MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT KUCHING

SUIT NO: 22-10-2007-I

BETWEEN

1. **JUBANG ANAK PUNJAB**
   (WN KP 650722-13-5471)
2. **JUSLIN MAJANG ANAK BADA**
   (WN KP 650605-13-6045)
3. **BERJAYA ANAK PUNDU**
   (WN KP 651102-13-5299)
4. **MAT ANAK TANGGON**
   (WN KP 431006-13-5251)

[Suing on behalf of themselves and all other proprietors, occupiers, holders and claimants of native customary rights land at Kampung Sual, 94800 Simunjan, Sarawak] **…. PLAINTIFFS**

AND

1 **FIRST BINARY SDN BHD**
(Company No. 597488-H)
No. 47, Lot 5397, 2nd Floor, Block C
RH Plaza Commercial Centre
Jalan Lapangan Terbang Baru
93250 Kuching, Sarawak

2 **DIRECTOR OF FOREST SARAWAK**

3 **SUPERINTENDENT OF LANDS & SURVEYS**
Samarahan Division

4 **GOVERNMENT OF THE STATE OF SARAWAK** **…. DEFENDANTS**

JUDGMENT

Introduction

This is a representative action by four plaintiffs on behalf of themselves and fellow villagers of Kampung Sual in Simunjan District of Sarawak. The 1st defendant is a timber company that had been issued a logging licence in the vicinity of Kampung Sual. The 2nd and 3rd defendants are in the employment of the Sarawak Government and have jurisdiction over forests and lands in the State. Briefly stated, the claim of the plaintiffs is that the 1st defendant had encroached into a part of their Native Customary Land (NCL) and caused destruction to forested as well as planted areas. The area in dispute approximately is 168 acres and is shaded in pink in the map marked as "M" which is attached to the Statement of Claim. It was tendered in evidence in the course of the trial by its maker who is an unqualified surveyor.

Case for the Plaintiff

All the plaintiffs are Ibans by race and therefore are natives of Sarawak. The defendants have not taken issue with the plaintiffs' status as natives. The plaintiffs' case is as follows. They are residents of Kampung Sual. Their case is that Kampung Sual does not merely include the land on which it is located. It also includes what is known in Iban Native Customary Law terminology as "pemakai menoa" which can be translated as the territorial domain of the village. The "pemakai menoa" is delineated by a boundary known as "garis menoa". In the instant case, the "pemakai menoa" of Kampung Sual which is asserted by the plaintiffs is quite large. In the map marked as "M", the "pemakai menoa" over which the plaintiffs' claim Native Customary Rights (NCR) is a large area which is probably over 3,000

hectares. It is the area between several villages. It is pleaded in the Statement of Claim that the boundary line of the village runs to Kampung Emplas in the south, to Kampung Temiang in the east and until Sungai Entanggor in the north. The surveyor of the plaintiffs, Nicholas Mujah testified that the area he covered during the survey of the territorial domain of Kampung Sual is 3,816.87 hectares. The 1st defendant, on the other hand, had been granted a timber licence (T/8408) over an area covering 1,400 hectares. The area under the said timber licence is edged pink on the map found at page 1 of the 2nd, 3rd and 4th defendant's Supplementary Bundle of Document (D). This map is actually a comparison map. It is produced by the Forestry Department for the purpose of this trial. It is proper map with co-ordinates that had been superimposed on the map produced by the plaintiffs. The map not only shows the area under the Timber Licence but also the Forest Reserves in the north and alienated land in the east. The area covered by the Timber Licence is also as shown in the map attached to the timber licence (T/8408). On the map, the Timber Licence area is to the south-east of Kampung Sual. The complaint of the plaintiffs is that the 1st defendant encroached onto about 168 acres of the territorial domain of Kampung Sual. All the four plaintiffs testified on their own behalves and on behalf of other villagers of Kampung Sual. In addition, they called four more witnesses. They are Dr. Klaus-Peter Wilhen Gross (P.W. 3, aerial photography expert), Nicholas Bawin ak Anggat (P.W. 5, Iban Adat expert), Nicholas Mujah anak Ason (P.W. 7, who drew the map of the "pemakai menoa") and Ajan ak Wein (P.W. 8, Tuai Rumah of neigbouring village, Kampung Sungai Raya).

The evidence of the four plaintiffs is substantially similar. I shall attempt to summarize their lengthy testimony as follows.

P.W. 1 is not an original inhabitant of Kampung Sual. He was born in a neighbouring village in 1943. He moved to Kampung Sual in 1958 after having married the daughter of the Tuai Rumah (Headman of a longhouse). His father in law, Tuai Rumah Resa anak Nyaring, had related to him the oral history of Kampung Sual. The plaintiffs of Kampung Sual are the descendants of Penghulu Buda anak Ajak or Tajak, the pioneer settler who was also the first Government appointed Paramount Chief during the era of the White Rajah. Penghulu Buda was succeeded by Tuai Rumah Nyaring anak Buda who was in turn succeeded by Resa anak Nyaring, the father in law of P.W. 1. When Resa anak Nyaring passed away, he was succeeded by his son, Sinja anak Resa. The current Tuai Rumah is Tambi anak Sinja. He succeeded Sinja anak Resa in 1998. However, Tambi anak Senja did not give evidence. P.W. 1 said that the ancestors of the plaintiffs since the time of Penghulu Buda had cleared virgin forest in the disputed area to create farmland. Apart from farming activity, the residents of Kampung Sual had also been living off the land by gathering jungle produce, fishing and hunting from the reserved part of the forests known as 'pulau". The oral history that P.W. 1 learnt from his father in law and from his experience in Kampung Sual since 1958 was repeated by the other three plaintiffs who are the original inhabitants. I, therefore, find it unnecessary to repeat it *in extenso*. On 30th September 2006, P.W. 1 and the other plaintiffs discovered that the 1st defendant had trespassed into their island of preserved forest (pulau) to carry out logging. This act of the 1st defendant prompted one of the villagers by the name of Retty anak Lemu to lodge a police report on 9th October 2006. He also complained to the District Officer of Simunjan. The District Officer requested Penghulu Kambiang who has jurisdiction over several villages, including Kampung Sual, to intercede with the 1st defendant and resolve the

