1A(R)

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. Q-01-42-2001 & Q-02-504-2001)

ANTARA

1. Superintendent of Lands & Surveys, **(RAYUAN SIVIL NO. Q-01-42-2001)**

2. Borneo Pulp Plantation Sdn Bhd **(RAYUAN SIVIL NO. Q-02-504-2001)**
3. Borneo Pulp & Paper Sdn Bhd

…Appellants/Perayu

DAN

1. Nor Anak Nyawai
2. Sekalai Anak Ling
3. Jerangku Anak Bakit
4. Lani Anak Taneh

(Suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary land (native customary land) at Sungai Sekabai, Sungai Tajem)

…Respondents/Responden

DALAM PERKARA GUAMAN NO. 22-28-99-1

DALAM MAHKAMAH TINGGI SABAH DAN SARAWAK DI-KUCHING

ANTARA

1 Nor Anak Nyawai
2. Sekalai Anak Ling
3. Jerangku Anak Bakit
4. Lani Anak Taneh

(Suing for and on behalf of themselves and
all other occupiers, holders and claimants
of native customary land (native customary land)
at Sungai Sekabai, Sungai Tajem)
… PLAINTIFFS

AND

1. Borneo Pulp Plantation Sdn Bhd
2. Borneo Pulp & Paper Sdn Bhd
3. Superintendent of Lands & Surveys,
   Bintulu

… DEFENDANTS

OUTLINE AND WRITTEN SUBMISSION
IN RESPOND TO APPELLANTS MEMORANDUM OF APPEAL

May it please you My Lords

- ***Respondents Concede To Ground 9.***

We concede to the Appellant's ground of Appeal under No. 9. This in all probability is a typographical error. The correct map should either be map **Exhibit PB** drawn by the Respondents' surveyor, at page 1205 or map **Exhibit PC** (also drawn by the Respondents' surveyor) at page 1207 of the BAHAGIAN C, Record of Appeal respectively. Parties in fact agreed orally to this but were advised by the learned trial judge to bring this on appeal.

From the grounds of appeal of the Appellant, it appears that the crux of the issues on appeal revolves around the following main issues, to which we will make detail submissions.

- ***1st Main Issue.***

Whether there is any legal distinction between the terms, "**Native Customary Rights"** over land or **"Native Customary Land" "Native Customary Law**" and **"Native Customs".** The appellant says that there is and the learned trial judge erred in law in failing to distinguish them. The appellant is saying that Native Customs *per se* cannot be enforceable in law. It is only those customs to which the law of Sarawak gives effect is enforceable in law. They say this is because the legal definition of **"Native Customary Law"** means **"a custom or body of customs to which the law of Sarawak gives effect".** As to the term "**Native Customary Rights",** the appellant is saying, it is a right over land to be recognized only if created in accordance with the provisions of the laws of Sarawak. The appellant concludes therefore that since the customs of ***pulau*** and ***pemakai menoa*** are not mentioned as one of the means or methods stated in any of the laws of Sarawak by which NCR could be recognized, such customs over land cannot be recognized and enforceable in law as NCR over land. The only method recognized by the law is the felling of virgin jungle and/or the creation of ***temuda***. This we respectfully disagree.

- ***2nd Main Issue.***

The appellant distinguished between common law and native customary right over land. This we respectfully disagree.

- ***3rd Main Issue.***

The third main issue is related to the first. The Appellant is saying that ***only the codified customs of the Respondents over land could be recognized and enforceable under the law of Sarawak.*** Since ***pulau*** and ***pemakai menoa*** are not codified customs of the Respondent under any laws of Sarawak pertaining to land, such custom should not be recognized and enforceable in law. This we respectfully disagree.

Our submission shall be in this order.

1st Main Issue.

1. ***Error of Law***

a. The trial Judge was right in his understanding of **"Native Customary Rights"** over land or **"Native Customary Land" "Native Customary Law"** and **"Native Customs".**

My Lords, it is necessary for us to get back to the relevant Agreed Issues to be tried between the parties to appreciate the issues involved. The relevant ones are as follows:

- **Agreed issues to be tried dated 26th October 2000, Bag. A at pp.504-507**

1. *Whether the Plaintiffs and those whom they claim to represent are lbans and natives of Sarawak?*

2. *Whether the Plaintiffs are entitled to claim that they are bringing this action on behalf of:*

   (a) *the residents of the longhouse known as Rumah Luang/Rumah Nor, Sungai Sekabai, Sebauh, Bintulu Division, Sarawak?*
   (b) *all other occupiers, holders and claimants of native customary land at Sungai Sekabai, Sungai Tajem, Sungai Ipuh, Sebauh, Bintulu Division?*

3.1 *If the answer to paragraphs 2(a) and (b) above are both positive, whether the Overlapping Area (**as defined in the Statement of Agreed Facts herein**) comprises:*

(i) ***"temuda";***
(ii) "pulau"; and
(iii) "pemakai menoa"?

If the answer to paragraphs 3.1 (i), (ii) and (iii) are positive, ***whether native customary rights could, in the circumstances of this case,***

be created over the land described as "temuda" or "pulau" or "pemakai menoa"?

3.2 *If the answer to paragraph 3.1 is positive, whether the Plaintiffs and those whom they claim to represent* ***had lawfully acquired any <u>native customary rights</u>*** *over the Overlapping Area (as defined in the Statement of Agreed Facts herein)?"*

My Lords, the crucial question is; what do we understand by this phrase ***Native Customary Rights*** (NCR)?

The trial Judge in His Lordship's judgment at ***page 2, paragraphs 2 and 3 (see p. 31 of the Appeal Record)*** said this:

"2. The Plaintiffs claimed that they have acquired ***native customary rights,*** described in the Iban language as ***temuda, pulau*** and ***pemakai menoa,*** over certain part of the lands ("the disputed area") and that the 2nd Defendant had trespassed and damaged the disputed area. Those Iban terms will be gone into in detail later. The 2nd Defendant had engaged contractors to clear the land and planted trees to feed a paper mill.

3. **The issues in this case calls for an examination of the rights of an Iban in relation to the land and its resources to which they have no documentary title. The answers must take into account Sarawak's history during the period:-**

(1) when it was under the reign of the Sultan of Brunei just before 1841;
(2) after it was ceded to James Brooke (the First Rajah of Sarawak) in 1841 right up to 1946;
(3) when it was under the British as a Crown Colony from 1946; and
(4) after Sarawak joined with other states to form Malaysia in 1963. "

In tracing the history of Sarawak, and the development of its laws relating to NCR, His Lordship then concluded in the affirmative the answers to all the issues to be tried as quoted above. In that process, after referring to the various laws and writings of various authors on the same issues, it is very clear that it needs no expert to understand these words or phrases, which in some cases may mean the same thing. They have been used interchangeably.

The phrase ***"Native Customary Rights"*** can be defined as right of the natives acquired and/or created by virtue of the customs or *adat* of the natives. It may refer to a ***right over land*** or ***rights that govern the social life of the natives' community,*** which is called ***adat*** or even referred to as ***customary laws.*** Under paragraph three point (2) of the **General Explanation to the Adat Iban 1993 (English version)** ***"Customary laws"*** is equated with ***"Adat".*** That paragraph is entitled ***<u>"Iban Customary Laws or Adat Iban".</u>*** The explanation states:

"The prime functions of the *Adat* Iban is to ensure harmonious relationship among community members and to preserve the spiritual well-being of the whole longhouse.

Conduct in accordance with the *Adat* is believed to maintain a community in a state of balance or ritual well being with the gods and spirits. Any breach of the customary laws may threaten this relationship. Therefore remedial action is to be taken immediately by providing or offering proper ritual propitiation. In order to preserve cohesiveness and to maintain the continuing state of spiritual well-being in terms of health and material prosperity, in the community, the *adat* must be strictly adhered to."

(See page 2 of Bundle of Authorities (BOA) 2 Dated 17th January 2004)

Adat simply means custom. In his paper entitled **"Administration of Native Courts & Enforcement of Customary Laws in Sarawak",** Empeni Lang the Chief Registrar, Native Court Sarawak, referred to a few sources on what is meant by ***"Customary Laws"***. He said:

"***'Customary laws"*** means a custom or body of custom to which the law of Sarawak gives effect. It is also known as the ***'Adat'***. ***Customary law*** can be defined as ***"customs usages and practices that are sufficiently fixed and settled over a substantial area, known, recognized and deemed obligatory. "*** (Vernom). A.J. N Richard defined ***adat*** *"a way of life, basic value, culture accepted code of conduct, manners and conventions'*. ***The very concept of adat is therefore about a set of rules, sanction and principal canon often divinely inspired and revealed and accepted as binding by all members of a community.*** Hart and Michael Happel referred to custom as ***Primary Rules."***

(See p. 6 Bundle of Authorities 3 Dated 17th January 2004)

Jayl Langub, the Secretary Majilis Adat Istiadat Sarawak in his paper entitled **"Legal Pluralism: The Role of Customary Law in Preserving Indigenous Heritage",** said of '***adat***':

"In virtually all the languages of the non-Muslim natives or Dayaks of Sarawak, ***custom*** and ***customary law*** is known as *adat*."

