

MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK AT MIRI

SUIT NO: _____.

BETWEEN

1. **TK PANAI IRANG** (WN KP 550714-13-5393)
2. **TK BALAN JON** (WN KP 48091-13-5793)
3. **JEFFERY SIBIN** (WN KP 640624-13-5735)
4. **PERENKHY KA LIBAN** (WN KP 650612-13-5681)
5. **GILANG VUN UNGUN** (WN KP 621130-13-5889)

Suing on behalf of themselves and all other families of the village communities of Ba Abang, Long Item and Long Kawi and all residents proprietors occupiers holders and claimants of native customary rights land (NCR) at and around Ba Abang, Long Item and Long Kawi, Baram, Sarawak
c/o Kampung Ba Abang, 98050 Baram, Sarawak

... Plaintiffs

AND

1. **DAMAI COVE RESORTS SDN BHD**
(Co. No. 278414-M)
4th – 11th Floors Menara SEDC
Jalan Tunku Abdul Rahman
93100 Kuching Sarawak
2. **SAMLING PLYWOOD (LAWAS) SDN BHD**
(Co. No. 153126-X)
Wisma Samling
Lot 296 Jalan Temenggong Datuk Oyong Lawai Jau
98000 Miri, Sarawak
3. **DIRECTOR OF FORESTS, SARAWAK**
Forest Department
Tingkat 14, Wisma Sumber Alam
Jalan Stadium, Petra Jaya
93660 Kuching
4. **STATE GOVERNMENT OF SARAWAK**

...Defendants

STATEMENT OF CLAIM

STATEMENT OF CLAIM

Parties

- 1 (a) The Plaintiffs are Penan by race and are natives of Sarawak.
 - (b) The Plaintiffs bring this action on their own behalf and on behalf of all other families of the village communities of Ba Abang, Long Item and Long Kawi and all residents proprietors occupiers holders and claimants of native customary rights land (NCR) at and around Ba Abang, Long Item and Long Kawi, Baram, Sarawak.
- 2.1 The 1st Defendant is a company incorporated in Malaysia under the Companies Act 1965 and having its registered address at 4th – 11th Floors Menara SEDC, Jalan Tunku Abdul Rahman, 93100 Kuching Sarawak with its principal nature of business in hotel operation. A Re-Entry Hill Logging Timber Licence No. T/9089 was issued to it by the 3rd Defendant to harvest merchantable timber over a licenced area. The Forest Timber Licence No. T/9089 was issued on 29.01.2002 and expiring on 28.01.2013.
 - 2.2 The 2nd Defendant is a company incorporated in Malaysia under the Companies Act 1965 and having its registered address at Wisma Samling, Lot 296 Jalan Temenggong Datuk Oyong Lawai Jau, 98000 Miri, Sarawak. The 3rd Defendant had issued a Forests Timber Licences numbered T/0405 to the 2nd Defendant to harvest merchantable timber over a specified licenced area. The Forests Timber Licence No. T/0405 is valid until May 2013.
 - 2.3 The 3rd Defendant is the Director of Forests, Sarawak, an employee in the employment of the 4th Defendant, who is responsible for the issuance of forest timber licences purportedly in the exercise of his powers conferred by provisions of the Forest Ordinance, Sarawak and is responsible for the acts conducts and deeds complained by the Plaintiffs enumerated herein and/or failed refused and or neglected to perform such lawful and legal acts conducts and deeds stipulated under the laws of Sarawak that pertain to the Plaintiffs' rights.

The Penan communities of Ba Abang, Long Item and Long Kawi

3. The Plaintiffs share the same ancestry as the Penans of settlements in Long Pagan and Long Lilim.
 - 3.1 About 200 years ago, or as far back as the Penans can recall of their oral history, the ancestors of the Plaintiffs and the Penans of settlements in Long Pagan and Long Lilim and generally the Penans who are now settled

in middle Baram, were living in and around *Ba Pita*, practicing the native customary rights over the land in *Ba Pita* and the vicinity. They hunted and gathered food from the forests and lived on sago (*uvut*) as their staple food.

- 3.2 The earlier leaders of the nomadic Penan tribes were *Opo Jengeto*, *Opo Jemekung*, *Opo Teradang*, *Opo Uyau Uvut*, *Opo Larah*, *Opo Ita*, *Na'ang*, *Tijan*, *Gung*, and *Alub Laja*.
- 3.3 By and through their customary practice most characterized by *molong*, tribal groups of the nomadic Penan lived in and within distinct territories. Traditional dwelling huts called *lamin toro* were left behind as distinct marks of earlier settlements.
- 3.4 When the Penans developed the system of setting up satellite sago harvesting camps, they started to be semi-nomadic, about 100 years ago.

