

CHIP AIK REALTY CO. SDN. BHD.

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v.

CHOOI TAI FUN &amp; ANOR.

HIGH COURT MALAYA, SEREMBAN

PEH SWEE CHIN J

[CIVIL SUIT NO. 104 OF 1983]

17 JUNE 1983

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**CIVIL PROCEDURE:** *Interim injunction - Application to remove - Likelihood of success of plaintiff's action - Adequacy of damages - Balance of convenience.*

The plaintiff and the 2nd defendant were housing developers of housing projects which adjoined each other. The 1st defendant was the owner of the land being developed by the 2nd defendant. Access to the defendants' project, Taman Lucky Height, was through a road reserve located in the plaintiff's land. The road reserve had been surrendered earlier by the plaintiff to State Authority at the time of the plaintiff's application for approval of a layout plan for its project, Taman Chip Aik. The plaintiff had filed a writ claiming injunction, damages for trespass etc. They had obtained an interim injunction restraining the defendants from entering Taman Chip Aik and carrying out development there. The defendants applied to dissolve the injunction. The plaintiff's complaint was that certain acts committed by the defendants at the land reserve located on the plaintiff's land had caused extensive silting, erosion and damage to its land. The acts complained of were, *inter alia*, that the defendants had cut the gradient of the road reserve; that the defendants had laid or built concrete drains along the side of the road reserve and that the defendants had removed water pipes belonging to the plaintiff. These acts were not disputed by the defendants.

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**Held:**

[1] The order for interim injunction was to restrain the defendants from entering and carrying out development work at Taman Chip Aik and not to restrain them from using the access road to enter their own Taman Lucky Height for carrying out development work there.

[2] The plaintiff had established to the satisfaction of the Court that there were serious questions to be tried and had adduced sufficient evidence to establish further that the plaintiff had a real prospect of success for its claim at that stage.

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[3] The common law remedy of damages was singularly inadequate. Acts of trespass and nuisance were being threatened or were likely to be repeated. Such acts would cause irreparable injury to the plaintiff's land and lead to multiplicity of suits to be filed by the plaintiff. Further, the extent of damage arising from the threatened trespass or nuisance was uncertain.

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[4] The balance of convenience was against the defendants.

*[Application dismissed.]*

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**Legislation referred to:**

Street, Drainage and Building Act 1974, s. 9

*For the plaintiff - Leow Shin Fong; M/s. Arifin & Partners*

*For the defendants - D.J. Puthuchery; M/s. Skrine & Co.*

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## JUDGMENT

**Peh Swee Chin J:**

Both the plaintiff and the 2nd defendant are housing developers of housing projects which adjoin each other. The 1st defendant is the owner of the land which is being developed by the 2nd defendant by virtue of some arrangements between the 1st and 2nd defendants.

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The plaintiff's project is known as Taman Chip Aik while that of the defendants as Taman Lucky Height.

From the haze of copious affidavit and plans filed, in my view, it would not be necessary to refer to all the matters set out therein but to mention those matters which clearly constitute serious questions to be tried, sufficient for this judgment so long as the matters relied on, would not have been affected or materially affected, by the matters not mentioned.

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Adjudication on merits should be left to the trial of this action while I am now dealing with the present application to dissolve the interim injunction in question.

Access to the Taman Lucky Height is through a road reserve located in the plaintiff's land. The road reserve was earlier surrendered by the plaintiff to State Authority in connection with the plaintiff's submission of its application for approval of a lay-out plan for Taman Chip Aik.

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The plaintiff, however, has filed both a writ claiming injunction and damages for trespass, nuisance etc.; and at the same time an application for injunction restraining the defendants, their agents etc. from entering the Taman Chip Aik and carrying out development there. An order for such interim injunction was made on 19 March 1983. Not surprisingly, the defendants have now filed an application to dissolve it.

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The complaint of the plaintiff appears, *inter alia*, to consist of three clear and distinct acts, which the plaintiff said, have caused extensive silting, erosion and damages to its land. All the three acts appear to have been committed by the defendants at the road reserve located in, and running through the plaintiff's land. The first was that the defendants had cut the gradient of road reserve; the second, the defendants had laid or built concrete drains along the side of the road reserve and the third, the defendants had removed water pipes belonging to the plaintiff. I do not think these acts have been really disputed by the defendants.