matter. However, Penghulu Kambiang failed to resolve the matter. P.W. 1 also stressed that the timber licence of the 1st defendant had expired before 30th September 2006. In conclusion, P.W. 1 asserted that the 1st defendant, through their acts of trespass and logging, had deprived the residents of Kampung Sual of sources of livelihood. P.W. 1 also said that the disputed area is about 30 minutes walk from Kampung Sual. During cross-examination, P.W. 1 agreed that the area shaded in pink is a "pulau" which means that it was generally not cultivated land but preserved forests. However, he disagreed later and said that there were rubber plantations and fruit trees on it. He said that the owner of the rubber plantation of the size of 3 acres is Berjaya anak Pundu (P.W. 2). P.W. 1 conceded that the villagers demanded compensation from the 1st defendant but he said that it was not paid. He was not aware that the timber licence was renewed until 31st December of 2008. He said that prior to the 1st defendant's logging, P.W. 2 had made a survey of the trees on the number and type of trees in the area.

P.W. 2's (Berjaya anak Pundu) testimony is similar to that P.W. 1. However, he claimed to own three acres of land planted with rubber trees in the disputed area. He said that his great grandfather, Lebung anak Chan had planted rubber trees on the disputed area during the time of the White Rajah. As proof, he tendered into evidence a copper plate with serial number "S 1854" which was issued by the then authorities to permit the sale of rubber. He was unable to produce any documents from the time of his great grandfather. P.W. 2 took some photographs of the area purportedly damaged by the 1st defendant. The photographs showed logged trees and stumps. They are found on pages 16 - 23 of the plaintiffs' Bundle of Document. For some reason, Counsel for the plaintiffs marked them as ID (identification)

only. The photographs, as pointed out by Counsel for the 1st defendant were never tendered in evidence. During cross-examination, P.W. 2 insisted that he owned three acres of rubber plantations and fruit trees in the disputed area. He said that apart from the three acres that belonged to him, there were no other cultivated areas in the disputed area shaded in pink.

The 2nd plaintiff (P.W. 4) gave similar evidence. He is a direct descendent of the original pioneer settler, Penghulu Buda. He said that on 30th September 2006, he discovered that the 1st defendant had trespassed into the disputed area. He said that the workers told him that they are from the 1st defendant company. He said that the forest trees and rubber trees were chopped down as a result of the encroachment. He also took some photographs that are shown in pages 16 - 23 of the plaintiff's Bundle of Document. As I said earlier, these photographs were not tendered into evidence. Apart from destruction to the "pulau" in the disputed area, he also said that the sources of water had been contaminated due to silting and erosion. During cross-examination he was asked to point out the area where he had planted crops. He pointed to a spot outside the disputed area shaded in pink. He agreed that the rubber trees in the disputed area belonged to P.W. 2. However, when he was asked to show where he collected forest produce, he pointed to the disputed area shaded in pink.

The last plaintiff to take the witness stand was Jubang anak Punjab (P.W. 6). He is a 45 year old full time farmer residing in Kampung Sual. He said that their NCR area consisted of communal forest land, "Pulau", cultivated gardens, "Temuda" land, "Tembawai" (old longhouse sites), fishing areas and farming land. He said that previously, the longhouse community of Kampung Sual had permitted logging in parts of their NCL. However, they

never entered into any agreement with the 1st defendant to permit them to log in their NCR area. He said that his wife, Retty anak Lemu had made a police report on 9th October 2006 over the encroachment by the 1st defendant. The villagers of Kampung Sual then requested the assistance of Sarawak Dayak Iban Association (SADIA) to survey the territorial domain or "pemakai menoa" of the village. P.W. 6 denied that the villagers of Kampung Sual had demanded exorbitant compensation from the 1st defendant.

The said survey was conducted by Nicholas Mujah (P.W. 7) who described himself as a community mapper. He is a social worker attached to SADIA. He is also from one of the neighbouring kampungs north of Kampung Sual. He was educated up to Form 6. Although he is not a licensed surveyor, he underwent courses in community mapping which was organized by SADIA and a few other NGOs (Non-Governmental Organizations). He described the aim of these courses as follows:

> The community mapping programme is an initiative of Sarawak Dayak Iban Association to train, assist and work in collaboration with the native communities of Sarawak to demarcate their native customary rights land boundaries.
>
> Community mapping is also known as participatory mapping where local community members participate to demarcate and make maps to describe the place in which they live. The local people who live and work in a place have the most intimate knowledge of the place. Only they are able to make a detailed and accurate map of their history, land use, way of life, or vision for the future.