Ba Abang

- 4 Aya who was born in or around 1872 was a famous nomadic Penan leader in *Ba Pita* area. His son Uyu, another renowned leader succeeded him as leader of the nomadic Penan in *Ba Pita*. Uyu and his followers were dwelling in the upper stream of *Ba Pita*. Aya and his other children were living in the downstream of *Ba Pita*, *Ba Bunau* and *Ba Akah* region.

Before and during the Japanese occupation, the leader of the nomadic Penans in the downstream of *Ba Pita*, *Ba Bunau* and *Ba Akah* region was Nyugun Jelamah, the nephew of Uyu Aya who also replaced Uyu as the leader of the nomadic Penans of *Ba Pita*.

Nyugun was replaced by his son, TK Irang Nyugun, in the 1950s. The abovenamed 1st Plaintiff succeeded his father as the headman of Ba Abang in or around 1970 and is still the headman of Ba Abang today.

From a semi-nomadic community during his late father's time, the 1st Plaintiff succeeded in convincing the people to settle themselves in Ba Abang after he was elected the headman of this Penan settlement.

Long Item

5. The earlier villagers of Long Item came from Long Lilim during Jengilan Uyu's time. Jon Paren, a nephew of Jengilan Uyu, brought his family and a group of followers to come to Long Item.

Jon Paren was succeeded by Jutang Dion and Jutang was later replaced by his son, Wan Jutang as the leadman of Long Item. In or about 2004, Wan Jutang moved out from Long Item and settled down at Ba Kabeng.

The abovenamed 2nd Plaintiff, a son of Jon Paren, was then elected to replace replaced Wan Jutang as the headman of Long Item.

Long Kawi

6. During Jengilan Uyu's time as a leader for the group of nomadic Penan, his son Purai brought his family and other followers to move near the present Long Kawi area.

Before his demise, Purai chose Kia to succeed him as the leader. Kia was later succeeded by his son Lawai.

Native Customary Rights over Land

7. At all material times, the Plaintiffs have acquired and claimed native customary rights ("NCR") and/or native title and/or usufructuary right and/or territorial domain locally referred to and known as "***Tana Pengurip***" over an area of land bordered by the following boundary with physical ground markings referred and known to the Plaintiffs and their neighbouring village communities as their ancestral or NCR land ("***NCR Land***") of Kampung Ba Abang, Long Item and Long Kawi, Sarawak.

Particulars

"Tana Pengurip" of Ba Abang

Berusu Asa Lai and the neighbouring mountains are the natural and main boundary delimiting elements of the area.

From *Berusu Asa Lai*, the boundary follows the mountain ridges and goes through the pass Sawa' Pedereng to *Berusu Lega Taha*. Then, it continues along the ridge through the passes *Sawa' Kovong* and *Sawa' Bawang Labei* to reach *Berusu Pege Payen*. It then runs down the hill to *Sawa' Jutang*, follows the mountain between *Ba Pelusan* and *Ba Pege* river up to *Berusu Uvut* and then goes down to the mouth of the river *Ba Pege Payen*. The boundary cross the river *Ba Abang*, follows the ridge on the left side of *Ba Kuren*, parallel to the *Ba Abang* river.

The boundary then follows the ridge between *Ba Sepatai* and *Ba Uma*, goes through *Sawa' Belavan*, *Berusu Pa Tai* to reach *Berusu Nakan*. From there it goes down the hill, *Ba Hoh* on the right and *Ba Sepatai* on the left.

The boundary continues along the ridge to *Sawa' Lamin Labu*, *Sawa' Banyu* and the ridge of *Tokong Bateu Murip*, passing through *Berusu Bateu Kelit*, along the left side of the watershed of *Ba Sepatai* and continues through *Sawa' Lai*.

The boundary then follows the ridge and passes *Berusu Nyateng Kenalei*, *Bateu Kenejan*, to reach *Berusu Uvut* and *Berusu Lamin Lakat Nepe* before going down to the pass *Sawa' Nyiwan*.

The boundary goes along the left side of the watershed of *Ba Penying*, follows the ridge between the rivers *Ba Bunau* and *Ba Abang* and reaches *Sawa' Sian*.

