Malayan Law Journal Reports/2002/Volume 2/SAGONG BIN TASI & ORS v KERAJAAN NEGERI SELANGOR & ORS - [2002] 2 MLJ 591 - 12 April 2002

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[2002] 2 MLJ 591

SAGONG BIN TASI & ORS v KERAJAAN NEGERI SELANGOR & ORS

HIGH COURT (SHAH ALAM)
MOHD NOOR AHMAD J
CIVIL NO MTI-21-314-1996
12 April 2002

Constitutional Law -- Right to property -- Aboriginal peoples' right over land -- Compulsory acquisition of ancestral land by government -- Whether proprietary interest of aboriginal people in their customary land was an interest in and to the land -- Whether aboriginal peoples' right under common law extinguished by Aboriginal Peoples Act 1954 -- Adequate compensation -- Meaning of 'land occupied under customary right' -- Land Acquisition Act 1960 s 2 -- Federal Constitution art 13(2)

Native Law and Custom -- Land dispute -- Customary rights over land -- Aboriginal peoples' right over land -- Compulsory acquisition of ancestral land by government -- Whether proprietary interest of aboriginal people in their customary land was an interest in and to the land -- Whether aboriginal peoples' right under common law extinguished by Aboriginal Peoples Act 1954 -- Adequate compensation -- Meaning of 'land occupied under customary right' -- Land Acquisition Act 1960 s 2 -- Federal Constitution art 13(2)

The plaintiffs were orang asli of the Temuan tribe. Pursuant to an acquisition of land, on 13 February 1996, the Sepang Land Administrator gave written notices to the plaintiffs to vacate the land they were occupying within 14 days failing which enforcement action would be taken ('the notices'). The plaintiff did not comply for obvious reason that they were not happy with the amount of compensation. The first defendant claimed that the land was state land and the defendants had refused to recognize that the plaintiffs had any proprietary interest in the land or any interest therein at all. Hence, the defendants had refused to compensate the plaintiffs for the value of the land lost except for the loss of their crops and fruit trees and the loss of their homes, ie the building structure only. On 21 March 1996, the plaintiffs were asked by the Sepang police to report at the Dengkil police station to collect their compensation cheques. Only the third and seventh plaintiffs collected the cheques. On 22 and 27 March 1996, the plaintiffs were evicted from the land by a police operation with support from the FRU in the presence of the officials from the Sepang District Office, the officials of the second and third defendants and of the Jabatan Hal Ehwal Orang Asli. The fruit trees and the crops on the land were destroyed, the houses, the Balai Raya and the Balai Adat of the Temuan community thereat were demolished. On 14 June 1996, the plaintiffs received their cheques for the limited compensation under protest and without prejudice to their legal rights.

Held:

(1) In principle, oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land should be admitted subject to the confines of the

Evidence Act 1950, in particular s 32(d) and (e), that is to say: (i) they must be of public or general nature or of public or general interest; (ii) the statement must be made by a competent person, ie one who

'would have been likely to be aware' of the existence of the right, customs or matter; and (iii) the statement must be made before the controversy as to the right, customs or matter had arisen (see pp 623G-624A).

(2) The land had been occupied by the Temuans including the plaintiffs for at least 210 years and the occupation was continuous up to the time of the acquisition. The land were customary and ancestral lands belonging to the Temuans including the plaintiffs and occupied by them for generations (see p 610D-F).

(3) The proprietary interest of the orang asli in their customary and ancestral lands was an interest in and to the land. However, this conclusion was limited only to the area that formed their settlement but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size, it was a question of fact in each case. In this case as the land was clearly within their settlement, the plaintiffs' proprietary interest in it was an interest in and to the land (see p 615F-G).

(4) In order to determine the extent of the aboriginal peoples' full rights under the law, their rights under the common law and the statute had to be looked at conjunctively, for both the rights were complementary, and the Aboriginal Peoples Act 1954 ('the Act') did not extinguish the rights enjoyed by the aboriginal people under the common law (see p 615H-I); *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 followed.

(5) The defendants purported to compensate the plaintiffs only for what had been provided for under the Act. Such compensation was not adequate within the meaning of arts 13(2) of the Federal Constitution, although the Act was a special Act relating to the aboriginal people. The deprivation of the plaintiffs' proprietary rights was unlawful (see p 617H-I).

(6) As the land was continuously occupied and maintained by the plaintiffs to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs, it fell within the ambit of 'land occupied under customary right' within the meaning of the definition of s 2 of the Land Acquisition Act 1960 ('the LAA'). Therefore, the plaintiffs must be compensated in accordance with the LAA (see p 618A-B, H).

(7) The first and fourth defendants owed fiduciary duties towards the plaintiffs, which had been breached and therefore, the plaintiffs would be entitled to be compensated for the loss suffered which was the value of the land. However no order was made for the breach of fiduciary duties since it was not specifically prayed for

and to avoid duplicity in view of the award of compensation made in accordance with the LAA (see p 621B, E-F).

(8) The eviction of the plaintiffs from the land was unlawful because the 14 day notice given was unreasonable and insufficient (see p 620D).

(9) Trespass had been committed against the possession of the land by the plaintiffs. The second and third defendants were liable for it (see p 621C).

Bahasa Malaysia summary

Plaintif-plaintif adalah orang asli daripada puak Temuan. Berikutan suatu pengambilan tanah, pada 13 Februari 1996, Pentadbir Tanah Sepang telah memberikan notis-notis bertulis kepada plaintif-plaintif untuk mengosongkan tanah tersebut dalam masa 14 hari, jika gagal maka tindakan penguatkuasaan akan bermula ('notis-notis tersebut'). Plaintif-plaintif telah tidak mematuhi notis-notis tersebut kerana sebab yang nyata bahawa mereka tidak puas hati dengan jumlah pampasan tersebut. Defendan pertama mendakwa bahawa tanah tersebut adalah tanah kerajaan dan defendan-defendan telah enggan mengakui bahawa plaintif-plaintif mempunyai apa-apa kepentingan keempunyaan atas tanah tersebut atau apa-apa kepentingan apa sekalipun. Justeru itu, defendan-defendan telah enggan untuk memberikan pampasan untuk nilai kehilangan tanah tersebut kepada plaintif-plaintif kecuali untuk kerugian hasil tanaman dan

pokok-pokok buah-buahan mereka dan kehilangan tempat tinggal mereka, iaitu struktur bangunan sahaja. Pada 21 Mac 1996, plaintif-plaintif telah diminta oleh pihak polis Sepang untuk membuat laporan di balai polis Dengkil untuk mengambil cek-cek pampasan mereka. Hanya plaintif-plaintif ketiga dan ketujuh telah mengambil cek-cek tersebut. Pada 22 dan 27 Mac 1996, plaintif-plaintif telah diusir daripada tanah tersebut oleh satu operasi polis dengan bantuan FRU dengan kehadiran pegawai-pegawai daripada Pejabat Daerah Sepang, pegawai-pegawai defendan-defendan kedua dan ketiga dan Jabatan Hal Ehwal Orang Asli. Pokok-pokok buah-buahan dan tanaman atas tanah tersebut telah dimusnahkan, rumah-rumah, Balai Raya dan Balai Adat masyarakat Temuan juga telah diruntuhkan. Pada 14 Jun 1996, plaintif-plaintif telah menerima cek-cek mereka atas protes sebagai pampasan yang terhad dan tanpa prejudis terhadap hak-hak mereka di sisi undang-undang.

Diputuskan:

(1) Secara prinsipnya, sejarah secara lisan tentang masyarakat orang asli berhubung amalan, budaya dan adat mereka dan tentang hubungan mereka dengan tanah hendaklah dimasukkan tertakluk kepada batasan Akta Keterangan 1950, khususnya s 32(d) dan (e), iaitu: (i) ia mestilah bersifat awam atau umum atau

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mempunyai kepentingan awam atau umum; (ii) pernyataan tersebut mesti dibuat oleh seorang yang kompeten, iaitu seorang yang 'berkemungkinan menyedari' tentang kewujudan hak, budaya dan perkara tersebut, dan (iii) pernyataan tersebut mesti dibuat sebelum kontroversi berhubung hak, budaya atau perkara itu timbul (lihat ms 623G-624A).

(2) Tanah tersebut telah didiami oleh puak Temuan termasuk plaintif-plaintif sekurang-kurangnya 210 tahun dan pendudukan tersebut berterusan sehingga waktu pengambilan tersebut. Tanah tersebut adalah tanah-tanah adat dan pusaka milik puak Temuan termasuk plaintif-plaintif dan telah didiami oleh mereka sejak bergenerasi lamanya (lihat ms 610D-F).

(3) Kepentingan keempunyaan orang asli ke atas tanah-tanah adat dan pusaka mereka adalah satu kepentingan ke atas dan terhadap tanah tersebut. Namun begitu, kesimpulan ini adalah terhad hanya kepada bidang yang membentuk penempatan mereka dan bukan hutan secara keseluruhan di mana mereka selalunya merayau untuk mencari makanan untuk hidup menurut tradisi mereka. Berhubung penempatan dan saiznya, ini adalah satu persoalan fakta dalam setiap kes. Dalam kes ini, memandangkan tanah tersebut dengan nyata terlingkung dalam penempatan mereka, kepentingan keempunyaan plaintif-plaintif adalah satu kepentingan ke atas dan terhadap tanah tersebut (lihat ms 615F-G).