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The following facts would, however, appear to be in dispute. The plaintiff complained that as a result of the first-mentioned act, the housing land abutting the road reserve was damaged. All the photographs exhibited to the affidavit of one Lim Kim Huat, a director of the plaintiff/company and made on 12 May 1983 (Encl. 14), do show clearly such alleged damage, erosion and silting. The housing land of the plaintiff abutting the road reserve, in particular, has become what appears to me to be, a somewhat precarious cliff or precipice. Some of these photographs also show alleged damage and silting to the plaintiff's drains (not the ones removed from under pre-cut road reserve), while others also show debris of the heavy type, strewn over the land resulting from the cutting of the gradient of the road reserve.

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Before I deal further with the defendants' reasons for justifying the three acts and the plaintiff's reply thereto, there is one question of a different kind which I should comment on and dispose of first.

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In the course of Counsel's arguments before me, it became increasingly clear to me that the defendants had misunderstood the wording regarding the extent of the order for interim injunction granted on 19 March 1983. I quote the relevant part of this order which says that:

the defendants Chooi Tai Fun and Lucky Height Development Sdn. Bhd. by themselves and by their agents or servants or otherwise be restrained and an Injunction is hereby granted restraining them from entering the housing project known as Taman Chip Aik, Jalan Templer, Seremban for the purpose of carrying out any development or connected works until after the trial of this action or until further order and it is also ordered that the said defendants be at liberty to apply to set aside the above order ...

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The wording as drafted by Counsel for plaintiff and approved by the Senior Assistant Registrar, I must say, is not a model of perfection or precision but its reasonably plain meaning cannot be doubted, i.e., that the defendants, etc. are restrained from entering Taman Chip Aik to carry out development work **there**. The emphasis is mine. The defendants apparently understood the words to mean that they could not use the access road to go to their own Taman Lucky Height for carrying out development work in Taman Lucky Height. Learned Counsel for plaintiff pointed out quickly, on realizing this misunderstanding, that the plaintiff would not object to the defendants using the access road to carry out their development work in Taman Lucky Height but not in Taman Chip Aik where the road reserve is. Later on, on being asked, as regards this by the Court, as to whether he would give an undertaking for plaintiff that the plaintiff would not object to the defendants using the road reserve, to go to Taman Lucky Height, he readily gave it. The misunderstanding of the defendants of this scope of the order for interim injunction is understandable enough; perhaps they were unwittingly misled by the words “development work” in the Order. The plaintiff had in mind for these two words, the construction of concrete drains, building of road etc. or similar type of work on the road reserve located inside Taman Chip Aik, while on the other hand, the defendants must have understood them to mean the main bulk of development work or construction carried on inside Taman Lucky Height itself. I have somewhat elaborated on this matter because learned Counsel for defendants appears to have submitted that the plaintiff would have reapply for a fresh injunction and the Order dated 19 March 1983 would have to be set aside in this connection. I must say that there is no substance at all in this submission, a *fortiori* after the undertaking given by the learned Counsel for the plaintiff so that the defendants would never hereafter be in peril of contempt, should the plaintiff ever complain later that the defendants have breached the injunction by using the road reserve to Taman Lucky Height to carry out their development in Taman Lucky Height.

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I now revert to the reasons given by the defendants for the three acts complained of Counsel for defendants submitted that as regards the first act of cutting the gradient of road reserve, it was in accordance, in the first place, with the instructions of para. 7 of a letter dated 29 May 1981 from the Majlis Perbandaran Seremban, (being Exhibit L1 to the affidavit of Lim Kim Huat made on 19 March 1983, Encl. 3A). Paragraph 7 however refers to removal or levelling of earth at front portion of bungalow lots on the eastern side of the road reserve. The plan annexed to this letter shows that these works refer to a shaded area in the plan which consists of four small squares. Paragraph 7 does not refer at all to the cutting of the gradient of road reserve. Further for the defendants to say that the plaintiff had consented to the cutting of gradient is far too improbable to be acceptable. Counsel for the defendants further submitted that the road reserve was a public road and the defendants were entitled to use the public land, apparently in any manner they thought fit, in other words, the defendants were entitled to carry out the three acts complained of. I will deal more with this contention later.

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For the laying or building of concrete drains, the defendants said it was in accordance with implied instructions of para. 5 of the same letter from the Majlis Perbandaran, Seremban but the said para. 5 refers to the building of a “silt trap” pending the construction of road and

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*a* drains. I do not think it can be reasonably implied that the defendants could build the road and drains without a mandatory application to the local authority for such permission or without consulting the plaintiff, or obtaining plaintiff's consent. I will deal more with this later.

