

5 **IN THE COURT OF APPEAL OF MALAYSIA**
 (APPELLATE JURISDICTION)

CIVIL APPEAL NO.Q-02-1116-05

10 **BETWEEN**

1. **BBC ESTATE V SDN BHD (573527-P)**
 2. **BBC ESTATE VI SDN BHD (573531-M)**
 3. **BBC ESTATE VII SDN BHD (573537-U)**

15 all of Lot 1038, Kemena Commercial Centre,
 Tanjong Batu, Bintulu, Sarawak ... **Appellants**

AND

1. **TR MADEL ANAK KANDOU (WN.KP.321006-13-5115)**
 20 2. **BADAR ANAK BUJANG (WN.KP.510607-13-5455)**
 3. **ERNEST DANA DIAM (WN.KP.500320-13-5061)**
 4. **ERAI ANAK LAI (WN.KP.630505-13-5477)**
 5. **BARENDAK ANAK SAP (WN.KP.410510-13-5135)**

25 (Representing themselves and 79 other
 family units or *bilik of Rumah* of Rumah
 Madel, Jalan Bintulu, Miri) ... **Respondents**

(IN THE MATTER OF SUIT NO.22-2-2005 (BTU) IN THE
 HIGH COURT IN SABAH AND SARAWAK AT BINTULU

30 **BETWEEN**

1. **TR MADEL ANAK KANDOU (WN.KP.321006-13-5115)**
 2. **BADAR ANAK BUJANG (WN.KP.510607-13-5455)**
 35 3. **ERNEST DANA DIAM (WN.KP.500320-13-5061)**
 4. **ERAI ANAK LAI (WN.KP.630505-13-5477)**
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40 (Representing themselves and 79 other
 family units or *bilik of Rumah* of Rumah
 Madel, Jalan Bintulu, Miri) ... **Plaintiffs**

AND

- 5 b) a declaration that this right precludes the 1st, 2nd,
3rd and 4th defendants and or their servant(s) and/or
agent(s) and/sub-contractor(s) and/or assignee(s)
from impairing or abridging the plaintiffs' native
customary rights;
- 10
- c) a decree of perpetual injunction against the 1st, 2nd,
3rd and 4th defendants restraining them and or
their servant(s) and/or agent(s) and/or sub-
contractor(s) and/or assignee(s) from further
15 trespassing on the said land;
- d) a declaration that the issuance by the 5th defendant
of Lots 20,21,22 and 23 to the 1st ,2nd ,3rd and 4th
defendants, respectively (that parts of Lots 20,21,22
20 and 23 which extend onto plaintiffs' said land),
without first extinguishing the native customary
rights over the said land was null and void;
- e) a declaration that the issuance by the 5th defendant
25 of Lots 20,21,22, and 23 to the 1st ,2nd , 3rd and 4th
defendants, respectively (that parts of Lots 20,21,22
and 23 which extend onto the plaintiffs' said land,
without paying the plaintiffs' any compensation in
accordance with the provisions of the Land Code,
30 Sarawak, is null and void;

5 f) further and/or in the alternative, a declaration that
the issuance of Lots 20,21,22 and 23 to the 1st, 2nd,
3rd and 4th defendants, respectively, without paying
the plaintiffs adequate compensation, was
unconstitutional, against Article 13 of the Federal
10 Constitution and therefore, null and void;

The 1st , 2nd , 3rd and 4th defendants are the registered owners
of four individual parcels of land described as Lot 20 Block 34
Kemena Land District, Lot 21 Block 34 Kemena Land District,
15 Lot 22 Block 34 Kemena Land District and Lot 23 Block 34
Kemena Land District, respectively. The 5th defendant is the
Superintendent of Lands and Surveys, Land Department,
Bintulu, Sarawak, who has jurisdiction over the said lands in
dispute.

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The plaintiffs who are all natives of Sarawak and of the Iban
tribe and are now residing at Rumah Madel, assert in the
statement of claim that their claims are founded on native
customary rights over land referred to as Native Customary
25 Land, namely, the area shaded green in the map annexed to
the statement of claim. The said land is locally known as
“pemakai menoa”. The boundary of the said land has been
detailed under paragraph 7 of the statement of claim.