(4) Bagi menentukan sejauh mana hak-hak sepenuhnya orang-orang asli di bawah undang-undang, hak-hak mereka di bawah common law dan statut perlu dilihat secara bersama, kerana kedua-dua hak-hak ini adalah saling melengkapi, dan Akta Orang Asli 1954 ('Akta tersebut') tidak melenyapkan hak-hak yang dinikmati oleh orang asli di bawah common law (lihat ms 615H-I); *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 diikut.

(5) Defendant-defendan bertujuan untuk memberikan pampasan kepada plaintif-plaintif hanya untuk apa yang diperuntukkan di bawah Akta tersebut. Pampasan sedemikian tidak mencukupi dalam maksud perkara 13(2) Perlembagaan Persekutuan, walaupun Akta tersebut adalah satu Akta yang khas berkaitan dengan orang asli. Perampasan hak-hak keempunyaan plaintif-plaintif adalah menyalahi undang-undang (lihat ms 617H-I).

(6) Memandangkan tanah tersebut masih diduduki dan diselenggarakan oleh plaintif-plaintif sehingga mengenepikan yang lain dalam meneruskan budaya dan diwarisi oleh mereka daripada generasi ke generasi menurut adat-adat mereka, ia terlingkung di bawah 'tanah yang didiami di bawah hak-hak adat' dalam maksud tafsiran s 2 Akta Pengambilan Tanah 1960 ('APT'). Oleh itu, plaintif-plaintif mestilah diberikan pampasan menurut APT (lihat ms 618A-B, H).

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(7) Defendan-defendan pertama dan keempat mempunyai kewajipan-kewajipan fidusiari kepada plaintif-plaintif, yang telah dilanggari dan oleh itu, plaintif-palintif akan berhak untuk mendapatkan

pampasan untuk kehilangan yang dialami iaitu nilai tanah tersebut. Walau bagaimanapun, tiada perintah dibuat untuk perlanggaran kewajipan fiduisari ini kerana perlanggaran ini tidak dipohon secara spesifik dan untuk menghindari kependuaan memandangkan award pampasan yang telah dibuat di bawah APT (lihat ms 621B, E-F).

(8) Pengusiran plaintif-plaintif daripada tanah tersebut adalah menyalahi undang-undang kerana notis 14 hari yang diberikan adalah tidak munasabah dan tidak mencukupi (lihat ms 620D).

(9) Pencerobohan telah dilakukan terhadap milikan tanah tersebut oleh plaintif-plaintif. Defendan-defendan kedua dan ketiga adalah bertanggungjawab terhadapnya (lihat ms 621C).]

Notes

For cases on aboriginal peoples' rights over land, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1784-1785.For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 620-623.

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418

Amodu Tijani v The Secretary, Southern Nigeria [1921] 2 AC 399

Bukit Melita Sdn Bhd v Lam Geok Hee & Ors [1996] MLJU 227

Bullock v London General Omnibus Co [1907] 1 KB 264

Calder v A-G of British Colombia (1973) 34 DLR (3d) 145

Canadian Pacific Ltd v Paul et al; Attorney General of Ontario, intervener (1988) 53 DLR (4th) 487

Delgamuukw v The Queen in right of British Columbia et al; First Nations Summit et al, Interveners (1997) 153 DLR (4th) 193

Dewan Undangan Negeri Kelantan v Nordin bin Salleh [1992] 1 MLJ 697

Haji Abdul Rahman v Government of Malaysia & Anor [1966] 2 MLJ 174

Johnson and Graham's Lessee v William M'Intosh (1823) 21 US 681

Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158

Lai Yoke Ngan v Chin Teck Kwee [1997] 2 MLJ 565

Lembaga Arkitek Malaysia v Cheah Kim Fah & Ors [1999] 1 MLJ 669

Mabo & Ors v State of Queensland & Anor (1986) 64 ALR 1

Mabo v Queensland (1991-1992) 175 CLR 1

Miriuwung and Gajerrong People & Ors v State of Western Australia & Ors (1998) 159 ALR 483

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241

Pareroultja & Ors v Tickner & Ors (1993) 117 ALR 206

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen [1998] 1 MLJ 503

R v Abadom [1983] 1 All ER 364

Siew Kong Engineering Works v Kian Yit Engineering Sdn Bhd & Anor [1993] 2 SLR 505

Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607

Steven Phao Cheng Loon v Highland Properties Sdn Bhd [2000] 4 MLJ 200

Wik Peoples, The v The State of Queensland & Ors (1996) 187 CLR 1

Wong See Leng v C Sarawasthy Ammal [1954] MLJ 141

Yee Seng Plantation Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152

Legislation referred to

Aboriginal Peoples Act 1954 ss 1, 2, 5, 6, 7, 10, 11

Civil Law Act 1956

Evidence Act 1950 ss 32(d), (e), 45, 48, 49, 50

Federal Constitution arts 4, 8(5), 13, 89(1), (6), 161A(6), 162

Federated Malay States Government Gazette Notification (NMB Selangor PU 1649/1935)

Government Proceedings Act 1956 ss 2, 3, 5, 6(1), (4), 11, 12, 18

Land Acquisition Act 1960 ss 2, 11, 12

National Land Code 1965 ss 4(2), 16(2), 447(1)

National Land Code (Penang and Malacca Titles) Act 1963

Rules of the High Court 1980 O 15 r 6(1)

Cyrus V Das (*Jerald Gomez, Abdul Rashid Ismail, Shamila and Leena Ghosh* with him) (*Jerald Gomez & Associates*) for the plaintiffs.

Mohd Zawawi bin Hj Salleh(*Kamarolzaman bin Abidin* with him) (Selangor State Legal Adviser) for the first defendant.

Zaki bin Tun Azmi (*Harjinder Kaur and Tan Siok Hui* with him) (*Rashid & Lee*) for the second defendant.

Ramesh Sanghvi (*Harmeet Singh* with him) (*Kassim Tadin Wai & Co*) for the third defendant.

Pretam Singh a/l Darshan Singh (*Lailawati Husin* with him) (Senior Federal Counsel) for the fourth defendant.

MOHD NOOR AHMAD J

: The plaintiffs sue in a representative capacity in respect of themselves and on behalf of each and every member of their respective families. The second and sixth plaintiffs died and were properly substituted by their respective daughters. The suit was filed as the result of a dispute that arose out of the eviction of the plaintiffs and their respective families from 38.477 acres of land situated at Kampong Bukit Tampoi, Dengkil, Selangor ('the land'). In March 1996, the land was acquired for the purpose of the construction of a portion of the highway to the Kuala Lumpur International Airport. The land was in the shape of a strip running through a gazetted aboriginal reserve under the Aboriginal Peoples Act 1954 ('the Act') and also land customarily occupied by the orang asli and, therefore classified as an aboriginal area or an aboriginal inhabited place under the Act. In the context of the purpose of the acquisition of the land, the first defendant (the Selangor State Government) is the acquiring authority which acquired the land through the Sepang District Office. The fourth defendant (the Federal Government) is the decision maker to undertake the construction of the highway, the third defendant (Lembaga Lebuhraya Malaysia) is the authority to supervise and execute the design construction and maintenance of the highway and the second defendant (United Engineers (M) Bhd) is the contractor engaged to construct the highway.

By this writ action, the plaintiffs seek the following declarations:

(a) that the plaintiffs are the customary owners, the original title holders and the holders of usufructuary rights in respect of the land;
(b) that their customary ownership, original title and usufructuary rights to the land are not destroyed, restricted or extinguished;
(c) that their ownership, title and usufructuary rights and/or that of the orang asli and of their ancestors to the land are entitled to be protected by the first defendant by reason of a fiduciary duty owed or the existence of a trust;
(d) that the first defendant owes a fiduciary duty to them and their ancestors or is their trustee in respect of the ownership, title and rights claimed;
(e) that the first defendant has no right to destroy, restrict or extinguish their ownership, title and rights to the land without compensation; and
(f) based on the reliefs sought, a declaration:
    (i) that the exercise of any power or action taken by any person or authority to destroy, restrict or extinguish their customary rights and title to the land is not valid and therefore is null and void, in particular, the notice for vacant possession issued by the Sepang Land Administrator; and
    (ii) that each of them, as beneficial owners of the land, is entitled to adequate compensation as stipulated in the Land Acquisition Act 1960 ('the LAA') in respect of the land which had been destroyed, restricted or extinguished by or on behalf of the first defendant.

The plaintiffs also pray for the following orders:

(i) the first defendant to pay adequate compensation for the land;
(ii) the second and third defendants to pay damages for trespass;
(iii) the first defendant to pay damages for the illegal eviction; and
(iv) special damages.

Consequently, and in the alternative, the plaintiffs ask for the following reliefs:

(a) a declaration that the land is 'Malay reservation' within the meaning of art 89(6) and protected under art 89(1) of the Federal Constitution ('the Constitution');

(b) a declaration that all actions taken by the defendants which deprived the plaintiffs of the use and enjoyment of the land are unconstitutional, invalid and therefore, null and void;
(c) a declaration that the land is protected by reason of usufructuary rights, customs and ancestral occupation;
(d) a declaration that the land is originally or based on laws protected;
(e) a declaration that it is the duty of the first and fourth defendants to protect the rights of the plaintiffs in the land under the Act, read with arts 8(5) and 162, or separately, under art 8(5) of the Constitution;
(f) a declaration that the first and fourth defendants are estopped from claiming, asserting or taking a stand that the land is not protected under the law by relying on their improper actions or failure to take proper steps to protect the rights of the plaintiffs to the land;
(g) damages; and
(h) interests and costs.