P.W. 7 was accompanied by 14 villagers of Kampung Sual when he plotted its territorial domain which included the disputed area by use of a GPS (Global Positioning System) equipment. He explained his method as

follows. He asked the villagers to show and walk with him along the boundary of their "pemakai menoa". They pointed out all the landmarks, historical places such as old longhouse sites to him. Together with this information, he also recorded the waypoints or geographical co-ordinates of various locations in his notebook. He did this by using the Garmin GPS equipment which can store the co-ordinates in its memory. He also inserted a peg at the waypoint that was recorded. Later by means of computer software which used the co-ordinates that he recorded, he was able to plot the map based on the "pemakai menoa" of the Kampung Sual. He agreed during cross-examination that the accuracy of the data in respect of waypoints would be affected by heavy cloud cover. However, he said that good weather prevailed when he did the survey. He also agreed that his method was subject to a margin of error of about 30 metres on the circumference of boundary.

In respect of interpretation of the aerial photographs taken by the Royal Air Force in 1947 of the disputed area and the surrounding general area, the plaintiffs called Dr. Klaus-Peter Wilhen Gross as their expert witness. Dr. Gross is an Associate Professor at the Department of Remote Sensing and Landscape Information System of the Albert-Ludwigs University in Germany. Dr. Gross is an expert on the use of photogrammetry to interpret aerial photographs. He explained as follows in simple terms in his report the work that was involved in translating historical aerial photographs:

> Photograph interpretation is the process of taking data from an aerial photograph. Interpreters translate the information provided by aerial photographs into a corresponding terrestrial model for vegetation coverage and land use by a classification. The interpreter has to extract useful

> information with his ability to identify objects and correctly judge their significance.

He used the following classes for stratification of the land cover:

1. Primary Forest
2. Dense Forest
3. Disturbed Forest
4. Regeneration Forests/Shrubs
5. Agriculture/ Clearings.

He also interpreted two line features in the photograph: a longhouse and a river. His finding was that 89% of the case area was covered by primary forest in 1947. He said that farming was distinguishable on only 5% of the case area. The cultivation mosaic corresponds to roughly the southern area of the "pemakai menoa". It is near the area shaded in pink where the alleged logging took place. He also detected a longhouse. During cross-examination, he agreed that the area of interest that he interpreted may not be exactly the disputed area claimed by the plaintiffs. Therefore he was unable to answer if his estimate of human presence on 11% of the case area shown by the aerial photographs is accurate. He said as follows:

> Q: So do you agree with me that your calculation on the human presence of the entire case area at 11 per cent is not accurate?
>
> A: Difficult to answer because we have different size, because of difference limits, so percentages cannot be compared.

The expert witness on Adat Iban for the plaintiffs was Nicholas Bawin Anak Anggat (PW 7). He is a former Deputy President of the Majlis Adat Istiadat Sarawak. He has been called to testify in a number of NCR cases as an expert in Iban customs (see *Nor Anak Nyawai & Ors v. Borneo Pulp*

Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 High Court, Muli Anak Baya & Anor v Everight Enterprise (21-6-2009, Sibu High Court), Nicholas Mujah Anak Ason & Ors v Hock Tong Hin Sawmill Co. Bhd 22-118-2007-I (High Court Kuching), Agi Anak Bungkong & 2 Ors v Ladang Sawit Bintulu Sdn Bhd & 4 Ors 22-93-2001-III (I). He gave evidence in respect of the initiation ceremony known as "Panggul Menoa" which was performed by the pioneer settlers before clearing the jungle for settlement. He then proceeded to explain the meaning of essential terms such as "pemakai menoa, garis menoa, tanah umai, temuda, tembawai, pendam", etc. I shall not repeat all his evidence here. They have been discussed and accepted in other cases, especially in *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769* and *Agi Anak Bungkong & 2 Ors v Ladang Sawit Bintulu Sdn Bhd & 4 Ors 22-93-2001-III (I).* P.W. 5 testified that he acquired knowledge of Iban customs through his experience in the Majlis Adat Istiadat Sarawak, his readings and study of Iban customs and living the life of an Iban. Given the acceptance of his expert evidence in the cases quoted above and the fact that his evidence was not significantly challenged or rebutted, I have no reason to doubt his expertise on Iban customary law and practice. Although I do not wish to summarize his entire testimony, I shall highlight some points that may have a bearing in his case. The area in dispute is about 168 acres. Some of the plaintiffs agreed that they did not have the right to "temuda" lands in the disputed area during cross-examination. They also agreed that the "temuda" right can be lost if an Iban sells the land or moves away. However, in the instant case, the plaintiffs in the main are asserting the collective communal ownership of the 168 acres which has been preserved as a 'pulau' for the common use of the villagers in accordance with Iban custom. Only P.W. 2 (Berjaya anak Bundu) claimed

that he owned about three acres of rubber land in the disputed area of 168 acres. He said that the rights to the "pulau" are passed down to the descendants of the longhouse as long as they remain in the village or maintain their attachment to it by participating or contributing to the activities of the longhouse. In respect of compensation, he said that a native would not lose his right to the land even if he had accepted consideration for allowing a non-native to log or plant on his ancestral lands. In the instant case, the 4th plaintiff is alleged to have received compensation of RM750 from the 1st defendant to permit logging. He said as follows during cross-examination by Counsel for the 1st defendant:

> Q: I put it to you that in situations such as where the 4th plaintiff had collected payments from a non native in order to allow free access, he lost his native customary rights over the land?
>
> A: I do not agree.

During cross-examination by Counsel for the 2nd to 4th defendant, P.W. 5 candidly agreed that at times he was involved in opposition politics and that NCR is always an issue during elections. However, I do not see why P.W. 5's involvement in political activities should detract from his expertise as an expert on Iban customs. If he has misled the court on Iban Adat, it is up to counsel for defendants to challenge him during cross-examination or alternatively the defendants should provide rebuttal testimony through their own expert on the same subject matter. A general accusation that P.W. 5 is biased merely because of his involvement in opposition politics cannot hold water.