(See at p. 51 Bundle of Authorities 3 Dated 17th January 2004)

Then the present Land Code of Sarawak (Cap. 81 1958) defined ***"Native Customary Land"*** under section 2 amongst other things as:

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

(See the case of ***Jok Jau Evong & 2 Ors v Marabong Lumber Sdn Bhd & 2 Ors [1990] 2 CLJ 625.*** See ***Haidar Bin Mohd Nor J's*** judgment 631 at p. 42 ***Bundle of Authorities 1 Dated 17th January 2004)***

My Lords, it was therefore incumbent upon the learned trial Judge to trace the historical development of the laws and custom or *adat* to even beyond the time of the 1st Rajah of Sarawak James Brooke, as referred to earlier in order that we may understand the concept and meaning of this right called ***Native Customary Right*** as it relates to land, the way it was understood by the natives and not by an outsider. His Lordship then began by saying:

> "4. This journey through history is necessary because, and it is common ground - arising from the decision in *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal ([1998] 2 MLJ 158) - ***the common law respects the pre-existing rights under native law or custom*** though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak.
>
> 5. Mr. Tan Thiam Teck, learned counsel for 1st and 2nd Defendants, and Ms Susan Gau, learned State Legal Officer, do not appear to me to dispute it because learned counsel had referred to a paper of Professor Douglas Sanders - Indigenous And Tribal Peoples: The Right To Live On Their Own Land (presented at the 12th Commonwealth Law Conference) – where certain passages read:
>
>> A leading Australian constitutional law text summarizes the basic rule from **Mabo** decision as follows:-
>>
>> "… the indigenous population had a pre-existing system of law, which along with the rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action."
>
> 6. The court in Canada held similar views in *Calder v Attorney-General of British Columbia* 1973 SCR which is followed by *Adong bin Kuwau*, viz.:-
>
>> …Hall J rejected as **'wholly wrong'** the 'proposition that after conquest or discovery the native peoples have no rights at law except those subsequently granted or recognised by the conqueror or discoverer'. ***The preferable rule, supported by the authorities cited, is that mere change in sovereignty does not extinguish native title to land***…but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so.
>
> 7. The disputes call for a consideration of whether the various legislation throughout those periods had the effect of extinguishing those rights since there is ample evidence, which I will refer to later, that such rights existed before the rule of the First Rajah. They also call for a consideration of whether those rights were ever exercised in the disputed area. But first, to the question who is an Iban because the Defendants had contended that the Plaintiffs are not Ibans."

(See p.32-33 Bahagian A (BAH. A)Record of Appeal).

Then at page 16 of the trial Judge's judgment His Lordship concluded:

> "This means, the ancestors of the Plaintiffs were at Sekabai by the latest in 1930. But that does not mean that their customs develop overnight in 1930. **The customs relating to *temuda, pulau* and *pemakai menoa*, is a way of life of the Iban that is *intimately connected with the land* and which was in existence even before the arrival of the First Rajah. Therefore it goes much further back than the year 1930.** This is how **A.F. Porter** in his paper called "The Development of Land Administration in Sarawak from the rule of Rajah Brooke to the present time (1841-1965)", p.18, stated it: -
>
> > At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term "Indonesian adat". Within Sarawak the term ***"adat"*, without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually "native customary law" or "native customary rights".**
>
> 19. **Thus, when the First Rajah arrived, the Ibans had already a body of customs which is referred to as native customary rights and this includes the rights I have discussed. Those rights being customs, I can conclude that the Plaintiffs' ancestors must have practised the same customs as the present day Ibans practise**. The Defendants did not point to any writing of any historian that hold a contrary view. Therefore, I conclude that the Plaintiffs and their ancestors had exercised those **native customary rights known as *temuda, pulau* and *pemakai menoa."***

(Emphasis added)

It is respectfully submitted that the trial Judge was correct in his reference, use and understanding of the terms "native customary rights" over land or "native customary land" "native customary law" and "native customs" when he concluded in favour of the Respondents.

b. ***That the clearing of the primary/virgin jungle for farming of cultivation (i.e temuda) is only one of the many means of how native rights over land can be acquired or created.***

My Lords, the methods of acquiring NCR had been stated under section 5 (2) of the present Land Code. The felling of virgin jungle is only one of the methods stated therein. It states as follows:

> (2) The methods by which ***native customary rights*** may be acquired are:-
> ***(a) the felling of virgin jungle and the occupation of the land thereby created;***
> ***(b) the planting of land with fruit trees;***

(c) ***the occupation or cultivation of land;***
(d) the use of land for a burial ground or shrines;
(e) the use of land of any class for rights of way; or
(f) ***any other lawful method.***

Provided that-

(i) Until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958."

(Emphasis added)

My Lords, I would like to adopt my earlier written submission pertaining to this section, which appears at ***page 818 of Bahagian B Jilid 2 dari 2***. *(See first two paragraphs).* There my argument rests on the fact that the method (f) ***"any other lawful method"*** encompasses such custom of creating ***pulau*** and ***pemakai menoa*** over land. Until its deletion by the Land Amendment Bill 2000, no judgment or case law to date had examined the meaning of this phrase ***"any other lawful method"***. The trial Judge unfortunately did not make any comment on it as well.

The other method stated under section 5(2) where the respondents had staked out their claim is method ***(c) "the occupation"*** or *cultivation of land."* This was my submission at ***page 823 of Bahagian B Jilid 2 dari 2.*** There I referred to the case of ***Ara Binti Aman and 16 Others v Superintendent of Lands and Survey, Second Division [1973]*** where section 66 of the Land Settlement Ordinance (Cap. 28) 1948, was examined which states four methods of acquiring NCR; where ***"continuous occupation"*** is stated as one of the four methods where NCR could be recognized. The Privy Council case of ***Newcastle City Council v Royal Newcastle Hospital [1959] 1 All ER 734*** where Lord Denning defined ***"occupation":***

> "Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: See POLLOCK AND WRIGHT ON POSSESSION, pp. 12, 13. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as "occupied" by anyone; but everyone would say that a farmer **"occupies"** the whole of his farm even though he does not set foot on the woodlands within it from one yea's end to another."

(See at page 142 of BOA 1 dated 17th January 2004).

My Lords, this is exactly the position of the Respondents in this case. They are not only occupying and cultivating the *temuda* land, but they are also occupying the whole area of their *pulau* and *pemakai menoa*. And that has been the case all these years. They ***"still subsist as such"*** (section 2(a) Land Code 1958). They are therefore ***"in continuous occupation"*** of the said lands (sec. 66 of Land Settlement Ordinance (Cap. 28) 1948)). As the custom of creating *temuda, pulau* and *pemakai menoa* are customs related to land, the trial Judge was correct in concluding that *temuda, pulau* and *pemakai menoa* are native customary rights over land. He said:

> "This means, the ancestors of the Plaintiffs were at Sekabai by the latest in 1930. But that does not mean that their customs develop overnight in 1930. **The customs relating to *temuda, pulau* and *pemakai menoa*, is a way of life of the Iban that is *intimately connected with the land* and which was in existence even before the arrival of the First Rajah. Therefore it goes much further back than the year 1930.** This is how **A.F. Porter** in his paper called "The Development of Land Administration in Sarawak from the rule of Rajah Brooke to the present time (1841-1965)", p.18, stated it: -
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> > At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term "Indonesian adat". Within Sarawak the term **"adat", without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually "native customary law" or "native customary rights".**
>
> 19. **Thus, when the First Rajah arrived, the Ibans had already a body of customs which is referred to as native customary rights and this includes the rights I have discussed. Those rights being customs, I can conclude that the Plaintiffs' ancestors must have practised the same customs as the present day Ibans practise**. The Defendants did not point to any writing of any historian that hold a contrary view. Therefore, I conclude that the Plaintiffs and their ancestors had exercised those **native customary rights known as *temuda, pulau* and *pemakai menoa*."**

(Emphasis added)

(See case at p. 45 Bahagian A, Record of Appeal).

My Lords, it is our submission that the rights in such a case must not be seen from the outsider's perception and understanding but must be seen and only can be understood through the natives and the indigenous concept and understanding of the right concerned. In the latest case nearer home, in the case of ***Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543,*** which followed ***Adong's Case***, the court cautioned after referring to a Privy Council case of ***Amodu Tijani v The Secretary Southern Nigeria [1921] 2 AC 399***, which was also relied in the Adong's case, not to interpret native title by reference to English land law principles. At page 566 of the report (see BOA 1 p. 84 a – e):

"In ruling that compensation should be on the basis of full ownership, the Privy Council observed (at p. 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 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."