Briefly, the undisputed facts are these. The plaintiffs are orang asli of the Temuan tribe. Pursuant to the acquisition of the land on 13 February 1996, the Sepang Land Administrator gave written notices to the plaintiffs to vacate the land within 14 days, failing which enforcement action would be taken (the notices). The plaintiffs did not comply for obvious reason that they were not happy with the amount of compensation. The first defendant claims that the land is state land and the defendants have refused to recognize that the plaintiffs have any proprietary interest in the land or any interest therein at all. Hence, the defendants have refused to compensate the plaintiffs for the value of the land lost except for the loss of their crops and fruit trees, and the loss of their homes, ie the building structures only. On 21 March 1996, the plaintiffs were asked by the Sepang police to report at the Dengkil Police Station to collect their compensation cheques. Only the third and seventh plaintiffs collected the cheques. On 22 and 27 March 1996, the plaintiffs were evicted from the land by a police operation with support from the FRU in the presence of the officials from the Sepang District Office, the officials of the second and third defendants and of the Jabatan Hal Ehwal Orang Asli ('the JHEOA'). The fruit trees and the crops on the land were destroyed, the houses, the balai raya and the balai adat of

the Temuan community thereat were demolished. On 14 June 1996, the plaintiffs received their cheques for the limited compensation under protest and without prejudice to their legal rights.

Let me dispose of the preliminary points raised by the first defendant and adopted by the fourth defendant before proceeding any further. The issues of law are:

(a) whether the first defendant has been correctly cited as a party; and
(b) whether the public officer, who issued the notices to vacate the land which are alleged to be invalid and therefore committed trespass to the land, must be named.

These preliminary points were raised only in the written submission submitted after the close of the case.

On issue (a), the first defendant contends that it should not be sued as 'Kerajaan Negeri Selangor' but as state authority, or the State Director of Lands and Mines Selangor should be cited instead. The contention is premised on the fact that 'Kerajaan Negeri Selangor' and state authority are two separate entities, and s 16(2) of the National Land Code 1965 ('the Code') requires that any action relating to land in which it is sought to establish any liability on the part of the state authority shall be brought against the state director in the name of his office. The cases of *Yee Seng Plantation Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699;*Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607 and *Steven Phoa Cheng Loon v Highland Properties Sdn Bhd* [2000] 4 MLJ 200 are cited in support thereof.

With regard to issue (b), it is contended that when there is a need to decide whether a particular officer or officers, as the case may be, has/have committed trespass, before the government can be held liable, it is absolutely necessary to identify and name the particular officer or officers whom the plaintiffs alleged to have committed the trespass. Reliance is placed on the provisions of ss 5, 6(1), (4) and 18 of the Government Proceedings Act 1956 ('the GPA'), and the cases

of *Haji Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174 and *Steven Phoa Cheng Loon* are cited to strengthen the contention.

On issue (a), to my mind, on the facts of the case and by reason of the fact that it was not raised as an issue at the trial, it has no force to stop the court from proceeding with the consideration on the merits of the substantive issues in the case for the following reasons:

(i) The plaintiffs based their claims on the rights under the Constitution, the Act and at common law, but not under the Code. Under each of these heads, the relevant party has to be the Federal Government as the authority administrating the Constitution, the Act and the party answerable for claims at common law; and the state government is a necessary party being the authority pertaining to land in the state and the party which evicted the plaintiffs from the land. Hence, s 16(2) of the Code does not apply and *Yee Seng Plantations Sdn Bhd*, which deals with the alienation of land under the Code, is distinguished.

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(ii) Section 447(1) of the Code provides that in matters relating to procedure not provided for by the Code, the rules of court shall prevail over the Code. On this point, O 15 r(6)(1) of the Rules of the High Court 1980 states:

> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

The law is clear that a misjoinder of parties, if any, is never fatal by reason of this order (*Lembaga Arkitek Malaysia v Cheah Kim Fah & Ors* [1999] 1 MLJ 669 at p 680 and *Siew Kong Engineering Works v Kian Yit Engineering Sdn Bhd & Anor* [1993] 2 SLR 505 at p 508.

(iii) The manner the preliminary point is raised is unfair to the plaintiffs. No explanation is advanced as to why the point was not raised at the trial. It is noted that the same learned Selangor State Legal Adviser Dato' Mohd Zawawi bin Haji Salleh, leading counsel for the first defendant, appeared for the ninth and tenth defendants in *Steven Phoa Cheng Loon* where the same point was raised by him. This clearly indicates that he knew all along of this point. Hence, he was duty bound to raise it at the trial as a matter of fairness to the plaintiffs. It is the usual practice for the issue of parties to be settled at the outset of the trial and not to be brought up by way of surprise at the close of the case.

(iv) The first defendant did not plead this point in its defence. It defeats the whole object of pleadings if a party is allowed to spring a surprise and deny notice to the other party on a point it considers material to its case. The object of pleadings is set out by Buhagiar J in *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 (quoting Bullen and Leake's Precedents of Pleadings (10th Ed) at p 1), in particular, to give to each of the parties distinct notice of the case intended to be set up by the other, and this is to prevent either party from being taken by surprise at the trial. This is related to the principle that the parties are bound by their pleadings, which means that the court is not entitled to decide on a matter which is not pleaded (*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154). Further, a fundamental rule of natural justice is the right to be informed of any adverse point so that one has the opportunity of stating the answer (*Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at p 418).

(v) The preliminary point is really in the nature of a preliminary objection. Hence, it was incumbent on the first defendant to have given written notice to the plaintiffs of its intention to raise the issue, failing which it is deemed to have waived the objection (*Bukit Melita Sdn Bhd v Lam Geok Hee & Ors* [1996] MLJU 227).

(vi) There is an inordinate delay in raising the preliminary point which is fatal (*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen* [1998] 1 MLJ 503 and *Bullock v London General Omnibus Co* [1907] 1 KB 264 at p 270).

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(vii) In *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697 at p 724, in a claim for declaration of rights, the Federal Court held that if a party who claims that he is the right party to the suit stands by and does nothing although aware of the suit, he is as much bound by the decision as a party to the case. Hence, in this case, if the Selangor State Director of Lands and Mines was of the view that he ought to be the proper party to be sued, it was always open to him to raise an objection through the state government. It is highly unlikely that he was not aware of the proceedings because the state government was represented by the state legal adviser throughout the proceedings.

(viii) The plaintiffs are entitled to rely on the principle that a party is bound by the manner it has pleaded and conducted its case in court, that is to say, the doctrine of estoppel in litigation, as observed by the Federal Court in *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565 at p 583. In the case before me, after having conducted the case on the basis that the Kerajaan Negeri Selangor is properly a party, and cross examining the plaintiffs' witnesses on its behalf, the first defendant should not now be allowed to reverse its stand and claim that it should never have been a party. Having had the opportunity of objecting to being made a party and failing to object, the first defendant is now precluded from changing course.

In respect of issue (b), in my view, the contention holds water notwithstanding that the point was not pleaded in the defence but raised at a late stage. This point, being substantive, stands on a different footing from issue (a) by reason of the concept of vicarious liability under common law imposed by the GPA on the government, that is to say, before the government can be held liable for trespass committed by its servants, it must be proved that the servant has committed trespass. If he is not liable, then the government is also exempted from liability. Section 5 of the GPA provides:

> Liability of the government in Tort
>
> Subject to this Act, the government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the government.

Section 6(1) states:

> Limits of liability of the government
>
> (1) No proceedings shall lie against the government by virtue of s 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally ...

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Section 6(4) reads:

> (4) No proceedings shall lie against the government by virtue of s 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the government and paid in respect

> of his duties as an officer of the government wholly out of the revenue of the government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

And s 18 provides:

> Application of written law relating to procedure
>
> Subject to this Act, the written law relating to procedure shall apply to civil proceedings by or against the government in the same way as to suits between subject and subject.

These provisions require that the identity of the officer must be ascertained and the liability of the officer must be established before the government can be made liable. However, if I am wrong in this respect, at least the point is relevant for the purpose of determining the issue of trespass and unlawful eviction, as alleged, in the light of the evidence adduced, which will be discussed later.

Now, I will deal with the substantive claims of the plaintiffs. The plaintiffs contend that the notices are unlawful and that the entry of the defendants onto the land to demolish their houses and destroy the crops thereon and deprive their continued occupation of the land is an act of trespass. The claims are based on their rights at common law, statutory law and under the Constitution.

At common law, they claim, as owners by custom, the native title and the holders of usufructuary rights over the land. They contend that the land was customary and ancestral land occupied by them and their forefathers for generations. Hence, they have customary and proprietary rights in and over the land.

Under statutory law, they claim the protection of the Act and that both under the Act and the Constitution, the first and fourth defendants as governments, owed a fiduciary duty towards them to protect their welfare and the land, and are therefore holding the land as trustees for them.