The last witness called by the plaintiffs was Ajan anak Wein (PW 8). He is the current Headman of a neighbouring village; Kampung Sg Raya. The said

Kampung is an extension to Kampung Temiang which is located to the south east of Kampung Sual. According to this witness, Kampung Sual and Kampung Sg Raya share a common boundary in respect of their respective "pemakai menoa". He corroborated the claim of the plaintiffs over their right to '"pemakai menoa" in the disputed area. He also said that he knows the identity of the logging company because they had extracted timber in the vicinity of his village. During cross-examination, he admitted that the 1st defendant paid him compensation of RM20 per ton of timber extracted from his land. He disagreed that the disputed area is within the Sedilu Forest Reserve.

The 1st Defendant's case

The defence of the 1st defendant is as follows. They had been granted a timber licence to take forest produce over 1,400 hectares. They deny that the plaintiffs have NCR over the disputed area of 168 acres which is shaded pink in the map marked as "M". The 1st defendant also denied entering the disputed area to extract timber. Their witness, Mr. Wong Ing Sin (D.W.2), the general manager of the 1st defendant testified that although the timber licence covered an area of 1,400 acres, his company was only allowed to extract timber in blocks or compartments by applying for a *permission to enter coupe* (otherwise known as PEC). He said only Coupe 6 of the timber concession area intersected with the purported "pemakai menoa" of the plaintiffs. Since the negotiations for compensation with the residents of Kampung Sual failed, the 1st defendant did not enter into the disputed area. For that reason, his company did not apply for PEC in respect of Coupe 6 which is in the purported territorial domain of Kampung Sual. The fact that the 1st defendant did not apply for PEC in respect of Coupe 6 was vouched

for by Asan Odau (D.W.5), the Executive Forester of the Forestry Department at Kuching. D.W. 2 told the court that normally before extraction of timber he would visit the vicinity of the logging area and consult with the Penghulu who has jurisdiction over the nearby villages. This is to ensure that there is no trouble from the natives. He also maintains contact with the Penghulu during the logging operations so as to receive feedback and complaints if any. In the event there is a demand from the natives for compensation, he would attempt to negotiate and make payment. He said that in the instant case, he contacted Penghulu Kambiang anak Tumin (D.W.3). Penghulu Kambiang is the Penghulu in charge of Kawasan Temiang Sungai Alit at the material time and the villages of Kampung Sual, Kampung Emplas, Kampung Temiang and Kampung Sungai Raya fall under his jurisdiction. D.W. 2 apprised Penghulu Kambiang of the logging operations that his company was about to undertake. Penghulu Kambiang told him that the residents of all the villages except for Kampung Sual were amenable to payment of compensation in exchange for their agreement to allow the extraction of timber near their respective villages. As the residents of Kampung Sual did not agree to the quantum of compensation offered, the 1st defendant did not apply for PEC for Coupe 6 and did not extract timber in the disputed area. The 1st defendant also did not apply PEC for Coupe 5 which is near the purported "pemakai menoa" of the plaintiffs. D.W. 2 held regular meetings with his Site Supervisor called Mandor Ting and his Log Pond Supervisor (Jimmy anak Busan, D.W.4). He ensured that they adhered to his instructions that timber should only be extracted from Coupes 2, 3 and 4. He said that the photographs on pages 16 - 23 of the plaintiffs' Bundle of Document (A) were not taken at the disputed area. He said that the allegation of the plaintiffs that the 1st defendant had entered the disputed area

is untrue. D.W. 2 also said that P.W. 8 is not an honest person as he had demanded that cash payments meant for all the residents of Kampung Sg Raya be collected by him personally. During cross-examination, he agreed that he was not present at the site during the timber extraction operations.

Penghulu Kambiang claimed in his evidence that he was well versed with the boundaries of the kampungs under his jurisdiction. He said that the residents of Kampung Sual wanted compensation from the 1st defendant if any timber is extracted from their area. He discussed their demand with D.W. 2. However, the negotiations for compensation failed. To his knowledge the 1st defendant did not extract any timber from Kampung Sual's "pemakai menoa" area. He said that the plaintiffs had all lied about the encroachment of the 1st defendant into the disputed area.

The Log Pond Supervisor of the 1st defendant, Jimmy anak Busan (D.W. 4) testified that he kept a record of all timber logged under the said licence for revenue collection purposes. He said that he calculated the payment of commission for timber extracted in the areas claimed as the NCR land of Kampung Emplas and Kampung Temiang/Kampung Sungai Raya. However, D.W. 4 was emphatic that the 1st defendant did not extract any timber from the area claimed as NCR land of Kampung Sual.

Asan Adau (D.W. 5), the Executive Forester testified that the wide area claimed by the plaintiffs as their "pemakai menoa" is largely within the boundaries of the Sedilu Forest Reserve and Extension (G.N. No. 143/23 dated 17 December 1923) and (G.N. No. 1368 dated 7 October 1955). This area is edged in green on the map exhibited as D5 on page 1 of Defendant Bundle of Document (D). D.W. 5 corroborated the evidence of D.W. 2 when

he said that the 1st defendant never applied for PEC to enter Coupe 5 and 6. He also said that as Executive Forester he never received any complaint of logging in the area covered by Coupe 5 and 6 from the villagers of Kampung Sual. During cross-examination he agreed that the gazette notification did not say that "no rights or privileges have been admitted or conceded in respect of the land within the Sedilu Forest Reserve". He agreed that there was no subsequent constitution of the Extension of Sedilu Forest Reserve. He also agreed that he did not produce the locality map showing the boundary of the Proposed Extension of Sedilu Forest Reserve.