In the present case, the learned trial judge did exactly the same as in the above case referred to. He drew his conclusion as to the existence of such rights or practice of *temuda, pulau* and *pemakai menoa* from the various testimonies of experts in this area, in particular Encik Nichola Bawin, the Deputy President of The Majilis Adat Istiadat Sarawak and the Appellant's own witness Pengulu Utong Ak Sigan, a Native Court's judge himself whose testimonies are in accord with the writings of the various authors on the said rights. ***At page 13 (see page 42 BAH. A),*** the trial judge said:

"17. It was also contended by Mr. Tan that all those works which I have referred to cannot be evidence since the authors have not been called. But we have the evidence of the said Utong Ak. Sigan, Sapit and Nicholas Bawin Anak Anggat (apart from the Plaintiffs) who gave evidence as to the nature of those native customary rights which evidence I accept and they are generally in accord with what the authors had written. Similar evidence was received by the court in *Hamit B. Matussin & 6 Ors. v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524. Therefore, even without the works of those authors there is ample evidence from witnesses who had testified in this case. The works, though unnecessary since I accept the oral evidence, serve to confirm the existence of such customs. The existence of such native customary rights were also affirmed by the various Orders and legislation which I will refer to later when I come to consider how such native customary rights had been affected by them. This takes me to the next question of whether such native customary rights had been exercised by the Plaintiffs and their forefathers and whether they were exercised in the disputed area."

2nd Main Issue.

c. That Native Customary Rights is synonymous with common law rights. Common law in England- that part of the law of England formulated, developed and administered by the old common law courts, based on the common customs of the country, and unwritten. It is "the common senses of the community, crystallized and formulated by our forefathers".

My Lords, at page 3 of the judgment, (p. 32 BAH.A), the learned trial Judge referred to the case of ***Mabo v State of Queensland (1992) 66 ALJR 408*** which was followed in ***Adong bin Kuwau & 51 Ors v The Government of Johore [1997] 1 MLJ 418*** and which decision was affirmed by this Court; [1998] 2 MLJ 158) ***(see p.99 BOA 1).*** His Lordship said:

> "4. This journey through history is necessary because, and it is common ground - arising from the decision in *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal ([1998] 2 MLJ 158) - ***the common law respects the pre-existing rights under native law or custom*** though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak."

My Lords, in the case of ***Adong bin Kuwau & 51 Ors v The Government of Johore* [1997],** the learned Judge after referring to the many cases in other jurisdictions that upheld native rights His Lordship concluded that the Plaintiffs in that case who are Aboriginal people do have their rights over their ancestral land protected under common law. At page 430 of His Lordship's judgment he said:

> ""My view is that, and I get support from the decision of Calder's Case and Mabo's Case, the aboriginal peoples' rights over the land include 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.*** I believe this is a ***common law right*** which the natives have and which the Canadian and Australian Courts have described as native titles and particularly the judgment of Judson J in the Calder's Case at page 156 where His Lordship said the rights and which rights include '... ***the right to live on their land as their forefathers had lived*** and that right has not been lawfully extinguished...... ***I would agree with this ratio and rule that in Malaysia 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 generations of the aboriginal people would be entitled to this right of their forefathers".***
>
> ***(Emphasis added)***
>
> *(See also written submission at page 832-834 BAH B 2 of 2).*

In the Privy Council case of ***Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor [1971] 1 MLJ 177***, (BOA 1 p. 107), the court was required to decide amongst other things whether or not the mate's receipt used in a shipment of certain goods from Sarawak to Singapore was a document of title a mode of trading quite established and regarded as an acceptable "custom" being used by the parties in such a trade. At ***page 179 (p. 112 BOA 1),*** of the report, their Lordships decided that ***such custom was good and reasonable*** and that became part of the common law of Singapore:

> "Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this case applies only to part of the shipping trade within the State of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore. ***A good and established custom "obtains the force of a law, and is, in effect, the common law within that place to which it extends": Lockwood v Wood [1844] 6 QB 50; 115 ER 19 per Tindal CJ at p 64.*** Thus the custom in this case, if proved, takes effect as part of the common law of Singapore. As such it will be applied by any court dealing with any matter, which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world.
>
> The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in the Laws of Singapore [1955] Ch *24* s 5(1). Accordingly, the question whether the alleged custom, if proved in fact as their Lordships hold that it is, is good in law must be determined in accordance with the requirements of the English common law. ***These are that the custom should be certain, reasonable and not repugnant. It would be repugnant if it were inconsistent with any express term in any document it affects, whether that document be regarded as a contract or as a document of title.***
>
> In their Lordships' opinion the custom alleged is neither uncertain nor unreasonable."

Therefore it is submitted that the trial Judge was correct in confirming that the same is true of the Respondents in this case. In addition, I refer to the reference made by ***Ramy Bulan*** in her paper entitled **"Indigenous Peoples and Property Rights To Land: A Conceptual Framework",** on the '**Nature of Common Law'.**

> "What does a right at common law mean and how does common law operate to provide a pre-existing right that co-exists with that of the state? Richard Bartlett in his article, "Mabo: Another Triumph For The Common Law", explains the nature of the common law succinctly:
>
> > The common law is founded on judge-made law that responds and seeks to resolve particulars disputes and fact patterns that come before the courts. Its wisdom has always been derived from the need to provide a solution in practice and not in the abstract. It is essentially pragmatic in nature.

> In its development over the millennium the common law has entrenched certain propositions, which form the basic minimum standard of human rights. The entrenchment takes the effect as a presumption against legislative interference with fundamental rights to the person and property. Such entrenchment arises from the role of common law as "an ultimate constitutional foundation". That role is a tribute to the virtues of the common law."

It must be noted that all the members of the High Court in *Mabo* who founded in favour of the concept of native title, relied upon the North American jurisprudence. They cited the Canadian cases of Calder and *Guerin v The Queen* but they explicitly relied on the Untied States Supreme Court in *Johnson v McIntosh.* It is the concept in Johnson devised by Marshall CJ in 1823 that has been recognized throughout the common law world. When he had to settle conflicting claims of settlers and aboriginal people in the European settlement of the United States, the compromise that he reached came to be known as native title. In Bartlett's words

> "The European nations wanted the land and they took it. The common law responded by devising a concept that sustained the property rights sanctioned by the government and yet in part maintained the rights of the aboriginal people."

On the said issue of common law, the trial judge concluded at page 12 of His Lordship's judgment ***(see at p. 41 of BAH. A from Line 17)***:

> "Mr. Tan also argued that the Plaintiffs cannot based their claim on the common law because it is not pleaded. But the pleadings had been replaced by the agreed statement of issues to be tried and ***the issue of native customary rights was whether such rights could exist over the disputed land, and this means, whatever the law maybe. Whether such native customary rights arise under the legislation or under common law is not an issue. In any event, the statement of claim when they refer to the legislation would also be referring to the common law right since the legislation advert to such common law right. Native customary right by its very term suggest a common law right and when the term is used in the statement of claim it is clear that the existence of such a right under the common law was asserted. The native customary rights are similar to the rights under a native title of the Australian Aboriginals which had been held to be enforceable as common law rights (see The Wik Peoples v Queensland [1996-1997] 187CLJ 1, 84 per Brennan CJ).***
>
> 16. In any event, evidence had been led without objection to show the existence of such rights from the time of the Plaintiffs' ancestors. It is too late for the Defendants in their submission to say that the Plaintiffs cannot argue that they have such rights under the common law. "

(Emphasis added)

[We adopt my Written Submission on what is the meaning of Law under the Interpretation Acts 1948 and 1967 at pp. 789-791 of BAH. B, 2 of 2 and the Mabo's case in the High Court at page 843 BAH. B, 2 of 2].

It is respectfully submitted that decision in *Adong's Case* on the common law right of the plaintiff therein was correct as confirmed by this Court and there is no evidence in the light of the authorities and laws referred to by His Lordship that the trial Judge was wrong in his application of that law in this case.

d. On the facts of this case the respondents had not abandoned, lost and/or extinguished their native customary rights over the disputed area.

My Lords, we adopt the Written Submission in the lower court from page 27 to 40 found at pp.774-787 of BAH. B, 2 of 2, where the testimonies of various witnesses confirmed that the said NCR was not abandoned, lost and/or extinguished over the disputed area.

3. **(a) That the trial Judge was correct in His interpretation and understanding of the relevant provisions of the laws of Sarawak which affirmed the existence of the Respondents customs and rights over land and this custom and right were never extinguished in the disputed area.**

(b) That *"pemakai menoa" "pulau"* and the activities of hunting, fishing and the collection of jungle produce are the customs of the respondents and their forefathers and practiced until this day, therefore considered "Native Customary Rights" in Sarawak.