From *Sawa' Sian*, the boundary follows the mountain ridge to the summit *Berusu Nyerotong*, goes along the mountain through the pass *Sawa' Tajem* to the summit *Berusu Luit* and reaches finally the summit *Berusu Alim*. Then, the boundary goes along the ridge to *Sawa' Ba Padeng Bateu*, passes *Berusu Lakat Lamin toroang*, *Sawa' Bateu Nejek* and up to *Berusu Lega Taha*.

“Tana Pengurip” of Long Item

The boundary of the *Tana Pengurip* or ancestral land and/or NCR Land of Long Item begins at the mouth of *Ba Kelesau* with *Ba Bunan*, follows the ridges of *Tokong Liang*, reaches the pass *Sawa' Banyu* (red durian) and follows the ridge between *Ba Udat* and *Ba Abang* watershed to the summit. From there, the boundary goes down the ridges to lake *Bawang* (turtle lake), follows first the border between *Ba Jian Atong* and *Ba Kawi* watershed and then the border between *Ba Lebeng* and *Ba Alut* watershed up to the mouth of the *Ba Alut* river.

The boundary then follows the ridges on the north side of the *Ba Alut* river and to lake *Bawang Patai Aseu Berem*. The boundary continues with the ridges on the south side of *Ba Kuleh* to *Sawa' Alim*, around *Ba O'ong* watershed to reach *Diva Lemesong*, to *Ba Bala Bateu* watershed and up to *Berusu Garo*. Then, it goes around the *Ba Item* watershed, to *Berusu Pidau* and *Berusu Tungen*. The boundary then follows the the river *Ba Tujau* from *Berusu Tungen* down to the mouth of the river.

It follows the *Ba Bunau* river upstream and passes the mouths of *Ba Padeng Bateu* river and *Ba Sian* river and continues up to the mouth of *Ba Litut*. Here, the boundary leaves *Ba Bunau* and follows the *Ba Litut* to the confluence of 2 rivers. The boundary runs between them and goes up the ridge to *Berusu Bateu Tevaun*. It goes through *Berusu Bateu Magung* to *Sawa' Lueng* and continues over the ridges between *Ba Bunau* and *Ba Penying* to *Tokong Lakat Nepe*. From there, it goes to the pass *Sawa' Sian*, following the ridges to *Berusu Nyerotong* and *Tokong Diva Sungan* and goes along the ridges of *Tokong Nyeretong* to *Berusu Luit* and *Berusu Alim*.

The boundary then follows the ridges along the watershed of *Ba Padeng Bateu* to reach *Berusu Lakat Lamin toroang*. From there, it continues along the ridge to *Berusu Asa Lai*, through *Sawa' Polo* and follows the ridges between the watersheds of *Ba Nao*, *Ba Gumi* and *Ba Teno*. The boundary continues on the west side up to *Berusu Pege Jemura* and along the ridges around *Ba Jemura* watershed and reaches *Berusu Tulang Ulun Babui*. At last, the boundary goes down to *Ba Kelesan* and follows it until it reaches its river mouth.

“Tana Pengurip” Long Kawi

The boundary of Long Kawi's *Tana Pengurip* or ancestral land and/or NCR Land starts from *Berusu Asa Lai* to *Berusu' Lega Taha* and continues to a pass called *Sawa'' Kovong*.

After this pass, the boundary climbs up to *Berusu' Bawang Labei* and goes down to the passes *Sawa' Bawang Labei* and *Sawa'' Tikup*. Then, the boundary follows through to *Berusu' Ba Pa'an Nyakit*, towards the direction of *Tokong Ba Raha*, along *Ba Raha* watershed to *Berusu Babui Kenulit* and reaches the pass *Sawa' Lamin Garo*.

The boundary continues on the ridges, goes around the watershed of *Ba Kerangan* and reaches the pass *Sawa' Ja'au*. Then, the boundary goes up to the watershed of *Ba Bukui* and follows the mountain ridge until *Tokong Melino*. From there, the boundary follows to the junction of *Pita* river and *Ba Belavan* river. It then follows the *Pita* river and passes along the mouths of the following rivers: *Ba Giran*, *Ba Biyo*, *Ba Gumi*, *Ba Bunau*, *Ba Kejawang*, *Ba Kebayoh* and *Ba Lebeng*. Then, the boundary follows the ridges between *Ba Lebeng* and *Ba Alut*, and between the watershed of *Ba Lebeng* and *Ba Jian Atong*, then between *Ba Jian Atong* and *Ba Kawi* up to *Berusu Kapon* which is located between *Ba Jian Atong* and *Ba Kawi*. Then the boundary goes around the *Ba Abang* watershed and through the pass *Sawa' Banyu* until the *Ba Bunau* river.