The last witness for the defendants was Bujang Redzuan bin Mohammed (D.W. 6). He is an officer of Land and Survey Department of Sarawak. He gave evidence about the procedure of classifying land as per the Land Code. In respect of the instant case, he was referred to page 5 of the Defendant Bundle of Document (D) which is a map of the wide area on which the plaintiffs are claiming as the "pemakai menoa" of Kampung Sual. He said that the purported area claimed by the Plaintiffs is *largely* within the boundaries of the Sedilu Forest Reserve and Extension that was gazetted under G.N. No.143/23 dated 17 December 1923 and G.N. No.1368 dated 7 October 1955. However, it must be noted that he did not say that the smaller disputed area of 168 acres is entirely within the Sedilu Forest Reserve. The superimposed map at page 1 of Bundle of Documents (D) which was produced by the Forestry Department also does not place the 168 acres within the Sedilu Forest Reserve. This witness gave lengthy evidence in respect of the approval of land for other companies in the wider area of "pemakai menoa" of Kampung Sual. However the disputed area in this case is only 168 acres at the southern portion of the Sedilu Forest Reserve from

which the 1st defendant had allegedly extracted timber. For this reason, I find the testimony of D.W. 6 in respect of other areas, apart from disputed area of 168 acres, as irrelevant.

Issues

The plaintiffs and the defendants did not present agreed issues in this case. However, after having considered the submissions of the parties, it is my view that the dispute turns on the following issues. The plaintiffs who are residents of Kampung Sual have purported to represent all their villagers. The action is intituled as a representative action. The principal interest sought to be protected in this action is the alleged communal right of Kampung Sual villagers to the land claimed as "pemakai menoa" or territorial domain. In the premises, common interest of a class of persons and a common grievance has been clearly defined and identified. I note that beyond several tentative questions on this issue, the Counsel for defendants did not challenge the rights of the plaintiffs to proceed by way of representative action. The plaintiffs have annexed a map drawn by unqualified surveyor showing the purported territorial domain of the Kampung Sual. It is large area of over 3000 hectares. However, in the Statement of Claim, the plaintiffs pleaded that the 1st defendant had encroached into an area covering only 168 acres. This is the overlapping area between the alleged territorial domain of the Kampung Sual and the area consisting of 1400 acres which is covered by the Timber Licence belonging to the 1st defendant. This overlapping area is shaded pink in the map annexed to the Statement of Claim. The 2nd, 3rd and 4th defendant had relied on their own map with co-ordinates indicated at the grid line. It was produced by the Forestry Department. This map was superimposed on the map of the

plaintiffs. The plaintiffs' map does not provide any co-ordinates although Nicholas Mujah said that he recorded them in a notebook. The Forestry Department's map also shows a small area which is covered by Coupe 6 which is the disputed area between the alleged territorial domain of the plaintiffs and the area under the Timber Licence. However, the plaintiffs have prayed for a declaration that the entire area edged in red be declared as the NCR land. Counsel for 2nd, 3rd and 4th defendants had argued that the larger area claimed by the plaintiffs which also includes the disputed area of 168 acres had been gazetted as the Sedilu Forest Reserve in 1922 and extended in 1955. In the alternative, both Counsel for 1st defendant and Counsel for 2nd, 3rd and 4th defendants argued that the plaintiffs had failed to establish NCR over the area edged in red as well as in the smaller disputed area. In this respect, Counsel for 2nd, 3rd and 4th defendants argued to the effect that any NCR claim based on "pemakai menoa" or "pulau" is erroneous as it is not part of NCR law at least since 1993 when the Adat Iban was codified. Counsel for 1st defendant also submitted that his client did not enter into the disputed area as they did not apply for permit to enter into Coupe 6 which would have been the disputed area. He also submitted that the plaintiffs failed to proof damage in the disputed area.

Whether a claim based on "pemakai menoa" and "pulau" is debarred by Adat Iban 1993?

I shall address this issue at the outset as the claim of the plaintiffs for a declaration over the area edged in red is a wide area that extends beyond 168 acres allegedly encroached by the 1st defendant. As explained by P.W. 5, Nicholas Bawin, "pemakai menoa" is the territorial domain of an Iban Kampung or longhouse. It includes the cleared area for farming (temuda),

the planted areas (tanah umai), old longhouse sites (tembawai), burial grounds (pendam), sacred shrines and forest preserved (pulau) for foraging, food, medicine etc. Counsel for 2nd, 3rd and 4th defendants in her well researched submission journeyed through history starting with the White Rajahs' edicts on native customs and rights over land until the promulgation of the present Land Code and the Adat Iban 1993. Her thesis is that "pemakai menoa" or "pulau" is not a practice of Iban custom that has the sanction of law. Her argument is that only "temuda" or land cleared for farming before 1958 without a permit would qualify as NCR land. I do not wish repeat her lengthy submission in its entirety or discuss all the authorities which include textbook writers and colonial government circulars. This issue has been addressed in recently decided court cases. In the well-known case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors (supra),* Ian Chin J dismissed the argument that the Adat Iban 1993 did not recognize the Iban custom of "pulau". His Lordship said that the Adat Iban 1993 and the Tusun Tunggu is not exhaustive as the concept of "pulau" was not unambiguously excluded. His Lordship said as follows:

> Mr. Tan's argument is that because the term "pulau" is not mentioned in the Adat Iban nor in the Tusun Tunggu, it means that "this practice is not in accordance with the customary law". For that argument to succeed it must be shown that there are provisions in the Adat Iban to say that unless a custom is mentioned in it, such a custom is no longer to be recognised or regarded as a native customary right. There is no such provision because it was not so intended.

