  
(continued)

the left bund, for example, proceeded on different understandings as to its contribution to the escape of water. Be that as it may, it is necessary to decide this appeal.

It would be convenient to start with the finding relating to the escape of water. This is important in many respects. For the rule in Rylands v. Fletcher (supra) to apply there must be proof of escape. It is sufficient to refer only to the decision in Read v. Lyons & Co. Ltd. (2) 10

As regards negligence, unless there is proof that damage or loss suffered by the respondent was caused by the escape of water from the appellants' land, I do not think that the latter can be held liable. Similarly, the proof of escape is necessary for nuisance in so far as it is material to show that it amounted to an invasion of the respondents' enjoyment of their land. The case for the respondents on the pleading is clear enough. It speaks of a "reservoir" containing "such volume" of water "bursting" and the escape of water which caused the flood on their land sometime in April 1965. Only the respondents' servants or agent claimed to have seen the flood when it occurred. It was not reported to the appropriate authority or authorities who might have the means or expertise to ascertain its real cause. PW1 and PW6 who claimed to have personally noticed the escape of water clearly did not impress the learned trial judge who came to his finding on this fact from other evidence, i.e. the plaintiffs' surveyor, evidence of defence witnesses, particularly DW1, DW4, DW8, and evidence of the photographs. But all these relate to what was found or seen after the occurrence of the flood when traces of sands, tailings and water could still be seen in the area. The learned trial judge also relied on the existence of the two bunds which, he held, were constructed by the appellants to prevent "further escape of water" from their land. As I understand the judgment, heavy rain also contributed to the escape of water; but His Lordship referred to the Federal Court decision in Hoon Wee Thin v. Pacific Tin Consolidated Corporation (3) for the view that heavy rainfall cannot be pleaded as an

(2) (1947) A.C. 156

(3) (1966) 2 M.L.J. 240



act of God to support a defence. With respects, the facts in that case as found by Gill J. (as he then was) were entirely different from the facts of the present case. In the former the reservoir was constructed on a high ground to supply water to the dredge paddock and the senior inspector of mines, who also gave evidence in the present case, had testified to the effect that the construction of the reservoir was not in accordance with the general mining practice. Mr. Curtis, in the present case, had said that as far as he could remember when he visited the area sometime in January 1965 everything seemed to be in order. The so-called reservoir as found by the learned trial judge in this case was in fact a mining pool which had come into existence as a result of mining operations carried out by the appellants and the previous occupiers of the land. There was no evidence of the height of the water level in the pool at the material date or dates. The learned trial judge said so. In his judgment he said:

"...The fact that the level of water was not given in evidence is of little effect to the plaintiffs' claim. Though the actual date of the happening was not given, it does not defeat the plaintiffs' claim since there is overwhelming evidence to show that there was an escape of water causing damage to the plaintiffs' land."

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 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.

In the Federal  
Court

—  
No.34

Judgment of  
Ali, F.J.  
31st December  
1971  
(continued)

In the Federal  
Court

—  
No. 34

Judgment of  
Ali, F.J.  
31st December  
1971  
(continued)

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<sup>(4)</sup> 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.<sup>(5)</sup> 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.

Accordingly, I would allow this appeal with costs here and below.

(Ali bin Hassan)  
Judge  
Federal Court,  
Malaysia.

Kuala Lumpur,  
December 31, 1971.

Counsel:

Mr. S.D.K. Peddie for appellants.  
Solicitors: M/s. Skrine & Co.

Mrs. S.B. Menon for respondents.  
Solicitors: M/s Shearn, Delamore & Co.

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(4) (1849) 7 C.B. 515  
(5) (1863) 15 C.B. (N.S.) 376.

171.