The boundary follows across the river and follows the ridges between *Ba Kelesan* and *Ba Jemura* until it reaches *Berusu Tulang Ulun Babui*, to the pass *Sawa' Sebangat*, goes up the mountain ridge passing *Ihang Nakan* to *Berusu Uvut* and *Berusu Pege Jemura*. Then, it follows the ridges between *Ba Nao* and *Ba Gumi*, to a pass called *Sawa' Polo* and reaches *Berusu Asa Lai*.

The boundary or extent of the said ancestral or NCR Land of Kampung Ba Abang, Long Item and Long Kawi is as reflected on the map marked “M” and annexed hereto.

8. The Plaintiffs' ancestors had roamed and/or occupied and the Plaintiffs have occupied all the areas within the said *Tana Pengurip* and or NCR Land since time immemorial until the 1950s, when their decided to settle at the present locations of their village settlements of Ba Abang, Long Item and Long Kawi. The

- Plaintiffs claim NCR over their said *Tana Pengurip is the home for the Penans* or NCR Land by virtue of their adat or customs and/or adat or customs of the Penans of Sarawak. The Plaintiffs have never abandoned their NCR over the said NCR Land and they have lived and/or settled within the said *Tana Pengurip* or NCR Land since their ancestors prior to the installation of the 1st Rajah as the Rajah of Sarawak, in the year 1841.
- 8.1. In accordance with the Plaintiffs' customs and practice, their ancestors and themselves prior to their decision to have a settled lifestyle in the 1950s, the Plaintiffs roam the areas of their said NCR Land along a distinct route and within a distinct territorial confine in search for jungle produce and games. Area often and frequently visited were the areas named in paragraph 7 hereinabove and the present settlement localities later became their home base from which they made of and on trips, in search for daily foods, within their said *Tana Pengurip* and or NCR Land.
 - 8.2. During the later years of the Brookes' era (1841-1942) the Plaintiffs and/or their ancestors were already in contact with other indigenous groups from other villages and settlements in Middle and Ulu Baram. The contact between the Plaintiffs and/or their ancestors with the Brookes' and British administration were conveyed through a Kenyah Chief the late Datuk Temenggong Oyong Lawai and native officials appointed by the administrations.
 - 8.3. The Plaintiffs ancestors and/or themselves had barter traded with other indigenous groups from other villages and settlements with good such as *Nyateng* (resin to get fire), stone gained from stomach wild animals, *Kapon* (latex of kapor trees) and handicrafts (mat, basket) in exchanged for shotguns, clothes for *avet* (dressing) cooking pot, axe, hatchet and others. The Japanese War of 1941-1945 hampered this barter trading. After the said Japanese War, the Plaintiffs and/or their ancestors met a few Whiteman who they called by name Tuan Gelat, Tuan Akat, Tuan Beripin, Tuan Lidam, Tuan Adinand and Tuan Rick to name a few.
 - 8.4. That Plaintiffs have various significant landmarks related with certain incidences within the said *Tana Pengurip* and or NCR Land that are now evidenced of their occupation of the said *Tana Pengurip* and or NCR Land as claimed herein. The names of the localities as enumerated in paragraph 7 hereinabove and the incidence or history connected or related to these landmarks shall be disclosed at the trial of this action.
9. Further and/or alternatively, the Plaintiffs claim that they have acquired and/or inherited their rights, interests and title over the said *Tana Pengurip* or NCR Land by virtue of and under the principle of common law.