Although the above decision of Ian Chin J was reversed in respect of the finding of facts, the pronouncement of law in respect of the conclusiveness of Adat Iban was not reversed. Undeterred, Counsel for 2nd, 3rd and 4th

defendants also cited the following passage from the Court of Appeal decision in the above case (*Superintendent of Land Surveys, Bintulu v Nor Anak Nyawai & Ors and Anor appeal* [2005] 3 CLJ 555:

> Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors (supra)* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.

However, as pointed out in other subsequent cases (see *Nicholas Mujah anak Ason & 2 Ors v Hock Thong Hin Sawmill Co Sdn. Bhd. & 3 ors, 22-118-2007-1, Kuching High Court)*, the above passage must be read in the light of the Court of Appeal's view that there was no evidence to support the claim that the disputed area was a traditional foraging area. The Court of Appeal said that:

> On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, in the circumstances of this case under appeals, the claim for the area to be under native customary rights is a non-starter. And it follows that the issues of which statute is applicable or whether the area was abandoned do not arise. *Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available.*

The Court of Appeal therefore did not make a decisive pronouncement that a claim based on "pemakai menoa" and "pulau" is defeated by the prevailing Native Customary Law of Sarawak. In fact in another celebrated case (*Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors* [1998] 2 CLJ 665), the Court of Appeal expressly approved the right of the native to live

off the land. In Sarawak, the argument that "pemakai menoa" or "pulau" is not part of the Native Customary Law that is enforceable was rejected in other recent cases (see *Agi Anak Bungkong & 2 Ors v Ladang Sawit Bintulu Sdn Bhd & 4 Ors [22-93-2001-III (I)], Mohamad Rambli Kawi v. Superintendant Of Lands Kuching & Anor* [2010] 1 LNS 115 and *Muli Anak Baya & Anor v Everight Enterprise [21-6-2009], Sibu High Court*). I shall respectfully follow the above decisions and hold that Native Customary Law that pertains to "pemakai menoa" and "pulau" has legal recognition.

Whether Plaintiffs entitled to pray for a declaration of the entire area edged in red in Map marked as "M" in the Statement of Claim?

In paragraph 4 of the Statement of Claim, the plaintiffs pleaded as follows:

> The plaintiffs stated that at all material times they have acquired and/or inherited and/or created native customary (NCR) over that area of Native Customary Land (NCL) locally referred to as "pemakai menoa" or otherwise spelt as "menoa" in and around Kampung Sual edged in RED in the map marked as "M" attached with this Statement of Claim (hereinafter referred to as "the said Land or NCL") containing 168 acres more or less, situated as Simunjan, Sarawak.

The evidence led during the trial was that the 1st defendant encroached into an area of the plaintiff's "pemakai menoa" which consists of 168 acres. This area is shaded pink in the map "M". In the 1st defendant's map, the purported overlapping area which is not admitted is in the Timber Licence area known as Coupe 6. However, the area edged in red in map "M" is a huge area of at least 3,000 plus hectares according to the map maker of the plaintiff, Nicholas Mujah. He took one week to draw his map and he covered an area of 3,816.87 hectares. On map "M", the purported NCR area of the plaintiffs

extended up to Sg Entanggor and Sg Sebangan in the north and near Sg Blebak in the east. However, it must noted that the disputed area, i.e. where the 1st defendant had allegedly encroached into the NCR area of the plaintiffs is a short distance to the east and south east of Kampung Sual. The plaintiffs' witnesses said it was a 30 minutes' walk from Kampung Sual. The question that arises here is whether the plaintiffs are entitled to a declaration in respect of the wider purported NCR area which is not the subject matter of dispute with the 1st defendant. The plaintiffs did not allege that their rights over the wider purported area have been infringed. The 1st defendant stands accused of entering only the 168 acre area shaded in pink in map "M". The government had issued a Timber Licence to the 1st defendant whose area includes Coupe 6 which roughly coincides with alleged NCR claim over the 168 acres. It is not the case of the plaintiffs that the area under the Timber Licence includes any part of their purported NCR area outside the area shaded pink in map "M" which is limited to 168 acres. It is also not the case of the plaintiffs that the 1st defendant had encroached into any part of their purported NCR area outside the area shaded pink. Counsel for 2nd, 3rd and 4th defendants has submitted that a large part of the purported wider NCR area falls under the Sedilu Forest Reserve. She also submitted that a small part of the area on the east had already been alienated under a Provisional Lease to Kris Jati Sdn. Bhd. Counsel for plaintiffs made a cogent argument that generally, the gazettement of an area as a Forest Reserve without inquiry or compensation could not have extinguished any pre-existing NCR of the natives. I agree with him. However, in the Statement of Claim, the plaintiffs singularly failed to pray for revocation of the gazettement of any part of their purported NCR land as a forest reserve or revocation of part of the provisional lease granted to Kris Jati Sdn. Bhd. It must also be noted that

Kris Jati Sdn. Bhd. is not a party in this Suit. Therefore, it is patently clear that the real matter in controversy in this Suit is only the 168 acres of land that had been allegedly encroached by the 1st defendant. I therefore rule that for this reason, the plaintiffs are not entitled for a declaration as to the status of the entire area edged in red in map "M".

Whether the Timber Licence should be declared null and void?

