

Summary of Central Administrative Court's Judgment

Black Case No. 214/2547

Red Case No. 637/2551

Between

Mr. Yaser Nasuansuwan No.1 and others in a total of 22 persons

the Plaintiff

Pollution Control Department No.1

the Defendant

Summary of Plaintiff

Lead Concentrate (Thailand) Co., Ltd. (the Corporate) located in Chalaie subdistrict, Thong Pha Phum district, Kanchanaburi Province, discharged turbidity and tin residue from the lead tailing pond and retaining container into the Klity Creek causing adverse effects to the Plaintiffs and the people residing in the Lower Klity village. Subsequently, the related State official ordered the mentioned Corporate to stop operating and imposed fine for its activities. The activities done in the Corporate's operation process caused the water, soil, and aquatic wildlife to be tainted with high levels of lead content, which impacted the Plaintiffs ways of life whose lives depended on the natural resources; especially when there is lead contamination in the Klity Creek where the local people are entirely reliant upon, as their only source of water, for clean water.

At any rate, the Defendant as the related State Agency did not attempt to perform the duty required by law, to mitigate the damages by either cleaning up or rehabilitating the lead pollutants in the Creek as to restore the watercourse to its original state. In other words, the Defendant did not monitor, regulate, or urge the Corporate to proceed in excavating the sediments and land filling them in accordance to the plan proposed to the Defendant. The measures proposed by the Corporate for the rehabilitation process consisted of the construction of a rock-fill weir for the purpose of retaining lead sediments and an excavation of sediments in the Creek in which the Defendant did not further attempt to suggest additional policies or conditions for the Corporate to proceed or did they use regulations instructed in the Foreign Educational Evaluation Report. Further, the Defendant did not present any information gathered to reveal the nature of the problem as to bring the attention to the National Environment Board in order to allow the Board to exercise its powers pursuant to Section 59 of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992) and announce the area concerned as a pollution control area. The Defendant failed to proceed with the remediation process to replace the Corporate's unreasonably prolonged performance. Furthermore, the Defendant did not attempt to demand the Corporate to pay compensation for the expenses incurred for the cleanup as provided by Section 96 of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992). The Defendant also omitted to demand compensation for damages caused to the environment which is considered to be the destruction to natural resources owned by the State or belonging to the public domain as provided by Section

97 of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992).

Summary of the Requests for Relief

1. Requests the Court to order the Defendant to perform the duties required by law in cleaning up the pollution in and rehabilitate the Klity Creek; initially by constructing a Step-by-step Remediation Program within a designated time period in order to restore Klity Creek and its ecosystems to its original condition, hence, to be performed in accordance to the standard level and pursuant to the law; and demand compensation for damages and expenses incurred from the owner or possessor of the point source of pollution within a reasonable time.

2. Requests the Court to order the construction of relevant measures which may bring closer the finding of a solution to the lead contamination problem in Klity Creek, and rehabilitate the its ecosystems. Thus, the residents of the Lower Kilty village shall have the rights to participate in the management and exploitation of natural resources and the environment, whereby; such rights shall be upheld in accordance to the Constitution.

3. Requests the Court to order the assemble of the gathered data and information relating to the lead contamination incident in the Klity Creek village, the residents' Health Impact Assessment reports, and the Environmental Impact Assessment reports; including contributory opinions as to submit to the National Environmental Board which has the powers and duties to exercise full discretion as to announce the affected areas and its vicinity in Klity Creek as a pollution control area.

Summary of the Central Administrative Court's Judgment

When the Pollution Control Department became aware of the lead contamination in the Klity Creek they decided to go in and investigate the claim for the first time in B.E. 2541 (1998) and continued their examination till today. Even though there were constant monitoring and pre-cautious examination of the contamination, there were still high levels of lead contamination in deposited sediments along the watercourse, which has the tendency to cause health hazards to the public or adverse impact on the environmental quality. Thus, the Pollution Control Department performed their duties in rehabilitating and extinguishing further spread of lead contamination in the Klity Creek with unreasonable delay.

The fact that the Pollution Control Department had known of the damages caused to the water and soil resources in the area of dispute for over 10 years, but failed to evaluate the damages, thereby, considered the Defendant to be in negligence to perform its official duty to demand the Corporate, the polluter who caused damages to the natural resources, to compensate indemnity. The fact that there is no any provisions by law guaranteeing the rights to exploitation of natural resources as provided for by the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), and Section 56 is merely a provision stating the details and conditions to which a person is able to exercise the right to the exploitation of resources, therefore it cannot be interpreted that the plaintiff is not entitled to receive compensation.