10. The Plaintiffs' NCR over the said *Tana Pengurip* and or NCR Land is recognized by the Sarawak Land Code (Cap.81) and or its predecessors and the said NCR was created and/or acquired prior to the 1st day of January,1958 and still subsist as such.
11. From the said *Tana Pengurip* and or NCR Land, which comprises of farmland and forests, the Plaintiffs derive food, valuable medicines, wildlife and other forest produces for their livelihood and substance. They also farm cultivate and plant padi, fruit trees, and other essential trees and crops on the said *Tana Pengurip* and or NCR Land.
12. The said *Tana Pengurip* and or NCR Land is not just a source of livelihood but also constitutes life itself as the said *Tana Pengurip* and or NCR Land is also fundamental to the Plaintiffs' social, cultural and spiritual survival as native Penan people of Sarawak.
13. The Plaintiffs are aware that other native communities and groups including Penans of other settlements, Kayan and Kenyah are also claiming NCR and/or native title and/or usufructuary right over parts of communal forests, land and rivers within the *Tana Pengurip* and/or ancestral or NCR Land of Kampung Ba Abang, Long Item and Long Kawi, Sarawak. The Plaintiffs' claim herein does not exclude the exercise of such NCR and/or native title and/or usufructuary right of the other native communities and groups and is without prejudice to the existing and subsisting NCR exercised by all other native communities and groups over the same *Tana Pengurip* and/or ancestral or NCR Land.

Forest Timber Licences

14. At various times, without consultation with the Plaintiffs and unknown to the Plaintiffs, the 3rd Defendant had issued Forests Timber Licences numbered T/9089 and T/0405 to the 1st and 2nd Defendants respectively, the licensed areas all of which encompasses or encroaches the said *Tana Pengurip* or ancestral or NCR Land of the Plaintiffs and since then the Licensees and/or their contractors subcontractors employees servants and workers had been and are working, trespassing and destroying the said *Tana Pengurip* or NCR Land and their constituents which are the very sources of the Plaintiffs' livelihood.

Timber Licence No. T/9089

15. The Damai Cove Re-Entry Hill Logging Timber Licence No. T/9089 was issued by the 3rd Defendant to the 1st Defendant to harvest merchantable timber over a Licenced area measuring about 61,334 hectares.

- 15.1 The same Licenced area was initially licensed to Sara Resorts Sdn Bhd under the Forest Timber Licence No. T/0339, issued in 1991.

15.2 The Forest Timber Licence No. T/9089 was issued on 29.01.2002 and expiring on 28.01.2008. In June 2007, the Forest Timber Licence was renewed to the 28.01.2013.

Forest Timber Licence No. T/0405

16. Forest Timber Licence No. T/0405 was issued by the 3rd Defendant to the 2nd Defendant. It is valid until May 2013.
17. The boundary or extent of the said Forests Timber Licences numbered T/0405 and T/9089 in the vicinity of the *Tana Pengurip* or ancestral or NCR Land of Kampung Ba Abang, Long Item and Long Kawi and the extent the said Forests Timber Licences numbered T/0405 and T/9089 overlaps the *Tana Pengurip* or ancestral or NCR Land of Kampung Long Pakan and Long Lilim is as reflected on the map marked “L” and annexed hereto.
18. The said Forests Timber Licences numbered T/0405 and T/9089 were granted without the permission of the Plaintiffs who are the rightful owners and/or proprietors and/or Licensees and/or claimants of the said NCR Land.
19. The said Forests Timber Licences numbered T/0405 and T/9089 were granted for areas of land which includes and comprises farmland of individuals, and forest reserves used by the Plaintiffs.
20. It is the express provisions and requirements of the Forest Timber Licences that they are granted subject to and/or without prejudice to the Plaintiffs’ rights including the exercise of native customary rights over the licensed area.
21. Neither the Defendants nor the logging contractors had conducted ground survey to identify and establish the boundary of the said NCR land or land claimed by the Plaintiffs to be burial grounds, historical sites, sacred sites and or crucial localities within the licensed area.

Plaintiffs’ rights impaired

22. The grant issuance and/or registration of the said Timber Licences by the 3rd Defendant on the ostensible authority of legislation such as the Forest Ordinance is unconstitutional and/or wrongful in so far as it abridges or impairs the Plaintiffs’ rights and/or title in or over the said *Tana Pengurip* or ancestral or NCR Land being the source of the Plaintiffs’ livelihood and the generation to come.
 - 22.1 Since time immemorial the ancestors of the Plaintiffs had established and maintained a comprehensive scheme by which through their laws customs

tradition and practices they determined question concerning the ownership, land use management and occupation of land, forests and rivers within their said *Tana Pengurip* or ancestral or NCR Land.

- 22.2 By the laws customs tradition and practices they were entitled to the rights of ownership and/or use and/or occupation of the said *Tana Pengurip* or ancestral or NCR Land and access to all the produces therein as well as to the hunting grounds and fishing waters. The Plaintiffs exercised the aforesaid rights over the said *Tana Pengurip* or ancestral or NCR Land since time immemorial until this day.
- 22.3 Therefore the Plaintiffs had prior to the enactment of the said legislation, accrued and vested native customary rights over the said *Tana Pengurip* or ancestral or NCR Land,
- 22.4 For the reasons aforesaid, the said accrued rights could not be, and were never lawfully vested in the state government under article 47 of the constitution of the state of Sarawak or howsoever otherwise,
- 22.5 No Timber Licences, temporary or otherwise, could therefore be issued over the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land.