And under the constitution they claim:

(i) that by reason of their customary and proprietary rights over the land from time immemorial, the land is classifiable as 'Malay reservation land' within the wide meaning of the expression in art 89(6) of the Constitution. Therefore, the land is protected land;

(ii) that the fourth defendant is under a positive duty under art 8(5) of the Constitution, read together with the Act and art 162 of the Constitution to take appropriate steps to protect the land rights of the orang asli including to positively discriminate in their favour, if necessary, that is to say, to have taken appropriate measures to protect

all aboriginal inhabited lands in question and that it cannot now take advantage of its own default and contends that the lands are unprotected lands;

(iii) that after the coming into force of the Constitution in 1957, any compulsory acquisition or taking of such lands can only be made pursuant to written law with adequate compensation under art 13 of the Constitution; and

(iv) that ss 11 and 12 of the Act are ultra vires the Constitution, in that they offend art 13 because they fail to provide for adequate compensation, and against art 8 in that there is discrimination in terms of process and compensation as between the acquisition of aboriginal land and acquisition under the LAA. In the alternative, the provisions of the Act as pre-Merdeka law ought to be read under art 162 in conformity with arts 13 and 8 of the Constitution.

On the other hand, the first defendant denies that the notices are unlawful and that a trespass had been committed since the entry and the taking of possession of the land was done according to law. It also denies that the plaintiffs are owners by custom, native title and the holder of usufructuary rights over the land. On the contrary, it asserts that whatever occupation of the lands by the plaintiffs in the area concerned was only authorized in accordance with the Federated Malay States Government Gazette Notification (NMB Selangor PU 1649/1935), and the right was given only for the purpose of residential and settlement, but not at all the rights as claimed. Further, it denies owing any fiduciary duty towards the plaintiffs as alleged. However, if at all the duty exists, the duty had been performed according to the existing laws. The fourth defendant proceeds more or less on a similar defence and asserts that all steps had been taken to protect the rights, interests and welfare of the orang asli and to enhance their well being. The plaintiffs' claim against the second and the third defendants is limited to damages for trespass. The second defendant claims to be the agent of the defendants and purports to seek shelter for all its actions under the authority of the Selangor State Authority, which is the legal owner of the land; whilst the third defendant denies liability for trespass based on the fact that it is not the decisions maker in respect of the acquisition of the land and other matters relating thereto, and that its involvement during the eviction is merely by the presence of its agent thereat.

An aborigine is defined in s 3 of the Act to mean:

> (a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;
>
> (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks and aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or
>
> (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language,
>
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>
> habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

Under s 2, an aboriginal ethnic group means a distinct tribal division of aborigines as characterized by culture, language or social organization and includes any group that the state authority may, by order, declare to be an aboriginal ethnic group. And an aboriginal community means the members of one aboriginal ethnic group living together in one place.

The defendants recognize the plaintiffs as aboriginal Temuan people but challenge the fact as to whether they still continue to practice their Temuan culture. Therefore, the onus is on the plaintiffs to show that they speak an aboriginal language, follow an aboriginal way of life as well as aboriginal customs and beliefs.

Evidence has been led to show the existence of a tribal council called the 'Lembaga Adat' from previous generations until the present day. It consists of 5 persons with specific roles and authority, namely the batin who is the head of the whole community and is the highest authority, the penghulu balai who is the keeper of the Temuan culture, the jenang who is the person that conducts and sanctions marriages in the community, the jekerah who directs communal activities and the pelima who is the watchdog against social ills and for peace in the community. It meets at the balai adat to resolve disputes and settle all matters relating to the adat (see the evidence of PW1, PW2 supported by the writings of Dr Baharom Azhar bin Rafie'i, the former Director General of the JHEOA in exh p 24 at pp 245 and 267, and agreed to by DW7, the current Deputy Director General of the JHEOA, the writings of Ahmad Ismail in exh P24 from pp 162-173, and the unchallanged expert evidence of PW7 at para 79 in exh P24 at pp 17-18). Hence, it is manifestly evident that the Temuan people of Kampong Bukit Tampoi live in an organized society, with a system for adjudicating

disputes, governed by their laws and customs, and that they still practice a specific political system according to their culture with specific persons to hold offices that had been passed down from generation to generation. The plaintiffs also adduce evidence in respect of other essential matters, that is to say, their culture relating to land (adat tanah) and burial (adat kebumian), their religion or belief system, their community weapon, ie the blowpipe (sumpitan), their tradition of sekor-menakor, their personal and place names, their custom on inheritance, their traditional activities and their aboriginal language. On adat tanah, the opening of land is preceded by specific rituals called 'adat tiga penjuru' in which the help of the spirits are invoked and homage to the spirits paid. The lands within the communal territory had been individually delineated by their forefathers as clearly defined family lots having the force of property and ownership in their culture. Each individual lot is demarcated by traditional markers, such as the pinang palm or specific fruit trees or by geographical features, such as rivers and streams, and these boundaries are invariably recognized by all in the community. The inheritance to the respective parcels of land is determined according to the adat and the distribution is resolved by the Lembaga Adat on the seventh day following the death of the land owner (see the evidence of PW1, PW2 and PW3). With regard to the adat

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kebumian, the plaintiffs bury the dead according to their distinct custom. Briefly, the deceased must be buried within the following day of the death and that the deceased's clothings, valuables and basic necessities must be kept at the burial site. Food is left in a specially built altar (sangkar) as the belief is that the deceased will rise up and eat the food. A 'sungkun' will be built wherein the incense (kemenyan) will be burnt. The penghulu balai will then invoke the spirits (serapah) and the relatives will be asked to call the spirit of the deceased. He will then take a bunch of leaves, and after calling the deceased, he will tell the deceased's spirit that the site is its home forever. The pelima will burn the incense according to the adat and pray for the soul. Once the body has been lowered into the grave, a palm frond is used six times to cushion the falling earth onto the body. Rice is then thrown on the grave at the same time, telling the deceased that the food is for him. A white ribbon is then stretched across the grave with a square centre which must lie directly above the centre of the deceased's body and the original top soil replaced. Those returning from the grave site will have to jump across a line that has been stretched across the path by someone who does not attend the funeral. The returnees are also required to beat a broken cooking pot (kuali) placed thereat. At the same time, the person who has not been to the grave site must throw soaked rice at the returning mourners. These are done to scare the spirit of the deceased from following them back to the village. On the third day, the family returns to the grave for the 'naik tanah' ceremony where food is again offered and prayers said. Then, on the seventh day, a meeting will be held, usually at the balai adat, presided by the batin to distribute the property of the deceased including land (see the evidence of PW1 and the relevant photographs). On religion or belief system, in essence, it revolves around the belief in a supreme diety and in the existence of 'moyangs' who act as intermediaries between the supreme diety and the living. The Temuans also believe that every living being is imbued with a spirit (roh) and needs to be appeased. Moyangs are the spirit beings that their ancestors are transformed into upon death. They watch over the community and their traditional lands, and are referred to as 'penunggu'. The moyangs are not worshipped but are revered and often called upon to protect or help the community including their health, such as to chase the rain away by a ceremony conducted by the penghulu balai. For that reason, the dead is buried within the vicinity of the village. The Temuans need to visit the graves regularly in order to conduct the ceremonies to appease and pay homage to their moyang protectors. The moyangs are very site specific in that they do not travel from one territory to another. Temuan religion is distinct and unique to themselves in the sense that they do not believe in or practice any of the religions of the other Malaysians (see the evidence of PW1 and PW7 in exh P24 paras 81, 82 and 83, and the 1984 study by Ahmad bin Ismail on Kampung Bukit Tampoi at p 194 of exh P24). In respect of the community weapon, the blowpipe has several terms to describe the various parts such as temiang, telak, tengkok, ipoh and damak. It is produced locally and the damak is made from 'pokok serdang'. It is used by adults and children for hunting small animals, self protection and to chase intruders away (see the evidence of

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PW1 and PW3). By the tradition of sekor-menakor, as practised by the Temuans, the customs (adat) handed down from one generation to another cannot be abandoned and that if anyone breaks the adat, the person can be expelled from the community (dipulaukan) (see the evidence of PW1). On their personal and place names, the names are derived from incidences or events that occurred during the respective infancy, for example, Dabak (PW1) got his name because he had bruises (debam) all over his body and Sagong (PW3) because he cried noisily (macam gong). Bukit Tampoi got its

name from the forest fruit called Tampeh and Dengkil from the thin or shallow flesh of the Tampeh fruit (see the evidence of PW1, PW3 and PW7 in exh P24 para 58). With regard to customs on inheritance, only the children of the deceased can inherit (see the evidence of PW1, PW2, PW3 and PW9). On traditional activities, the Temuans use the self made wooden boats as means of transport along the Langat River, fish in the river using fishing spears (tirok) made from the penaga tree, and used the 'tuba' obtained from the old cengal tree as poison to stupefy the fish in the river. The skill of boat making and the boat making tools had been passed down to the present day, and the spear head and the remains of the trees are still in existence (see the evidence of PW3 and PW9, exhs. P7, P8, P9, P10, P11, P12, P23 and the photographs in exhs. P4 and P5). In relation to the aboriginal language, the Temuan community at Kampung Bukit Tampoi have a distinct language of their own, that is to say, the Temuan language which they still use today. There is no written script of their own but the language is passed down by word of mouth through the generations dating back to the pre-literate period (see the evidence of PW7, exh P24 para 44 at pp 9, 10, 222-225 and 269-278). This fact is not challenged by the defence and no evidence to the contrary adduced. The fact that the plaintiffs spoke Temuan as their first language and that a Temuan interpreter was required to facilitate the translation of the questions and answers during their testimony is self evident.