The Court delivered its verdict stating that the defendant have neglected to perform its official duties in proceeding to demand compensation from the Lead Concentrate (Thailand) Co., Ltd. and in rehabilitating or restraining the further spread of lead contamination with unreasonable delay. The Court ordered the defendant, the Pollution Control Department, to make compensation to all twenty plaintiffs for the food expenses needed in replacement of the food which existed before in nature, and their rights to exploitation of the natural resources; in the amount of 33,783 Baht per person, totaling into 743,226 Baht.

Summary of the Supreme Administrative Court's Judgment

Klity Creek Case

Dated 10th January B.E. 2556 (2013)

The first issue to be considered is whether or not the Defendant had neglected to perform its official duties required by the law or performed such duties with unreasonable delay.

The first issue to be established is how the Defendant has the duties to perform to formulate a plan or develop a measures to prevent or mitigate the hazards caused by the spread of pollution and the polluted environment impacting the water quality, and remedy the hazards caused by the spread of pollution and the polluted environment in advance. Additionally, it is also the Defendant's duties to monitor and enforce the duties concerning pollution control as prescribed by the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992). Initially by formulating a plan, collaborating to perform in accordance with the plan, and following up with and monitoring the implementation prescribed by the plan, including remedying the hazards incurred from the spread of pollution and the polluted environment impacted the water quality, remedying the hazards incurred from the spread of pollution due to inefficient management of hazardous chemicals and sediments, and also collaborating to designate the areas to be announced as pollution control area. Further, the Defendant has the powers and duties to remedy the environmental issues that had transpired, and to rehabilitate the environment affected. Pursuant to Section 23 and 24 of the Act on Organizations of Ministries, Sub-Ministries, and Departments, B.E. 2534 (1991) and Section 3 of the Royal Decree on the Organizational Division of Pollution Control Department, Ministry of Science, Technology and Environment, B.E. 2535 (1992).

Given the fact that the Defendant consented with the rehabilitation program with the plan to excavate the deposited sediments, causing lead contents to spread intensively throughout the water, including the fact that the Defendant did not, in any circumstance, attempt to formulate an environmental management plan or control, preventive, or remedial measures. In addition, the Defendant did admit that such incident have never before occurred, and the hold back for a technical advices were necessary, which suggest that the Defendant had failed to develop an environmental quality management program and a preventive, control, and remedial measures for the environmental problems caused by the pollution. Moreover, the Defendant failed to construct an emergency response plan to prevent and remedy the hazards caused by the spread of pollution and the polluted environment impacting the water quality in advance. Thus, considered

the Defendant's actions to be in dereliction of its official duties to be performed as required by law pursuant to Section 3 and Section 5 of the Royal Decree on the Organizational Division of Pollution Control Department, Ministry of Science, Technology and Environment, B.E. 2535 (1992).

The fact that the Lead Concentrate (Thailand) Co., Ltd. had already completed excavating sediments from the creek and laid them alongside the creek, until there was an order to remove the sediments into a landfill, and when they finished landfilling the sediments there was barely any topsoil to cover the landfill, causing the lead contents to flow back into the creek when it's raining, which implicated the Defendant's ignorance and negligence to collaborate in enforcing the proceedings to be in accordance with the mentioned plan. Even though the Defendant did order for a reconstruction, it was after the sediments had been excavated and placed alongside the creek and after the landfill was covered with topsoil, thus, considered the Defendant to have performed its official duty required by law with unreasonable delay.

Although the Defendant conducted a meeting thereafter with the Office of Natural Resources and Environmental Policy and Planning reaching a consensus that the creek self-rehabilitate through natural processes. However, such process would involve the construction of a jetty whereby the Defendant prepared the equipment necessary to the construction since B.E. 2544 (2001), which was three years after they had known of the contamination incident on 21st April B.E. 2541 (1998). With the foregoing reasons, the Defendant is considered to perform its official duties in rehabilitating and restraining the lead contamination from spreading further in Klity Creek with unreasonable delay.

