9, 1968

JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL No. 18 of 1966

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

IN THE MATTER of CIVIL SUIT No. C/TO/63 in the HIGH COURT IN BORNEO AT KUCHING

- and -

IN THE MATTER of THE LAND CODE (CHAPTER 81 of the LAWS OF SARAWAK) PART IV

- and -

IN THE MATTER of THE ACQUISITION of K.O.T. 16178 and K.O.T. 16179 of KUCHING

B E T W E E N:

AIK HOE & COMPANY LIMITED
(Objector) Appellant

- and -

SUPERINTENDENT OF LANDS AND SURVEYS, FIRST DIVISION
(Respondent) Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from a judgment of the Federal Court of Malaysia (Thomson Lord President Ong Hock Thye Acting C.J. and Suffian J.) dated the 17th January 1966 which allowed the Respondent's appeal from a judgment of Harley J. in the High Court of Borneo given at Kuching and dated the 13th March 1965. By his judgment Harley J. on an application under Section 56 of the Land Code (Chapter 81 of the Laws of Sarawak) for the amount of compensation payable to the Appellant for the resumption by the Crown of two areas of land comprised in K.O.T. 16178 and K.O.T. 16179 to be determined by the High Court awarded the Appellant the sum of $607,000. The Court of Appeal allowed an appeal by the Respondent against the said judgment to the extent

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of reducing the award to $370,140.

2. The provisions of the Land Code which are relevant to this appeal are as follows:-

(i) Section 46 provides that land alienated by the Crown under Part III of the Land Code may be resumed by the Crown whenever it is required for certain purposes therein specified;

(ii) Section 47 provides that whenever the Governor in Council passes a resolution that land in any locality is likely to be needed for any of the purposes specified in Section 46 the Respondent shall cause a public notice of the substance of such resolution to be given at convenient places in the locality;

(iii) Section 48 provides that whenever it appears to the Governor in Council that any particular land is needed for any of the purposes specified in Section 46 the Clerk of Councils shall make a declaration to that effect and that the declaration shall be posted in the office of the Respondent and of the District Officer and shall state the situation of the land, the particular purpose for which it is needed, its approximate area and all other particulars necessary for identifying it;

(iv) Section 49 provides that the Respondent shall cause notices to be posted at convenient places on or near the land to be taken, stating that the Crown intends to take possession thereof and that claims to compensation for all interests therein may be made to him and that every such notice shall require all persons interested in the lands to appear before the Respondent at a time and place in the notice mentioned and to state the amount and particulars of their claims to compensation;

(v) Section 51 provides that on the day so fixed or on any other day to which

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the enquiry has been adjourned the Respondent shall proceed to enquire into the objections which any person has stated and shall make an award under his hand of the compensation which in his opinion should be allowed for the land in accordance with the directions in Sections 60 and 61 thereof;

(vi) Section 56 provides that any person interested who has not accepted the Respondent's award may by written application to the Respondent require that the matter be referred by him for the determination of the Court;

(vii) Section 57 provides that in making the reference the Respondent shall state for the information of the Court amongst other things the situation and extent of the land with particulars of any trees buildings or standing crops thereon, the amount of compensation awarded under Section 51 and if the objection be to the amount of compensation the grounds on which the amount of compensation was awarded;

(viii) Section 59 provides that the Court shall appoint two assessors for the purpose of aiding the Court in determining the objection;

(ix) Sections 60 and 61 prescribe the matters to be taken into consideration in determining the amount of compensation to be awarded and provide (so far as material) that the Court shall take into consideration the market value of the land at the date of publication of the notification under Section 47

3. On the 1st April 1960 the Respondent, pursuant to Section 47 of the Land Code, caused public notice to be given of the substance of a resolution by the Governor in Council that land in the vicinity of Kuching was likely to be needed for all or some of the purposes specified in Section 46 of the Land Code. By a Declaration made under Section 48 of the Land Code and published on the 20th April 1961 it was declared that certain land situate in the Pending Peninsula and described in the p.13-16

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Schedule thereto was needed for the purposes of residential and industrial development and other public facilities in connection with the new Port of Kuching. The land described in the Schedule to the said Declaration included the land comprised in K.O.T. 16178 and K.O.T. 16179 (hereinafter called "Plot A" and "Plot B" respectively).

