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MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING
SUIT NO. 22-218-2010-II

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BETWEEN

- 1. NUMPANG ANAK SUNTAI [WNKP.550101-13-5227]
- 2. SAMUEL ANAK NELI [WNKP.670112-13-5237]
- 3. SADUN @ SADON ANAK ASON [WNKP.530403-13-5953]
- 10 4. TINSY ANAK BUNDA [WNKP.550427-13-5162]
- 5. SANYAM ANAK DAUN [WNKP.330225-13-5259]
- 6. APAT ANAK HAMBA [WNKP.440926-13-5179]
- 7. PHILIP ANAK BAKAT [WNKP.461103-13-5525]
- 8. BAWI ANAK SAMAN [WNKP.481212-13-5629]
- 15 9. ANIH ANAK BIDIE [WNKP.530801-13-5887]
- 10. APRIT ANAK BAGIH [WNKP.600703-13-5307]
- 11. NELI ANAK NIPA [WNKP.410825-13-5121]
- 12. SIDI ANAK GAMA [WNKP.360502-13-5191]
- 13. LINGGA ANAK TASI [WNKP.570519-13-5695]
- 20 14. UNGA ANAK GAMIT [WNKP.520522-13-5543]

[Suing on behalf of themselves and other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land surrounding Kampung Entanggor, Ensika, Lumut, Arus Dayak, Tongkah Dayak, Tongkah Dayak Lubuk Manta, Tongkah Dayak Atas, Tongkah Dayak Rumah Panjai, Lunying, Belimbing Besi, Ketimbong and Bajong Ili, Bajong Ili Atas, Bajong Ili Tengah, Bajong Ili Baruh, situated at Sebangan, 94800 Simunjan, Sarawak]

All c/o of: Tr Gubah ak Suntai, Kampung Bajong Ili, Semunjan, Kota Samarahan Division.]

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... Plaintiffs

40

AND

1. QUALITY CONCRETE HOLDINGS BERHAD
[REG. NO.378282-D]
2ND Floor, Room 209,
Wisma Bukit Mata Kuching
93100 Kuching, Sarawak.
 2. LOYAL BILLION SDN BHD
[REG.NO.823803-P]
No. 16, Lorong Wong King Huo 1D
96000 Sibu, Sarawak.
 3. PENGHULU MERUM AK BABU
[WNKP.551102-13-5549]
Kampung Arus, Sebangan
 4. AGU ANAK KALENG
[WNKP.540917-13-5159]
Kampung Bajong Ili
 5. THE DIRECTOR OF FORESTS, SARAWAK
 6. GOVERNMENT STATE OF SARAWAK
- ... Defendants

BEFORE THE HONOURABLE JUDICIAL COMMISSIONER
Y.A. PUAN RHODZARIAH BT. BUJANG

IN CHAMBERS

RULING
[Encl. 19]

The fourteen plaintiffs are bringing a representative action for themselves and all others in the sixteen villagers situated at Sebangan, Simunjan, Sarawak. They are Ibans and claimants of native customary rights over land delineated as "M" to their statement of claim – land which is situated at Hulu Sebangan. The 1st defendant has been issued with a Licence to Take Forest Produce

under sections 49 and 51 of the Forest Ordinance over the claimed land by the Director of Forests who is sued as the 5th defendant in this case. For convenience, I would refer to the licence as 'timber licence'. The Sarawak Government is sued as the 6th defendant.

5 The 2nd defendant is the appointed contractor of the 1st defendant to extract timber from the licensed area.

The timber licence of the 1st defendant was issued on 30.11.2009 and valid for a year. In all that time, there had been a

10 ground swell of objections and mounting disputes among the villagers of the logging activities carried out by the defendant companies. The Director of Forests was aware of the dispute and there had been attempts at solving the problem. Meanwhile this action was filed by the plaintiffs on 1.11.2010 and when the case was mentioned before

15 me, on 10.1.2011, I was informed by Mr. Liew Tang Chieh, acting for the 1st and 2nd defendants that their licence has been renewed but involving a much smaller area than the original one.