Since the Defendant had known of the contamination in B.E. 2541 (1998) but asked the Royal Forest Department to permit the rehabilitation process in Klity Creek by excavating alluvial sediments for further elimination, was over nine months since the day the Defendant had known of the incident. Therefore considered the Defendant to perform with unreasonable delay.

The second issue is whether or not the Defendant neglected to perform its official duties by not demanding for expenses suffered in eliminating the pollution and rehabilitating the environment from Lead Concentrate (Thailand) Co., Ltd.

Pursuant to section 97 of the Enhancement and Conservation of National Environment Quality Act, B.E. 2535 (1992) and clause 3 of the Ministerial Regulation on the Organization of the Pollution Control Department and the Ministry of Natural Resources and Environment, B.E. 2545 (2002), the Defendant is entitled to file a case against the point source of pollution to make compensation for causing damages to the natural resources. When the Defendant filed a complaint against the Lead Concentration (Thailand) Co., Ltd. to make compensation in Black Case No. 777/255 and the Kanchanaburi Court had already delivered its ruling as Red Case No. 724/2552, until then that the Plaintiffs proceeded to demand Lead Concentrate (Thailand) Co., Ltd. to make compensation for cleaning up the pollution and rehabilitating the environment.

The third issue is whether the Defendant neglected to perform its official duty in allowing the interested parties to exercise their rights to participate, with the government and its communities, in the maintenance and preservation of natural resources and environment.

Given the fact that the Defendant appointed the Director of the Karen Studies and Development Centre, the President of Seub Nakhasathien Foundation, the President of the Kanchanaburi Conservative Group, and Secretary-General of the Green World Foundation as the Working Committee responsible for resolving and remedying the pollution problems caused by lead contamination in Klity Creek area, in order to have full discretion to consider and give consent to Klity Creek rehabilitation plan. Therefore, considered the Defendant to not be in negligence as to perform its official duty in allowing the interested parties to exercise their rights to participate, with the government and its communities, in the maintenance, preservation, and exploitation of natural resources and environment pursuant to Section 46, 56, and 79 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The fourth issue is whether the Defendant neglected to perform its official duty by not presenting the facts to the National Environment Board so that they can announce the Klity Creek area as a pollution control area.

The power to designate and publish notification of an area as a “pollution-control area” is vested in the National Environment Board pursuant to Section 59 of the Enhancement and Conservation of National Environmental Quality Act, B.E. 2535 (1992). For that reason, the fact that the Defendant proposed the Lead Concentration (Thailand) Co., Ltd.’s rehabilitation program, the continuous monitoring of the water quality to the National Environment Board, and subsequently proposed the Board to declare Klity Creek as a pollution control area, but the Board dismissed the proposal with consensus reasoning that it was unnecessary; thereby, considered the Defendant to not be in negligence to perform its official duty.

The second issue to be considered is whether the Defendants’ actions are considered to be a wrongful act against the twenty Plaintiffs on the assumption that the Defendant had neglected to perform its official duties required by the law or performed such duties with unreasonable delay.

The fact that the twenty-two Plaintiffs sued the Lead Concentration (Thailand) Co., Ltd. for the discharge of lead contaminants and the Defendant’s negligence to eliminate the lead contaminants in Klity Creek or performed such procedure with unreasonable delay. Thus, causing the Plaintiffs to suffer from damages to live in a hazardous environment and their incapability to use the water in Klity Creek for consumption due to the lead concentration exceeding the standard. Considering the aforementioned facts, such case was filed against the Defendant for committing a wrongful act causing the twenty-two Plaintiffs to suffer from damages as provided by Section 420 of the Civil and Commercial Code, not a case filed pursuant to Section 96 of the Enhancement and Conservation of National Environment Act, B.E. 2535 (1997). For the aforementioned-reasons the Supreme Administrative Court disagreed with the Administrative Court of First Instance decision to disregard the facts of whether the Defendant committed a wrongful act against the twenty-two Plaintiffs.