4. On the 1st April 1960 the Appellant was the Registered Proprietor of Plot A and Plot B. Both plots were held under Leases from the Crown for a term of 900 years from 17th July 1911. Both Leases were granted without conditions but under the general description "agricultural". Plot A comprised an area of
p.11 25.72 acres situate about four miles from Kuching and fronting on Pending Road for approximately 32 chains with an average depth of 5 to 10 chains. Except for about one acre Plot A was below 10 ft. contour and subject to flood and affected by tidal water. No electricity or main water supply was available. Plot B
p.11-13 comprised an area of 17.82 acres also situate about four miles from Kuching fronting Pending Road with a frontage of approximately 18 chains. Included within the boundaries of Plot B were two plots held under K.O.T. 16180 and K.O.T. 16181 which were not used by the Appellant and which were then used for burial purposes. About half an acre of Plot B was below the 10 ft. contour and subject to flood and affected by tidal water, the remainder being high land up to the 50 ft. contour near the graves in K.O.T. 16181.

p.17 5. On the 27th April 1961 the Respondent gave notice in accordance with Section 49 of the Land Code that the Crown intended to take possession of Plot A and Plot B and that claims for compensation for all interests therein might be made to him. On the 19th September 1961 an inquiry was held by the Respondent pursuant to Section 51 of the Land Code. At the enquiry the Appellant claimed that the market value of both Plot A and Plot
p.28-31 B was $30,000 per acre. On the 16th March 1963 the Respondent awarded the Appellants $121,460 in respect of Plot A and $112,920 in respect of Plot B together with $3,380 in

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respect of improvements to Plot B.

6. On the 26th April 1963 the Appellants applied pursuant to Section 56 of the Land Code for the compensation awarded by the Respondent to be referred to the High Court of Kuching upon the ground that the compensation was inadequate and that the award could not be supported having regard to the potentiality and market value of the land and to sales of land in the vicinity. p.36

7. In December 1964 the Respondent offered to increase the award in respect of Plot A to $167,418 and in respect of Plot B to $131,350. This offer was refused by the Appellant.

8. The Respondent made the Statutory Statement required by Section 57 of the Land Code on the 25th January 1965. In the Statutory Statement the Respondent stated that the amount of compensation awarded had been based primarily on the evidence of these recent sales of comparable land in the vicinity. A plan and Schedules giving particulars of these sales forms Appendix J. thereto. p.1-46

9. The reference was heard by Harley J. at Kuching on the 9th, 10th and 11th March 1965 with two Assessors (appointed pursuant to Section 59 of the Land Code) namely Song Thien Chick and Yeo Cheng Hoo.

10. The Appellant called two witnesses, John Murray Carter (a Surveyor and Valuer practising in Singapore) and Robert Hardy (an Architect practising in Kuching). Carter produced a Report (Exhibit 8) dated the 17th May 1963 in which he valued Plot A and Plot B at $698,000. He arrived at this figure by taking a "commencing value" of $15,500 per acre and by making the adjustments to the commencing figure (to allow for the cost of raising the level of the land to 9 ft. contour, constructing roads and other matters) explained in pages 12-16 of his Report. He arrived at the commencing value of $15,500 per acre by selecting out of the sales of land in the Pending area listed in Annexure C thereto the ten sales p.215-237

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which are listed in Annexure A1 thereto. These sales took place between 1958 and 1962. He contended that these selected sales showed a trend of rising prices which he extrapolated onto the graph which is Annexure F thereto. From these sales and the graph he drew the conclusion that the value of internal land in the vicinity on the 1st April 1960 was $15,500 per acre. In his Report he said that in determining the level of prices on the 1st April 1960 he had used evidence of higher prices realised on sale in preference to the lower prices realised. He justified this by saying (amongst other things) that higher sale figures declared in transfers or conveyances were more likely to be correct, that it often happened that a considerable period elapsed between the date of the bargain and the date of a transfer with the result that it appeared that sales had taken place at prices below those of previous sales and in contradiction to the general trend of the market, that the case of Ittimathu Faru v. The State 1951 K.L.T. 500 recognised the principle that "it is not the lowest value that is to be awarded as compensation but the highest value that land will fetch having regard to its potentialities" and that the case of Adinarayana Sethy v. Special Land Acquisition Officer A.I.R. 1954 Mys. 71 recognised the principle that "where in a case the evidence shows that the price has had an abnormal rise in the locality due to wartime conditions, this fact must be taken into account in fixing the rate". In his Report he said that he had not made any allowance for the size of Plot A and Plot B since "the proposition that small lots are worth more per unit of area then large lots is a fallacy in the development market". In his oral evidence he agreed in the light of estimates produced by the Public Works Department of the cost of earth moving to reduce his valuation to $306,000 for Plot A and $301,000 for Plot B, a total of $607,000. He said that he had not included Awards in Annexure C and agreed that he had taken into consideration sales taking place after the 1st April 1960 "in order to establish trend". He said that he had valued

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Plots A and B as potential industrial or residential land. He refused to accept that publication of the scheme for the development of a new part would raise prices in the neighbourhood. He agreed that the saled numbered 28 Annexure C was outside the Pending area and said that it was included "simply to show trend". He said that the sales numbered 25 and 27 in Annexure C were not comparable to Plots A and B but were included "to check the trend." He described a plot, K.O.T. 4729 numbered 19 in the Schedule to Annexure D to the Statutory Statement, as "far the worst piece of land in the area, low and swampy internal land". p.52 p.16