In view of the foregoing, I am satisfied that the plaintiffs belong to an organized society, following an aboriginal way of life, practising customs and beliefs and having their own Temuan language which they use to the present day. Therefore, the plaintiffs belong to an aboriginal society within the meaning of the Act. To my mind, the facts that:

(a) they no longer depended on foraging for their livelihood in accordance with their tradition;
(b) they cultivate the lands with non-traditional crops such as palm oil;
(c) they also speak other languages in addition to Temuan language;
(d) some members of the family embrace other religions, and/or marry outsiders;
(e) some family members work elsewhere either before or after the acquisition; and
(f) the Jawatankuasa Kemajuan dan Keselamatan Kampung ('JKKK') was set up by the JHEOA to manage their affairs

do not change their origin. The election of Tukas anak Siam (PW2) as batin by the JKKK after his appointment by the Lembaga Adat should not be construed as an abandonment of their adat because it was held for administrative purposes only. Further, s 3(2) of the Act preserves their ethnic identity, which reads:

> Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion.

About the land, whether the plaintiffs have proved that the Bukit Tampoi lands are customary and ancestral lands belonging to the Temuan and occupied by them for generations:

(a) Evidence has been adduced of the settlement of Temuans in Bukit Tampoi. The plaintiffs and the Temuans have lived in Bukit Tampoi, Dengkil for at least seven generations, that is to say, about 210 years based on Professor Khoo Kay Kim's (DW6's) testimony that a generation is 30 years (to be amplified later). Kampung Bukit Tampoi is part of the area identified in various historical journals and authoritative texts which came under the administrative jurisdiction of Sepang, Kuala Langat and Dengkil districts at various times (see paras 26, 34 and 37 of exh P24). According to PW7, from the documents in the archives, Kampung Bukit Tampoi was already in existence at least 100 years ago and from his research into other authoritative texts, as well as from interviews with elders thereat, he opined that Kampung Bukit Tampoi has an even longer history of settlement and residence (see also para 140 in exh P24). There is also archival evidence indicating the early settlement of the orang asli in Bukit Tampoi lands, such as the letter from the District Officer of Kuala Langat dated 30 March 1896 concerning 'sakai' (now called Temuan) dusuns and lands. At paras 1 and 2 it is mentioned that the 'sakai'

dusuns are strictly reserved for their use and that the dusuns are in small patches all over the forest (see para 25 in exh P24 and ikatan C at p 17). Based on an archival document dated 26 November 1896 in which the District Officer of Kuala Langat wrote about the jungle produce collected by sakais, PW7 testified that the orang asli were actively involved in collecting and trading in forest produce, such as rattan, more than 100 years ago (see para 27 in exh P24 and ikatan C at p 19). In another archival document dated 16 March 1936, the Selangor State Adviser of Forests mentioned of orang asli living in the forest reserve in Kuala Langat and that they were growing rubber (see para 30 in exh P24 and ikatan C at p 4). In the Selangor Secretariat document No 675/48 relating to the discussion on Sakai Reserves and Sakai Headmen, the District Officer of Kuala Langat had written that there were altogether 16 settlements in his district, of which seven were gazetted and the rest were not (see para 31 in exh P24 and ikatan C at p 15). According to PW7, based on the same document where it

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was recorded that there were 11 headmen (Batin) for the 16 orang asli settlements in the district, the orang asli were living as a community with their own headmen and that the British recognized the appointments (see para 32 in exh P24 and ikatan C at p 16). The early presence of the orang asli in the Kuala Langat area is further supported by the 1906 publication by Messrs Skeat and Blagden at p 38 of Vol 1 (see at pp 89-106 in particular at p 100 in exh P24) where the breakdown of the aborigines in Selangor, including that of Kuala Langat district was given which shows that the highest number of orang asli was found in Kuala Langat (see para 28 in exh P24). In fact, in the JHEOA report entitled 'A brief note on the orang asli of Peninsular Malaysia and their administration' of 1972, the Temuans have been depicted to be the largest of the Proto-Malay tribes, and that the great majority of them lived in Selangor and Negeri Sembilan (see para 29 in exh P24 and ikatan C at p 86). On the evidence, I am satisfied that the Temuans were settled people and that the Bukit Tampoi lands were occupied by them long before acquisition.

(b) Evidence has also been adduced of the fact that the Temuans, including the plaintiffs, have been living at Kampung Bukit Tampoi for at least seven generations. PW3 (the first plaintiff) testified that he is the son of Tasi, the grandson of Batin Pa' Lapan, and had been living at Kampung Tampoi all his life and that he inherited his land (marked as C in exh P1) from his father. It is also not disputed that Batin Pa' Lapan was succeeded by his son Batin Endek, who in turn was succeeded by his nephew, Batin Tukas anak Siam (PW2, the seventh plaintiff). Based on these facts, PW7 concluded that since PW3 is the grandson of Batin Pa' Lapan and he himself has grandchildren living with him, that would mean that at least five generations of Temuans had lived at Kampung Bukit Tampoi from Batin Pa' Lapan's time, and considering that two other predecessors of Batin Pa' Lapan had also lived there, that is to say, Batin Pa' Gurau and Batin Mongkok, at least seven generations of Temuans had lived there (see para 45 in exh P24). The life and person of Batin Pa' Lapan is also corroborated by the document from the then Museums Department, Federation of Malaya, acknowledging the donation of an aboriginal spear from Batin Pa' Lapan (see ikatan B at p 106). From the letter dated 18 February 1955 in ikatan B at p 105 which states that Batin Pa' Lapan lived on his own land with his aboriginal group at Bukit Tampeh near Dengkil and that the Department of Aborigines was responsible for him and his people on behalf of the government, PW7 opined that the Federal Adviser on Aborigines (the predecessor of the Director General of JHEOA) recognized that the land the aboriginal group was living on belonged to them, supporting the fact that the Temuans at Kampung Bukit Tampoi lived as a community and that Batin Pa' Lapan's position was an official one, and that the colonial government assumed a fiduciary responsibility towards him (see paras 46, 47 and 48 in exh P24). PW3 testified that the original name of Kampung Bukit Tampoi was Bukit Tampeh, and according

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to PW7, Bukit Tampeh refers to Bukit Tampoi and that the aboriginal group that lived at Bukit Tampeh is the same Temuan community of Kampung Bukit Tampoi today (see para 37 in exh P24). The existence of Batin Pa' Lapan is further corroborated by the following facts and documents:

(i) the Selangor Secretariat document No 675/1948 in which the District Officer of Kuala Langat

made reference to Batin Pa' Lapan and stated that the district office had never taken any hand in the election of the headmen (see ikatan C at p 16);

(ii) the group photograph in which Batin Pa' Lapan appeared (ikatan B at p 107). PW7 stated that given his status as overall Senior Headman of all the orang blandas in Selangor then, Batin Pa' Lapan must have been above 50 years of age at the time when the documents in ikatan B at pp 104-105 mentioning him were made in 1949 and 1955 respectively (see para 38 in exh P24). According to PW7, 'orang blandas', like other terms such as 'mantra' and 'biduanda' is a term used to refer to the Temuan people (see para 35 in exh P24). Dr Baharom, the former Director General of the JHEOA, in his doctoral dissertation, speaks the same (exh P24 at pp 233-234); and

(iii) the locations marked H2 and H3 in exh P1 as the graves of PW3's ancestors, including that of Batin Pa' Lapan as shown in the photograph in ikatan B at p 114 marked as exh P7(A) (see the notes of evidence at p 28).

Further support to the claim that Kampung Bukit Tampoi was already an established orang asli settlement at least half a century ago can be gathered from the 1950 archival document relating to the schedule of aborigines settlements in Ulu Langat (ikatan C at p 42) which recorded that 50 families were living in Kampung Bukit Tampoi then and that there was a need for a school thereat. To my mind, the recognition by the authorities of the need of a school then is a clear indication that Kampung Bukit Tampoi was, prior to 1950, already a settled and established community. The evidence adduced has not been contradicted. Hence, I am satisfied that the Temuans, including the plaintiffs, have been living at Kampung Bukit Tampoi for at least 210 years.

(c) It is evident that the Bukit Tampoi lands, including the land, were customary and ancestral lands based on (i) the adat of inheritance and succession of lands; (ii) their usage for dwelling purposes and cultivation of subsistence and economic crops, hunting and fishing, as resting places of their deceased members of the community and to practice their way of life and (iii) the recognition of individual or family ownership thereto not only by all the members of the local community, all other neighbouring Temuan communities, all neighbouring non-orang asli communities, but also by the authorities without any dispute except for the acquisition. It is also clear that the Bukit Tampoi lands, including the land, are customary lands by reasons of (i) the existence of graves of the ancestors thereat and the

importance of the moyangs to the Temuans; (ii) the existence of evidence on the Bukit Tampoi lands that confirm the presence of the community thereat and that they used the area for their daily activities for ages. Such evidence is the old cengal tree from which the poison (tuba) was extracted for fishing purpose and the remains of the penaga tree from which the fishing spear (tirok) was made; (iii) the existence of the names for specific places thereat and its vicinity such as Bukit Tampoi, Dengkil, Bergul, Batik Abok, Binyai and Panggol which originated from the Temuans' spoken language (see the evidence of PW7 at para 59 in exh P24 and PW3); (iv) the existence of balai adat on the land before the acquisition, which is another culturally significant monument of the distinctive Temuan culture (see exh P1 marked II) and (v) the archaeological findings of PW8 relating to an old iron spear head and its age (exh P9) and the wooden boat (see at pp 85-86 of the notes of evidence and the evidence of PW3 at p 29 of the same, who claimed to have found exh P9 and exh P13 (pisau meraut) thereat).