My Lords, I'd like to refer and quote my written submissions in the lower Court, which have some relevance to this issue, which appears at page 811 – 815 of BAHGIAN B Jilid 2 Dari 2 of the Record of Appeal. For ease of reference, I copied that portion which were as follows:

"x. The Sarawak Letters Patent 1956

Under section 13 of the Sarawak Letters Patent of 1956, the Governor of Sarawak was only empowered to dispose of lands "which may be lawfully granted or disposed of by us" (see p 36 PBA-3 (2) (ii) Treaties and Engagement affecting Sarawak) and under section 12 of the Royal Instructions 1956 of "any vacant or waste lands belonging to us." ***(See PBA-3 (2) (ii) Treaties and Engagement affecting Sarawak p 41).***

It is submitted therefore that native customary right over land was not in questioned since the days of the Rajahs. The proposal to sell the fee simple *(Fee simple is an estate of freehold, held originally by free (not servile) services; an estate of inheritance, being the most extensive interest that a man could have under the King. It implied an absolute inheritance, clear of any condition, limitation or restrictions to particular heirs; it was descendible to heirs*

general whether male or female, lineal or collateral ***(Roger Bird, Osborn's Concise Law Dictionary, 7th Edn. p 145)*** in **"waste and unoccupied land"** for a dollar an acre in 1863 is proof of such recognition of native possessory rights over land. The subsequent Land Orders and Ordinances expressly provides for such recognition. When the country was finally ceded to the Crown in 1956, the Rajah clearly expressed reservation to transferring their rights on land ***"subject to existing private rights and native customary rights."*** In the circumstances, it is respectfully submitted that the natives of Sarawak can be said to have common law rights over land if they have been ***'in continuous and unbroken occupation and/or enjoyment of their rights over land since time immemorial'.*** Although native customary rights over land had been varied and restricted through the years as evidence from the provisions of the various Orders and Land Ordinances, it is submitted that as long as such customs had been in practice and such rights have never been extinguished, natives of Sarawak shall have common law rights over such lands. They have also statutory rights by virtue of the various Ordinances.

My Lord, the facts of the instant case before Your Lordship show that the creation and the practice of marking boundary of the Plaintiffs' *pemakai menoa* and their *pulau* within their *pemakai menoa* is a custom in practice since time immemorial and therefore must be lawful.

The writing of ***Robert Maxwell Pringle, The Ibans Of Sarawak Under Brooke Rule, 1841-1941 (1967)*** (PBA-2), Chapter VI at page 302 illustrates the very fact that the custom of creating *pulau* among the Ibans had long been in existence. Minggat was a known as a "Government war leader" serving the Government, James Brooke, in the 1870s and 1880s fighting against Iban rebels in the upper Ketibas and Batang Lupar Rivers. In later years Munan the son of Minggat had a family dispute with one Ampan. Although the account was in relation to a political maneuvering, between the Government Officer, D.J.S Bailey and Munan, the excerpt below shows that the creation of *pulau* as a reserved area for future generations to procure domestic needs is established and that the said creation of a *pulau* was in accordance with the Ibans' adat. At page 304 - 305 of his thesis Pringle wrote:

> "A tremendous family quarrel rapidly developed between Munan, backed by his powerful relatives and Ampan, the new pengulu, backed by the Resident. The first major crisis involved a dispute over an area of virgin jungle in the upper Awik. Munan and his party argued that before his death, Minggat had, according to Iban custom, reserved this area as a place where future generations might procure timber and other materials for house building. It was not to be felled for farming. But Ampan proceeded to ignore this restriction, distributing the land to his followers to farm. Munan outraged, immediately went to the Saribas, where he sought the advice and assistance of the Chiefs in

> the Paku, his father's place of birth. According to the version remembered by his relatives, he was merely seeking support for his interpretation of the adat governing such restrictions on old jungle. But Ampan promptly went to Bailey, and told him that Munan was in Saribas visiting people with the object of stirring up rebellion."

(See also Pringle's note on *pulau* at page 344-345 which also means **"any unfelled patch of jungle".** Therefore *pulau* need not necessary be surrounded by *temuda* or farmed land).

Writing on the how the Second Rajah ruled in Chapter V of his thesis, Pringle relates how the Second Rajah value the way the Dayaks tribes in Sarawak see life when he said the existence of the Dayaks in many cases, presents a happier aspect than that of the British. He said, ***"In point of creature comforts the Dayaks certainly have the best of it."*** Until Charles Brooke death in 1917, he said Sarawak functioned without a comprehensive land law and that the Rajah's Notices and Orders, the only written legislation in the country, were issued piecemeal, in response to local problems. (See page 232 and 233, Pringle PBA-2 (1)). Writing on the various Courts set up by the Rajah, Pringle wrote:

> "There was no equivalent court for either Chinese or Ibans, but the customary law of both was recognized, as interpreted by Native Officers and community headmen, subject to the Resident's discretion.
>
> The customary law (adat) of the various ethnic groups was the third foundation of the Sarawak legal system, the first two being common sense and a vague adherence to English legal principle. Like everything about the Government of Charles Brooke, acceptance of local adat grew quietly and naturally from his early outstation experience, reinforced by the theories of his uncle." (See Pringle p 280).

At page 281 Pringle continued:

> "Down through the years Brooke's Court recognized and enforced Iban adat, but under the Second Rajah no attempt was made either to embody it in a written code, or to eliminate the variations which existed from river to river. It was apparently recognized that either course would tend to violate the subtle, flexible spirit of customary law."

And as to that spirit of customary law Pringle referred to Richards' Dayak Adat Law In the Second Division, where Richards said, ***"That the customary law is alive and always changing; it lives by the spirit, and not by the letter. If it is put into the straight-jacket of statutory form it will perish or, if it lives, it does so by disregarding the statute."*** (**See at page 300 of Pringle).**

It was further recorded that in 1910, when A.B Ward suggested that Iban customary law in the Krian should be altered in certain respects to conform with practice else where in the Second Division, the Rajah's son and heir stoutly defended diversity and said:

> "I am told to inform you that the customs and adat amongst the Dayaks are not to be altered.
>
> As His Highness rightly observes the Dayaks observe different customs in different districts…
>
> "Kindly see that no alterations are made in the Dayak "adat" and that the "adat lama" be recognized and continued…"
>
> ***(See Pringle p 282)"***

4. **The trial Judge was correct in construing the provisions of Order No. XIV 1921, Section 55(1) of the Forests Ordinance, 1934 (Cap. 31), Section 65(1) of the Forests Ordinance 1953 (Cap. 126) and the 1899 Timber Order which allow the collection of timber for personal use by an inhabitant of Sarawak, to justify his ruling that the exercise of such rights given by statute were "native customary rights" and/or the exercise thereof confers rights to land within what according to native custom, is called *"pulau"* or *"pemakai menoa"*.**

5. **The trial Judge was correct when he concluded at paragraph 88 of his judgment (page 102 of the Record of Appeal) as follows:**

> "Native customary law existed and operated side by side with the Orders and other legislation of the Rajah until they were abolished by the Rajah (see Professor Douglas Sanders; Calder; Adong bin Kuwau, Mabo supra.). Therefore, even assuming that those rights of temuda, pulau and pemakai menoa were not expressly mentioned by any written law, it does not mean that they could not exist as native customary law. They exist, and in this regard I have already adverted to the evidence and found them to exist, until abolished by Orders or other legislation for which also I have concluded_that they had not abolished those native customary rights which are also equated as native customary laws."

This is because:

(a) Even if the above stated cases referred to by the learned Judge were pertaining to common law rights it is submitted that native customary law is

synonymous to common law rights in the Sarawak context. Native customary law is the "common law rights" of the respondents in Sarawak as stated above. The same is true to other indigenous people all over the world.

(b) Native Customary Laws includes customs that are codified and not codified. Customary law is understood as customs usages and practices that are sufficiently fixed and settled over a substantial area, known and recognized and deemed obligatory (Vernom). It is a way of life, basic value, culture, accepted code of conduct, manners and conventions (Richard). Not all the adats or customs of the natives of Sarawak are codified yet. (See Empeni Lang, Administartion of Native Courts & Enforcement of Customary Laws in Sarawak). Are we saying that customs and adat of these natives cannot be enforced now? No, it cannot be. Interpretation Act definition of "law" includes common law and customs.

(c) That the practice of creating "pulau" and "pemakai menoa" in accordance with the customs of the Ibans of Sarawak was duly documented by various writers and authors.

(d) There is nothing in any of the Order of the Rajahs or the Laws of Sarawak pertaining to land that oust this custom of creating *"pulau"* and *"pemakai menoa"* from being part of the customs of the Ibans of Sarawak.

(e) Section 5(2)(f) Land Code (Cap. 81) 1958 (Amended 2000) states "any other lawful method" as one of the methods by which native customary rights may be acquired. This phrase includes uncodified customs of the natives of Sarawak.

(f) On a true construction of the provision of the Land Order 1863, the definition of State Land did not include land within Sarawak already occupied by natives by virtue of their customs.