Since the Defendant neglected to perform its duties, which consisted of the following: failing to construct a plan or develop a measure to prevent or remedy the hazards originated from the spread of pollution and the polluted environment, which impacted the water quality; failing to remedy the hazards caused by the spread of the pollution and the polluted environment in advance; did not attempt to monitor the mentioned plan to excavate and landfill the sediments; including the fact that the Defendant permitted the Lead Concentrate (Thailand) Co., Ltd. to be

in charge of constructing a plan to excavate sediments, a landfill, and a jetty to be proposed to the Defendant and once operated in accordance to the mentioned plan, the excavation of sediments caused the lead contaminants to spread and the landfilling process caused the lead contaminants to flow back into the Creek, hence, making the mentioned operation unsuccessful. If the Defendant had constructed a rehabilitation plan beforehand, the rehabilitation process in Klity Creek would proceed much faster. As for the plan to construct a jetty to retain the sediments, even though the Defendant did went in and monitor the Lead Concentrate (Thailand) Co., Ltd., it was already three years since the day the Defendant had known of the contamination before the construction first began. The mentioned omission to perform its official duties and the performance of such duties with unreasonable delay led to the spread of lead contaminants for a very long time. The results of the lead concentration level evaluation showed that the levels of lead concentration in the deposited sediments remained exceedingly high in certain areas of the waterbed. Even though the facts asserted by the Defendant can be settled that rehabilitating through natural recovery processes is a generally accepted method, in principle, but it is a method that requires a lot of time. Since the daily lives of the twenty-two Plaintiffs and the residents of Lower Klity village were dependent on the Creek as their only source of water for consumption; thus, it could be hazardous to their physical health, or if the lead contaminants were left polluting the Creek, it would cause adverse environmental effects leaving lead concentration to remain exceedingly high for a long period of time. For the aforementioned-reasons, the fact that all twenty-two Plaintiffs were not able to use the water from the Creek for consumption was a direct consequence of the Defendant's negligence to perform its official duties required by law and performed such duties with unreasonable delay.

The third issue to be considered is whether the Defendant is liable to perform or make compensation to the twenty-two Plaintiffs, and if so, to what amount.

After considering the reports on the Resolution to Klity Creek Lead Contamination Forum and the meeting of the Sub-committee responsible for resolving Klity Creek's lead contamination problems, it appeared that the inspection of the Klity Creek's current environmental quality discovered that the level of lead contaminants during certain time and in some areas were higher than the standard levels specified for quality of surface waters. However, deposited sediments remained contaminated with high level of lead contaminants and aquatic animals were too, still, contaminated with high level of lead contaminants than the standard level. With the foregoing reasons, the residents of the Lower Klity village were advised to take the following precautions:

- 1) Water that is taken for consumption should be filtered beforehand.
- 2) Water that is taken for consumption should be filtered and purified beforehand.
- 3) Fish and other aquatic animals taken from Klity Creek should be avoided from consumption.

Since the Plaintiffs and the residents of the Lower Klity village were still unable to use the water in Klity Creek for consumption and other necessities due to the water and aquatic animals were still polluted with lead contaminates higher than standard; and the fact is settled that there was lead contamination in water, soil, deposited sediments, aquatic animals, and plants in the watercourse, which the officers of the Ministry of Public Health pinned up a temporary

“No Drinking” sign for the water in Klity Creek, consequentially, the twenty-two Plaintiffs were obligated to buy drinking water, meat, fish, and other sources of proteins as a source of food as a replacement. Therefore, given the fact that the twenty-two Plaintiffs had no other source of protein for consumption making it necessary to buy food provided by a local merchant in the village within the market price, it is considered to appropriate to determine the expenses required to buy food to replace the foods originally existing in their prior environment to be 700 Baht per month.

It is deemed appropriate to determine the extent of compensation to all twenty-two Plaintiffs in the amount of 700 Baht per person, per month. The Supreme Administrative Court disagreed with the Administrative Court of First Instance’s ruling in determining the extent of compensation in this case to be half of the said amount, which is 350 Baht per person, per month. In addition, the facts were settled that there was lead contamination higher than the standard level since before November B.E. 2545 (2002). Therefore, all twenty-two Plaintiffs had to suffer from the damages incurred since the said date until the day the additional plaint was filed, which was twenty-one months and twenty-seven days, thereby, it is deemed appropriate for the Plaintiffs to receive compensation in the amount of 15,330 Baht with interest, at the rate of seven and a half per cent per year; which is 2,069.55 Baht per person, totaling into 17,399.55 Baht per person.