In the final analysis, I conclude that:

(a) the Bukit Tampoi lands, including the land, have been occupied by the Temuans, including the plaintiffs, for at least 210 years and the occupation was continuous up to the time of the acquisition;

(b) the plaintiffs had inherited the land from their ancestors through their own adat;

(c) the Temuans who are presently occupying the Bukit Tampoi lands including the plaintiffs in respect of the land are the descendants of the Temuans who had resided thereat since early times and that the traditional connection with the Bukit Tampoi lands have been maintained from generation to generation

and the customs in relation to the lands are distinctive to the Temuan culture; and

(d) the Bukit Tampoi lands, including the land, are customary and ancestral lands belonging to the Temuans, including the plaintiffs, and occupied by them for generations.

Before proceeding with the law, I need to deal briefly with the following matters:

(a) PW7, Dr Collin Nicholas, gave expert evidence on the Temuan practices, customs, culture, traditions, political system and their way of life including those of the Temuan community at Kampung Bukit Tampoi. Unfortunately, no challenge to his expertise was made before he was called to testify. Be that as it may, judging from his credentials and testimonies relating to his fieldwork, research, studies, publications and presentations as deposed in his affidavit (exh P24) I accept him as an expert. However, in accepting his evidence, I adopt a cautious approach because he is deeply involved with and active in the welfare of the orang asli, though not completely biased. His evidence can be relied upon because, to a great extent, it is supported

by the evidence of other lay witnesses called by the plaintiffs and also based on the published works of other writers, which are not hearsay but admissible under s 45 of the Evidence Act 1950 ('the EA') (*R v Abadom* [1983] 1 All ER 364 and Sarkar's Law of Evidence (15th Ed) at p 884).

(b) On whether oral histories of the Temuans relating to their practices, customs and traditions and on their relationship with the land can be accepted, please see my ruling made during the trial (see p 621). The acceptance of evidence is confined to the ruling.

The common law recognizes a form of native title which reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands. The aboriginal people's right over the land includes the right to move freely about their land, without any form of disturbance or interference, and also to live from the produce of the land itself, but not to the land itself (in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein) since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. In Malaysia, the recognition was affirmed by the High Court in the case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and confirmed by the Court of Appeal in the case of *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158 (both referred to as 'the Adong case'). It was held that the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generation of the aboriginal people would be entitled to this right of their forefathers, and further, that the Act does not exclude rights vested in the aboriginal people at the common law. The decision in the Adong case was influenced by the persuasive authority of the Canadian case of *Calder v A-G of British Colombia* (1973) 34 DLR (3d) 145 ('the Calder case') and the Australian cases of *Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1, *Mabo v Queensland* (1991-1992) 175 CLR 1 ('Mabo No 2') and *Pareroultja & Ors v Tickner & Ors* (1993) 117 ALR 206. The Adong case is concerned with the deprivation of vast areas of the aborigines' traditional and ancestral land on which they did not stay, but depended on to forage for their livelihood in accordance with their tradition. However, in the case before me, the acquisition is in respect of a small portion of their traditional and customary or ancestral land where they resided, that is to say, their settlement. I follow the Adong case, and in addition, by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land. I am fortified in my view by the leading Privy Council case of *Amodu Tijani v the Secretary, Southern Nigeria* [1921] 2 AC 399 ('the Amodu case'), which was relied on by the High Court in the Adong case though the issue of settlement did not arise in the case. The issue in the Amodu case was whether the native people whose land was taken for a public purpose ought to be compensated on the basis of ownership of the land or merely on the basis of having a right of control and management of

the land. In ruling that compensation should be on the basis of full ownership, the Privy Council observed (at pp 403-404):

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

The Privy Council had cautioned against interpreting the native title by reference to the English land law principles (at p 403) and in Mabo No 2, Brennan J administered the same caution (at p 29). Accordingly, the Privy Council relied upon a report on the character of the tenure of land among the native communities in West Africa which stated that all members of the native community had an equal right to the land although the headman or the head of the family had charge of the land, and in loose mode of speech is sometimes called the owner who held the land for the use of the community or family, and the land remained the property of the community or family. The same can be said of the character of land tenure and use amongst the Temuan people based on the facts as found. Further, the character of proprietary interest of the aboriginal people in their land as an interest in land and not merely an usufructuary right can be gathered from the following features of the native title as decided by the courts:

(a) it is a right acquired in law and not based on any document of title (see the Calder case, followed in the Adong case at p 428F);
(b) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration (see Brennan CJ in*The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1 ('the Wik Peoples case') at p 84, followed in the Malaysian case of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 at p 780);
(c) native title is a right enforceable by the courts (see Brennan CJ in the Wik Peoples case at p 84);
(d) native title and interest in aboriginal land is not lost by colonization, instead the radical title held by the sovereign becomes encumbered with native rights in respect of the aboriginal land (see Mabo No 2, headnotes at p 2);
(e) native title can be extinguished by clear and plain legislation or by an executive act authorized by such legislation, but compensation should be paid (see Mabo No 2, headnotes at p 3); and
(f) the aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty (see Ward & Ors (on behalf of the *Miriuwung and Gajerrong People & Ors v State of Western Australia & Ors* (1998) 159 ALR 483 at p 498, lines 43-45).

The aforesaid principles of native title were adopted in the current leading cases on the subject in Australia and Canada viz Mabo No 2, the Wik Peoples case, and Delgamuukw v The Queen in right of British Columbia et al; First Nations Summit et al, Interveners (1997) 153 DLR (4th) 193 ('the Delgamuukw case') which holds that the aboriginal people's rights included an interest in the land and not merely an usufructuary right. The position is the same in the United States of America from the time of the case of Johnson and Graham's Lessee v William M'Intosh (1823) 21 US 681 at p 688 where Marshall CJ said:

> They (Indian tribes or nations) were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.

My view is that, although I am inclined to wear blinkers in considering the issues involved in this case by confining only to our existing laws and local conditions, I am compelled not to be blinkered by the decisions of the courts of other jurisdictions which deserve much respect, in particular on the rights of the aboriginal people which are of universal interest, especially when there is no clear and plain indication to the contrary in our laws. In fact, the Court of Appeal in the Adong case had accorded much respect to those decisions of the courts of other jurisdictions when it agreed with the views expressed by the learned judge based also on the decisions of the courts of other jurisdictions for the same reason, where Gopal Sri Ram JCA held at p 164:

> We can find nothing objectionable in the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds.

Although the Adong case purported to follow Mabo No 2, it did not consider that an essential character of aboriginal titles to the land as described by the High Court of Australia was a proprietary interest in the land itself. Brennan J (as he then was) explained it as follows:

> Whether nor not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of 'property' which require alienability under the municipal laws of our society (39), to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in the people: land is susceptible of ownership, and there are no other owners ... .

His lordship went on to explain that although an aboriginal title was a community title belonging to the community as a whole, individuals within

the community could, by its laws and customs, possess proprietary individual rights over their respective parcels of land, as follows:

> Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws, and customs and are dependent on the community title. *A fortiori, there can be no impediment to the recognition of individual proprietary rights.*

The Adong's case was decided at the time when the Calder case was the leading Canadian authority. It was decided before the landmark decision of the Canadian Supreme Court in the Delgamuukw case; and it appears from the judgment as reported, the case of Canadian Pacific Ltd v Paul et al; Attorney-General of Ontario, intervener (1988) 53 DLR (4th) 487 ('the Canadian Pacific case') was not cited before it. Therefore, it is evident that the Adong case did not take into account the important developments and clarifications made to the aboriginal title by Canadian case law after the Calder case. In the Canadian Pacific case the Supreme Court said of aboriginal interest in land that '... it is more than the right to enjoyment and occupancy' (at p 505). And in the Delgamuukw case, the Supreme Court specified that the content of an aboriginal title is a right in land, when it held:

> Aboriginal title is *a right in land* and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights (per Lamer CJ at p 240).

This statement was made in refuting the argument by the government that the aboriginal title is no more than a bundle of rights to engage in activities or the right to exclusive use and occupation of land. And Lamer CJ went to explain that because the aboriginal title is a right in the land itself, it cannot be limited to use only for activities which are traditionally aboriginal activities. He said:

> ... aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in Van der Peet (at para 46):

> '... in order to be an aboriginal right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> *Aboriginal title, however, is a right to the land itself*. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s 35(1). Those activities are parasitic on the underlying title.' (Emphasis added.)

Since the establishment of the Selangor sultanate in 1766, it was claimed that all lands in the state belonged to the Sultan, including those occupied by the aboriginal people since time immemorial. In general, the aboriginal

[2002] 2 MLJ 591 at 615

people occupied the lands in the hinterland in an organized society, though some were nomadic. Although the Sultan owned the lands, they were left undisturbed to manage their affairs and way of life thereon in accordance with their practices, customs and traditions, except in respect of those lands which attracted activities to enrich the privy purse, such as tin mining etc. In my view, if the aboriginal people are now to be denied the recognition of their proprietary interest in their customary and ancestral lands, it would tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the 20th century where the laws, practices, customs and rules of the indigenous peoples were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters. The reason being that when a territory was colonized by the Whites, it was regarded as practically unoccupied, without settled inhabitants or settled land, an empty place, desert and uncultivated eventhough the indigenous peoples had lived there since time immemorial because they were regarded as uncivilized inhabitants who lived in a primitive state of society. However, Mabo No 2 changed the position, and since then, there had been a flurry of state and federal legislation relating to native titles. Brennan J in his reasoning, referred to international human rights norms. He said:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisaiton of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size, it is a question of fact in each case. In this case, as the land is clearly within their settlement, I hold that the plaintiffs' proprietary interest in it is an interest in and to the land.

