

ASTON'S MINING LAW CASE REVIEWS™



by R. LEE ASTON

*Ph.D., D. Eng., J.D., Attorney-at-Law
Mining & Geological Engineer
Aston Mineral Law & Engineering Div.,
Aston Law Offices-Ga., Va., Ind., Mont., Attorneys-at-Law,
P.O. Box 34, Elberton, Georgia 30635 USA
E-mail: leeaston@elberton.net*

Aston's Complimentary Mining Law Case Review™ #15-02-04

Jurisdiction : Malaysia

Kuala Lumpur High Court

MINE OPERATOR TRIED FOR NEGLIGENT FLOODING OF ADJACENT MINE

The Malaysian Kuala Lumpur High Court tried and decided on 7 September 2001 the case of. Yap Kow & Sons Sdn. Bhd. v. Hongkong Tin Plc [2001] 450 MLJU 1, where the Plaintiff tin mine operator claimed against the Defendant tin mine operator for loss and damages as a result of the flooding of its mine in June 1983, allegedly caused by the negligence and/or breach of statutory duty imposed by the provisions of the Mining Enactment on the part of the Defendant, its servants or agents.

Background Facts :

The Defendant had worked the land near the common boundary with the Plaintiff's mine and with the Plaintiff's consent stripped about 2 chains into the Plaintiff's land. When the Defendant finished mining at the common boundary, in early 1982, the Defendant built a bund at the common boundary up to the original level. In November 1982, the Plaintiff started to mine at the common boundary. A week before the flooding the Plaintiff's chief *kepala* (mine boss) noticed that the Defendant's mine was full of water and was about to overflow from the tailing retention bund. The kepala went with his manager to the Defendant's *kongsi* (mine office) to see the person in charge of the Defendant's land, one Lim Chan Fook and told the latter about it. The three of them visited the scene and left after Fook said that he would deal with the problem.

There were two versions as to how and why the flooding occurred. The Plaintiff's version was offered by a mining consultant with vast experience in tin mining and had been employed by the Plaintiff as its consultant since 1978. Plaintiff's consultant was familiar with the flooded mine area in the course of his work at the Plaintiff's mines. He [Page 4] visited the scene on the following day of the incident. According to Plaintiff's expert, the cause of the flooding was solely due to breaches in the bunds of the tailing dumps of the Defendant in the north end of his mine. There were two

breaches (Breach # 1 and Breach # 2). He opined It was not possible that the flooding was caused by the water from the Plaintiff's mine. The Plaintiff's expert summarily testified , "There was nothing to indicate in any way that the Plaintiff had caused the breaches." As to what had caused the breaches,, he explained there were many ways that a breach could occur; firstly, the water level in the bund of the tailing dumps must have gone up very high, or secondly, the bund was not properly built, or thirdly, the bund was not properly maintained.

According to the Defendant's expert mining engineer's version, the flooding happened when the bund at the common boundary breached causing water from a pond at the boundary to rush southwards and thereby weakened the toe of the bund. He opined that the cause of the flooding was the weakening of the toe of the dividing bund at the common boundary which collapsed. The weakening of its toe could have been caused by the Plaintiff's mining activities at his mining face, known as hydraulic mining, or hydraulicking, using a high pressure water pump and nozzle to mine the tin at the mine face. However, as to Plaintiff's hydraulic mining activities in the area of the breached bund, it was adduced that the Plaintiff was not hydraulicking in the area of the breached bund as previously reported by the Defendant, but was hydraulicking at a remote part of his mine which would have had no effect in causing the breach of the bund built by the Defendant at the common property line.

The Court's Analysis :

The Court noted, " The evidence of an expert, like any other witness, has to be appreciated in accordance with law and [ref., Page 8] accepted only if found to be trustworthy. He is entitled to testify based on observed data of his own or on data furnished by others, though he lacks personal knowledge of the incident. His opinion is not always binding on the court, and if accepted by the court it becomes the decision of the court and ceases to be an opinion evidence of the expert. Under the circumstances, his evidence also has to be interpreted like any other evidence. In so doing the effort should be made to explain the same correlated with evidence of eye-witness. It is only when that the two become irreconcilable that the question of accepting one or the other arises and not otherwise (see Sarkar's Law of Evidence, 15th edition @ 862-863). Having assessed the evidence of the two experts in the light of the evidence of eye-witnesses, I am inclined to accept the evidence of the Plaintiff's expert witness as to why the flooding occurred, on the following grounds [ref. page 9] :

- 1) The Court noted that Plaintiff's expert's testimony that "... a week earlier he noticed that the Defendant's mine was 'full of water and was about to overflow from the tailing retention bund.' With his manager he went to see Lim Chan Fook, the Defendant's agent, and told the latter about it. Lin Chan Fook accompanied Plaintiff's agents to the mine and observed the imminent overflow of water. Defendant's agent promised 'to deal with the problem.' Thereafter, he did not notice the agent and his men did anything about it. The Defendant did not challenge any of the expert's testimony for the Plaintiff. Lim Chan Fook was not called by the Defence to testify on this very material issue and no reason was given as to why he was not called. Therefore, the Court was justified to apply the presumption under section 114(g) of the Evidence Act 1950 against the Defendant.

2) “ Plaintiff’s expert, when cross-examined, stated that when he inspected the breaches he noticed that there was no [Page 10] channel at the Defendant’s dumps. This fact was not seriously challenged nor evidence adduced by the Defendant to rebut it or to explain why the channel was not provided for as required under condition 11 in the Defendant’s Hydraulic Licence. Therefore, the Defendant was in breach of the condition.”

