YAN YEE HAN **APPELLANT**

AND

KAI WANG SDN BHD **1ST RESPONDENT**
LAU TECH CHIONG **2ND RESPONDENT**

Court of Appeal of Brunei Darussalam
Civil Appeal No. 7 of 2020

KAI WANG SDN BHD **1ST APPELLANT**
LAU TECK CHIONG **2ND APPELLANT**

AND

YAN YEE HAN **RESPONDENT**

Court of Appeal of Brunei Darussalam
(Civil Appeal No. 4 of 2020)

Before: Burrell, P., Seagroatt and Lunn, JJ A.
22 June 2021

Ms Vuina Song of m/s YC Lee & Lee for 1st and 2nd Appellants
Mr Czar C Calabazaron of m/s Rudi Lee, Annie Kon & Associates for Respondent

JUDGMENT

Seagroatt, JA.:

This is an appeal by the owner of a piece of land known as Lot 64004, Kg. Kiarong, on which she intended to build a property, intended for sale, against part of the judgment of Judge Masni in which she disallowed certain items claimed as a result of trespass and damage carried out by the respondents, their servants or agents. The appellant also owns Lot number 63654.

The hearing before Judge Masni was an Assessment of Damages following a judgment by the Judicial Commissioner who found in favour of the appellant (then the Plaintiff in the action) that the Respondents had committed trespass to the Appellant's land and caused

considerable damage to it and consequent loss to its owner. He then remitted the Assessment of Damage to the Registrar.

This was not a case of small-scale interference. The appellant to whom I shall refer as plaintiff (unfortunately in the judgment which is the subject of this appeal, the principal plaintiff is referred to as PW6 which is an unhelpful designation) contended that she intended to build a 3-storey split-level house on the land with a view to selling it.

By reason of the defendants' trespass and damage, she was unable to carry out her development, and suffered extensive loss and costs which she claimed in these proceedings, together with a claim for loss of profit because of the inability to build and then sell the designated house.

The picture of what had happened to the plaintiff's land is best illustrated by some of the brief statements of facts contained in the written submissions made by the appellant in her submissions to this appeal.

> *"8……for 5 days (the Respondents) excavated and transported soil out of the property."*

The plaintiff obtained an injunction to prevent further excavations on the 6 February 2013. In fact the excavation continued for 7 days

> *"16……The respondents took 3,039 cubic metres of soil from Lot 64004."*
>
> *"17……The respondents……..left a massive hole on the Appellants' land…..[this] severely compromised the soil integrity and soil structure of the Lot."*
>
> *"18……equivalent to a height of 18 feet a 2 storey building, 3 or more average height persons."*

Unfortunately neither party in this appeal has put before this court any photograph of the land concerned showing the nature of the damage to it so as to illustrate properly the subject matter of the action. We were left with the quantification of the volume of soil excavated and a figure for the reduction in height of the land so caused. Yet on the application for the injunction the Judicial Commissioner must have been shown some very relevant photographs.

Unarguably the plaintiff could not build her 3-storey house. As a matter of common sense and logic, the soil would have to be replaced, compacted and protected by some structure. The integrity of such land would require years of checking and remedial protection to restore it to its former integrity.

The principle in the law of tort upon which the plaintiff relies is almost trite law. A plaintiff in such circumstances is entitled to be compensated to the extent that he or she is restored to the pre-existing state, as if no such trespass and damage had occurred. The defendant's

expert witness gave evidence to the effect that the plaintiff's building project would have been completed in 2013, but for the trespass and excavation.

The finding against which the plaintiff appeals is the judge's ruling that the plaintiff cannot recover damages for the necessary works, identified as item D, being in effect remedial construction costs, totalling $117,256.74. As an alternative to that cost a figure for a retaining wall and backfill is a costing by the defendants' expert, in the sum of $59,902.50 for what is conceded to be additional works instead of a retaining wall with some variation in the design of the projected building.

The level of the ground has to be restored to PL+21.5 metres in order for the plaintiff to be able to construct the house in accordance with her original design.

The judge's approach and finding in relation to the retaining wall is not clear.

In para.85 the judge held that *"by restoring the soil (that had been excavated) the Plaintiffs would have been placed in the position as she would have been."* This is saying that she would have been restored to her pre-trespass state or condition.

She seems to have misunderstood the evidence of the Plaintiff's engineer, Mr. John Ng King Hong, an Engineering Consultant. She concluded (para.79) that the debate or dispute between the two experts *"is not relevant".*

It is necessary therefore to consider the evidence from the two engineering experts. Mr. John Ng, (wrongly identified in the judgment as PW7, he was in fact PW2) premised his evidence correctly on the Plaintiff's entitlement to pursue her own architectural design for the house on the basis that the land was to be restored to its original state. On the other hand, Mr. Nava adopted, as the basis of his approach, the idea that the design would have to be altered to take account of the changes brought about by the defendants' wrongful acts. As a matter of law the Plaintiff was entitled to proceed on the basis that the land had to be restored to its original state together with any remedial structures or additions in order to achieve that end.