With regard to their statutory rights, it was affirmed and confirmed in the Adong case (which was concerned with the aboriginal inhabited place) that the Act does not limit the aborigines' rights therein and in order to determine the extent of the aboriginal peoples' full rights under the law, their rights under the common law and the statute has to be looked at conjunctively, for both the rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under the common law. This is what Mokhtar Sidin J (as he then was) said leading to the affirmation (at p 430):

[2002] 2 MLJ 591 at 616

> Recognizing these rights of the aboriginal people, the government enacted the Aboriginal Peoples Act 1939 which is 'an enactment for the protection of the aboriginal tribes of Perak'. In the same year, this enactment was extended to the states of Selangor, Negeri Sembilan and Pahang which were then known as the Federated Malay States. The Aboriginal Peoples Act was amended in 1954, 1967 and lastly in 1974.

> Sections 6 and 7 of the Act specifically provide for the creation of special areas exclusively for the aboriginal peoples of Malaya, either as a reserve land or for the right to collect the produce of the jungle and to be used by hunting grounds. By virtue of s 1, the rights of the aboriginal peoples to occupy and/or collect forest produce overrides Malay reserve land, forest reserve or game reserve. Section 10 reflects the legislature's intention to allow the aboriginal people to lead the type of life they have always led, which has been nomadic and always looking for greener pastures. Under s 11, the State Authority must pay compensation when acquiring by alienation or leasing any land upon which are fruit and rubber trees claimed by the aboriginal people.
>
> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by he government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s 11 of the Act, which guarantees adequate compensation for the land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

And in such confirmation, Gopal Sri Ram JCA said at pp 162 and 164:

> According to the learned State Legal Adviser, the respondents' rights and the manner of their enforcement are exclusively governed by the Aboriginal Peoples Act 1954 ('the Act'). Consequently, there is no room for the co-existence of common law rights.
>
> A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law. As pointed out by the learned judge, and by counsel for the respondents during argument before us, the Act in s 2 creates a distinction between an 'aboriginal area' and an 'aboriginal inhabited place'. These are defined as follows:
>
> > 'aboriginal area' means an aboriginal area declared to be such under this Act.
> >
> > 'aboriginal inhabited place' means any place inhabited by an aboriginal community which has not been declared to be an aboriginal area or aboriginal reserve.
>
> *[2002] 2 MLJ 591 at 617*
>
> Section 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case is not based upon a claim that the land in question was an aboriginal area. They rely upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place'. Herein lies the fallacy in the appellants' argument.

I follow the decision on the issue of their statutory rights. Hence, I need not labour too much on this issue.

On their constitutional rights, the constitution is the supreme law of the country. Article 4 of the Constitution provides that all laws passed after independence day, which are inconsistent with the constitution, are void to the extent of the inconsistency. Under the constitution, the aboriginal people enjoyed a special position. Article 8(5)(c) of the Constitution provides:

> (5) This article does not invalidate or prohibit:
>
> > (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

In Adong's case, wide interpretation was given to proprietary rights under art 13 of the Constitution, and the court held that the aboriginal peoples' rights, both under the common law and statutory law are proprietary rights protected by art 13 of the Constitution. The article provides:

> Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The learned judge, in so holding, said:

> The Federal Constitution art 13 supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use of property without compensation shall be rendered void in accordance with art 4 of the Federal Constitution. I assume that the alienation of the Linggiu valley lands in four titles was done under the National Land Code 1965 but the National Land Code 1965 does not provide for compensation of land acquired. However, the National Land Code 1965 must read as being subservient to art 13 of the Federal Constitution and where there is no provision for compensation under statutory law, art 13(2) should be read into that statute.

In the case before me, it is evident that the defendants purported to compensate the plaintiffs only for what had been provided for under the Act. To my mind, in the light of what had been pronounced in the Adong case as reflected above, such compensation is not adequate within the meaning of art 13(2) of the Constitution, although the Act is a special Act relating to the aboriginal people. Therefore, I hold that the deprivation of the plaintiffs' proprietary rights was unlawful because they are entitled to the compensation in accordance with art 13(2).

[2002] 2 MLJ 591 at 618

The law governing the acquisition of land is the LAA. Under s 2, the word 'land' is defined to mean alienated land within the meaning of the state land law, *land occupied under customary right* and land occupied in expectation of title. To my mind, as the land was continuously occupied and maintained by them to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs, it falls within the ambit of ' *land occupied under customary right*' within the meaning of the definition. The expression ' *land occupied under customary right*' is not defined. Hence, in construing its meaning, I adopt a purposive approach and hold that it should be given a wider interpretation so as to achieve the object of the LAA, that is to say, to ensure adequate compensation be paid for the land acquired. Although the Code, including the previous state enactments, make provision for the customary tenure and customary land holder and that Judith Sihombing in the book entitled 'The National Land Code -- A Commentary' (Malayan Law Journal Sdn Bhd 1997) at paras 353, 505-552 deal with those matters (in particular, in respect of the customary tenure referred to in s 4(2) of the Code as that of the tribal adat in force in Negeri Sembilan and Malacca), in my view, it does not mean that the land cannot fall within the definition, because the Code and the enactments were enacted and the book was written before the Adong case was decided at the time when native titles were unknown to our law. Further, by such construction, full effect can be given to the requirements of arts 13 and 8 of the Constitution, otherwise ss 11 and 12 of the Act relating to compensation would be ultra vires the constitution, being inconsistent with the articles. And further, the definition clearly contemplates that the customary land may not have title and is distinguished from alienated land which has title, and acquired land where the title is forthcoming. It should be noted that the definition of 'land' is peculiar to Malaysia only eventhough India and

Singapore have similar legislation. Apart from the orang asli and the native people of the Borneo states, there are no other classes of people in Malaysia who occupy the said lands on the basis of customary right, except the lands occupied under the tribal adat in Negeri Sembilan and Malacca. This was recognized when the Act was enacted. Thus, the Act speaks of aboriginal reserve land and aboriginal occupied land. The latter refers to hereditary land or customary land. The National Land Code (Penang and Malacca Titles) Act 1963 was enacted for the introduction of a system of registration of titles to land in the states of Penang and Malacca, for the issue of replacement titles and for the assimilation of such systems into the provisions of the Code, that is to say, to give full effect to the Torrens system adopted. The absence of similar legislation in respect of the aboriginal land cannot be construed to mean that the aboriginal land is to be excluded from the expression ' *land occupied under customary right*' in the definition of 'land' under the LAA. Therefore, the plaintiff must be compensated in accordance with the LAA.

The content of the fiduciary duties has been described in may ways. But in essence, it is a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs. In Mabo No 2, it

[2002] 2 MLJ 591 at 619

was said that the obligation on the Crown was to ensure that the traditional title was not impaired or destroyed without the consent of or otherwise contrary to the interests of title holders. And in the Wik People's case, it was reiterated that the fiduciary must act consistent with its duties to protect the welfare of the aboriginal people. The remedy, where the government as trustee or fiduciary has breached its duties, is in the usual form of legal remedies available, namely by declaration of rights, injunctions or a claim in damages and compensation.

To my mind, the first and fourth defendants owe fiduciary duties towards the plaintiffs on the following grounds:

(a) by reason of the constitutional and statutory provisions, art 8(5)(c) of the Constitution provides an exception to the equality provision in respect of any provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service. In addition, item 16 of the 9th Sch of the Constitution in List 1 -- Federal List expressly empowers the Federal Government to enact laws for the welfare of the aborigines, though no specific law has been enacted on this after Merdeka. The Act is pre-Merdeka law. However, by art 162(6) of the Constitution, any court applying pre-Merdeka law has to read it in conformity with the provisions of the Constitution. The object of the Act is to provide for the protection, well being and advancement of the aboriginal peoples of West Malaysia. They need to be protected from unscrupulous exploitation and to safeguard their tribal organization and way of life (see para 92 in exh P24).

(b) The JHEOA was set up pursuant to the Act and was charged with the responsibility of looking after the welfare of the orang asli. It made a significant policy statement in 1961 called 'Statement of Policy Regarding the Administration of the orang asli of Peninsular Malaysia' (see ikatan C at p 45-49), which it considers still applicable and forming the policy of the department (see DW 7 at p 171 of the notes of evidence). In respect of the land rights of the aborigines, the statement states:

> (d) The special position of aborigines in respect of land usage and land rights shall be recognized, that is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically in line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent.

(c) In a 1955 document, the then adviser on aborigines in the Colonial Government expressly declared responsibility for the welfare of the orang asli in the Bukit Tampoi area (see ikatan B at p 105). Part of it reads:

> Batin Pa' Lapan is the overall Senior Headman of all the Orang Blandas Aborigines) in Selangor. He lives on his own land with his aborigine group at Bukit Tampoi near Dengkil.
>
> *[2002] 2 MLJ 591 at 620*
>
> This department is responsible for him and his people on behalf of the government of the Federation of Malaya and the Selangor State Government.
>
> In any matters concerning Batin Pa' Lapan and his people, please refer to the adviser on aborigines at the address given above.

