

Cottage Home Sdn Bhd v Wong Kau @ Wong Kon Lin & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02-2774
OF 2010
ABU SAMAH, ALIZATUL KHAIR AND MOHTARUDIN BAKI JJCA
21 SEPTEMBER 2013

Land Law — Easement — Right of way — Whether equitable right of way in nature of easement could be acquired by long uninterrupted user — Whether easement only effectual if expressly granted by way of registration — Principles governing award of general, special and exemplary damages — National Land Code s 286(1)

The appellant and the respondents owned lands adjacent to each other. The respondents claimed the only access to their land was a 12-foot wide laterite road over the appellant's land which they had been using for about two decades with the consent of the former owner of the appellant's land. The respondents alleged that when the appellant became owner of the land it cut off the access road by erecting a 10-foot high metal gate across it. The appellant also fenced up its land and dug a deep trench which, the respondents claimed, not only encroached onto their land but diverted the course of a natural stream resulting in floods that damaged the respondents' property. The High Court granted the respondents various reliefs which included a declaration that they were entitled to an equitable right of way over the appellant's land and mandatory injunctions directing the appellant to remove the metal gate, provide for a 12-foot wide tarred road over its land as a right of way to the respondents, and to execute the Form 17A granting the respondents an easement under s 286(1) of the National Land Code ('NLC') coupled with a right to access the appellant's land under s 288 of the NLC. Mandatory injunctions were also granted directing the appellant to restore the respondents' land to its original state by refilling the trench and restoring the original course of the natural stream. The trial court also awarded the respondents RM100,000 as general damages, RM150,000 as special damages and RM50,000 as exemplary damages. The High Court dismissed the appellant's counterclaim for a declaration that the respondents had no right to access its land, an injunction prohibiting the respondents and their servants/agents from entering upon its land and for general damages. The appellant appealed against the whole of the decision of the High Court including the dismissal of its counterclaim.

Held:

- (1) In view of the express provisions in the NLC and case authorities on the point, the trial court erred in granting the respondents an equitable right

- A of way. The respondents' claim was for an equitable right of way in the nature of an easement and not for a right of way under s 390 of the NLC. Section 284 expressly stated that no right in the nature of an easement was capable of being acquired by long and uninterrupted user. For an easement to come into effect it had to be expressly granted by registration of an instrument in Form 17A pursuant to s 286(1) of the NLC. The respondents had never formally applied to the owner of the appellant's land for a right in the nature of an easement (see paras 14–15 & 21).
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- C (2) The appellant's own survey plan showed the trench had encroached onto the respondents' land. The trench had also diverted the flow of water from the natural stream. As the trial court had ordered the appellant to restore the respondents' land to its original state by refilling the trench and by restoring the course of the natural stream to its original route at the appellant's expense, there was no justification to award the respondents RM100,000 in general damages as the basic principle for the measure of damages in tort was *restitutio in integrum*. The respondents should therefore only be given nominal damages in the sum of RM20,000 (see paras 12, 23–24).
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- E (3) The respondents' projections for loss of future earnings as a result of their being denied access over the appellant's land was purely speculative. Once the trial court accepted that the respondents had failed to substantiate their claim for special damages, that claim should have been dismissed. A reduced figure based on conjecture should not have been awarded (see paras 28 & 31).
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- G (4) The respondents' claim for exemplary damages did not fall within any of the established categories under which such damages would be awarded. In any event, since the respondents did not acquire an equitable right of way, their claim for exemplary damages had to be dismissed (see para 33).

G **[Bahasa Malaysia summary**

H Perayu dan responden adalah pemilik tanah bersebelahan dengan satu sama lain. Responden mendakwa satu-satunya akses kepada tanah mereka adalah jalan tanah merah selebar 12 kaki di atas tanah perayu yang telah digunakan selama kira-kira dua dekad dengan persetujuan bekas pemilik tanah perayu. Responden mendakwa bahawa apabila perayu menjadi pemilik tanah itu ia memotong jalan masuk dengan membina pintu logam setinggi 10 kaki merentasinya. Tanah perayu juga dipagar tanah dan digali parit yang dalam, responden mendakwa, bukan sahaja mencero boh ke atas tanah mereka tetapi mengalihkan perjalanan aliran semula jadi menyebabkan banjir yang merosakkan harta responden. Mahkamah Tinggi membenarkan responden pelbagai pengecualian termasuk satu deklarasikan bahawa mereka berhak untuk hak sama rata ke atas tanah perayu dan injunksi mandatori mengarahkan perayu untuk membuang pintu logam, memperuntukkan jalan berturap