3rd Main Issue

6. ***Whether the Appellants contention that Native customary laws refer only to those customs codified under the provisions of the Native Customary Laws Ordinance (Cap. 51), and thus native customs and practice per se, do not have the enforce of law unless so codified?***

My Lords, the trial Judge had already addressed this issue at page 72, paragraph 87 of His Lordship's judgment (see at p. 101 BAH. A) in these words:

> "But it was argued that absence of any reference to or mention of the terms *pulau* or *pemakai menoa* in the Tusun Tunggu meant that such custom was not native customary law since they do not come within the definition of "customary law" of the Land (Classification) (Amendment) Ordinance 1954, viz.:- "a custom or body of customs to which the law of the Colony gives effect". The following sentence of Richard, p.9, was referred to as supporting that view:
>
>> As was pointed out by Mooney, as Crown counsel and Hickling, the law does not in fact give effect to any customs whatsoever except the codified law of the delicts.
>
> 88. The matters of *temuda*, *pulau* and *pemakai menoa* were already recognised by their being mentioned in the various Orders and reference which I have earlier referred to and therefore the law of Colony has indirectly given effect to them. Native customary law before its codification was not in any legal written form but a matter of proof. Native customary law existed and operated side by side with the Orders and other legislation of the Rajah until they were abolished by the Rajah (see Professor Douglas Sanders; *Calder*; *Adong bin Kuwau*, *Mabo supra*.). Therefore, even assuming that those rights of *temuda*, *pulau* and *pemakai menoa* were not expressly mentioned by any written law, it does not mean that they could not exist as native customary law. They exist, and in this regard I have already adverted to the evidence and found them to exist, until abolished by Orders or other legislation for which also I have concluded that they had not abolished those native customary rights which are also equated as native customary laws.
>
> 89. Reference was also made to the Native Courts Ordinance 1955, which was an "Ordinance to make better provision for the constitution of Native Courts; the definition of their powers and jurisdiction; and all matter ancillary thereto", and its successor the Native Courts Ordinance 1992 with the same preamble. However, there is no provision in either Ordinance to state that native customary rights like those claimed by the Plaintiffs are abolished. Both these Ordinances have the same definition for "customary law", "native system of personal law" and "system of personal law" as those of the amended Land (Classification) Ordinance, 1948.
>
> 90. Those definitions were referred to for the purpose of arguing that the native customary rights claimed by the Plaintiffs must have recognition by statutory law. The "general law of Sarawak" referred to in one of the definitions mean not only statutory law but custom and usage as well and such include native customary rights that have existed before the rule of the Rajah and continued until now as I have said earlier. In this respect I regard as an accurate statement of the position of native customary rights the following statements of Pringle:
>
>> There was no equivalent court for either Chinese or Ibans, but the customary law of both was recognized. As interpreted by Native Officers or community headmen, subject to the Resident's discretion.
>>
>> The customary law (*adat*) of the various ethnic groups was the third foundation of the

Sarawak legal system, the first two being common sense and a vague adherence to English legal principle. Like everything about the Government of Charles Brooke, acceptance of local adat grew quietly and naturally from his early outstation experience, reinforced by the theories of his uncle.

………..

Down through the years Brooke's Court recognized and enforced Iban adat, but under the Second Rajah no attempt was made either to embody it in a written code, or to eliminate the variations, which existed from river to river. It was apparently recognized that either course would tend to violate the subtle, flexible spirit of customary law.

91. That description of customary law, which is the same as native customary rights form a part of the general law of Sarawak. Richard also correctly regarded that as part of the law when he said:

> That the customary law is alive and always changing; it lives by the spirit, and not by the letter. If it is put into the straight-jacket of statutory form it will perish or, if it lives, it does so by disregarding the statute."

His Lordship then went on to refer to the present Land Code 1958 (Cap. 81) quoting section 5 in *toto.* At page 77 to 78 of his judgment paragraph 93 found at ***pp. 106-107 of BAH. A***, his Lordship concluded as thus:

> "93. As with previous legislation, this one does not abrogate whatever native customary rights that exist before the passing of that legislation. This means the Plaintiffs' native customary rights were unaffected by this legislation except that they can no longer claim new territory even though the families may increase unless they obtain a permit under s 10 of that legislation from the Superintendent of Lands & Surveys. The case of *Pang Cheng Lim v Bong Kim Teck & 3 Ors [1997] 4 AMR 3717* which dealt with the Malacca Lands Customary Rights Ordinance and which held that if a person could not acquire any title under that Ordinance he could not acquire it by any other method as that would defeat the purpose of that Ordinance is of no relevance to the present case as it is not concerned with the question of whether native customary rights survived the various Orders and legislation. Also of no relevance is the case of *Lebbey Sdn Bhd v Chong Wooi Leong & Anor* [1994] 3 AMR 2205 which concerns squatters on state land in Selangor of which this case is not and because there is no law in Sarawak to say that if you do not apply for a licence to occupy the land under s 30A of the Land Ordinance or s 29 of the Land Code you will lose your native customary rights which you have hitherto enjoyed now and which your ancestors have enjoyed since the days of the Rajahs. Support for the view that whatever native customary rights that were acquired are not affected by the Land Code can be found in *TR Bujang Ak untor v TR Tanjong Ak Usat* 4 MC 62 which is a decision made in 1966 where Lee Hun Hoe J (as he then was) sitting in appeal with 2 assessors held that *temuda* acquired prior to 1958 continue to subsist. "

At para. 98 to 101 of his Lordship's judgment, on the same issue, the trial judge referred to

the laws after the formation of Malaysia which support His Lordship's opinion that NCR continued in its existence and notwithstanding the fact that the words *"pulau"* or *"pemakai menoa"* are not stated in these laws, it does not mean that it does not have the force of law. His Lordship said:

> 98. Then came the formation of Malaysia in 1963 where **"Law"** has been defined by the Malaysian Constitution to include **"custom and usage having the force of law"** which again reaffirm the continue existence of native customary rights.
>
> 99. This leads me to consider whether the Majlis Adat Istiadat Sarawak Ordinance 1997 has any effect on those native customary rights of the Plaintiffs. This Ordinance was passed **"to provide for the establishment of a Council (to be known as the Majlis Adat Istiadat Sarawak) to advise the Yang di-Pertua Negeri on all matters relating to the customary law and adat of the various natives of Sarawak other than Malays or natives who profess Islamic religion and for matters connected therewith and incidental thereto."** ***The preamble describes it all and this Ordinance does not purport to deal with the legal position of existing native customary rights.*** A council is established to advise His Excellency, the Head of State of Sarawak, on matters of customary law and *adat* of non-Muslim natives and non-Malay. It does not eliminate the native customary rights exercised by the Plaintiffs.
>
> 100. Then in 1993, which is some years after Sarawak together with other states come together to form Malaysia on 16 September 1963, the customs of the Iban were codified and this code is known as the Adat Iban 1993. This code was derived from the 1952 revised version of the Sea Dayak Customary Codes of Fines for the Third, Fourth and Fifth Divisions and this 1952 version was in turn derived from the 1936 version. I have already dealt with the position of the Tusun Tunggu and why, in my view, it did not abolish the said native customary rights. It remains to be examined whether the Adat Iban 1993 which is governed by the Native Customs (Declaration) Ordinance, 1996 (which replaced the Native Customary Laws Ordinance 1958) changes that legal position. Section 7(1) provides that the Adat Iban shall be ***"conclusive as to the customs of the native race in respect of which it was compiled and its correctness shall not be questioned in any court whatsoever. If a provision of the Adat Iban is repugnant or inconsistent with any written law, the written law shall prevail (see s 9). Mr. Tan's argument is that because the term "pulau" is not mentioned in the Adat Iban nor in the Tusun Tunggu, it means that "this practice is not in accordance with the customary law". For that argument to succeed it must be shown that there are provisions in the Adat Iban to say that unless a custom is mentioned in it, such a custom is no longer to be recognised or regarded as a native customary right. There is no such provision because it was not so intended. This is clear from the words in s 7(1) that where the Adat Iban states that where a particular custom is stated it is deemed to be correct. As was said earlier, there must be clear unambiguous words to that effect if it was intended that the native customary rights that had existed since before the time of the First Rajah and that had survived through all the Orders and legislation were to be extinguished. Not only that there are no such words, neither were there any words that can possibly give rise to such an inference.***
>
> 101. Mr. Tan had also referred to several authorities, namely, *Nyalong Ak Bungan v The Superintendent of Lands & Surveys, 2nd Division, Simanggang* CNCLS 139-143;

Abang v Saripah CNCLS 163-167; *Injing v Tuah & Anor.* CNCLS 178-183; *Ara Bte Aman & 16 Ors v Superintendent of Lands & Suveys, 2nd Division*, CNCLS 31-34, for the proposition that because the term *pulau* or *pulau galau* is not mentioned in those cases, they suggest that there are no such native customary rights. ***This proposition can be dismissed by saying that those cases were not concerned with pulau or pulau galau nor were they concerned with whether they survived the various Orders and legislation; therefore, they are not relevant."***

(Emphasis added)

[See also Written submission at pp.788 to 829 of BAH. B 2 of 2, which we adopt in support of the above issue]

In addition, My Lords, it must be noted that the **Adat Iban 1993**, which came into effect on the 1st June 1993, explicitly states under section 193 that, *"An action or suit in respect of **any breaches of other Iban customs recognized by the community but not expressly provided for in the Adat Iban 1993, may be instituted by any person in any Native Court** having original jurisdiction over such matter and the court may impose such penalty or award such compensation as it may consider appropriate in the circumstances."* And under section 5 of the said Adat Iban, it revoked (a) the Tusun Tunggu (Third Division) Order; (b) the Tusun Tunggu (Fourth Division) Order; (c) the Tusun Tunggu (Fifth Division) Order; and (d) the 1952 version of the Tusun Tunggu in Dayak and its translation in English appearing in Volume VII of the Revised Edition of the Laws of Sarawak 1958.