5 The plaintiffs have pleaded that the native customary rights
had been acquired or created before the 1st day of January
1958 by their ancestors where they dwelled, occupied,
cultivated, planted fruit trees and buried their dead, on the
said land. The said land subsists as such until today. The
10 basis of claiming such rights are stated in paragraph 8 of the
statement of claim as follows:

PARTICULARS

- 15 *i The Plaintiffs and/or their ancestors
originated from the 2nd Division sometime in
the 1870s to settle within the said Land. The
Plaintiffs and or their ancestors settled
and/or farmed the said Land and/or roamed
its forests for food until today. The Plaintiffs
20 shall detail their history at the trial of this
action*
- 25 *ii The Plaintiffs never abandoned their said land
and they have been in continuous occupation
of the same.*
- 30 *iii The said land still subsists as it were, being
the source of their livelihood, as a farming
land, hunting ground and as stated under
the particulars in paragraph 13 below.*

5 In paragraphs 9,10, 11, 12, and 13 of the statement of claim
the plaintiffs have pleaded as follows:

10 9. *The Plaintiffs claim that the 1st and/or 2nd
and/or 4th Defendants and/or their servants
or agents had been unlawfully issuing notices
to the Plaintiffs to surrender their rights over
the said Land and/or individual lands within
the said Land, without any legal basis
and/or in accordance with the provisions of
15 the Sarawak Land Code.*

20 10. *The boundaries of the said Lots 20, 21, 22 are
within the boundaries of the said Land and
part of the boundary of Lot 23 overlapped
with the boundary of the said Land (as
reflected in the map attached marked "M").*

25 11. *The Plaintiffs claim that Lots 20, 21, 22, and
part of Lot 23 that overlapped with the
boundary of the said Land are an
infringement and/or an impairment of the
Plaintiffs' NCR over the said Land therefore
the issuance of the said lots were
unconstitutional and/or unlawful and/or
30 improper.*

5 *animals and fish in the rivers and streams
 therein; and/or*

*iv. the Land is not only a source of life for the
 Plaintiffs but it constitutes life itself;*

10

*v. the Plaintiffs are still in occupation of the
 said Land; and*

15

*vi. the Plaintiffs preserved this Land for the
 future generations of their community to
 ensure that their people survive.*

The 1st , 2nd and 3rd defendants received the writ of summons
and statement of claim on 28/3/2005 through individual pre-
20 paid registered post. On 1/4/2005 they filed individual *ex*
parte summons in chambers seeking leave to enter conditional
appearance. A conditional appearance under O12 r 6 Rules Of
The High Court 1980 (RHC) is a prelude to an application
under O12 r 7 RHC to strike out the writ. A conditional
25 appearance is a complete appearance to the action for all
purposes subject only to the right reserved by the defendants
to set aside the writ or service of the writ under O12 r 7 RHC.
Upon obtaining leave to enter conditional appearance the
solicitors for the said 3 defendants served the memorandum of
30 conditional appearance on the solicitors for the plaintiffs on

5 2/4/2005 and thereafter, filed a summons in chambers
together with an affidavit in support of Mr Yet Nai Sing, in
which the 1st, 2nd and 3rd defendants made a joint application
for an order that the writ of summons and statement of claim
be set aside or struck out. The said application was for all
10 intents and purposes an application under O12 r 7 RHC as
well as an application under O18 r 19 RHC.

The said 3 defendants relied on three basic grounds, that is:

- 15 i. The said writ dated 2/2/2005 is defective in
reducing the prescribed period for entering the
defendants' appearance in contravention of O12 r 4
(b) RHC.
- 20 ii. The representative action of the plaintiffs is
misconceived and not maintainable as the writ did
not show or disclose the true names and identities
of the persons whom the plaintiffs claimed to
represent (the 79 family units or bilik).
- 25 iii. The statement of claim dated 4/1/2005 discloses no
reasonable cause of action, or it is scandalous,
frivolous or vexatious, or it may prejudice,
embarrass or delay the fair trial of the action, or it is
30 otherwise an abuse of the process of the Court.

5 The learned High Court Judge at Bintulu dismissed the said application by the said 3 defendants on 13/9/2005 and hence, this appeal. The appellants and respondents before us shall be referred to as, the said 3 defendants and plaintiffs, respectively.

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The said 3 defendants abandoned the application to set aside the writ under O 12 r 7 RHC and therefore the appeal before us is only in respect of the application for the plaintiffs' action to be struck out under O18 r 19 RHC.