DW7 confirmed that the JHEOA still accepts the contents of the letter (see at p 173 of the notes of evidence).

It is evident that the government is moving towards issuing permanent titles to orang asli lands, but is administratively hampered. It is also clear that the government is implementing the integration policy in respect of the orang asli vis-à-vis the Malays by setting up 'Perkampungan orang melayu -- orang asli'. Further, the government has spent millions of Ringgit to improve their standard of living so that they will have a better quality of life, at par with the other races. However, to my mind, unfortunately notwithstanding its good efforts, the government had breached the fiduciary duties owed to the plaintiffs by:

(i) the deprivation of their proprietary rights without adequate compensation;
(ii) by the unlawful eviction of the plaintiffs from their lands. It is unlawful as the 14 day notice was unreasonable and insufficient, not being compliant with the LAA procedure.

Therefore, had it not been for the reasons as stated in order (3) below (see p 621), the loss in consequence of the breach must be made good, and that loss would be the value of the lands lost as a result of the first and fourth defendants failing to protect it.

Trespass is a tort against possession. As the plaintiffs were in possession of the land, a trespass had been committed in respect of the land. However, in my view, the first and fourth defendants are not liable for trespass by reason of the provisions of s 6(4) of the GPA since the identity of the relevant officer has not been ascertained and the liability of the officer has not been established. For the same reason, the first defendant is not liable in damages for the unlawful eviction. As for the second and third defendants, they are liable to the plaintiffs for trespass. They cannot take shelter under the authority of either the first or fourth defendants or both, because trespass is against possession but not ownership, and their misdeeds are reflected by the presence of the highway on the land now which had been constructed by the second defendant and maintained by the third defendant.

To summarize:

(1) The land is customary and ancestral land occupied by the plaintiffs for generations.
(2) Under the common law, their proprietary interest in the land within the settlement is an interest in and to the land.
(3) Their rights under the common law and the Act are complementary to each other.

[2002] 2 MLJ 591 at 621

(4) Their rights both under the common law and statutory law are proprietary rights protected by art 13 of the Constitution.
(5) The compensation paid to them under the Act is not adequate within the meaning of art 13(2) of the

Constitution; therefore, the deprivation of the land was unlawful.

(6) They must be compensated under the LAA.

(7) The first and fourth defendants owe fiduciary duties towards the plaintiffs, which had been breached and therefore, the plaintiffs would be entitled to be compensated for the loss suffered which is the value of the land, had it not been for the reasons as stated in order (3) below (see p 621).

(8) The eviction of the plaintiffs from the land was unlawful because the 14 day notice given was unreasonable and insufficient.

(9) Trespass had been committed against the possession of the land by the plaintiffs. The second and third defendants are liable for it.

Therefore, the following orders are hereby made:

(1) All the declarations sought for in paras 2(1)(a) to (f) and 2(2)(b) to (f) above are granted. For para 2(2)(a), declaration is refused because the land is not 'Malay reservation' within the meaning of art 89(6) of the Constitution. Article 89 of the Constitution, when read as a whole, does not include the aboriginal people of the Malay Peninsular because the word 'natives' appearing in sub-art (6) is defined in art 161A(6) of the Constitution to mean the natives of Sabah and Sarawak. If it is meant to be otherwise, the word 'aborigines' would have been used in the sub-article.

(2) The first defendant is to pay adequate compensation for the land, to be assessed strictly in accordance with the LAA.

(3) No order is made for the breach of fiduciary duties since it was not specifically prayed for and to avoid duplicity in view of order (2) above.

(4) The second and third defendants are to pay damages to the plaintiffs for trespass.

(5) No order as to aggravated and exemplary damages because the first and the fourth defendants are not liable for trespass and unlawful eviction.

(6) As the parties had agreed that the hearing is for the purpose of determining liability only, the compensation in order (2) above and the damages in order (4) above are to be assessed by the senior assistant registrar with interests to be awarded according to the law.

(7) Costs to the plaintiffs against all the defendants.

RULING OF THE COURT ON A PRELIMINARY ISSUE

The preliminary issue before me is whether the plaintiffs should be allowed to adduce oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with the land.

[2002] 2 MLJ 591 at 622

The plaintiffs seek to introduce evidence of oral histories relating to: (i) the status of the said land viz, the land use and (ii) the practices, customs and traditions of the plaintiffs who are 'orang asli' known as Temuans. The defendants object on the ground that it offends against the hearsay rule.

Briefly, the plaintiffs plead (para 1 to 6 of the statement of claim) that they are Temuans and had acquired rights over the said lands by land use and occupation through customs, original possession and usufructuary derived from their forefathers and still continuing up to the present time, notwithstanding the past or present legislations pertaining to land. The defendants, in their defence, though not challenging the plaintiffs' authenticity or origin assert that the plaintiffs are no longer practicing or observing their traditional way of life and put the plaintiffs to strict proof of their averments. This is the real dispute in this primary issue for my consideration.

It is trite that hearsay evidence is to be excluded because it is not the best evidence and not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost. That is the rational for the

exclusion. Also, it is trite that hearsay becomes admissible only when specific provision has been made for its admissibility. Our pertinent legislation is the EA. Sections 32, 48, 49 and 50 of the EA are exceptions to the hearsay rule. In the context of the issue before me, s 32(d) of the EA deals with the statement of a dead person which given the opinion of the person as to the existence of any public right or custom or matter of public or general interest (as opposed to private right, customs or interest), of the existence of which if it existed he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter had arisen and s 32(e) of the EA is concerned with the statement relating to the existence of any relationship by blood, marriage or adoption on the same conditions as s 32(d) of the EA. Sections 48, 49 and 50 of the EA deal with the opinion of living person as to the existence of general right or customs, usages, tenets etc. and on relationship when relevant.

It is manifestly clear that under art 8(5)(c) of the Constitution and the act the plaintiffs have the right to be protected and the right to well-being and advancement, in particular to land use. The situation here is similar to the aboriginal peoples of Canada where in the Delgamuukw case the Supreme Court of Canada affirmed the principles established in Van der Peet viz, first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit -- must be understood against this background. The first principle relates to the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. Since many aboriginal societies did not keep written records at the time of the contact or sovereignity, it would be exceedingly difficult for them to produce conclusive evidence from pre-contact times about the practices, customs and traditions of their community. The second

principle is to adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of the past.

However, in Malaysia, the rules of evidence are codified and the reception of the UK common law under s 3 of the Civil Law Act 1956 does not cover the hearsay rule. We have to look only at the four corners of the EA whether oral histories of aboriginal societies should be accepted and if so, under what circumstances. In this respect s 32(d) and (e) of the EA come into play. Section 32 of the EA permits verbal statement as well. Based on this fact ie the enabling provision, I am sure the framers of the EA would have been aware or ought to have been aware of the fact that our aboriginal peoples also did not keep or have written records of their histories. That being the case, the evidentiary difficulties as envisaged should not be a reason for the courts here to create further exceptions to the hearsay rule other than what have been codified otherwise it will make a mockery of the law. Although the courts in Canada, USA and Australia had adopted a liberal approach in this respect, the courts here must interpret and apply the relevant laws as existing until they are amended.

It is pertinent to note that s 32(d) of the EA merely permits statement of dead person in the form of an opinion. Dr Das contends that such statement is in fact only an opinion but still admissible except as to weight and how much weight to be attached to it will depend very much on the status of the maker in relation to the subject matter of the statement; eg a Batin or a Penghulu Balai/Ketua Adat stating their practices, customs and tradition and on their relationship with the land. I agree with that contention in the sense that the statement gives the opinion of the declarant, that is to say, of general reputation which his position has naturally brought within his knowledge and not of facts within the declarant's knowledge. The statement must be founded on the concurring opinions of many others of the community who are equally interested in the matter, and which opinion having thus accumulated and grown through generations, furnishes strong presumptive evidence of its trustworthiness, such as statement of general reputation made by a Batin that the boundaries of land were demarcated by certain trees or made by a Penghulu Balai/Ketua Adat that the graves of their ancestors were lighted and provided with food for the souls to eat.

In the final analysis, it is my considered view that, in principle, oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land should be admitted subject to the confines of the

EA, in particular s 32(d) and (e), that is to say:

(i) they must be of public or general nature or of public or general interest;
(ii) the statement must be made by a competent person, ie one who 'would have been likely to be aware' of the existence of the right customs or matter; and

[2002] 2 MLJ 591 at 624

(iii) the statement must be made before the controversy as to the right, customs or matter had arisen.

In arriving at this decision I did also consider the necessity of the plaintiffs to overcome the burden of strict proof placed on them by the defendants. To my mind, the plaintiffs may do so by resorting to the aforesaid provisions of the EA and that would be sufficient because the degree of proof placed on the plaintiffs is only on the balance of probabilities. However, this is not a blanket sanction but just on ad-hoc basis. That is to say, the defendants or the plaintiffs, as the case my be, are entitled to object to a particular piece of evidence to be given by a witness during the trial, only if it merits objection, and the matter may be argued on the respective merits only within the confines of this decision that I made.

Order accordingly.

Reported by Peter Ling