*b* Concerning the removal of plaintiff's water pipes, the argument of the defendants was, because to quote, "it was laid at a road formation being a gradient of 17% which is not acceptable to the Majlis and therefore it was to be removed and is to be removed."

*c* The plaintiff's reply was to the effect that it had never agreed to any of the three acts complained of neither were they authorized by the Majlis Perbandaran. To the argument, that the road reserve where they took place was a public place, it being surrendered land, the plaintiff said that under the Street, Drainage and Building Act, 1974, the defendants could not have the right to build any road or drain unless there was an application made under s. 9 of the Act. Further the plaintiff had control of the road reserve, it was submitted, and had the responsibility of building the road in accordance with its own approved layout plan until the road was taken over by the Majlis Perbandaran when the latter would then maintain it. It was further submitted that plaintiff's pipes were removed because the defendants wanted to and did lay their drains over the route where the pipes were.

*d* I would resist any temptation to go into the merits and from what is stated above, I am more than satisfied that the plaintiff has established that there are serious questions to be tried and has adduced sufficient evidence to establish further that the plaintiff has a real prospect of success for its claim at this stage.

*e* I will deal with the next question as to whether damages would be an adequate remedy. It is apparent, that the alleged acts of trespass (e.g., cutting the gradient of the road reserve, cutting thereby the plaintiff's housing land, removing plaintiff's water pipes etc.) and alleged acts of nuisance viz., the same acts which have caused the alleged damage, silting or erosion, have already taken place or ceased, therefore common law remedy of damages would appear to be suitable. However, the defendants have asserted their right all along to enter Taman Chip Aik to carry out their further development work at the road reserve in

*f* Taman Chip Aik. In fact, while some discussion was held with Counsel for some suggested compromise, in the application to dissolve the interim injunction, the Court was informed from the Bar table by learned Counsel for the defendants that the defendants intended to tar the road reserve. The very nature of the defendants' claim of right to enter Taman Chip Aik and do anything they thought fit at the road reserve coupled with some evidence of their very intention to do so would make it very probable indeed that acts of trespass and

*g* nuisance are threatened or likely to be repeated. Further such acts could also involve destruction or alteration of the plaintiff's land, although the defendants claim a right to commit such similar acts. The threatened acts, could in my judgment, cause irreparable injury for which common law remedy of damages would be inadequate. The remedy of damages would be inadequate because the acts or injury may involve likely alteration or destruction albeit minor destruction, of plaintiff's housing land. Damage so caused cannot be repaired or

*h* restored, e.g., how does one go about making the cliff on the plaintiff's housing land disappear? Another reason why damages would not be an adequate remedy, is that such threatened acts may lead to multiplicity of suits to be filed by the plaintiff, even assuming that no irreparable injury can be caused. Yet another reason is that the extent of damage as regards the threatened trespass or nuisance is uncertain, and the remedy of damages would also be inadequate. Subject to what I have to say about the balance of convenience, bearing

*i* in mind constantly that a cardinal object of an interim injunction as the one in this case, is

to preserve the matters between the parties in *status quo* pending the trial of the dispute, the circumstances mentioned above would make the common law remedy of damages singularly inadequate, leaving me, sitting as a Court of Equity, with practically no choice but to confirm and maintain the interim injunction granted earlier to prevent the threatened acts of trespass and nuisance.

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On the balance of convenience, if the interim injunctions were not issued, or if the interim injunction is now dissolved, there is no telling what the defendants would do and the extent of potential damage would appear to be serious to the plaintiff while on the other hand, with the interim injunction remaining in force, the defendants can still carry on their construction activities without hindrance and sell the houses being built or to be built without any interference. It is, of course, possible that the defendants' houses may not be extremely marketable on account of there being no properly tarred or levelled road at the moment, but the purchasers will have to endure this for a while until the trial of this action. Greater hardship would therefore be caused to the plaintiff for withholding the injunction from it. Even if the factors of balance of convenience were equal for both parties however, I would have had no hesitation in tipping it against the defendants for having disregarded the plaintiff's rights in a very highhanded manner.

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I will therefore dismiss the application of the defendants to set aside the Order for interim injunction dated 19 March 1983 and order that the costs be plaintiff's costs in the cause.

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Also found at [1983] 2 CLJ 136

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