

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
(BAHAGIAN SIVIL)
GUAMAN NO.: BA-22NCvC-256-01/2021**

ANTARA

**WAN NORHALINA BINTI WAN MOHD NAJIB
(No. K/P: 700920-11-5044)**

- PLAINTIF

DAN

**PESAT BUMI SDN BHD
(No. Syarikat: 199701027361/442859-T)**

- DEFENDAN

GROUND OF JUDGMENT

Introduction

[1] The Plaintiff is the registered owner of a piece of land known as Geran Mukim 675, Lot 2269, Tempat Sungai Kuyow Settlement, Mukim Petaling, Daerah Petaling Selangor (after this is refer to as "Lot 2269"). Lot 2269 is a Malay Reserved Land.

[2] The Plaintiff brought this action against the Defendants that are the Developer (Pesat Bumi Sdn Bhd) as the First Defendant and 20 other Defendants who are the occupants and/or owners of the houses along Jalan Makmur 3/1 in Taman Bukit Serdang, Seri Kembangan, Selangor where she claimed that the Defendants had encroached, trespassed and



used her land for a road on part or a portion of Lot 2269 (the Trespassed Area).

[3] The Plaintiff claims for the Developer to restore the Trespassed Area of Lot 2269 to its original condition and to return the same to the Plaintiff and for damages.

[4] On the third day of the full trial (that is on 30-9-2022), the Plaintiff had discontinued the actions against 2nd Defendant to 20th Defendant with no liberty to file afresh and no order to costs. The 2nd Defendant to 20th Defendant also withdrew the claims on indemnity filed against the Defendant (before is the 1st Defendant).

The Land (Lot 2269), the Project (Taman Bukit Serdang/Serdang Heights) and the Road (Jalan Makmur 3/1)

[5] Lot 2269 land's area is 0.8219 hectare that is equivalent to 2.031 acres. A copy of the Title of Lot 2269 is exhibited at Bundle of Document B3 at pages 411 to 414.

[6] The registered owner of Lot 2269 was Tuan Haji Nazman Puteh (Tn Haji Nazman). Tn Haji Nazman sold Lot 2269 to Wan Mohd Najib bin Wan Mohamad ("Wan najib"). Wan Najib is the Plaintiff's father and Wan Najib died in year 2015.



[7] In his witness statement as marked PSD1 and PSD1-1A, Tn Haji Nazman (Defendant Witness 1/DW1) said the following:

- (a) on 16-12-2009, DW1 sold Lot 2269 at a purchase price of RM1,000,000.00 to Wan Najib.
- (b) the ownership of Lot 2269 was transferred to Wan Mohd Najib and the registration for the transfer of Lot 2269 was completed on 16-12-2009.
- (c) on 7-4-2005, DW1 affirmed that he had consented *vide* a letter that “sebahagian dari Tanah tersebut untuk membina sebatang jalan raya yang kini dikenali sebagai Jalan Makmur 3/1”. The Letter of Authorization dated 7-4-2205 signed by DW1 was tendered before this Court (Bundle B5 at page 850).
- (d) DW1 had personal knowledge that the Defendant was the Developer for the housing project known as Taman Bukit Serdang or Serdang Heights (after this is refer to as “the Project”). Lot 2269 is not covered in the Project.
- (e) the Project was “bersempadanan dengan Lot 2269”. The Project also included the construction of a reserve road at the southern part of Lot 2269.



- (f) DW1 stated that the reason he allowed the Defendant to construct and build the Road is because –

“Tanah saya merupakan sebidang Tanah Terkunci (“Land Locked”) di mana saya tidak mempunyai sebarang akses sempurna dari atau ke Tanah tersebut. Dengan Defendan Pertama membina sebatang Jalan di atas Tanah tersebut, maka saya akan mempunyai akses sempurna dari atau ke Tanah tersebut.

Dengan ada akses tersebut, nilai Tanah saya akan meningkat. Lebih lagi, Defendan Pertama telah bersetuju untuk menanggung segala kos dan perbelanjaan untuk pembinaan Jalan tersebut.”.

- (g) on the issue about the subdivision of the Land, DW1 in his PSD1-1A said –

“Pada atau sekitar 2009, saya mempunyai niat untuk menggunakan Tanah tersebut untuk membangunkan satu projek perumahan bungalow selepas pembinaan jalan di atas Tanah saya yang disempurnakan oleh pemaju Defendan Pertama. Ini adalah kerana jalan tersebut akan memudahkan projek perumahan bungalow saya yang diniatkan.



Ekoran dari itu, saya juga mempunyai niat untuk membuat pembahagian Tanah saya. Akan tetapi, saya tidak dapat melakukan pembahagian tanah kerana pada masa itu Encik Wan Mohd Najib telah teringin membeli Tanah tersebut dengan secepat mungkin.

Encik Wan Mohd Najib ada memaklumkan kepada saya bahawa dia juga ingin membangunkan satu projek perumahan di atas Tanah tersebut selepas membelinya daripada saya. Oleh itu, Encik Wan Mohd Najib bersetuju untuk melaksanakan pembahagian tanah selepas membelinya daripada saya.

Dengan itu, saya telah menjualkan Tanah tersebut kepada Encik Wan Mohd Najib tanpa membuat sebarang pembahagian tanah ke atas Tanah tersebut.”.

- (h) DW1 affirmed that Wan Mohd Najib bin Wan Mohamad had visited the Land and agreed to buy the Land.

[8] On 25-3-2014, Wan Mohd Najib had transferred the ownership of Lot 2269 to his son named Wan Mohd Nazmi (the Plaintiff's brother).

On 13-6-2016, Wan Mohd Nazmi had transferred the ownership of Lot 2269 to his younger brother named Wan Mohd Hisham (the Plaintiff's brother).