No. 35

Order

In the Federal  
Court

          
No.35

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR

(APPELLATE JURISDICTION)

Order  
31st December  
1971

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellants

And

10 Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Respondents

(In the Matter of Civil Suit No. 1264  
of 1965 in the High Court in Malaya at  
Kuala Lumpur

Between

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Plaintiffs

And

Weng Lok Mining Co. Ltd. ... Defendants)

20 CORAM: SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA;  
ALI, JUDGE, FEDERAL COURT, MALAYSIA; AND  
HONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 31ST DAY OF DECEMBER, 1971

O R D E R

30 THIS APPEAL coming on for hearing on the 16th and  
19th days of August, 1971 in the presence of Mr. S.D.K.  
Peddie of Counsel for the Appellants and Mrs. Santha B.  
Menon of Counsel for the Respondents abovenamed AND  
UPON READING the Record of Appeal filed herein AND UPON  
HEARING the arguments of Counsel as aforesaid IT WAS  
ORDERED that the Appeal do stand for judgment AND  
the same coming on for judgment this day in the

In the Federal Court

No.35

Order  
31st December  
1971  
(continued)

presence of Mr. S.D.K. Peddie of Counsel for the Appellants and Mr. V.T. Nathan for the Respondents abovenamed IT IS ORDERED that the Appeal be and is hereby allowed AND IT IS ORDERED that the Judgment of the Honourable Mr. Justice Raja Azlan Shah given on the 19th day of March 1971 be and is hereby set aside AND IT IS FURTHER ORDERED that the costs of this appeal and the costs in the Court below be taxed by the proper Officer of the Court and be paid by the Respondents to the Appellants AND IT IS LASTLY ORDERED that the sum of \$500/- (Dollars Five hundred only) deposited in Court as security for costs of this appeal be refunded to the Appellants.

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GIVEN under my hand and seal of the Court this 31st day of December, 1971.

Sgd. Mokhtar b.Hj.Sidin

CHIEF REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.

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No.36

Notice of Motion

No. 36

Notice of Motion

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellant

And

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Respondents

30

(In the Matter of Civil Suit No. 1264 of 1965 in the High Court in Malaya at Kuala Lumpur

Between

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Plaintiffs

In the Federal  
Court

And

No. 36

Weng Lok Mining Co. Ltd. ... Defendants

Notice of  
Motion  
11th February  
1972  
(continued)

NOTICE OF MOTION

10 TAKE NOTICE that this Honourable Court will be moved on the 20th day of March 1972 at 9.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Counsel for the Respondents above-named for an Order that:-

- (1) Conditional leave may be granted to the Respondents to appeal to His Majesty the Yang di-Pertuan Agong against the Judgment of this Honourable Court given on the 31st day of December 1971 allowing the appeal.
- (2) The costs of this application may be costs in the cause.

Dated this 11th day of February 1972

20 Sgd: Shearn Delamore & Co.  
Solicitors for the  
Respondents

Dated this 29th day of February 1972

Sgd:  
Chief Registrar,  
Federal Court.

- To:-
1. The Chief Registrar,  
Federal Court,  
Kuala Lumpur.
  2. Weng Lok Mining Co. Ltd.,  
and/or their Solicitors,  
Messrs. Skrine & Co.,  
Straits Trading Building,  
Jalan Medan Pasar,  
Kuala Lumpur.

30 This Notice of Motion is taken out by Messrs. Shearn Delamore & Co. and Drew & Napier, solicitors for the Respondents herein whose address for service is No.2 Benteng, Kuala Lumpur.

174.

In the Federal  
Court

No. 37

No.37

Affidavit of  
Tan Kim Hai  
11th February  
1972

Affidavit of Tan Kim Hai

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

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellants

And

Hiap Lee (Cheong Leong & Sons) ... Respondents 10  
Brickmakers Ltd.

(In the Matter of Civil Suit No. 1264  
of 1965 in the High Court in Malaya  
at Kuala Lumpur

Between

Hiap Lee (Cheong Leong & Sons) ... Plaintiffs  
Brickmakers Ltd.