<u>The evidence and opinion of Mr. John Ng</u>

His opinion was that for *"the proposed house there is a requirement for the retaining wall and evidence of over excavation of the land".* It had been cut about 5½ meters from the original level.

Although we are not entirely clear whether the reference to *"the proposed house"* requiring the retaining wall, means the original concept and design of the Plaintiffs, or the situation after the damage had been done by the defendants. The general sense suggests that the requirement for the retaining wall arose as a result of the defendant's unlawful actions.

His later evidence supports the latter interpretation: *"we are talking about the earth work and I think anything to do with super structure is not relevant….."*

"Mr. Nava's design involved additional retention wall and some amendments to the existing structure "- i.e. original design structure of the plaintiffs."

"He wanted to omit these walls……This proposed wall which he proposed to omit cannot be viewed in isolation."

He was asked:

Q. "Is our case relating to earth work or super structure?"

A. "Earthwork."

"What we are trying to say is how to compensate for the over excavation."

Q – *"You proposed a retaining wall needs to be built and import soil. The retaining wall is to contain the backfill soil."*

A – *"Yes."*

Mr. John Ng proposed *"Wall A"* as the one for that purpose. He agreed that he required the area of the swimming pool designed for the first floor level, to be backfilled with soil. He was not certain that the soil would be strong enough to support the swimming pool and required something more than a small retaining wall to support it. The alternative proposal of Mr. Nava, the defendants' engineer, was put to him and he considered it too costly and not structurally sound. He stressed convincingly and reasonably that his client, the plaintiff, did not want any of the alternatives propounded by Mr. Nava. Her duty to mitigate her loss did not, we find, extend to an acceptance of the defendants' proposals however economic they might be, in the dressed up form presented by Mr. Nava.

Mr. John Ng put the cap on the difference between the two of them when he said ……. *"But the defendant removed the soil from the wrong area. It is over excavated.''*

<u>The evidence and opinion of Mr. Nava</u>

Having reviewed the transcript of his evidence it is clear that it is predicated on a change in the design by the plaintiff and that is an unreasonable approach.

He suggested columns instead of walls and then suggested two supporting walls instead of such backfilling soil as making for a safe structure.

He agreed that the plaintiff had to be compensated for the soil that had been removed but then, somewhat surprisingly, asserted that the removal of the soil benefited the plaintiff in the building of the house.

Finally after a degree of evasiveness he conceded that what he was proposing was *"a newly corrected design".* The key to his approach, which indicated a judgmental flaw in his misunderstanding of the issue, was as follows:-

> "Q – *If there was no trespass or excavation of the land, do you agree that she would be able to build the original design of the house?:*
>
> A – *Architecturally yes but not structurally."*

Later on there is an interesting if not surprising exchange:-

> *"*Q – *The place where the excavation of the land is where the swimming pool is to be place(d)?*
>
> A – *Yes.*
>
> Q – *At least put back the soil and for the swimming pool to be built?*
>
> A – *I disagree."*

Such answers suggest a range of relevant questions. They were not however put and we are left with the overriding impression that Mr. Nava had not thought matters through.

The judge was correct in regarding the discussion concerning change in designs, alternative structural features consequent upon the original design, and an alternative to the restoration of the soil wrongfully excavated by the defendants, as irrelevant. But the evidence relating to the remedial measures in the shape of restoration of the removed soil, the necessary backfill of soil and the retaining wall, were material issues. We had little difficulty in concluding that she should have accepted the evidence given by Mr. John Ng and given the award claimed under ''D''. It is possible from some of what she said in her judgment that she accepted the logic of Mr. Ng's views.

The material findings of the judge are as follows:-

> *para.80. I accept that there are different ways to build the retaining wall. It is [the plaintiff's] prerogatives and within her rights to build the said retaining wall in accordance with that wish. It is also within [her] right to have the design of her house in accordance to her wish.*
>
> *para.82. The issue here is whether [she] could claim the building of the retaining wall from the defendants when the said wall has not been built and on the same note she is also claiming the increased in building construction costs as in item E.*

She then went on to confuse the two issues i.e. the retaining wall and backfill and the extra construction costs of the house caused by the increase in the price of construction materials.

She found clearly that the plaintiff was entitled to adhere to the design of her house and have the necessary retaining wall and backfill to restore the land to it original state, in line with the evidence of the plaintiff's expert evidence, which rejected that of the defendant's expert.

The judge, having been satisfied that the plaintiff intended to build the house, and would have done so in 2013 but for the trespass and damage, then went on to misdirect herself.