11. Hardie gave evidence that Plots A and B would have to be filled to normal flood level before building on them but that it would be sufficient to raise the level to 9 ft. contour. He said that between 1958 and 1962 land values rose. p.57-8

12. The Respondent called two witnesses, Ambrose Foo (a Valuer in the Land and Survey Department) and Robert Ball Beatty (an Engineer of Roads in the Public Works Department). Foo produced a valuation (Exhibit 3) in which he valued Plots A and B at $307,778 (including a sum of $3,630 for improvements to Plot B). He said that in making his valuation he had considered the sales set out in Appendix J. to the Statutory Statement but considered those numbered 1 to 13 to be the only relevant ones. He said that he had taken into consideration Awards of compensation for comparable land but preferred evidence of actual sales. He said he had made a "mental allowance" for the cost of filling. He agreed that there had been an upward trend in prices between 1958 and 1960 and said that he had made an allowance for this in the case of sales in 1958 though he had not worked out the rate of increase. He disagreed with the commencing value taken by Carter in his Report but did not otherwise dispute the method of valuation used. p.59 p.61 p.62 p.62

13. Beatty said that land lying below 8 ft. p.65

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contour should be raised 3 ft. or 4 ft. before it could be used for building. He produced a calculation of the cost of filling Plots A and B to the necessary level (Exhibit 11).

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14. Harley J. summed up for the Assessors on the 12th March 1965. In his summing-up Harley J. accepted the evidence of Carter uncritically and failed to give sufficient weight to the evidence given by Foo whose experience of local valuations was far greater. His summing-up showed that he had misunderstood or failed properly to evaluate much of the evidence given at the hearing and was seriously misleading in that:-

(i) he failed to point out that the graphs relied on by Carter to establish his commencing value were based on selected sales many of which took place after the 1st April 1960 and failed to warn the Assessors of the danger of relying on sales taking place after the 1st April 1960 as establishing the value of land at that date;

(ii) he failed to point out that the selected sales set out in Annexure A1 to Carter's Report were all sales of areas considerably smaller than Plots A and B and that Carter's statement that plots as large as Plots A and B would command the same price per unit as these smaller plots was contrary to common experience and ought not to be relied on;

(iii) he failed to warn the Assessors of the danger of basing a valuation on a graph which assumed an even rise in values between 1958 and 1962 in the absence of evidence of such an even rise in values;

(iv) he failed to point out that Carter's statement in his Report that higher prices should be preferred as the basis of valuation had no foundation in law and that the correct course

was to disregard unusually high or unusually low prices and to take the middle range of prices as the guide;

(v) he failed to point out that Carter's statement that the date of registration of transfer was often delayed long after the bargain had been struck was made by a valuer who had no experience of valuations in Sarawak and was contrary to the requirement of immediate registration under the Torrens system embodied in the Land Code;

(vi) he failed to point out that Carter's valuation was based on the assumption that Plot A and Plot B could have been sold on the 1st April 1960 as industrial land or for development as residential lots, that before a valuation on this basis could be accepted there would have to be evidence of future development and of a demand for Plots A and B as industrial land or residential lots and that there was no evidence that there was such a demand or that the Appellants or anybody else had any plan to develop Plots A and B on the 1st April 1960 or of any plan to extend municipal services for the supply of water or electricity to the vicinity or of any rise in value in expectation of such an extension;

(vii) he failed to point out that the land comprised in K.O.T. 4729 and described by Carter as "the worst piece of land in the area, low and swampy" was in fact similar to Plot A;

(viii) he incorrectly stated that it made no difference whether Plots A and B required building up to 8, 9 or 10½ feet and that "the cost of fill to a higher level is completely and utterly irrelevant" and appears to have based these statements on the erroneous belief that the value of land varies with its footage above flood level

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and that the cost of filling would necessarily be reflected in an equivalent enhancement of value;

(ix) he failed to point out that the height to which Plots A and B required to be raised for building purposes was an essential question to be considered if the possible future use of Plots A and B for building purposes was to be taken into account and failed to give any adequate direction upon the evidence given on behalf of the Respondent on these matters;

(x) he wrongly stated that Plots A and B and the land in the vicinity looked "like being developed as an industrial area" although there was no evidence apart from the notice given pursuant to Section 47 from which any such likelihood could be inferred;

(xi) he failed to point out that Carter's valuation made no allowance for a developer's profit or for the deferment of capital values or for unforeseen costs and contingencies; and that a purchaser of Plots A and B would take these matters and also the possibility that permission for the subdivision of Plots A and B would be refused into account in making an offer for Plots A and B;