And

Weng Lok Mining Co. Ltd. ... Defendants)

A F F I D A V I T

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I, TAN KIM HAI of 314, 2½ Mile Ipoh Road,  
Kuala Lumpur do solemnly make oath and say as  
follows:-

1. I am the managing director of the Respondents  
abovenamed and am duly authorised to make this  
Affidavit.

2. On the 31st day of December 1971 this  
Honourable Court delivered Judgment allowing with  
costs the appeal from the Judgment of the High  
Court at Kuala Lumpur in Civil Suit No. 1264 of 1965. 30

3. The Respondents are desirous of appealing to  
His Majesty the Yang di-Pertuan Agong against the  
said judgment.

4. The said judgment is a final Judgment or order in a civil matter.

In the Federal Court

5. I am advised and verily believe that the case is from its nature a fit one for appeal for the reasons that follow.

No.37

Affidavit of  
Tan Kim Hai  
11th February  
1972  
(continued)

6. The case involves the legal duties and liabilities of a tin miner with regard to damage caused to adjoining owners by water which the miner has accumulated for mining purposes; and the nature and extent of such legal duties and liabilities is a matter of great public and private importance in Malaysia.

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7. Throughout the trial and again in the appeal it was conceded and admitted by the miner (the Defendants in the proceedings) that he had encroached on to the Plaintiffs' land, and that he had in the process of treating that part of the Plaintiffs' land which had encroached as his own, allowed water which he had accumulated to remain on the Plaintiffs' land.

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8. It was further conceded and admitted by the Miner/Defendants that once he realised that he was committing an encroachment he began to construct a bund (referred to in the proceedings as the left bund) to contain the accumulated waters on his own property. The Defendants' case on appeal was that since the water beyond the left bund was already there when the left bund was constructed (no emphasis being placed by them on the bund having failed to achieve the purpose for which the Defendants had constructed it i.e. to contain all the water they had allowed on the Plaintiffs' land on their own) and there being insufficient evidence for the trial Judge to conclude that there was any change in these circumstances by any fresh quantity of water coming onto the Plaintiffs' land from the Defendants' they were under no legal liability to the Plaintiffs. It was also argued that even though the Plaintiffs may be technically entitled to Judgment or liability general damages should have been nominal, that \$3,000/- general damages were not nominal, and that as the Defendants had successfully resisted a claim for special damages in the sum of \$19,713/- they should be awarded the costs of the entire action in the Court below.

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In the Federal  
Court

—  
No.37

Affidavit of  
Tan Kim Hai  
11th February  
1972  
(continued)

9. The Learned Trial Judge had found for the Plaintiffs on liability on three causes of action, namely negligence, nuisance and under the doctrine of Rylands v. Fletcher. He gave a reasoned Judgment and full details of the primary facts and the inferences therefrom whereby he concluded that the Plaintiffs were entitled to succeed on these issues of liability.

10. On the question of quantum the Learned Trial Judge found as a fact that damage had been suffered by the Plaintiffs but disallowed the Plaintiffs' claim for specials NOT because they had not been suffered but because their value as claimed had not been proved to conclusions. 10

11. I am advised and verily believe that the judgment of the Federal Court was "perverse" (the word being used with all due respects to the Learned Federal Judge involved and in the judicial sense that "the verdict was not only against the weight of evidence but was altogether against the evidence"). 20

12. There was initially a complete failure of justice because the Federal Court did not consider in its Judgment the issue of negligence or nuisance at all and gave no finding thereon.

13. The only legal aspect of the matter considered in the Federal Court judgment is the application of the rule of Rylands v. Fletcher.

14. Here the Learned Federal Judge misdirected himself in giving undue importance to the fact that heavy rain had contributed to the escape of water. The case for the defence was that there was no heavy rain and the Plaintiffs had not suggested otherwise, and the trial judge's reference thereto and to Hoon Wee Thim's case was purely obiter dicta and designed to enunciate the principle that even if heavy rainfall had been pleaded as a defence (IT HAD NOT) it would not have availed the Defendants. The imputation by the Learned Federal Judge that the Trial Judge had concluded mistakenly that the facts in Hoon Wee Thim's case were similar to the present case was without any foundation whatsoever. 30 40

15. There was a complete denial of justice when



the Learned Federal Judge directed himself that he was not prepared to agree with the Trial Judge's finding that there was overwhelming evidence that the flood on the Respondents' land could only be caused by water escaping from the Appellant's land and that without evidence as to the height of the water level in the mining pool on or before the date of the flood the possibility of water flowing in from other places or directions could not be disregarded.

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16. I am advised and verily believe that the judicial process on appeal requires an appellate judge where he disagrees with a trial Judge's finding to give detailed reasons why he considers the trial Judge's finding must be disturbed and in what respect the primary facts relied were inadequate to support the trial Judge's conclusion.