No Extinguishment Of The Plaintiffs' NCR

23. There was no extinguishment of the Plaintiffs' NCR within the land covered by the said Timber Licences before the same were issued and or granted to the 1st and 2nd Defendants and/or no provision as to compensation in accordance with the Land Code of Sarawak and the Federal Constitution has ever made or paid to the Plaintiffs. The issuance of the said Timber Licences is unlawful, unconstitutional, and improper and henceforth their issuance and grant were null and void.
 - 23.1 The said Timber Licences were issued without the consent of the Plaintiffs who are the rightful owners and/or proprietors and/or Licensees and/ or claimants of the said *Tana Pengurip* or ancestral or NCR Land.
 - 23.2 There was no extinguishments exercise carried out under the provisions of the Land Code (Cop.81) Sarawak, 1958, by the 3rd and/or 4th Defendants, which is a legal and mandatory requirement before alienation of State Land to any person group corporation and or institution and that such issuance of Timber Licences are and amounts to alienation of state Land.
 - 23.3 The mandatory provisions of the Sarawak Land Code and/or the Federal Constitution on compensation were not followed by the 3rd and/or 4th Defendants.

- 23.4 Further and/or in the alternative, there was a breach of Articles 13 of the Federal Constitution, in that there was deprivation of the Plaintiffs' properties without adequate compensation.
24. Alternatively, the granting and issuance of the said Timber Licences amount to an extinguishment and/or termination of the Plaintiffs' right in or over the said *Tana Pengurip* or ancestral or NCR Land which extinguishment and/or termination are bad as, *inter alia*, they were not, and had not been done, by legislation designed specifically and clearly for that purpose.
25. Further and/ or in the alternative, the Plaintiffs state that the granting and/or issuance of the said Timber Licences by the 3rd Defendant are unconstitutional as it contradicts the articles provisions and/ or spirits of the federal constitution.
26. Further and/or in the alternative, the Plaintiffs state that the provisions of the forests ordinance (cap, 126) in as far as they allow the issuance of the said Timber Licences over the said *Tana Pengurip* or ancestral or NCR Land is unconstitutional.
27. Further and/ or in the alternative. The Plaintiffs state that the terms of the said Timber Licences are subjected to the Plaintiffs' NCR over the said *Tana Pengurip* or ancestral or NCR Land.

Trespass

28. For more than 10 years, the various and numerous Licensees including the 1st and 2nd Defendants their contractors subcontractors employees servants and/or workers wrongfully trespassed onto the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land, and with the aid of bulldozers, excavators, shovels, trucks and lorries, destroyed and damaged a very substantial area of the said NCR Land, fruit trees and crops thereon and earth-filled the streams running through the affected land.
29. The various and numerous Licensees including the 1st and 2nd Defendants their contractors subcontractors employees servants and/or workers also fell the trees and clear vegetations and thereby destroying and damaging the communal forests of the Plaintiffs.
30. Despite of the numerous and continued objections and protests by the Plaintiffs, the 3rd Defendant and/or with the 4th Defendant and/or their employees servants representatives and or officials had gave assurance to resolve the disputes and stopped the trespass but had continued to grant and issued re-entry Licences and the said Timber Licences thereby causing and enabling various and numerous Licensees including the 1st and 2nd Defendants their contractors subcontractors

employees servants and/or workers to continue and still continue to trespass onto the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land.

31. With the licenses issued by the 3rd Defendant including the said Timber Licences, the various and numerous Licensees including the 1st and 2nd Defendants their contractors subcontractors employees servants and/or workers wrongfully claim that they have the right to enter, clear, use and occupy the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land.

Damages

32. By reason of the matters aforesaid, the Plaintiffs' sources of and any right to their livelihood is seriously threatened and they have suffered loss and damage.
 - 32.1 The farmland, rivers and the communal forests are damaged and destroyed by the various and numerous Licensees including the 1st and 2nd Defendants their contractors subcontractors employees servants and/or workers.