A week later an ex parte summons in chambers was filed on

20 18.1.2011 by the plaintiffs which I heard on 27.1.2011 and I granted an interim injunction restraining the 1st and 2nd defendants from continuing with their logging activities in the said area. The plaintiffs convinced me then, showing a letter from the Director of Forests that in view of the ongoing disputes between the companies and the

25 villagers, the activities in Coupe 1B would be suspended until a solution is found but with the proof of two sets of photographs showing logs marked with "Camp: B, Coup : 01", this directive was

not complied with by the 1st and 2nd defendants. The plaintiffs contended that the 1st and 2nd defendants had been logging illegally after their licence has expired and that the renewal of the same was wrongful and illegal.

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The inter partes hearing

The law on the grant of an interlocutory injunction is laid down and summarized in the Court of Appeal's case of *Keet Gerald Frances Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193* which case is cited by both Mr. See Chee How for the plaintiffs and Mr. Liew Tang Chieh for the 1st and 2nd defendants. I have to first determine whether on the totality of the facts presented by the parties, a serious bona fide issue to be tried has been disclosed.

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Secondly, if such an issue is found, where in lies the justice of the case. In this regard I must consider the practical realities of the case and should, inter alia, weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. At the forefront of my mind, advised the Court of Appeal, I must realize that the remedy sought here is discretionary and intended to produce a just result until the trial is heard.

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The interest of the plaintiffs : a serious issue to be tried

At this stage of the proceedings, based on the case authority just cited, I need not have absolute proof that the plaintiffs have native customary rights over the land. It is sufficient that their

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affidavits evidence show that their claim to be so entitled discloses a serious question to be tried. I believe that such a question has been established in this case when first, the area covered by the timber licensed was incised – clear evidence that what the plaintiffs have
5 originally claimed to be their native customary rights land when they filed this claim was indeed true.

The second point is this. The plaintiffs have also pleaded in their statement of claim that they had resorted to physical blockades
10 of the road access to the licensed area and some of the plaintiffs who manned the blockades were even arrested by the police. The seriousness of their claim to the land can be inferred from the intense objection to the logging activities of the 1st and 2nd defendants as evidenced by the physical blockades. The 1st and 2nd defendants
15 have in their affidavits in opposition referred to a Deed of Settlement and Undertaking exhibited as LPH-3 to their affidavits in opposition No. 2 in which the signatories thereto have agreed, on consideration of RM250.00 per house or '*pintu*' in Iban, to the extinguishment of their native customary rights over an area shaded in green to the map
20 marked "C" and exhibited in the Deed of Settlement. In Recital "D" of that Deed of Settlement, it was stated that the claimants listed in Schedule B are "*Native Customary Rights claimants of portions of all that Lands edged in red in the locality plan annexed herewith as "Annexure C"*".

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The statement made in this recital and the map is significant in two ways. The first is that when I caused a comparison between the

map at Annexure C with the map marked "M" to the plaintiffs' statement of claim, it is quite obvious that the timber licensed area of the 1st defendant covers more or less that of the native customary rights land acknowledged in the Deed of Settlement. Referring to

5 **Keet Gerald's** case again (supra), at this stage of the proceedings, I am not required to be satisfied that the plaintiffs' claim for native customary rights has been proved on the merits - only that it raises a serious question for trial. Therefore, although the 1st and 2nd defendants have disputed the authenticity and content of map "M", I

10 believe I am entitled to make the comparison as I did - the actual proof of it can come later at the trial.

The other significant thing to note is that the said Deed acknowledges native customary rights exists over the licensed area,

15 if not there is absolutely no reason to have it executed. The 1st plaintiff has in his affidavit in reply disputed the signatories' understanding of the effect of that Deed. That is a question which is fit to be discovered at the trial and further, whether the lists of signatories duplicate the named plaintiffs in this action. But the point

20 that is being crucially made here is that the 1st and 2nd defendants' denial of the plaintiffs' native customary rights over the timber licensed area is seriously compromised by their own evidence.