Plaintiff’s expert was never cross-examined on the facts relating to the contention of the Defendant that the cause of the flooding was due to the collapse of the dividing bund at the common boundary and the reason for the weakening of the toe of the bund as deposed by Defendant’s expert. “ To my mind, grounds (a) and (b) lend weight to the opinion of the Plaintiff’s expert one of the ways that the breach could occur was that the water level in the bund of the tailing dumps must have gone up very high. This is another breach of the condition in the Defendant’s Hydraulic Licence, that is to say, condition 10 which requires the freeboard of the tailings retention bunds shall not be less [ref., Page 11] than one meter at all times. And ground (c), to a certain extent supports Plaintiff’s expert’s that one of the ways that the breach could occur was that the bund was not properly maintained.”

The Court concluded that the cause of that breach was by reason of grounds (a), (b) and (c) as stated in the paragraph above. i.e., the water level in the bund of the (Defendant’s) tailing dump must have gone up very high [ref., Page 12] and that the bund was not properly maintained. Plaintiff proved the cause of the breach on the balance of probabilities.

3) With regard to Defendant’s expert’s theory that the cause of the flooding was due to the collapse of the dividing bund at the common boundary by reason of the weakening of the toe of the bund by the Plaintiff’s mining activities near the common boundary, the Court believed that possibility was quite remote in the light of the evidence that (i) the second palong was not working for about 2 months, prior to the incident; (ii) at that time the Plaintiff was mining at the eastern boundary, and (iii) the Plaintiff had not implemented its proposal to strip its land at the common boundary to mine there at the time when the breaches occurred.

The Court’s Decision

With regard to the Defendant’s negligence and the totality of the evidence, the Court held that the Plaintiff had proved its case on liability on the balance of probabilities.

In paragraph 6 of the Statement of Claim, the Plaintiff relied on the doctrine of *res ipsa loquitur*. That doctrine did not apply in this case because the cause of the flooding is known.

With regard to damages, since the statistics on the volume of slime, water and solids discharged and the recommendation to rehabilitate the mine contained in the reports by the Plaintiff were not challenged by the Defendant, they must be accepted. The Plaintiff claimed for loss of profits in the sum of RM500,000.00 and special damages in the sum of [ref., Page 14] RM930,000.00 being the cost of removal of solids (RM300,000.00) and the cost of de-watering, building bunds, / roads, loss of pipes/monitors, etc, repair of engines, fuel and lubricating oil, cost of purchase of pump

shed, materials, replacing pump/upkeep of pipes, claim for salaries of contract workers (R M 6 3 0 , 0 0 0 . 0 0) .

With regard to the claim for the loss of profits, the Plaintiff presented evidence that it took about 2-1/2 months to rehabilitate the mine before recommencing mining operations, and for full mining operations to commence it took longer. Before the flooding it was extracting about 450 piculs of tin ore per month. The price of tin at that time was about RM1,800.00 per picul gross and the net price was about RM1,300.00 per picul. Therefore, the profit that it would have made during the 2-1/2 months was about RM500,000.00 net. During the relevant time there was tin control to maintain the price of tin ore by the International Tin Control by way of quota imposed on the sale of tin. However, the Plaintiff mined in excess of its [ref., Page 15] quota and stored the same as the sale could only take place in accordance with the quota. Therefore, during the 2-1/2 months when the mine was being rehabilitated no tin ore could be extracted and stored which could be sold later. Details of mines production, sale and stocks from each palong were produced. It was confirmed that tin ore was stored in such a manner irrespective of the palongs from which the tin ore was extracted and that there was production of tin ore whilst the mine was being rehabilitated. This production was from the stock of tin ore and the tin ore processed from pebble and unrefined ore. On the evidence adduced, the Court found that although the mine was not operating during the rehabilitation, there was production by the Plaintiff from the stock of tin ore and the tin ore processed from pebble and unrefined ore and by reason thereof the Plaintiff's stock had been depleted by the end of July 1983. It was evident that palong #2 was not in operation prior to the flooding and in the process of being re-sited, though already approved by the [ref., Page 16] Mines Department. The Plaintiff did not present credible evidence on how much longer it would take for the Plaintiff to complete the re-siting and to be operational had there been no flooding in order to enable the Court to determine a realistic figure for the loss of profits. Therefore, to simplify the calculation on this claim, the Court awarded RM250,000.00 on the basis that palong #2 was not operating during rehabilitation.

With respect to the special damages, the Court awarded RM300,000 being the cost of removal of solids as reasonable. However, with regard to the claim of RM650,000, the Court took into account the following factors : the huge volume of water to be drained, the extensive damage to the mine caused by the flooding, the fact that the engines would still have to be repaired, maintained and/or replaced including wear and tear, the fuel and lubricating oil would still have [ref., Page 17] to be consumed and certain number of manpower would still have to be engaged except for the extra workers engaged for dewatering, had there been no flooding.

To simplify this calculation, the Court awarded a sum of RM487,500 (RM650,000.00 minus 25%) Judgement entered against the Defendant with costs was as follows: loss of profits in the sum of RM250,000.00 with interest at the rate of 8% per annum from the date of service of the Summons until full realisation, special damages in the sum of RM787,500 with interest at 4% per annum from 14.6.83 until judgement and thereafter at 8% per annum until full realization.