17. The clear definition of the functions of an Appellate Court in this respect and the non-permissibility of conjecture and speculation of other reasons for an established trial fact (i.e. the flood) as to which other places and directions there was no evidence or suggestion on the evidence, is I am advised a matter of the utmost general public importance.

20

18. Furthermore whilst it is not challenged that miners have a justification for keeping water on their land, the Learned Appellate Judge failed to direct his mind to the real issue for legal determination in this case, which was the justification if any there was for the Defendants keeping water NOT on their land, but on the Plaintiffs' land and causing damage thereby.

30

19. The learned Appellate Judge did not define what meaning he had in mind for the word "escape" in this connection when he impliedly found that there was no escape of water sufficient to create liability under Rylands v. Fletcher. Creating conditions by operations on Defendants' land whereby a level of water on the Plaintiffs' land which is originally inoffensive, (i.e. the situation before the left bund was constructed) rises to a level where it becomes offensive and causes damage is equally an "escape" of water within the rule of Rylands v. Fletcher. This point is also one of general public importance in this country and appears free from legal precedent.

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In the Federal Court

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No.37

Affidavit of  
Tan Kim Hai  
11th February  
1972  
(continued)

In the Federal Court

No.37

Affidavit of  
Tan Kim Hai  
11th February  
1972  
(continued)

20. Furthermore I humbly submit that this case is of great private importance to the Plaintiffs. The undoubted fact is that the Plaintiffs suffered damage by the Defendants' mining operations. The trial judge so found and the Federal Court had not disturbed this finding. The Defendants through their solicitors have indicated that they propose to claim approximately \$24,000/- in costs for the Appeal and in the Court of first instance and the matter in dispute in the appeal now inevitably involves the question of our liability to pay this sum to the Defendants, which with the sum of \$3,000/- general damages awarded exceeds \$25,000/-.

10

AFFIRMED by the said)  
TAN KIM HAI at Kuala )  
Lumpur this 11th day )  
of February 1972 at }  
2.50 p.m. }

Sgd: Tan Kim Hai  
(in Chinese)

Before me,

Sgd: Low Jau Kin  
Commissioner for Oaths,  
High Court, Kuala Lumpur.

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I hereby certify that the above Affidavit had been read, translated and explained to the deponent who seemed to perfectly understand the same and made his signature in my presence.

Sgd: Low Jau Kim,  
Commissioner for Oaths,  
High Court, Kuala Lumpur.

This Affidavit is filed by Messrs. Shearn Delamore & Co. and Drew & Napier, solicitors for the Respondents herein whose address for service is No. 2 Benteng, Kuala Lumpur.

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No. 38

Grounds of Judgment of Ong, C.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

Between

Weng Lok Mining Co. Ltd. ... Appellants

And

10 Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Respondents

(In the Matter of Kuala Lumpur High Court  
Civil Suit No. 1264 of 1965

Between

Hiap Lee (Cheong Leong & Sons)  
Brickmakers Ltd. ... Plaintiffs

And

Weng Lok Mining Co. Ltd. ... Defendants)

20 Cor: Ong, C.J.  
Gill, F.J.  
Ali, F.J.

GROUND OF JUDGMENT OF ONG, C.J.

30 The appellants were miners working lands adjacent to the property of the respondents, who were brickmakers. Hydraulic mining, as in this case, requires a constant supply of water in circulation, which is conserved in pools or reservoirs; from there the water is drawn for the monitors and gravel pumps, after which it is returned via the dumping areas into the reservoirs to be used again. Where there are no natural pools, water has to be artificially retained in reservoir and prevented, if necessary, by bunds from escaping. In any case, whenever a rise in the water-level - by reason of heavy rains or otherwise - is likely to cause the

In the Federal  
Court

—  
No.38

Grounds of  
Judgment of  
Ong, C.J.  
25th May 1972

In the Federal  
Court

—  
No.38

Grounds of  
Judgment of  
Ong, G.J.  
25th May 1972  
(continued)

overflow spilling on to lowlying lands in the vicinity, such escape of water from the reservoir has to be prevented by bunds.