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selebar 12 kaki ke atas tanah perayu sebagai hak laluan kepada responden, dan menandatangani Borang 17A yang memberikan responden isemen di bawah s 286(1) Kanun Tanah Negara ('KTN') ditambah pula dengan hak untuk mengakses tanah perayu di bawah s 288 KTN. Injunksi mandatori juga diberikan mengarahkan perayu untuk memulihkan tanah responden kepada keadaan asalnya dengan membaiki parit dan memulihkan aliran semula jadi kepada asal. Mahkamah perbicaraan juga mengawardkan responden RM100,000 sebagai ganti rugi am, RM150,000 ganti rugi khas dan RM50,000 sebagai ganti rugi teladan. Mahkamah Tinggi menolak tuntutan balas perayu bagi suatu deklarasi bahawa responden tidak mempunyai hak untuk mengakses tanahnya, injunksi melarang responden dan pekhidmat/ejen-ejen mereka daripada memasuki ke atas tanahnya dan bagi ganti rugi am. Perayu merayu terhadap keseluruhan keputusan Mahkamah Tinggi termasuk penolakan tuntutan balas itu.

Diputuskan:

- (1) Mengambil kira peruntukan jelas dalam KTN dan autoriti-autoriti kes, mahkamah perbicaraan terkhilaf dalam membenarkan responden hak sama rata atas laluan. Tuntutan responden adalah untuk hak sama rata atas laluan dalam bentuk isemen dan bukan untuk hak laluan di bawah s 390 KTN. Seksyen 284 jelas menyatakan bahawa tiada hak dalam bentuk isemen mampu diperolehi dalam jangka masa panjang dan tanpa gangguan oleh pengguna. Untuk isemen berkuat kuasa ia perlu diluluskan secara nyata dengan pendaftaran suatu surat cara dalam Borang 17A menurut s 286(1) KTN. Responden tidak pernah memohon secara rasmi kepada pemilik tanah perayu untuk hak dalam bentuk isemen (lihat perenggan 14–15 & 21).
- (2) Pelan ukur perayu menunjukkan parit telah menceroboh masuk ke atas tanah responden. Parit juga telah dialihkan aliran air daripada aliran semula jadi. Memandangkan mahkamah perbicaraan telah mengarahkan perayu untuk memulihkan tanah responden kepada keadaan asalnya dengan membaiki parit dan dengan memulihkan perjalanan aliran semula jadi kepada laluan asal atas tanggungan perayu, tiada justifikasi untuk award RM100,000 kepada responden sebagai ganti rugi am kerana prinsip asas untuk menentukan ganti rugi dalam tort adalah *restitutio in integrum*. Responden oleh itu hanya harus diberikan ganti rugi nominal dalam jumlah wang sebanyak RM20,000 (lihat perenggan 12, 23–24).
- (3) Unjuran responden untuk kehilangan pendapatan masa hadapan akibat dinafikan akses ke atas tanah perayu adalah spekulasi semata-mata. Sebaik sahaja mahkamah perbicaraan menerima bahawa responden gagal untuk menyokong tuntutan mereka bagi ganti rugi khas, tuntutan

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- A sepatutnya ditolak. Jumlah yang dikurangkan berdasarkan agakan semata-mata tidak sepatutnya diawardkan (lihat perenggan 28 & 31).
- (4) Tuntutan responden bagi ganti rugi teladan tidak termasuk dalam mana-mana kategori yang ditetapkan yang mana ganti rugi tersebut akan diberikan. Dalam apa jua keadaan, oleh kerana responden tidak memperoleh hak sama rata ke atas laluan, tuntutan mereka bagi ganti rugi teladan terpaksa ditolak (lihat perenggan 33).]
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Notes

- C For cases on right of way, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3286–3315.