The absence of the terms *"pulau"* or *"pemakai menoa"* in the said Iban Adat or The *Tusun Tunggus* referred above which are now revoked, cannot be sustained in support of the appellant's argument that such customs were therefore not recognized and enforceable in law. Notwithstanding the above submission, we are in total agreement with the trial judge's conclusion at pages 80 - 81 (see pages 109 - 110 BAH. A), when his Lordship in reference to the said *Adat Iban* said:

"99. This leads me to consider whether the Majlis Adat Istiadat Sarawak Ordinance 1997 has any effect on those native customary rights of the Plaintiffs. This Ordinance was passed *"to provide for the establishment of a Council (to be known as the Majlis Adat Istiadat Sarawak) to advise the Yang di-Pertua Negeri on all matters relating to the customary law and adat of the various natives of Sarawak other than Malays or natives who profess Islamic religion and for matters connected therewith and incidental thereto."* **The preamble describes it all and this Ordinance does not purport to deal with the legal position of existing native customary rights. A council is established to advise His Excellency, the Head of State of Sarawak, on matters of customary law and *adat* of non-Muslim natives and non-Malay. *It does not eliminate the native customary rights exercised by the Plaintiffs."***

(Emphasis added)

His Lordship in reference to the common law right "which he says respects the pre-existing rights under native law or custom" went on to refer to the Canadian case of ***Calder v Attorney-Genral of British Columbia 1973 SCR*** which was followed by ***Adong Bin Kuwau & 51 Ors v The Government of Johore [1997] 1 MLJ 418*** affirmed by this court [1998] 2 MLJ 158, as thus:

> "…Hall J rejected as **'wholly wrong'** the **'proposition that after conquest or discovery the native peoples have no rights at law except those subsequently granted or recognised by the conqueror or discoverer'**. *The preferable rule*, supported by the authorities cited, is that ***mere change in sovereignty does not extinguish native title to land…but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so."***
>
> ***(Emphasis added) [See at page 33 of BAH. A]***

At page 428 of the report in the said ***Adong Kuwau's case***, the High Court referred to another Canadian Federal Court's case of ***Hamlet of Baker Lake v Minister of Indian Affairs and Borthern Development (1980) 107 DLR (3d) 513*** which followed ***Calder's case*** when it was said:

> "…The *Calder* decision renders untenable, in so far as Canada is concerned, the defendants' arguments that ***no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect."***

In the case of ***Mabo case No. 2*** which was followed by ***Adong's case***, the Common Law of Australia recognizes a form of native title, which, except where it has been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with the laws or customs to their traditional land, which is preserved as native title. The nature of native title must be ascertained by reference to the traditional laws and customs of the indigenous inhabitants of the land. Native title does not have the customary incidents of common law title to land, but it is recognized by the common law. If a group of aboriginal people substantially maintains its traditional connection with the land by acknowledging the laws and observing the customs of the group, the traditional native title of the group to the land continues to exist. But once the traditional acknowledgement of the laws and observance of the customs of the group ceases, the foundation of native title of the land expires and the title of the crown becomes a full beneficial title. ***(See at page 429 of the Adong's Report at High Court, page 131 BOA 1)***

His Lordship then went on to trace the history of the Plaintiffs, beginning from the Malay Sultanates era through the British Government with the introduction of the *torrens* land sys-

tem. Right from the beginning and through these cessation or, annexation of political powers, the Plaintiffs remained in occupation of their lands; ***"roaming freely and sheltered wherever they wanted".*** They continued ***'to live from the produces of the jungle and the jungles are still their hunting ground".*** The Plaintiffs, His Lordship said, lived ***"Just like their forefathers had done".*** His Lordship was in total agreement with the ratios in ***Calder's and Mabo's Case*** and held that the Plaintiffs do have common law rights over their ancestral land. His Lordship at page 430 of His Lordship's judgment then said:

> "My view is that, and I get support from the decision of Calder's Case and Mabo's Case, the aboriginal peoples' rights over the land include 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. ***I believe this is a common law right which the natives have and which the Canadian and Australian Courts have described as native titles and particularly the judgment of Judson J in the Calder's Case at page 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished...... I would agree with this ratio and rule that in Malaysia 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 generations of the aboriginal people would be entitled to this right of their forefathers".***
>
> ***(Emphasis added)***

Before the Court of Appeal, the State Legal Adviser for the Appellant argued that the Respondents therein has no common law rights over land and therefore not entitled to receive fair and reasonable compensation under Article 13(1) of the Federal Constitution. Similarly, he argued that their rights are governed by the Aboriginal Peoples Act 1954. Gopal Sri Ram JCA at page 162 of the report said:

> "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. Before we express our views upon the correctness of the submissions made in support of the appeal, it is important that we hearken to certain passages in the judgment of the learned judge which were drawn to our attention by the learned State Legal Adviser and which form the subject matter of the appellants' complaint."

Their Lordship then went on to refer to the above quotation referred above on the trial judge's reliance on the various authorities in other jurisdictions, which the Court of Appeal said deserve much respect, and concluded, ***"We can find nothing objectionable in the foregoing passages."*** (See from pp. 103-105 BOA 1).

Then in the Privy Council case of ***Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor [1971] 1 MLJ 177***, (BOA 1 p. 107), referred earlier the court was required to decide amongst other things whether or not the mate's receipt used in a shipment of certain goods from Sarawak to Singapore was a document of title a mode of trading quite established and regarded as an acceptable ***"custom"*** being used by the parties in such a trade. At page 179 (p. 112 BOA 1), of the report, their Lordships decided that such custom was good and reasonable and that became part of the common law of Singapore:

> ***"A good and established custom "obtains the force of a law, and is, in effect, the common law within that place to which it extends": Lockwood v Wood [1844] 6 QB 50; 115 ER 19 per Tindal CJ at p 64.*** Thus the custom in this case, if proved, takes effect as part of the common law of Singapore. As such it will be applied by any court dealing with any matter, which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world.
>
> The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in the Laws of Singapore [1955] Ch *24* s 5(1). Accordingly, the question whether the alleged custom, if proved in fact as their Lordships hold that it is, is good in law must be determined in accordance with the requirements of the English common law. ***These are that the custom should be certain, reasonable and not repugnant. It would be repugnant if it were inconsistent with any express term in any document it affects, whether that document be regarded as a contract or as a document of title.***
>
> ***In their Lordships' opinion the custom alleged is neither uncertain nor unreasonable."***

Though this case concerns the custom pertaining to trade in shipping, it is submitted that the issue of what is a good and established custom and therefore obtains the force of law, and is in effect the common law within that place it extends is relevant to our case to determine by analogy, whether such custom of the Respondents pertaining to land is ***a good and established custom*** which therefore obtains the force of law. Our respectful submission is therefore that the Iban custom on *"pulau"* and *"Pemakai menoa"* was and is a good and established custom and should have the force of law and is in effect the common law among the Ibans of Sarawak.

In the latest case referred earlier of ***Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543***, which followed ***Adong's Case*** and in fact followed the judgment in this Case before Your Lordships, when His Lordship said at page 566 of the report (see p. 84 BOA 1):

> "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 native title as decided by the courts:
>
> (a) it is a right in law and not based on any document of title (see the Calder case followed in *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 State of Queensland & Ors [1996] 187 CLR 1*** (hereinafter referred to as ***'The Wik Peoples Case'***) at p. 84, followed in the Malaysian case of ***Nor Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd. & Ors [2001] 2 CLJ 769*** at p. 780)."