In March 1965 the respondents complained to the appellants that water was seeping into their property. Though this allegation was denied by the appellants, it was nevertheless a fact that they found it necessary in March or April 1965 to build what their manager described as a safety bund. An existing bund on the right had to be raised higher and another constructed on the left, which intruded some 40 feet across the boundary into the respondents' property. This encroachment was constituted by a body of water straddling the common boundary. It was described by the Inspector of Mines, D.W.5, as 20 to 25 feet deep and 6 to 7 acres in extent, of which approximately 0.61 acre was situate on the respondents' property. The Miners discovered this encroachment in late 1964, that is to say, some six months before the escape of water complained of. Sometimes in April 1965 the water spilled over and flooded the respondents' property, causing damage for which they claimed compensation in the High Court. 10 20

On the issue of liability the trial judge found for the respondents. He held that, on the evidence, they were entitled to succeed, not only under the Rule in Rylands v. Fletcher (1) but also in negligence and in nuisance. It was only in respect of the five heads of special damage that he felt dissatisfaction over the poor quality of the evidence tendered as proof - one item he disallowed with some reluctance. As to general damages, he took all the circumstances into consideration and awarded them \$3,000/- and the costs of the action. 30

The appellants' appeal was essentially against the trial judge's findings of fact as set out in a judgment of 18 pages. The Federal Court, in a very terse judgment, allowed the appeal with costs. 40

The costs of the trial and the appeal have been taxed at \$15,000/- in round figures. Even with the award of damages added thereto, the total sum involved in this litigation is only \$18,000/-.

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(1) (1868) L.R. 3 H.L. 330

Under section 74 of the Courts of Judicature Act 1964, no further appeal lies as of right to the Yang di-Pertuan Agong unless the matter in dispute in the appeal is of the value of \$25,000/-, or upwards. Leave, however, may be granted, notwithstanding that the value of the subject-matter in dispute is of lesser value, provided that from its nature the case is a fit one for appeal: see section 74(1)(a)(iii).

In the Federal  
Court

—  
No.38

Grounds of  
Judgment of  
Ong, C.J.  
25th May 1972  
(continued)

10           The respondents' application for leave came up before this court, one of whom was the judge whose judgment was that of the court appealed against. Naturally he expressed no opinion. But the majority gave leave for the reasons following.

20           In the first place, we were of opinion that this case is a fit one for appeal because it is of vital importance in the public interest that any appellate court - especially the court of last resort in this country - should as a matter of course state adequately its reasons for reversing the decision of a subordinate court. With the utmost respect the judgment herein appealed against was little more than an ipse dixit, as may be gathered from the following excerpt therefrom:-

30           "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."

40           It is true, as the trial judge himself puts it, that the special damage claims "were characterised by the poor quality of evidence tendered and the general lack of proof". But this criticism does not extend to the other evidence, which satisfied the trial judge that the appellants should be held liable on all counts - the rule in Rylands v. Fletcher, in negligence and in nuisance.

In the Federal  
Court

—  
No. 38

Grounds of  
Judgment of  
Ong, C.J.  
25th May 1972  
(continued)

The judge found as a fact that the water had escaped from the appellants' land on to the respondents' property. The record shows that, not only was the resultant flooding testified to by the managing director of the respondents, by another director who was the works manager and others, but it was in no way contradicted by the evidence of the appellants' own witnesses. The judge stated in full the reasons for his finding of the primary fact, which was the escape of water; then the grounds on which he held the appellants liable under each cause of action. The judgment of the Federal Court in no way showed how this finding and conclusions of the learned trial judge were against the weight of evidence. In that same judgment the point was stressed that: 10

"there was no evidence of the height of the water level at the pool at the material date or dates ... In my view it is important to know the height of the 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". 20

Again, with respect, it would seem that speculation by the appellate tribunal has been allowed to displace clear findings of fact based on evidence which had fully satisfied the trial judge. Not only had he seen and heard the witnesses, but it is important to note that, in coming to the conclusion he did regarding the escape of water and the source of the flood, the trial judge had also had the further advantage of viewing the mining land and brickworks (see page of the record). Having seen the lie of the land for himself, we do not think that the conclusion he formed should have been disregarded by another court which had not had the same advantage. Indeed, the Federal Court was imposing an impossible condition upon the respondents requiring them (if they were to succeed in their claim) to have kept watch on mining operations which were no concern of theirs. 30 40

In the second place, respect for precedents under the rule of law requires that authority binding on our courts must guide decisions of the Federal Court unless it can be distinguished. We

10 have but recently been reminded by Lord Diplock that "Where the inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, and appellate court ought to accept the High Court's findings of primary fact save in very exceptional circumstances": see Collector of Land Revenue v. Alagappa Chettiar<sup>(2)</sup>.