(xii) he failed to give proper emphasis to Awards under the Land Code for other comparable areas similar in size to Plots A and B as evidence of the value of Plots A and B and in particular to take account of Awards for other land which was resumed by the Crown together with Plots A and B;

(xiii) he failed to point out that Foo, unlike Carter, had considerable local valuation experience;

(xiv) he stated that Hardy was constantly in touch with property deals in the area

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and treated him as an expert on land values and failed to point out that Hardy was a professional architect and not a valuer, or property agent and that there was no evidence that he was in touch with property deals or had any special knowledge or experience of valuation of land or of land prices;

(xv) He stated that Carter's starting figure was based upon actual sales or trends of sales and failed to appreciate or point out that the sole origin of Carter's starting figure was the "graph" of Annexure F to his Report and that this graph and the other graph annexed to his Report were unscientific and misleading.

15. The Respondent appealed to the Federal Court of Malaysia (Thomson Lord President Malaysia, Ong Hock Thye, Acting C.J., and Suffian J.) and on the 17th January 1966 the Federal Court of Malaysia unanimously allowed the appeal and reduced the award to $370,140 (made up as to $205,760 for Plot A, $160,380 for Plot B and $4,000 for improvements to Plot B. p.191

16. Suffian J. delivered the leading judgment. He gave the following reasons for allowing the appeal (to the extent aforesaid) namely:- p.163-189

(i) that Carter in his evidence had failed to take into account the possibility that Plots A and B might never be required for development and might not be so required for some considerable time;

(ii) that Carter allowed for the cost of filling Plots A and B to the requisite level for development but not for unforeseen costs contingencies and developer's profit;

(iii) that while Carter's evidence that parcels of land as large as Plots A

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and B were as viable as smaller lots and command a price per unit of area not less than the price per unit of area of small plots might have been correct as regards land in densely populated areas, his evidence was incorrect in the case of land situate near a town with a population of only 50,000, since common experience shows that in areas where there is a small population the price per unit of land is less for large areas than for small areas;

(iv) that a prospective buyer for development purposes would take into account the possibility that permission for subdivision of Plots A and B might be refused or delayed and would adjust his price to cover this risk;

(v) that a prospective purchaser for development purposes would take into account not only the cost of filling the land to the requisite level but also interest on such cost and on the cost of development over an uncertain period;

(vi) that prices obtained on sales after the 1st April 1960 were not necessarily in every case a reliable guide to values at the 1st April 1960;

(vii) that Awards of compensation under the Land Code were reliable evidence of value at least in the case of Awards for areas as large as Plots A and B;

(viii) that it was fallacious to assume a steady rise in values between 1958 and 1962 in the absence of evidence of a steady rise since the price of land was dependent on demand which might fluctuate from time to time, and that such evidence as was available indicated that there were fluctuations in the value of land during this period;

(ix) that all the sales selected by Carter and set out in Annexure A1 in his Report related to small areas of land

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(ranging from ¼ acre to 1.543 acres) and so were not comparable to Plots A and B;

(x) that insufficient account had been taken of Awards accepted by the land owners for other lands resumed by the Crown at the same time which ranged from $5,000 to $10,000 per acre.

(xi) that the graph which is Annexure F to Carter's Report was misleading and based on fallacious assumptions.

Suffian J. said that the finding by the Assessors and Harley J. as to the market value of Plots A and B was not a simple fact but an inference of fact from the evidence which could be reviewed by an Appellate Court and that taking into account all the factors which should be taken into account the proper value to be put on the land comprised in Plots A and B was in his judgment $8,000 per acre in the case of Plot A and $9,000 per acre in the case of Plot B, with the addition of $4,000 in respect of improvements to Plot B.

17. Thomson Lord President and Ong Hock Thye, Acting C.J., delivered concurring judgments. p.161-2

18. The Respondent respectfully submits that this appeal should be dismissed for the following (among other) REASONS:-

(i) BECAUSE the summing-up of Harley J. showed that he had not understood or had failed properly to evaluate all the evidence produced at the hearing and was misleading by reasons of the omissions and misstatements set out in paragraph 14 hereof;

(ii) BECAUSE Harley J. misdirected himself and the Assessors as to the factors to be taken into account in valuing Plots A and B and the weight to be given thereto;

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(iii) BECAUSE examination of comparable sales shows that Carter's Report was based on false assumptions and that his conclusions were inconsistent with the evidence of actual sales and incorrect

(iv) BECAUSE the opinion of the Assessors and the judgment of Harley J. were inferences from the primary facts proved at the hearing and were not supported by such facts;

(v) BECAUSE the decision of the Court of Appeal was right.

John Vinelott.

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AIK HOE & COMPANY LIMITED
(Objector)

- v -

SUPERINTENDENT OF LANDS AND SURVEYS, FIRST DIVISION
(Respondent

CASE FOR THE RESPONDENT

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