In that case, a similar argument was advanced by the Defendants as in this case where it was argued that the Plaintiffs' occupation of the land in questioned was only authorized in accordance with the Federated Malay States Government Gazette Notification (N.M.B. Selangor P.U. 1649/1935) and the right was only given for the purpose of residence and settlement but not all the rights claimed, viz; rights at common law, therefore owners by custom, native title and the holders of usufructuary right over the land ***(see pp. 555-556 of report pp. 73-74 BOA 1).*** After referring to the various authorities in other jurisdictions and the case of *Adong,* which was affirmed by this Court (see pp.565-569 of the report found at pp. 83-87 of BOA 1), His Lordship said at p. 569 e of His judgment:

> "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 people occupied the lands in the hinterland in an organized society though some were nomadic. Although the Sultan owns 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 now the aboriginal people are to be denied of the recognition of their proprietary interest in their customary and ancestral lands it would tantamount to taking a step back ward to the situation prevailing in Australia before the last quarter of the twentieth century where the laws, practices, customs and rules of the indigenous people 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 even though 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 title. 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 doctrines 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 organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

> **(3) Therefore, to be 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 <u>an interest in and to the land</u>.** 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 on the land."***

And on the issue of whether the plaintiffs' rights were limited by statute, His Lordship then said:

> "12. 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."

His Lordship then went on to quote the judgment of the learned judge in *Adong's case.* ***(See page 570, of judgment found at p. 88 of BOA 1).*** It is respectfully submitted that the appellant's grounds of appeal relating to this issue is unsustainable in law.

My Lords, it must be noted that the *Sagong* case ventured further beyond *Adong* as decided by the learned judge in the above judgment, where it was decided that the proprietary interest of the *orang asli* in their customary and ancestral lands is ***an interest in and to the land*** as opposed to a mere right to exclusive use and occupation. His Lordship before the above conclusion said at page 568 g of the report (see page 86 of BOA 1):

> "The *Adong* 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* (hereinafter referred to as '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 aboriginal title by Canadian caselaw 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 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 specified activities which may be themselves aboriginal rights. (per Lamer CJ at p. 240).

My Lords, we respectfully submit that the same should apply in this instant case in that the Respondents not only have right to forage and/or having the exclusive or occupancy right

over the disputed area but that they have also interest in the land; in this case, the disputed land.

7. Native Customary Rights.

(a) Referring to paragraph 19 of the judgment, page 45 of the Record of Appeal, the provision of the Land Settlement Ordinance 1933 includes land in **"continuous occupation"** by the respondents, which includes the *"pulau"* and *"pemakai menoa"*.

(b) There is no clear provision in the said Land Settlement Ordinance 1933 that oust *"pulau"* and *"pemakai menoa"* from the definition of Native Customary Rights in the said Ordinance.

My Lords, at this juncture I would like to re-emphasize the fact that the respondents had been in continuous occupation and by an express provisions of the law at the relevant time, been lawfully occupying the disputed area. I refer to page 807 – 811, of the BAHAGIAN B Jilid 2 dari 2 Record of Appeal, where my written submissions touched on the Land Classification Ordinance 1948. (***Kindly refer to the said references).***

8. Disputed Area (672.08 hectares).

(a) The fact that the respondents' longhouse is outside the disputed area does not mean that no native customary right exist within the disputed area.

(b) At page 29 line 2, page 58 of the Record of Appeal, the learned Judge agreed with the respondent's Counsel, that the disputed area could have been cleared prior to 1958 as shown from the 1951 photographs.

(c) That *"tembawai/temawai"* sites as shown in Exhibit PB (page 1205 of Record of Appeal) proved occupation of the disputed area because its proximity to the disputed area. Definition of "occupation".

(d) From the testimonies of the respondents their occupation of the disputed area was clearly established prior to 1958.

(e) That the Judge was correct in accepting Exhibit PB as accurate notwithstanding the fact that it was done by an unlicensed surveyor. This is primary evidence which ought to be accepted. No evidence to show that it was otherwise from the appellants.

(f) Native customary rights cannot be extinguished by the mere presence of a non-native person working within the disputed area. The provisions of an existing law on extinguishments of native customary rights must be followed.

9. Life and Livelihood

(a) Ample of evidences show that the disputed area is the source of the respondents' livelihood as it is the *"pulau"* of the respondents.

10. Adat Iban 1993

(a) clearly provides recognition and the enforcement of other Iban customs recognized by the community though not expressly provided for in the *Adat Iban* 1993.

11. Remedies

(a) The trial Judge was correct in his exercising for the remedies of rectification under the general prayer of the respondents.

12. Miscellaneous

(a) The Judge was correct in referring to the Declaration on the Human Rights of Indigenous Peoples being a universal expectation. Malaysia being a member of the United Nations ought to respect and enforce this universal expectation on Human Rights.

***(See Sagong case above at p. 88 of BOA 1.** Where the learned judge agreed to the application of the provisions of International Law on human right.)*

For the above reasons, we humbly pray that this appeal be dismissed with costs, to be taxed accordingly.

Dated this 22nd March 2004.

Signed

……………………………………………

MR. BARU BIAN
COUNSEL FOR THE RESPONDENTS

RESPONDENTS'COUNSELS
REPLY TO WRITTEN REPLY OF
THE APPELLANTS' SUBMISSION

May It Please You My Lords

1. Referring to page 2 point 1.5 (b) & (c).

Reply: Refer to the Learned Trial Judge's judgment at page 41 BAH. A Record of Appeal, from line 17. Also covered at page 18 of my Written Submission (WS).

2. Referring to page 4 point 1.7 (b) & (c) and page 10 point 3.3.

This is on the issues of Interior Area Land. Disputed area is an Interior Area Land. The ancestors of the respondents were from Kanowit and settled in the Sekabai area ***"latest in 1930" (Judgment of Trial Judge at pp. 44-45 BAH. A Record of Appeal).***

Reply: See at pp. ***807 to 811*** of BAH. A, Jilid 2 of 2, Record of Appeal. Adopt my submission at the High Court. See the case of ***Sepid Anak Selir v. R (1954) (Enclosed) and Case of State Government of Sabah v. Francis Lim & Ors (1993) at p. 810.***

Submit: That the respondents ancestors were within the Sekabai area and occupied the disputed area prior to the passing of the Land Order 1933 and Land (Classification) Ordinance 1948. The applicable law is the custom or *adat* of the respondents or common law. Trial Judge referred to and adopted Adong's Case at page 3 of Judgment (see page 32 of BAH. A Record of Appeal). Section 8(3) of the Land (Classification) Ordinance 1948, allows natives to create NCR over Interior Area Land. Disputed area is declared as such. ***Sepid Anak Selir v. R (1954) referred.*** Respondents' ancestors occupied and created their *Pulau* and *Pemakai Menua* earlier than these Ordinances of 1933 and 1948.

3. Referring to page 14 point (ii) and (iii).

Reply: Trial Judge did not say that the Common law referred in His Lordship's judgment is the common law of England. He was referring to the principle of common law. In this case 'common law' means the common law of Sarawak or Malaysia. (See ***Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor [1971] 1 MLJ 177***, (BOA 1 p. 107), referred in my ***WS*** earlier and ***Adong's case***).

4. **<u>Referring to page 17 quotation on writings of A.F Porter.</u>**

<u>Reply:</u> Learned SAG said crucial sentence omitted by the Trial Judge. *"Where these rights relate to land the expression used* ***<u>may</u>*** *ordinarily be either "native customary tenure" or "native customary rights over land". (Emphasis added).* Note that the earlier paragraph quoted speaks of ***"a system of land tenure..*** the term ***"adat" ...*** is used to describe this ***body of customary rules or laws;*** the English equivalent is usually ***"native customary law" or "native customary rights".***

Refer to the full text submitted in my written submission at the High Court at page 795 BAH. B Jilid 2 of 2.

Submit: Therefore SAG submission at page 18 point 4.3 – 4.5 is incorrect.

<u>5.</u> ***<u>Referring to page 24 on the Case of Sagong Bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002</u>].***

<u>Reply:</u>

i. That the judgment referred therein must be in view of the facts before the Court; i.e referring only to the acquired land which was part of the Settlement area of the Plaintiff. This is because prior to conclude as such, th eLearned Judge had referred to the various Cases including Adong's Case and in fact Nor Nyawai's Case, where the indigenous people has the rights over the forest area.

ii. In any event this issue had been subject to an appeal, under cross-appeal. The Appeal Papers had been submitted to the Court.

<u>6.</u> ***<u>Referring to page 35 that no clearing found in the disputed area. This is misleading. {Note: Submission did not mention before or after 1958].</u>***

<u>Reply:</u> See: Testimonies of DW7 in BAH. B Jilid 1 of 2 page 464 and DW13 at BAH. B Jilid 1 of 2 page 491. 2 acres of clearing in the map at page 1201 BAH. C. [***<u>Note: Submission did not mention before or after 1958].</u>*** See: Trial Judge's judgment on this matter at page 57 line 1 to 30 to page 58 line 1 to 13 BAH. A Record of Appeal. Also see: page 60 lines 29 onwards to page 61 line 1 to 27 of BAH. A, Record of Appeal where the trial judge held that the survey made on the ground is better then the map produced by the defendants witnesses. ***Submit:*** *Pulau* and *Pemakai menua* were created before 1958. Whether *temuda* were created after or before 1958 is irrelevant. ***The disputed area is within the Pemakai menua of the respondents (See Trial Judge's finding at page 61 BAH. A lines 23 to 27).***

7. ***Referring to page 51 on "Loss of Livelihood".***

Reply: Irrelevant to say that the rest of the *Pemakai Menua* is big compared to the disputed area. Therefore Respondents are not deprived of the source of their livelihood. The disputed area is a *Pulau* therefore the source of the respondents' livelihood. It was a finding of facts that the disputed area is the Respondents source of livelihood.