In the Federal Court

—  
No. 38

Grounds of Judgment of Ong, C.J.  
25th May 1972  
(continued)

In the third place, a certain passage in the Federal Court judgment would appear to lay down new law, in so far as miners are concerned, affecting the operation of the rule in Rylands v. Fletcher, in these terms:-

20 " 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,<sup>(3)</sup> I think, was designed to prevent such claims."

30 This was further reason why in our opinion leave should be given to appeal to the Yang di-Pertuan Agong so that all those engaged in a major industry in Malaya should know precisely where they stand.

40 In the fourth place we noted that, in his concluding submission at the trial, counsel for the appellants conceded without any reservation whatsoever that they were liable for nuisance - although it was, in his view, a case for nominal damages only. Before the Federal Court, counsel on page 20 of his written submission, again acknowledged that "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". Since legal liability was thus

(2) (1971) 1 M.L.J. 43, 44.  
(3) (1849) 7 C.B. 515.

In the Federal Court

No.38

Grounds of Judgment of Ong, C.J. 25th May 1972 (continued)

clearly conceded, and since the Federal Court, nevertheless, held the appellants not liable on any ground whatsoever, we thought the respondents were entitled to a further appeal in order that justice may not only be done but be seen to be done.

Sd. CHIEF JUSTICE HIGH COURT IN MALAYA.

Kuala Lumpur, 25th May 1972.

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M. Shankar Esq. of M/s Shearn Delamore & Co. for applicants/respondents. S.D.K.Peddie Esq. of M/s Skrine & Co. for respondents/appellants.

No.39

Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong 7th August 1972

No. 39

Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 34 OF 1971

20

Between

Weng Lok Mining Co. Ltd. ... Appellants

And

Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd. ... Respondents

(In the Matter of Civil Suit No. 1264 of 1965 in the High Court in Malaya at Kuala Lumpur

Between

Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd. ... Plaintiffs

30

And



Weng Lok Mining Co. Ltd.

... Defendants)

In the Federal Court

CORAM: ONG, CHIEF JUSTICE HIGH COURT, MALAYA  
GILL, JUDGE FEDERAL COURT, MALAYSIA  
ONG HOOK SIM, JUDGE, FEDERAL COURT, MALAYSIA

No.39

Order granting  
Final Leave to  
Appeal to His  
Majesty the  
Yang di-Pertuan  
Agong  
7th August 1972  
(continued)

IN OPEN COURT

THIS 7TH DAY OF AUGUST, 1972

O R D E R

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UPON MOTION made unto Court this day in the presence of Mr. M. Shankar of Counsel for the Respondents abovenamed and Mr. K. Thayalan of Counsel for the Appellants abovenamed AND UPON READING the Notice of Motion dated the 11th day of July, 1972 and the Affidavit of Tan Kim Hai affirmed the 18th day of June 1972 filed in support of the Motion AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be granted to the Respondents abovenamed to appeal to His Majesty the Yang di-Pertuan Agong against the whole of the judgment and order of the Federal Court of Malaysia on the 31st day of December 1971 AND IT IS ORDERED that the costs of this application be costs in the cause.

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GIVEN under my hand and the seal of the Court this 7th day of August, 1972.

Sgd:

DEPUTY REGISTRAR,  
FEDERAL COURT,  
MALAYSIA.

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

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B E T W E E N :

HIAP LEE (CHEONG LEONG & SONS)  
BRICKMAKERS LTD. (Plaintiffs) Appellants

- and -

WENG LOK MINING COMPANY  
LIMITED (Defendants) Respondents

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RECORD OF PROCEEDINGS

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