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At the very outset we wish to state that the law and principles applicable to striking out actions under O18 r19 RHC are very clear and settled. The summary procedure should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 the Supreme Court held:

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The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedures can only be adopted when

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5 *it can clearly be seen that a claim or answer is*
on the face of it 'obviously unsustainable'. It
cannot be exercised by a minute examination of
the documents and facts of the case in order to
see whether the party has a cause of action or a
10 *defence.*

Bearing the above principles in mind, we shall approach this
appeal by the said 3 defendants against the decision of the
learned High Court Judge, dismissing the application in the
15 following words:

Having heard counsel and read the written
submission - I ruled that there are serious issue
for trial. The Defendant grounds are based
20 *merely on technical and procedural impropriety.*
However Court should have regard to
substantial justice of the case in the light of the
new O 1A of the High Court Rule 1980.
Therefore the 1st 2nd and 3rd application in
25 *enclosure 32 is hereby dismissed with cost.*
Cost to the plaintiff.

We do not have the benefit of the written grounds of decision
of the learned judge. It would appear from the above ruling
30 greater emphasis has been given in his deliberation to that

5 part of the application pertaining to the setting aside of the writ under O12 r 7 RHC, which was incorporated in the same application under O18 r 19 RHC. Nevertheless, we are of the view he had the principles set out in *Bandar Builder* in mind, as well, when he dismissed the said 3 defendants' application.

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The said 3 defendants thrust in arguing that the plaintiffs' action is unsustainable is based on the fact that the said 3 defendants are the registered owners of Lots 20, 21 and 22 and therefore under the provisions of section 132(1) Sarawak
15 Land Code (Land Code) they have thereby acquired indefeasible titles to the said Lots. What they have failed to appreciate is that the claim of the plaintiffs is also for declarations against the 5th defendant (Superintendent Lands & Surveys Bintulu Sarawak) who will have to furnish answers
20 in relation to the central issue in this case touching on Native Customary Land, native customary rights therein and, the alienation of State land before all customary rights therein have been surrendered or terminated, or provisions made for compensating the persons entitled to such rights. It is to be
25 noted that the 5th defendant has neither made any application to strike out the plaintiffs' action nor filed any affidavit in support of the said 3 defendants' application regarding the indefeasibility issue of their title, by reason of the fact the said lands were never Native Customary Land subject to any native

5 customary rights, immediately before the issuance of the said
Lots to the said 3 defendants.

The indefeasibility issue will be a very critical issue of fact and
law at the trial. Based on the statement of claim it may hinge
10 on the evidence adduced by the plaintiffs and the 5th
defendant on the issue of Native Customary Land and native
customary rights asserted by the plaintiffs.

Native Customary Land is interpreted at section 2 of the Land
15 Code to mean:

(a) *land in which native customary rights,
whether communal or otherwise, have
lawfully been created prior to the 1st
20 day of January, 1958, and still subsist
as such;*

(b)

(c)

(d)

25

It would appear that under the Land Code, Native Customary
Land may not be alienated.

5 *13(1) Subject to the direction of the Minister
under section 3(1A), the Director may alienate
State Land, other than Native Customary Land.*

Under the Land Code, native customary rights are protected.

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*15(1) Without prejudice to section 18 and 18A,
State land shall not be alienated until all
customary rights therein have been surrendered
or terminated or provision has been made for
15 compensating the persons entitled to such
rights.*

From the statement of claim it is clear that the plaintiffs are
claiming that their native customary rights over the subject
20 land have lawfully been created prior to the 1st day of January
1958 and still subsists as such land and it is thus Native
Customary Land. The said 3 defendants have not shown that
the plaintiffs have surrendered their native customary rights
over the land. There is also no evidence adduced by the said 3
25 defendants that such native customary rights have been
terminated or compensation has been paid to the plaintiffs.

An application to strike out an action under O 18 r 19 RHC
should not descend into a trial on affidavits .What the court
30 should be concerned with is to determine whether the

5 pleadings disclosed facts which merit a trial of the action. The
plaintiffs' statement of claim herein certainly disclosed facts
which merit a trial of the action.

We are unanimous that this appeal be dismissed with costs.
10 Deposit for this appeal to respondent on account of taxed
costs.

15 **(DATO' NIHRUMALA SEGARA A/L M.K. PILLAY)**
Judge
Court of Appeal
PUTRAJAYA

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Counsel for the appellants

En Henry Ling Kuong Meng
(M/S Ling & Wong)

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Counsel for the respondents

En Baru Bian
(M/S Baru Bian)

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11 DISEMBER 2007