Secondly, the fact that the *Pulau* or disputed area had been logged on twice does not change the status of the *Pulau.* Licences to log over the *Pulau* were given by the Government of which the Respondents have no power to object.

8. ***Referring to distinctions made between Adong's Case and Nor Nyawai at page 58.***

Reply: The facts are different but the legal principles are adopted and applied in ***Nor Nyawai.*** The Court of Appeal affirmed this.

Dated this 25th March 2004.

MR. BARU BIAN
Counsel for the Respondents

Sarawak Tribune
(http://www.sarawaktribune.com.my/exec/view.cgi?archive=27&num=27340)

‘NCR only covers Temuda land’

Standley Dikod

Mar 24, 2004

KUCHING – The State Attorney-General Datuk J C Fong told the Court of Appeal here yesterday that native customary rights as recognised by Section 66 of the Land Settlement Ordinance, 1933 and the Tusun Tunggu only cover Temuda land.The Court of Appeal was hearing an appeal by the Superintendent of Lands and Surveys, Bintulu against an earlier judgment of the High Court delivered in 2001 that the natives from Rumah Nor in the Sg. Sekabai region in Bintulu, had native customary rights over an area of about 1,700 acres, which had become part of a Provisional Lease issued to Borneo Pulp Plantation Sdn. Bhd with an area of 8,854 hectares.

The High Court decision, in favour of the natives led by Nor ak Nyawai, made the Provisional Lease null and void.The Court of Appeal, comprising Datuk Richard Malanjum, Dato’ Hashim bin Dato’ Haji Yusoff and Tengku Dato’ Baharudin Shah bin Tengku Mahmud, was told that the total area claimed by the natives was over 18,000 acres but only 1,700 acres is disputed by the Superintendent of Land and Surveys because the aerial photograph taken in 1951 showed the disputed areas was covered by virgin jungle without cultivation and that the disputed area was an Interior Area Land which the natives could occupy at the pleasure of the Government and they could only create rights if issued with a permit by the District Officer in which the natives had no permit from the District Officer to occupy the disputed area.

The State Attorney-General submitted that the High Court erred when equating native customary rights in Sarawak to common law right. He said common law had no application in dealing with issues pertaining to ownership of land in Sarawak, and that the famous Australian case of Mabo No.2 was decided according to the common law of Australia which has no relevancy to Sarawak. He said that the evidence from a former Tuai Rumah Sapit of the longhouse was that there was no Temuda in the disputed area and the High Court Judge, Justice Datuk Ian Chi, had accepted his evidence.On whether the disputed area was “pulau” (i.e. forest preserved by natives for timber and food), the State Attorney-General said that, at the time of the issue of the Provisional Lease, there was no “pulau” because, between 1984 and 1989, the area was logged twice and cleared of all merchantable timber.

On both occasions, the natives sought payment from the logging companies which the High Court said was evidence that they had sold timber from the “pulau”.In any event, Fong contended that “pulau” and “Pemakai menoa” did not appear in any of the Rajah’s Orders, Land Ordinances and the Land Code, as customs which could give rights to land.He reiterated that native customary rights, as recognised by statutes, covered only Temuda land.Fong pointed out that there was an area

of over 17,000 acres over which the Government had not issued any Provisional Lease because the 1951 photograph showed cultivation over those areas. The natives' longhouse, Rumah Nor, and established in 1955 is outside the disputed area. The area, which was logged in the 1980's by Limbang Trading (Bintulu) Sdn Bhd, is part of Lot 591 of Batu Kapal Land District's total area of 8,854 hectares.

Subsequently, a provisional lease on the area was granted by the Superintendent to Borneo Pulp Plantation Sdn Bhd for tree plantation.Fong, therefore, contended that the High Court Judge was wrong and unfair to hold that the Government was destroying native customs and culture by issuing a Provisional Lease over the disputed area and the natives were deprived of their livelihood and turned into "vagabonds in their homeland".He said that there was plenty of undisputed land left for the natives to survive and practise their cultures and tradition, and their longhouse is still standing today.Finally, he pointed out that the natives from Rumah Nor originally migrated from Kanowit to Sg. Sekabai in the 1930s. "Whether they have any native customary rights over the disputed area must be determined by the law relating to the creation of native customary rights in the 1930s, and not according to customs which their ancestors practised before the Rajah came to Sarawak."

Based on the relevant laws prevailing in the 1930s, the natives could only have native customary rights if they cleared virgin jungle and, in accordance with Section 66 of the land Settlement Ordinance, planted fruit trees thereon at the prescribed rate of 20 trees per acre, he added. "Since the disputed area is 1,700 acres, there is no evidence to show the natives or their ancestors had ever planted 34,000 fruit trees in the disputed area."He asked the Court to set aside the order of the High Court and allow the Superintendent's appeal with costs.The State Attorney-General was assisted by Jonathan Jolly and Kezia Norella Daim bte Datuk Matnor and the natives were represented by Mr. Baru Bian, Mr. Paul Raja, Mr. See Chee How and Mr. Harrison Ngau. Hearing continues.

Sarawak Tribune
(http://www.sarawaktribune.com.my/exec/view.cgi?archive=27&num=27472)

Judges need time to study submissions

Mar 25, 2004

KUCHING – The Court of Appeal here yesterday deferred judgement on an appeal by the Superintendent of Land and Surveys against the judgement of the Kuching High Court given in May, 2001 that the natives had rights to a disputed area of 1,700 acres of Sg. Sekabai in Bintulu District.The three-member Court of Appeal, comprising Datuk Richard Malanjum, Dato' Hashim bin Dato' Haji Yusoff and Tengku Dato' Baharudin Shah Tengku Mahmud, said in view of the seriousness of the case the judges needed time to study the lengthy submissions.

The Court was yesterday told by counsel for the natives from Rumah Nor, Baru Bian, that the area

under dispute was virgin jungle as shown by the aerial photographs taken by the Lands and Surveys Department in 1951. But he argued that the disputed area remained a 'pulau' even though the area had been logged twice in the 1980s.The counsel said native customary rights "must not be seen from an outsider's perception and understanding but must be seen and can only be understood through the natives." He submitted that the natives had customs which are regarded as common law rights, including the right to live on their land as their forefathers.

The rights of the natives to the disputed area must be determined by common law and not according to the Land Settlement Ordinance, 1933 alone.He said there were four methods of acquiring NCR land and cultivation was only one of the methods. By virtue of Section 66(b) of the Ordinance, a land could also be acquired through continuous occupation.State Attorney-General, Datuk JC Fong, replied that Section 5(2)(ii) of the Land Code provided that the issue of whether native customary rights had been acquired or lost must be determined according to the laws prior to 1.1.1958. These laws include the Land Settlement Ordinance and various Orders made by the Rajah.

The only difference between Section 5 of the Land Code and Section 66 of the Land Settlement Ordinance is that the threshold for creating native customary rights of having to cultivate 20 fruit trees per acre to create Temuda land, was removed from the current Land Code.He pointed out under the Tusun Tunggu, native customary rights can be created by a native through felling of virgin jungle for cultivation and occupation, or by way of gift and inheritance. There is no other lawful method to create native customary rights except those methods stated in the Tusun Tunggu.Fong contented that the creation of native customary rights over land must be according to the laws at the relevant time prevailing and not according to the perception of the natives.

He pointed out several court decisions which were made with the aid of assessors from either the native communities or Native Affairs Officer had ruled that native customary rights could only be created over Temuda land and have not recognised 'Pemakai menoa' as native customary rights.As the ancestors of the residents of Rumah Nor migrated to Sg. Sekabai during the Brooke era, they have "no pre-existing rights" over the land before the First Rajah came. Their rights, if any, to the land there must be judged according to the laws existing in 1930.Tan Thiam Teck, for Borneo Pulp Plantation Sdn Bhd, argued that for native customary rights to be recognised by statutes, natives must be "in continuous occupation" of the land.

By that, it is meant that they must be occupying the land permanently. He referred the Court to the evidence that there was no cultivation by the natives from Rumah Nor in the disputed area until after the area had been logged in the 1980s. He argued that having regard to the slash and burn methods used by the natives, there would not have been merchantable timber to be logged in the 1980s if the disputed area had been farmed before 1980. He agreed with the State Attorney-General that the Rajah's Orders and the relevant legislation passed by the Rajah showed that native customary rights can only be recognised if the natives expended efforts in cultivating the land and not otherwise.The State Attorney-General was assisted by Jonathan Jolly and Kezia Norella Daim bte Datuk Matnor. The natives were represented by Baru Bian, Paul Raja, See Chee How and Harrison Ngau.