Mr. Liew Tang Chieh in his written submissions (there is more

25 than one) have stressed that the said Deed was prepared by an advocate and solicitor, Mr. Arthur Lee and that the claimants' signatures were witnessed by a Penghulu Merum ak Babu. I could

not on the strength of this submission accept that the said Deed settles the dispute in this case because Penghulu Merum has been sued as the 3rd defendant and the plaintiffs are alleging that he had breached his duty towards them. Furthermore, from the affidavit
5 evident it is not proved that the signatories to the said Deed are exactly the same people whom the plaintiffs are representing in this case. It is to be noted that there are sixteen (16) villages named in the title to the writ and the 1st plaintiff has averred in his affidavit in reply (4) that less than half of the families in the Kampung Ensika and
10 the Tongkah Iban longhouse communities have their names in the list of claimants (Annexure B) to the Deed. Mr. Liew Tang Chieh countered this averment in his submission that the 1st plaintiff is from Kampung Bajong Ili and therefore has no personal knowledge of the number of inhabitants in the other kampongs. With respect, I am
15 unable to agree. The action here is a representative action and the 1st plaintiff affirms the affidavit not only for himself but on behalf of those he represents from all the other kampongs. Therefore his averments, unless proven otherwise, should be taken seriously and not rejected outright. Similarly, this action being a representative
20 one, the named plaintiffs need not personally lodged police reports against the logging activities. In fact the nature of the action being such, the named plaintiffs need not have to obtain the consent of those whom they purport to represent for they are self elected and the fact that there are others in the same community (like the 3rd
25 defendant) who opposed this action, does not prevent the action from being continued as one. (See *Jok Jau Evong v Marabong*

Lumber [1990] 3 MLJ 427 at pge 428 and *Eh Riyid v Eh Tek [1976] 1 MLJ 262* at page 263).

The application for injunction : a timely move

5 The 1st and 2nd defendants have also raised the issue of delay in applying for this injunction – that it should have been filed way back in 2009 when the timber licence was issued and was not even filed together with the writ of summons and statement of claim as is the norm when injunction is deemed necessary to protect the plaintiffs' right. On this issue, I am of the view that the pertinent time begins with the filing of the writ as that is when the application for injunction could earliest be made. There is admittedly a lapse of about 2½ months from the filing of the writ to that of the summons in chambers but given that the timber license expired at the end of November and was only renewed by a letter in late December, there is sufficient cause for the plaintiffs to only galvanize into action after that. When the expiry and subsequent renewal of the timber license is viewed collectively with the earlier letter dated 13.8.2010 from the 5th defendant in which the 1st defendant was directed to suspend their activities in Coupe 1B "*because of the ongoing disputes with the local community*" including the police reports made by the plaintiffs against the 1st and 2nd defendants for the alleged illegal logging, the lapse of about 2½ months is excusable.

25 One last point I need to mention in relation to this issue is the argument of Mr. Liew Tang Chieh that if I grant the injunction I would be granting an injunction against the 5th and 6th defendants which is

against section 29(2) of the Government Proceedings Act 1956 and section 54(d) of the Specific Reliefs Act 1950 in that the 5th defendant would be prevented, inter alia, from marking the logs for royalty and collecting the royalties in respect of them. It is indeed an interesting proposition but which I have no qualms in rejecting. That duty and right that the 5th defendant and consequently the 6th defendant have respecting the timber royalties only arose if the plaintiffs failed in their claim and they will be still be there if and when that day comes. If the argument of such an 'indirect injunction' is to be upheld, practically no commercial or business related actions could be enjoined because the government agencies have the right to collect taxes, duties, levies or royalty from these actions. Such end result is simply absurd, not to mention unjust.

15 **The justice of the case : where it lies**

On one hand, the 1st and 2nd defendants are saying that their business and contractual obligations will be severely and adversely affected by the grant of this injunction whilst on the other hand the plaintiffs are saying that the continued logging in the licensed area would affect their very lives. In their statement of claim the particulars of loss and damages are stated as follows:

- (i) Sungei Selabu, Sungei Ijuk and Sungei Sebangan were found to be polluted and had affected the lives of the plaintiffs.
- (ii) The water reservoir and/or the pipe waters which feed the populace at Sebangan Bazaar is polluted and murky.
- (iii) Farmed areas or padi fields or *temuda* within the Sungei Selabu area are affected by such pollution or destruction.