Particulars Of Damage

- (a) Irreparable damage to vegetations, food, water, valuable medicines, wildlife and other forest produce which the Plaintiffs need and are dependent upon with the destruction of the communal forests and thereby seriously impairing the Plaintiffs' sources of livelihood.
- (b) Extensive damages to the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land.
- (c) Destruction of fruit trees and other essential trees such as “*Tajem*” (poison trees) and “*Kayeu Kelepu*” (blowpipe trees), and crops.
- (d) Deprivation of the Plaintiffs crucial source of earning with the irreversible destruction of the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land.
- (e) Destruction of graves, historical and cultural sites which are essential and imperative constituents of the cultural heritage of the Penans in the region.

Legitimate Expectation & Natural Justice

- 33.1 The Plaintiffs have a legitimate expectation that their rights, tradition, culture and livelihood will not be disrupted, extinguished, and/or restricted.
- 33.2 The Plaintiffs' rights were impaired without a right to be heard and/or a right to say "no" and/or object to the granting and/or issuance of any Timber Licences and/or title to the extinguishment and/or termination of their rights.

Relevant Consideration Not Taken Into Account

34. The 3rd Defendant had also acted unreasonably and had failed to take relevant matters into consideration when it granted and/or issued the said Timber Licences.

Particulars

- 34.1 That the said Timber Licences affected the rights and/or interests of the Plaintiffs, their immediate family members and generations to come.
- 34.2 That any activities of the Licensees their employees servants and/or contractors subcontractors within and/or over the said NCR land would cause irreparable damage to the said NCR land, the resources, environment and eco-system of the area, thereby affecting the lives and lifestyle of the Plaintiffs, their families and descendants who are and/or would be dependant on their said NCR land resources and rivers for their food and medicine, well-being and the very survival of themselves, their children and their communities.

Constitutional Issues

35. Further and in the alternative, the Plaintiffs aver that the provisions of the aforesaid legislation impaired the Plaintiffs' rights to property in a manner which discriminatory and unfair and based on criteria which is not made applicable to the right to property acquired and held by non-natives. In the premises, the said legislation or any process exercised pursuant to it in so far as it affects the Plaintiffs' rights unconstitutional and invalid as being violative of article 8 of the Federal Constitution (equality before the law).
36. Further and in the alternative, the issuance of the said Timber Licences were unconstitutional as it was issued in violation of Article 13 of the Federal Constitution (no confiscation of property without adequate compensation).

Particular

- 36.1 The granting of the said Timber Licences by the 3rd Defendant amounted to the compulsory acquisition of the Plaintiffs' said NCR Land but no provision for compensation in accordance with law has been made nor have the Plaintiffs been paid any compensation.
37. Further and in the alternative, the acts as aforesaid of the 3rd Defendant, the 1st and 2nd Defendants as Licensees and/or their contractor subcontractors employees servants and/or agents and/or provisions of the law which impair the rights of the Plaintiffs to their NCR over land as herein before referred to, are unconstitutional and void in that they violate, individually and/or cumulatively Article 5 of the Federal Constitution which guarantees, *inter alia*, that no person shall be deprived of his life (which includes the right to livelihood) except in accordance with the law.

Particular

- 37.1 The Plaintiffs have been deprived of their sources of food, fish, medicines, wildlife and other forest produce with the Plaintiffs need and are dependent upon for their daily sustenance.
- 37.2 The Plaintiffs have also been deprived of their sources of income from their lands, fruit trees, and other essential trees and crops.
38. The Plaintiffs aver that their right to livelihood has been, and will continue to be seriously impaired by the aforesaid acts and provisions of the law.
39. The Plaintiffs further aver that the impairing of their rights to livelihood by the aforesaid acts and provisions of the law is unjust, unfair and unreasonable and destructive of their economic, cultural and social system for their existence and therefore not in accordance with the law.
40. Further and in the alternatives, the Plaintiffs aver that the said Timber Licences were subject to the rights of the Plaintiffs in or over the said NCR Land and therefore the Licensees cannot lawfully acquire any title or interest therein.
41. Further and in the alternative, the Plaintiffs aver that the issuance of the said Timber Licences was an abuse of the fiduciary duty of the Defendants to protect the Plaintiffs rights and/or title in and possession of their said NCR Land in that by its said act as aforesaid the 3rd Defendant had failed to act for the benefit of the Plaintiffs. The said Timber Licences was therefore null and void.