Cases referred to

- D *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, HC (distd)
- Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)
- Datin Siti Hajar v Murugasu* [1970] 2 MLJ 153 (refd)
- EW Talalla v Ng Yee Fong & Anor* [1985] 1 MLJ 261 (refd)
- E *Rooks v Barnard* [1964] AC 1129, HL (refd)
- Wangsa Timber Industries Sdn Bhd & Ors v Adulfast Anthony Robert & Anor* [2001] 4 MLJ 438; [2001] 4 CLJ 498, CA (refd)

Legislation referred to

- F National Land Code ss 282, 282(1), 283, 284, 285, 286, 286(1), 287, 288, 289, 290, 291, 390, Forms 17A, 17B
- Sabah Land Ordinance

Appeal from: Suit No MT5–22–100 of 2002 (High Court, Shah Alam)

- G *Ranjinder Singh (Dennis Nik & Wong) for the appellant.*
Lee Chooi Peng (Sidek, Teoh Wong & Dennis) for the respondents.

Abu Samah JCA (delivering judgment of the court):

- H [1] The appellant and the respondents are owners of adjacent lands. The appellant is the registered owner of Lot 1706 held under Grant No 57712 Mk Ulu Langat District of Ulu Langat, Selangor ('Lot 1706'). The appellant purchased the land from its previous owners in 1999. The respondents are the registered owners of Lot 2445 held under Grant No 27407, Mk Ulu Langat District of Ulu Langat, Selangor since 1977 ('Lot 2445'). The appellant was the defendant while the respondents were the plaintiffs in the court below.
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- [2] According to the respondents the only access to their land from the main

public road was through a 12ft wide laterite road over the appellant's land. They and the owners of neighbouring lands had been using the laterite road with the consent of the previous registered owners of Lot 1706, as access to their respective lands since 1977. **A**

[3] The problems started after the appellant purchased Lot 1706 in 1999. The appellant erected a metal gate of 10ft in height across the laterite road and fenced up its land thereby preventing the respondents a right of way to their land. The problem was aggravated after the appellant dug up a man-made trench, measuring about 20ft in width and 20ft in depth along the western border of the respondents' land, which according to the respondents had encroached onto their land. **B**
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[4] The respondents alleged that the appellant had dumped the excavated earths, sands and rubbish on its side of the trench which had the effect of altering the natural contour and stability of both lands as well as separating the respondents' land from the appellant's land. The existence of the trench and the dumping of the earth, sands and rubbish along the appellant's side of the trench had also prevented the respondents from going to their land and deprived them from the use and enjoyment of their lands. **D**
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[5] There is a natural stream which runs across the respondents' land starting from the southern part of their land and exiting through the appellant's land. The respondents alleged that by creating the man-made trench the appellant had thereby diverted the flow of the water from the natural stream into the trench which had encroached into their land. The flooding due to the overflow of water from the trench had caused substantial damage, among others, to the respondents' flower plants and fruit trees. **F**

[6] By reasons thereof the respondents commenced a writ action against the appellant for the following reliefs: **G**

- (a) for a declaration that they are entitled to an equitable right of way over the appellant's land;
- (b) a mandatory injunction to remove the metal gate which obstructs the respondents from using the laterite road as a right of way to their land; **H**
- (c) a mandatory injunction directing the appellant to provide a 12ft width tarred road over its land as a right of way for the respondents to enter their land; **I**
- (d) a mandatory injunction directing the appellant to execute Form 17A for the grant of an easement under s 286(1) of the National Land Code ('the code') coupled with the right to pass and repass over the appellant's land pursuant to s 288 of the Code;

- A** (e) a mandatory injunction directing the appellant to restore the respondents' land to its original state by refilling the man-made trench which had encroached into the respondents' land;
- B** (f) a mandatory injunction directing the appellant to restore the course of the natural stream which had been diverted by the appellant back to its original route;
- (g) RM517,000 as special damages with interest thereon at 8%pa from 1 January 2000 until full realisation;
- C** (h) general damages for encroachment and loss of future income from the fruit trees and miscellaneous plants on their land;
- (i) exemplary damages; and
- (j) costs.

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DEFENCE AND COUNTERCLAIM

- E** [7] The appellant, in its defence denied, inter alia, any encroachment into the respondents' land. It admitted creating the trench but claimed that it was done on its own land. It also admitted erecting the metal gate as its right and fenced its land but this was done in order to prevent theft and any intrusion into its land where it was rearing fish on a commercial scale.
- F** [8] The appellant counterclaimed against the respondents for (a) a declaration that they had no right of access over its land; (b) an injunction to prohibit the respondents, by themselves or their servants or agents from entering its land; (c) general damages and interest thereon at 8%pa until full realisation.