Regarding the issue that the twenty-two Plaintiffs filed an appeal, requesting that the Defendants be liable to make compensation for the future damages suffered from the food expenses endured, in the amount of 300 Baht; including the compensation for damages caused by the actions that violated their rights to the exploitation of natural resources and its biodiversity to the twenty-two Plaintiffs, in the amount of 1,000 Baht per month, totaling to 1,700 Baht per person, per month.

When considered the results of the tests measuring lead contamination levels in the Lower Klity area in September B.E. 2545 (2002), it was discovered that aquatic animals had high levels of lead contaminants that was higher than required by the Contaminated Food Standard as provided by the Ministry of Public Health’s Regulation No.98, B.E. 2529 (1986). Therefore, all twenty-two Plaintiffs with the residents of the Lower Klity village were not able to gather these aquatic animals for consumption due to the lead contaminants still exceeding the standard. Further, the Defendant’s rehabilitation process by the excavation of sediments into a landfill and the construction of a jetty, were ineffective, instead, it caused the lead pollutants to spread even further. The result of the Defendant’s failed rehabilitating process caused the twenty-two Plaintiffs to suffer continuously from damages, for a very long period. Nevertheless, allowing Klity Creek to recover naturally by avoiding any actions that would disrupt its natural process or cause the deposited sediments to spread was considered to be a suitable method, but the said method would still take up a lot of time.

The facts appeared that in B.E. 2554 (2011), there were still a substantive amount of lead contaminants in the aquatic animals, higher than the standard level, and it continued to be so until the first hearing. Due to the mentioned circumstances, the Plaintiffs continued to suffer from damages; since the following day the additional plaint was filed, August 28th B.E. 2547 (2004), until the day of the first hearing, June 26th B.E. 2555 (2012). Thereby, it is deemed appropriate to determine that the Defendants make compensation to the twenty-two Plaintiffs who carried the burden of assuming the expenses needed to buy food in the amount of 700 Baht,

per month, starting from August 28th B.E. 2547 (2004) till June 26th B.E. 2555 (2012); totaling to ninety four months; totaling to the amount of 65,800 Baht per person. In addition, another issue to be considered was the amount of compensation that infringed the twenty-two Plaintiffs from their rights to exploitation from natural resources and its biodiversity. Considering the value of things the Lower Klity community ought to receive, from both the forest and the Klity Creek in order to live is dependent on the nature according to their conservative way of lives, it seemed appropriate to determine that the Defendant make compensation for damages in the amount of 1,000 Baht per person, per month, starting from August 28th B.E. 2547 (2004) till June 26th 2555 (2012); in the total of ninety four months, totaling to the amount of 94,000 Baht per person.

The Defendant is held liable to make compensation to the twenty-two Plaintiffs for the future expenses assumed to buy food and for the damages caused by the violation of their rights to exploitation from natural resources and its biodiversity, in the amount of 159,800 Baht per person.

In regards to the Plaintiffs' appeal, requesting the construction of a scheme within a specific time period, however, the rehabilitation method allowing Klity Creek to recover naturally without the disruption of any other procedures cannot be determined for a specific time period.

The Supreme Administrative Court is of the opinion that the method of natural recovery is, in its nature, unable to determine a specific time period, thus, unable to demand the Defendant to proceed under any time condition. Since the fact is established that the lead contaminants in the aquatic animals remained higher than the standard level, the Defendant is to continue with the rehabilitation process by operating in every season and by revealing the results of the operation to the interested parties.

Judgment

- Ordered the dismissal of the Administrative Court of First Instance's ruling, which stated that the Defendant neglected to perform its official duty to proceed to demand compensation and indemnity from the Lead Concentration (Thailand) Co., Ltd.
- Ordered the Defendant to propose a plan and method, and proceed in rehabilitating, evaluating and studying the samples collected from the water, soil, plants, and aquatic animals in the Klity Creek; it is to be collected at least once in every season until the lead levels in the Creek is not higher than the standard level for at least within a one year period. Also, the Defendant is to openly inform all twenty-two Plaintiffs by posting an announcement at the Klity Creek village chief's office, Chalae Subdistrict Administrative Organization, and Thong Pha Phum District Office.
- Ordered the Defendant to make compensation to the twenty-two Plaintiffs in the amount of 177,199.55 Baht per person.
- Ordered that the Court's fees be returned to the twenty-two Plaintiffs in proportion to the winning of the case.
To be paid within ninety days from the day the final judgment is rendered.
Other requests not mentioned shall be dismissed.