Particulars of fiduciary Duty relied on

- 41.1 Although the law granted upon the 4th Defendant special powers and discretion to give preferential treatment to the Plaintiffs as regards the reservation or alienation of land in Sarawak, the 4th Defendant had failed,

refused or neglected to exercise it to protect the Plaintiffs said rights and/or title in and possession of the said NCR Land and/or to give them such preferential treatment.

- 41.2 The 4th Defendant and/or its predecessors, upon acquiring and/or establishing sovereignty over the State of Sarawak with the agreement and/or undertaking that the said sovereignty shall be subjected to the natives rights and/or title to and possession of their land, the 3rd and or the 4th Defendants are entrusted and obliged to act to protect the Plaintiffs said rights and/or title to and possession of the said NCR Land.
42. The Plaintiffs in addition to the matters pleaded in the aforesaid paragraphs, further claim exemplary damages by reason of the conducts of the Defendants.

Particulars of conduct

- 42.1 The 4th Defendant, despite express knowledge of the Plaintiffs claim over the said NCR Land and the continued objections and protests by the Plaintiffs, have persisted to issue the said Timber Licences to the 1st and 2nd Defendants.
- 42.2 Such conduct is oppressive, arbitrary, illegal and/or unconstitutional.
- 42.3 Such conduct is also calculated to result in a profit for the Defendants.
43. Further and in the alternative, the Plaintiffs aver that the issuance of the said Timber Licences was in breach of section 8 and/or section 13 and/or section 15 of the Land Code (Cop.81) in that the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land were alienated to others without extinguishments of the Plaintiffs rights therein and without payment of compensation to them. In the premises, the said Timber Licences were illegal unlawful and void.

Relief

Wherefore the Plaintiffs claim for:

- i. A declaration order that the Plaintiffs had acquired and/or inherited native title and /or Native Customary Rights (NCR) over the area as claimed by the Plaintiffs referred to in the locality map marked as Exhibit “M” and annexed herein;
- ii. A declaration that this native title and/or rights precludes the Defendants from issuing and/or granting the said Timber Licences thereby impairing or abridging the Plaintiffs’ said right;

- iii. A declaration that the acts of the 3rd Defendant in issuing the said Timber Licences, in so far as they impair the Plaintiffs NCR over the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land, is wrong illegal unlawful bad and/or void;
- iv. A Declaration order that the issuance of the said Timber Licences to the 1st and 2nd Defendants in as far as the extent of that area under the said Timber Licence overlaps and/or covers the Plaintiffs' said *Tana Pengurip* or ancestral or NCR Land is unlawful, improper, unconstitutional and therefore null and void, for want of extinguishment of Plaintiffs' NCR over the said *Tana Pengurip* or ancestral or NCR Land;
- v. Alternatively, a Declaration that the issuance of the said Timber Licences was subject to the native title and/or native customary rights and/or usufructuary rights of the Plaintiffs in or over the said *Tana Pengurip* or ancestral or NCR Land and that the licences do not affect the Plaintiffs said title and/or rights therein;
- vi. A declaration that in issuing and granting the said Timber Licences as aforesaid, the Defendants are in breach of their fiduciary duty to the Plaintiffs and therefore the said Timber Licences was null and void;
- vii. A Declaration that the issuance and granting of the said Timber Licences were in breach of the statutory provisions of the Forests Ordinance (Cap.126);
- viii. A Declaration that the issuance and granting of the said Timber Licences is unlawful, improper, unconstitutional and therefore null and void;
- ix. A Declaration order that the area so included in the said Timber Licences as claimed by the Plaintiffs as part of their *Tana Pengurip* or ancestral or NCR Land, the same be excised out of the area of land under the said Timber Licences;
- x. A prohibitory injunction restraining the 1st and 2nd Defendants their contractors subcontractors employees servants and/or workers from trespassing, clearing, using or occupying the Plaintiffs said *Tana Pengurip* or ancestral or NCR Land;
- xi. A mandatory injunction against the Licensees and the 1st and 2nd Defendants, their contractors subcontractors employees servants and/or workers to cease operation and remove all structures and their equipments or machineries from the Plaintiffs said *Tana Pengurip* or ancestral or NCR Land forthwith;
- xii. Damages
- xiii. Exemplary damages, alternatively, aggravated damages;
- xiv. Alternatively, an order that the damages be assessed accordingly;
- xv. Interests;

xvi. Cost; and

xvii. Such further and/or other relief this Honourable Court deems fit and just.

Dated this day of December 2009

.....
MESSRS BARU BIAN
Advocates & Solicitors for the Plaintiffs