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THE ISSUES ON APPEAL

- H** [9] The learned judicial commissioner ('JC'), after a full trial, granted the declaration and the various injunctions sought by the respondents with costs and dismissed the appellant's counterclaim against the respondents. As to damages, the learned JC allowed RM100,000 as general damages, RM150,000 as special damages and RM50,000 as exemplary damages.
- I** [10] The appellant's appeal before us was against all the orders made in favour of the respondents and the dismissal of its counterclaim. The main issues were whether the trench created by the appellant had encroached or trespassed onto the respondents' land and if so, whether the respondents had proved their claim for the said damages. The other issue was whether the

respondents were entitled to an equitable right of way over the appellant's land.

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WHETHER ENCROACHMENT ESTABLISHED

[11] The learned JC found as a fact that the man-made trench was created on the respondents' land. This finding was based on the survey plan (Ex PI) prepared by their surveyor (PW1) and the testimony of PW1 himself and his field assistant (PW2) who carried out the survey on the respondents' land. PW3, who was engaged by the respondents to do the clearing works on the respondents land in 1992/1993 testified that there was no trench on the respondents' land then. In any event, the appellant admitted in its statement of defence that it created the trench save that it was done on its own land. The appellant's own survey plan (Ex D68) in fact corroborated the existence of the trench on the respondents' land. In our judgment the appellant's contention that it did not encroach onto the respondents' land was devoid of any merit.

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[12] The learned JC also found as a fact, which we agreed, that the existence of the man-made trench on the respondents' land had diverted the flow of the water from the natural stream into the trench, contrary to the appellant's contention that it dugged out the trench on its own land along the natural stream to drain out excessive water from its fish ponds.

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EQUITABLE RIGHT OF WAY

[13] The learned JC granted the respondents' claim for an equitable right of way over the appellant's land based on the evidence of PW3 (the contractor), PW4 (the first respondent), PW5 (the second respondent) and PW6 (the respondents' son), who testified that they had been using the laterite road over the appellant's land as an access to Lot 2445 with the consent of and without any interruption from the previous owners for at least two decades before the appellant bought Lot 1706 in 1999. Although it was the respondents' pleaded case that the previous owners of Lot 1706 had given their consent to use the laterite road on their land as an access to the respondents' land, they were not called as witnesses. The learned JC accepted the evidence of the respondents' witnesses that the laterite road over the appellant's land was the only access to the respondents' land. The evidence of these witnesses was consistent with the photographs (exhs P61 and 62) which showed the satellite view of the laterite road on the appellant's land as the only access to the respondents' land. In making this finding of fact the learned JC overlooked PW4's own admission and DW1's evidence that there was an alternative access via Lot 1933 to the respondents' land.

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A [14] It must be noted that the respondents' claim was for an equitable right of way in the nature of an easement and not for a right of way under s 390 of the Code.

B [15] Easement is defined in s 282(1) of the code to mean 'any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land in accordance with the following provisions of this Chapter'. The relevant provisions on easement for our consideration are ss 282–291. Section 284 expressly states that no right in the nature of an easement shall be capable of being acquired by prescription (that is to say by any presumption of a grant from long and uninterrupted user). Thus, in law, the right in the nature of an easement cannot be presumed to have been granted by the proprietor of the servient land (Lot 1706) based on mere evidence of long and uninterrupted usage. Section 286(1) of the code clearly states that the grant of any easement shall be effected by an instrument in Form 17A, or in the case of the grant by adjacent proprietors of cross-easements of support in respect of any party wall, by an instrument in Form 17B; and the easement shall come into existence on the date on which the instrument is registered. It is undisputed that there was no written or formal application by the respondents to the proprietor of Lot 1706 for a right in the nature of an easement. The issue here is whether the High Court was right in granting an equitable right of way to the respondents.

F [16] In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 cited by the respondents is not an authority to support their contention that they are entitled to an equitable right of way based on the evidence of long and uninterrupted usage. The facts in that case are distinguishable from the facts before us. In that case the Penang High Court allowed the plaintiffs' application for a right of way in the nature of an easement based purely on a contractual basis ie cl 11 of the agreement which states that:

H This sale is sold subject to the right of way to owners of neighbouring holdings to and from their land on the existing road and also from holding 64(10) (now known as lot 48 Mukim 17, North East District, Penang.