In paragraph 86 she said that the cost of building the retaining wall (and the backfill) would have been absorbed in the additional costs of constructing the house. That cannot be correct. These are two unrelated discrete heads of claim as the judge initially recognized. In any case the costs of the former far exceed the latter, so the claim for the extra construction costs, which she rightly allowed, could not have absorbed those for restoring and making good the land itself i.e. the retaining wall and backfill soil. We therefore allow the figure claimed under Item D.

The Defendants' Cross-Appeal

This relates to items B, E and F set out in paragraph 7 of the Judgment. Item B relates to the additional professional fees incurred in respect of Lot 64004, Item E the increase in building construction cost, and Item F, loss of profit on the consequent inability of the plaintiffs to sell the building she planned to build, which has been postponed, or prevented by the defendants' tort.

i. The claim for additional professional fees – Item B

With effect from 2016, after the trespass and damage caused by the defendants, the Ministry of Development required plans from a QP in respect of Mechanical and Electrical Engineering drawing and since 2018 also, a QP has to approve plans for structural engineering. She has to pay $7,600 for these requirements.

These extra costs would not have been incurred had she been able to build the house and sell it in or about 2013.

The defence contends that the plaintiff is not entitled to claim these fees because she did not take necessary steps to obtain the permit and funding to build the house. They argue that this is too remote.

It is not. It is, we accept necessary to take such steps and it lies ill in the mouth of the defendants to argue such, since they have handicapped and obstructed the plaintiff in her taking such steps and delayed her progress in achieving her object. We, as did the trial judge, accept that the plaintiff had the genuine intention to construct the building and that the defendants' unlawful actions have caused or will cause liability for increased cost. None of the delay was caused by the plaintiff. It is not necessary to repeat the judge's detailed reasons.

ii. The increased costs of the construction – Item E

It is entirely foreseeable that the costs of carrying out the construction would increase over the years that have elapsed since 2012. The judgment was delivered in August 2020. Almost a year has passed by since. The figure claimed will need to be brought up to date by the rate of interest that an award under this head can properly attract. The plaintiff's expert on the costings for the project in 2013, when the house was likely to be completed but for the trespass and damage, was not challenged. The increase in cost is $76,196 and we confirm that award of damage.

iii. Loss of profit/interest on the sale of the property in 2013 – Item F

This is predicated on the basis of the property having been constructed and then sold in 2013. Evidence was adduced of the likely sale proceeds and the consequent profit. However, her claim is confined to the loss of interest on that profit, had it been realized and invested in a bank account. She will in due course, though much delayed by the defendants be able to build the house and sell it profitably.

The judge has accepted that the plaintiff would have been granted the necessary permits and approvals, built the house and eventually sold it. There would have been a profit which may or may not have been of the order anticipated. But there are certain imponderables and the defendants argue that this claim, in whatever form it is advanced, is too remote to be quantified.

There is of course a risk that in due course the fact and nature of the defendants' interference with the land will raise some questions from potential purchasers about the stability of the land, however (effectively) restored, and consequently about the stability and risk of subsidence of the house. However that does not feature in this action.

Nonetheless the more significant factor is that she will have the award covering the cost of restoring the land eventually to the pre-trespass state, and the award compensating her for the increase in the cost of the construction of the house. She will now be able to build it and sell it. She cannot have an award for notional loss of profit because such profit will still be available to her. But the realization of that profit has been delayed by the defendants. She has therefore lost the chance of using that profit at an earlier time. There is an element of remoteness involved but she is entitled to an award for the loss of a chance of enjoying such a profit earlier. It is not possible to quantify that with precision but an award for loss of that chance is appropriate. We consider under this head the figure should be $50,000. and that award replaces the award of interest calculated by the judge which is as a specific sum too remote. As a consequence of our decision the breakdown of the award to the plaintiff is as follows:

A. Surveyors Fees	2,500
B. Additional Professional Fees	7,600

C.	Cost of soil taken	25,378.33
D.	Cost of retaining wall and backfill	117,256.77
E.	Increase in building costs	76,196
F.	Loss of chance of interest on earlier sale and profit	50,000
G.	Cost of replacement boundary stone	2,500
H.	Signboard and fences	2,840.93
I.	Interest on initial award to be revised upwards From $BND52,072.12 by agreement.	(52,072.12)
		$BND336,344.12)

The judgment of the court is that the plaintiffs award be varied to the sum of $BND336,344.12. There is an appropriate increase in interest on those individual sums to be agreed.

There will be an award of costs to the plaintiff on a party and party basis. Although the defendants have succeeded in part on Item F this forms but a minor part of their appeal. They having lost on the principal grounds, we do not consider there should be any fractional adjustment to the order for costs.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A.**