The defendants led evidence that by the time of trial, the Timber Licence had expired. It had expired on 31st December 2008. Counsel for 2nd, 3rd and 4th defendants submitted, that the Timber Licence is not a live issue at this point in time and therefore any order to declare it null and void would be purely academic. In support, she cited the case of *Baltim Timber Sdn Bhd v The Minister of of Resource Planning & 2 Ors.* [1993] 2 CLJ 327. In that case Richard Malanjum JC (as His Lordship then was) held that:

> Similarly in the present case the validity of the revocation of the said Licence is no longer in dispute. ….. It is therefore my view that given the circumstance of this case it is not necessary and not a condition precedent that an Order of *Certiorari* should be obtained before the applicant can pursue its claim for damages under private law.

She submitted that in the instant case, assuming that it is found that the 1st defendant had encroached into the NCR area, the plaintiffs could pursue their claim for damages in private law. Counsel for plaintiffs had no answer to this argument. However, he did not dispute that Timber Licence had expired. In the premises, I shall not make a declaration to nullify the Timber Licence that had already expired.

Whether the Plaintiffs have established NCR over the area shaded pink in map "M"?

This is the disputed area that had been allegedly encroached and damaged by the 1st defendant. The evidence outlined earlier to support the claim of NCR over the disputed area comes mainly from the four plaintiffs. They all live in Kampung Sual and related the oral history and tradition of the village told to them by their ancestors. Only Berjaya anak Pundu claimed that he owns three acres of farmland in the disputed area. The ownership asserted by the other three plaintiffs on behalf of themselves and the other residents is communal in nature, i.e. they claimed that the disputed area has been preserved as "pulau" for their common benefit. The evidence that the plaintiffs are required to discharge is on the balance of probabilities. I am satisfied that insofar as the disputed area is concerned, the plaintiffs have discharged the burden that the disputed area of 168 acres is land over which the plaintiffs can exercise NCR. My reasons are as follows. Under section 48 of the Evidence Act 1950, evidence of custom can be given by those who would be likely to know of its existence (applied in the NCR cases of *Hamit B. Matussin & 6 Others v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 677 (Rep); [1991] 2 CLJ 1524, *Agi Anak Bungkong & 2 Ors v Ladang Sawit Bintulu Sdn Bhd & 4 Ors [22-93-2001-III (I)] and Masa Nangkai & Ors v. Lembaga Pembangunan Dan Lindungan & Ors* [2011] 1 LNS 145):

> **48. Opinion as to existence of right or custom when relevant.**
>
> When the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant.
>
> *Explanation* - The expression "general customs or right" includes customs or rights common to any considerable class of persons.

ILLUSTRATION

The right of the inhabitants of a particular village to use the water of a particular well is a general right within the meaning of this section.

For this reason, the evidence of the four plaintiffs cannot be dismissed merely as self serving testimonies or pure hearsay in respect of the NCR claim merely because the evidence is aimed at bolstering their case. Their testimonies were generally consistent. All of the plaintiffs live in the Kampung Sual longhouse community. With the exception of P.W. 1 who came to live in the village in 1958, the other plaintiffs had lived there for generations. The disputed area is only about a 30 minutes' walk away from the longhouse. Therefore the oral history and tradition related by them which was not in any significant manner challenged during cross-examination, cannot be dismissed as hearsay or self serving. They are not giving evidence of a recent transaction but relating the custom of their community to live off the disputed area from time immemorial. In the premises, it is nigh impossible for any these witnesses to rely on recorded history from those times to support their claim. Since all the witnesses live in longhouse community of Kampung Sual, unless they have been challenged as having been untruthful, there is no good reason why appropriate weight should not be given to their evidence of custom which supports the existence of "pulau" in the disputed area. It is significant that the disputed area is only a 30 minutes' walk from the longhouse. It is also significant that the superimposed map of the Forestry Department shows that the disputed area of 168 acres is outside of the Sedilu Forest Reserve. Apart from the evidence of oral history and tradition, there are other evidences which lend credibility to their claim. The disputed area is 168 acres. The witnesses said this is mainly a 'pulau". However, Berjaya Pundu gave convincing evidence that

his family from the time of his great grandfather owned three acres of rubber land on the disputed area i.e. from a time before 1958. He even produced a copper plate allegedly issued by the then authorities as evidence that his ancestors were permitted to sell rubber sheets. Counsel for plaintiffs did not address the court in respect of the practice of the colonial administration to issue copper plates with serial numbers to permit sale of rubber. However, the point to note was that the witness was not successfully challenged in cross-examination. As for the balance of the disputed area, all witnesses consistently testified that their ancestors had been entering the disputed area to live off the land by sourcing for food, medicine and hunting for wild animals. Counsel for 2nd, 3rd and 4th defendants submitted that the common finding of both experts on the aerial photograph is that the general area claimed as "pemakai menoa" was primary and dense forests before 1958. This is true. However, the plaintiff's expert (Dr Gross, P.W. 3) testified that there is *cultivation mosaic* around the south of the general area which is the vicinity of the disputed area. This is not disputed by the government's expert. Unfortunately, the plaintiffs' map did not provide geographical co-ordinates so that it can be overlaid with the map analysed by Dr Gross to determine the exact location of the cultivation mosaic. Nonetheless, one cannot fail to notice that a small part of the cultivated area is very near the disputed area. This lends credence to the oral testimonies of the four plaintiffs, especially that of Berjaya anak Pundu that his ancestor had cleared a small part of the disputed area of 168 acres to plant rubber trees. Berjaya anak Pundu is alleged to have received RM750 as compensation for allowing logging on his land. However, according the Nicholas Bawin, mere acceptance of compensation would not have the effect of extinguishing NCR over land. The claim asserted here is communal ownership under NCR. For