[17] Edgar Joseph Jr J (as he then was) at p 241 of his judgment clearly said:

I Accordingly clause II does not by itself create an easement of way, an essential requirement of which is registration under s 286 of the Code in Form 17A.

[18] In *Datin Siti Hajar v Murugasu* [1970] 2 MLJ 153, a case which was cited in *Alfred Templeton's* case, Syed Agil Barakbah J (as he then was) held, inter

alia, that the law of easements in the Malay States is now provided exclusively by the Code which expressly precludes the acquisition of any easement by long user. A

[19] In *EW Talalla v Ng Yee Fong & Anor* [1985] 1 MLJ 261 the plaintiff, in 1977, filed a suit against the defendants to remove a part of their house and the septic tank which had been erected on the plaintiffs land since 1955. Wan Hamzah J, after considering ss 282, 283, 284 and 286 of the Code, allowed the plaintiff's claim. The learned judge at p 264 said: B

To estop the plaintiff from pursuing his claim in this suit would defeat the purpose of the above provisions of section 284 and the provisions of section 341 referred to above earlier. Acquiescence on the part of the plaintiff is not sufficient to create easement. There must be an express grant of easement in accordance with the provisions of the above sections. C

[20] In *Wangsa Timber Industries Sdn Bhd & Ors v Adulfast Anthony Robert & Anor* [2001] 4 MLJ 438; [2001] 4 CLJ 498 referred to by learned counsel for the respondents is not a relevant authority that the respondents are entitled to an equitable right of way. That case was decided under the Sabah Land Ordinance which, in the opinion of the Court of Appeal, 'does not exclude the reception in appropriate circumstances the English Common Law, such as easement of right of way without it being registered'. D

[21] In view of the express provisions of the Code and the cases which we have referred to above the trial court had clearly erred in granting the respondents' application for an equitable right of way. E

CLAIMS FOR GENERAL, SPECIAL AND EXEMPLARY DAMAGES

[22] The award for general, special and exemplary damages were based on the: F

- (a) evidence of PW2, PW3, PW4 and PW5;
- (b) photographs in P14(a) and (b), P15(a) and (b), P16(a)–(d), P17(a) – (c) and P20(a) and (b); and H
- (c) income tax returns of the first respondent in Ex P31, P32, P33, P34, P35, P36 and P37 and the statement of accounts annexed thereto. I

GENERAL DAMAGES

[23] The court awarded RM100,000 as general damages to the respondents

A as it found as a fact that the appellant created the trench on the respondents' land. No justification was however given how it arrived at this figure. The basic principle for the measure of damages in tort is that there should be *restitutio in integrum*. The respondents were not asking for costs of restoring their land to its original state before the encroachment. The trial court awarded the general

B damages in addition to the mandatory injunctions directing the appellant to restore the respondents' land to its original state by refilling the man-made trench and to restore the course of the natural stream back to its original route. That would be at the expense of the appellant.

C [24] In view of the mandatory orders made by trial court we are of the view that the respondents should only be given nominal damages. After hearing the submissions of the respective counsel we allowed nominal damages in the sum of RM20,000 only.

D SPECIAL DAMAGES

E [25] The respondents claimed a sum of RM517,000 as special damages. The particulars for special damages are spelt out in para 7(b) of their amended statement of claim. The trial court reduced it to RM150,000 as the respondents could not substantiate their claim. This is what the trial court said:

F In awarding RM150,000 as plaintiffs' special damages the Court was mindful that plaintiffs' estimated loss of RM517,000 from their fruit trees and plants were not conclusively ascertained, supported nor corroborated by any other independent assessment. The plaintiff's had failed to substantiate the basis for their claim and had arbitrarily quoted RM500,000 as the amount of special damages suffered by the plaintiffs from the damage to the plaintiffs' mother plants.