- (iv) The hunting grounds and fishing grounds were destroyed and/or disrupted.
- (v) Fruit trees and/or crops like rubber, engkabang, pepper, durians, langsung, rambutan, temedak, mawang, cocoa etc; planted by the plaintiffs and/or their forefathers were destroyed and felled for the 1st and 2nd defendants' benefits.

These alleged assertions of loss and damages by the plaintiffs are not figments of their own imagination or mere illusions. It is recognized in cases such as *Adong bin Kuwau & 51 Ors v the Government of Johore [1997] 1 MLJ 418* and the appeal therefrom reported in *[1998] 2 MLJ 158* which applied the principles of native rights over their land in other jurisdictions, propounded in cases such as the famous *Mabo & 2 Ors v State of Queensland & Anor (1986) 64 ALR 1* and *Calder v A.G. of British Columbia (1973) 34 DLR (3d) 145*. The rights of the natives which were accorded protection in these cases are not merely to literally live on but also to live off the land – not just to build their homes on and to cultivate it but also to derive sustenance from the fishes that swim in its rivers, the birds that nest in its trees and the plants that grew in the forest.

It is therefore simply not right to look at the issue narrowly and say, as the 1st – 2nd defendants did, that the land is not taken away from the plaintiffs by the issuance of the timber licence to them or that the said Deed was only to compensate the claimants for the merchantable timber on the land, and the land will always be there for the claimants to use after the logging is done. That is all so true but

the possibility which I cannot help but acknowledge is that after all the trees have been logged, the plaintiffs' right to live off the land may even be as barren as the land itself. Such a possibility is not one which the court should trifle with except on very clear evidence.

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As for the 1st – 2nd defendants' fear, which I am in no way belittling, of not fulfilling their contractual obligations for the sale of the timber harvested from the licensed area, should the interim injunction be made permanent, their salvation lies in the fact that the frustration
10 of their contract(s) with third parties is not of their doing. Therefore, in my view they cannot be made liable for the potential breaches, if any. Furthermore, should the trial of this case be resolved in their favour, the trees would still be there for them to log for having filed this claim and alleging the loss and damages which I particularized above, the
15 plaintiffs would not be so foolhardy as to log the forest clean until the determination of this suit because if they were to do that, the credibility of their own claim would be totally destroyed. Convinced as I am that the 1st – 2nd defendants would not be deprived of the profits and rewards from the issuance of the timber license to them
20 should the plaintiffs lose this case as the same is only kept in abeyance and only delayed until the full trial of this action settles the plaintiffs' claim, I have decided to grant the plaintiffs the order of injunction without the usual undertaking on damages. However, it is in my view only appropriate and just that the plaintiffs be made to
25 undertake, during this interim period before the trial is heard, not to fell the trees in the timber licensed area for any commercial or business purposes as an assurance to the 1st and 2nd defendants that

their right under the timber licence is also preserved during this period.

The plaintiffs' application for an injunction in terms of prayer (a) of their summons in chambers is granted until the trial of this action upon the undertaking of the plaintiffs as stated above with costs to be in the cause.

Sgd.

Sgd: Y.A. PUAN RHODZARIAH BT BUJANG

(Y.A. PUAN RHODZARIAH BT. BUJANG)
Judicial Commissioner
High Court II Kuching

15 Date of Decision : 7th day of March 2011

Date of Hearing : 10.1.2011, 26.1.2011, 9.2.2011,
10.2.2011, 18.2.2011, 22.2.2011 and
7.3.2011.

20 For Plaintiffs : Mr. See Chee How,
Messrs. Baru Bian Advocates,
Kuching.

25 For 1st-2nd Defendants : Mr. Liew Tang Chieh,
Messrs. Tang & Partners Advocates,
Kuching.

30 For 5th-6th Defendants: Mr. McWillyn Jiok
State Legal Officer
State Attorney-General's Chambers,
Kuching.

SALINAN DIAKUI SAH
DIBEKALKAN KEPADA

Messrs. Baru Bian Adv -

[Handwritten signature]

3015 award costs
7 Mac 2011

LAU KIAT HUONG
Setiausaha K. J. ada
Pesuruhjaya Kehakiman
Mahkamah Tinggi II. Kuching