that reason, I fail to see why acceptance of compensation by a lone resident would have the effect extinguishing the right of the entire longhouse community. I have also considered the submission of the 1st defendant that the plaintiffs had only given oral testimony and that anyone can stake a historical claim to NCR without proof of documents. Documentary proof is of course impossible given the fact that longhouse communities from time immemorial relied on oral tradition and custom to demarcate their property. It is not argued that written records were available at that point of time. Therefore appropriate weight must be given to the evidence of the witnesses who are relating their oral tradition and history. In this case, all the plaintiffs with exception of P.W. 1 have lived their entire lives and for several generations in the same longhouse. The disputed area is only a 30 minutes' walk from their longhouse. They gave consistent testimony. They were not successfully challenged in respect of details of the history they related. One of the plaintiffs, Berjaya anak Pundu was even able to produce copper plates evidencing his family's involvement in rubber cultivation in the disputed area. He was also not convincingly challenged during cross-examination. The aerial photograph evidence, though not conclusive, lends corroboration to the testimony of Berjaya anak Pundu that some limited cultivation was visible before 1958 near the disputed area. For all the above reasons, I am satisfied on a balance of probabilities, that the plaintiffs have established NCR over the 168 acres shaded in pink in Map "M". Counsel for 1st defendant submitted that Map "M" lacks coordinates.

Whether the 1st defendant had entered and caused damage in the disputed area?

In respect of this issue, I am inclined to agree with Counsel for 1st defendant that the plaintiffs have failed to proof their case on the balance of probabilities. My reasons are as follows. The only evidence of damage tendered by the plaintiffs on this issue is oral testimony. In the Statement of Claim, the plaintiffs have pleaded specifically the number of trees and type of trees that were damaged. However, during the trial, all the plaintiffs only stated in very general terms that the 1st defendant had cause damage to trees, cause pollution and ecological damage. The number of trees was mentioned in the police report which was admitted as to authenticity. However the maker of this police report was not called as witness to verify the damage to the disputed area. In their respective testimonies, the plaintiffs did not even bother to refer to the specifics of damage as listed in the Statement of Claim and the police report. It may well be that in respect of the NCR claim, the plaintiffs had relied on oral history and tradition out of necessity. However, for the type of damage asserted in present time, the plaintiffs could have collected photographic evidence, evidence of independent persons or report of ecological damage. The photographs taken (pages 16 - 23 of the Plaintiff Bundle of Document) of the alleged damage to the disputed area were not even tendered as evidence as pointed out by Counsel for 1st defendant. In respect of the oral evidence, the plaintiffs only gave sketchy and general evidence of damage. None of them specifically referred to the number of fallen trees or stumps that they had discovered. For that reason, the inference that the plaintiffs are simply making a general assertion without proof cannot be avoided. I am mindful that Counsel for plaintiffs had urged the court to send this case for assessment of damages to the Deputy Registrar. However,

before the course can be adopted, there must be evidence of damage. Beyond the oral evidence which is neither specific nor detailed, the plaintiffs have not adduced any other evidence to support damage to the disputed area. I also find that the defence that the 1st defendant did not cause damage at the disputed area is probable. Two witnesses, who can be considered as independent witnesses testified to this fact. Penghulu Kambiang under whose jurisdiction Kampung Sual falls was emphatic that the 1st defendant did not encroach into the disputed area. Asan Adau, the Executive Forester in charge of the area said that no PEC for Coupe 6 was issued by him and he would know of any encroachment in the disputed area. However, I hasten to add that it is not for the 1st defendant to prove that they did not enter the disputed area and cause damage. It is for the plaintiffs to prove on a balance of probabilities that damage was caused by logging. They cannot merely rely on oral evidence when other supporting evidence could have been adduced. I shall therefore dismiss the claim for damages.

In conclusion, in view of my acceptance of the evidence on oral history and tradition in respect of the NCR claim over the disputed area, I am only prepared to grant a declaration that the plaintiffs have established NCR over the said 168 acres. The map marked "M" has no geographical coordinates but I note that the map of the Forestry Department at Bundle of Document (D) (page 1) which is superimposed on Map marked as "M" gives the geographical co-ordinates of disputed area shaded pink. I shall therefore grant a declaration that the plaintiffs have acquired NCR over the said area shaded pink.

As the plaintiffs have only succeeded partially against the government, I shall reduce the costs that they are entitled to. I shall order the 2nd, 3rd and 4th

defendants to pay costs of RM30,000 to the plaintiffs. Insofar as the 1st defendant is concerned, at the time the suit was filed in 2007, the Timber Licence subsisted. In the premises, I shall order the 1st defendant to bear their own costs.

(RAVINTHRAN PARAMAGURU)
Judicial Commissioner

Date of Delivery of Judgment:	25.8.2011
Date of Hearing:	6.1.2010 3.3.2010 12.5.2010 15.6.2010 28.6.2010 1.7.2010 5.7.2010 25 & 26.8.2010 21 & 22.12.2010 13.1.2011 1.2.2011 30.6.2011
For all the Plaintiffs:	Mr. Baru Bian Messrs Baru Bian & Co. Advocates Kuching
For the 1st Defendant:	Mr. Allan Lao with Miss Lidwina Kiew Messrs David Allan, Sagah & Teng Advocates Kuching
For the 2nd, 3rd and 4th Defendants:	Puan Dayang Jamillah Tun Salahuddin State Attorney General's Chambers Sarawak Kuching

Notice: This copy of the Court's Reasons for Judgment is subject to editorial revision.