G [26] Learned counsel for the appellant submitted that the photographs in P14(a)(b), P15(a)(b), P16(a)(d); P17(a)(c) and P20 (a)(b), (c) were taken in April 2009, which was more than nine years after the appellant purchased the land and erected the metal gate across the laterite road on its land. Generally, these photographs show some wild trees and plants, which do not resemble an abandoned orchard and landscaping business due to denial of access and

H creation of the trench. PW4 was asked in cross-examination to show the photographs of fruit trees and mother plants on Lot 2445 depicting the orchard and nursery, which he could not produce. PW4 was also asked to show proof of costs incurred in planting mother plants on Lot 2445, which he could

I not produce.

[27] We have read the testimony of the witnesses for the respondents. PW2, the field assistant who carried out the survey on the respondents' land did not give evidence on the damages suffered by them. PW3 was contracted by the

respondents to do the clearing works on their land in 1992/1993 and did not give evidence on the damage to the fruit trees and other plants on the respondents' land. PW3's evidence was wholly irrelevant as the appellant only became the owner of Lot 1706 in 1999.

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[28] The learned JC took into account the first respondent's (PW4's) evidence that the net profit from the sale of fruits and plants for the year 1999 was RM71,168.84, in assessing the respondents' claim for damages for loss of future earnings. PW4 in his witness statement (p 191 Part B of the record of appeal) calculated that his loss of future earnings from year 2000 to year 2016 would be RM1,705,395.81 if he was not allowed access to his land (see answer to question 129, of PW4's witness statement). We find that these projections of future earnings are purely speculative and not supported by any records of past earnings derived from the sales of fruits harvested from Lot 2445.

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[29] The net annual income of the first respondent as can be seen from his annual income tax returns until the year of assessment 2000 was less than RM100,000. For example, his net income for the year 1999 was RM73,027. His net income for the year 2000 was RM77,330. He testified in court in 2010 but did not produce his income tax returns for subsequent years (after the year 2000) to show that his net income had been drastically reduced as a result of being denied access to his land via the appellant's land.

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[30] The respondents did not produce any documentary evidence of sales and purchase transactions relating to their business to show how much they earned annually before the appellant erected the metal gate, so as to give an idea of what would be their future earnings had they not been denied the right of access over the appellant's land.

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[31] It is trite law that special damages must be specially proved. Once the trial court accepted that the respondents had failed to substantiate their claim for special damages, the proper order would be to dismiss the claim and not to award a reduced figure based on conjecture.

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EXEMPLARY DAMAGES

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[32] The respondents' claim for exemplary damages as pleaded in para 9(a) of their statement of claim was based on the appellant's alleged intentional, contemptuous and wrongful denial of their right of access over the appellant's land.

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[33] In *Afred Templeton & Ors v Law Yat Holdings Sdn Bhd & Ors*, and in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19 Edgar Joseph Jr (as he then was) had concisely

A stated the law on exemplary damages. In both cases, the learned judge adopted what Lord Devlin said in *Rooks v Barnard* [1964] AC 1129. In that case Lord Devlin said that exemplary damages could only be awarded in three categories, namely oppressive action by the crown; in cases where a defendant 'with a cynical disregard for a plaintiff's right has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk'; and where statute expressly authorised exemplary damages. Exemplary damages are not compensatory but are awarded to punish the defendant and to deter him and others from similar behaviour in future. The evidence in the instant case before B us did not come within any of those categories. In any event, the respondents' C claim for exemplary damages is dependent the outcome of their claim for an equitable right of way. In view of our decision that the respondents did not acquire an equitable right of way, the respondents' claim for exemplary damages should be dismissed.

D [34] For the reasons as aforesaid we allowed the appellant's appeal in part as follows:

- E (a) the declaration that the respondents are entitled to an equitable right of way is set aside;
- F (b) the mandatory injunctions directing the appellant to:
- (a) remove the metal gate on the appellant's land;
- (b) construct a tarred 12ft wide access road on the appellant's land; and
- G (c) to execute Form 17A under s 286 of the Code for registration; are set aside;
- (c) the award for general damages in the sum of RM100,000 is set aside and in lieu thereof a sum of RM20,000 as nominal damages is allowed;
- (d) the awards for special and exemplary damages are side aside; and
- H (e) the mandatory injunctions directing the appellant to refill the trench and restore the respondents' land to its original state; and to restore the natural stream to its original course prior to the creation of the trench are affirmed.

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[35] As to costs, each party to this appeal should bear its own cost. The deposit to be refunded to the appellant. A

Order accordingly.

Reported by Ashok Kumar B

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