On 22-3-2021, Wan Mohd Hisham had transferred the ownership of Lot 2269 to the Plaintiff.



Both Wan Mohd Nazmi and Wan Mohd Hisham were not called as the witnesses.

[9] DW1 affirmed that on 7-4-2005, 4 years before he sells Lot 2269 to the Wan Mohd Najib, DW1 had signed a letter that he had consented and agreed to surrender a portion of Lot 2269 to the Defendant for the construction of a 50 feet road (after this is refer to as “the Road”) in the southern part of Lot 2269.

[10] The Defendant is the developer of the Project over all pieces of land held under the titles, namely Lots 2263, 2264, 2265, 2266, 2267, 2268, 2219 and 2220. Lot 2267 is adjacent to Lot 2269 (the Plaintiff’s land). All these lands are for residential housing area. Majlis Bandaraya Subang Jaya (MBSJ) [formerly known as Majlis Perbandaran Subang Jaya/MPSJ] had duly approved the Project.

[11] The Defendant had sold 16 houses comprised in the Project to the respective purchasers *vide* the standard form of sale and purchase agreement. The Plaintiff had named these purchasers in this case. However, on the third of the full trial, the Plaintiff withdrew her legal action against the other Defendants except the Developer.

[12] The Project also included the construction of a 50 feet road in the southern part of Lot 2269. The Road is built by the Defendant as the developer of the Project. The Road will be used by DW1 and any subsequent owner of Lot 2269 and the occupants of the Project and also the public road user can use the Road.



[13] The Defendant's representative named Mr. Shum Yew Choong (Defendant Witness 2/DW2) had approached DW1 to discuss about the use of a portion of Lot 2269 to construct the Road as it is the requirement by MBSJ for the Project.

[14] The construction of the Road had started on or about the end of 2008 and the Road was completed in year 2009.

[15] The Defendant had borne the entire costs and expenses for the construction of the Road. The Defendant is not involved in the construction of any fenced wall on Lot 2269 and the boom gate.

[16] On 27-7-2009, MBSJ had informed the Defendant that MBSJ had approved the street name and the building number of the Project and officially named the Road as Jalan Makmur 3/1 and the Road was designated a public road by MBSJ.

[17] The Plaintiff filed this suit against all the Defendants on 1-7-2021.

The Plaintiff's claims

[18] In the amended statement of claim, the Plaintiff pleaded that –

- (a) in the process of constructing and developing the Project, the Defendant trespassed Lot 2269.



- (b) the acts of trespass on the southern site of Lot 2269 with an area of 3,320 square metres (“the Trespassed Area”) are by constructing a tarmac road known as Jalan Makmur 3/1 and fencing wall along the Trespassed Area without the Plaintiff’s permission and consent. The acts of trespass are continuing.
- (c) based on the Valuer Report (the Valuer was appointed by the Plaintiff), the Plaintiff stated that the Defendant did trespass the Plaintiff’s Land (Lot 2269).
- (d) due to the continuing trespass by the Defendant, the Plaintiff has lost of use the Trespassed Area and suffers continuing losses.
- (e) the Plaintiff demanding that the Defendant restore the Trespassed Area to its original condition and to return the Trespassed Area to the Plaintiff.
- (f) the Plaintiff soughts the following reliefs:
- i. a declaration that the use and/or possession of the Trespassed Area is against the law and void ab initio.
 - ii. the tarmac road known as Jalan Makmur 3/1 and the fencing wall on the Trespassed Area to be removed.
 - iii. damages in the sum of RM1,250,000.00 being the market value of the Trespassed Area.



- iv. aggravated damages to be assessed.
- v. exemplary damages to be assessed.
- vi. *an order that the Defendant shall deliver vacant possession of the Trespassed Area within 7 days from the order.*
- vii. *interest at the rate of 5% per annum on the total amount of iii, iv and v from 25-3-2021 until the date of the order.*
- viii. *cost.*
- ix. *other order and/or relief which is deem fit by this Court.*

The defence

[19] The Defendant had stated that –

- (a) at all material times, both parties only agreed to build a road in the Road Reserve and had never agreed to build any fencing wall or anti-climb wall on Lot 2269. The Defendant denied that the Defendant had any involvement on the fencing wall or anti-climb wall.
- (b) during the construction of the Project from 2007 to 2010, MBSJ had approved on the construction of the Road and had approved on the Defendant's Development Order (DO) and the Building Plans for the Project.



- (c) on or about 17-8-2010, MBSJ had issued the CCC to the Defendant for the Project and affirmed that all the construction for the Project (including the Road) were in order.
- (d) the Plaintiff's claimed that the Defendant had trespassed Lot 2269 that is to build the Road (now named as Jalan Makmur 3/1 is baseless.
- (e) The Defendant firmly averred that the Road was built with the prior approval from Tuan Haji Nazman bin Puteh (the owner of Lot 2269 before the Land been sold to the Plaintiff's late father).
- (f) the construction of the Road not only benefitted the owner of Lot 2269 but indeed is very needed by the buyers of the houses.
- (g) the Road had been designated a public road by MBSJ in which the address plan for the Project was approved by MBSJ on 19-5-2009. MBSJ had also taken over the control, management and maintenance of the Road from the Defendant as of 1-8-2011.
- (h) at all material times, neither Plaintiff, Wan Mohd Najib, Wan Mohd Nazmi, Wan Mohd Hisham and Tuan Haji Nazman complained and challenged the construction of the Road against MBSJ.



- (i) regarding the fencing wall or anti-climb wall, the Defendant has no knowledge and the fencing wall or anti-climb was not included in the DO or the Building Plans that were approved by MBSJ. The CCC that was issued by MBSJ also made no mention about the construction of the fencing wall or anti-climb wall. The Defendant believes that the fencing wall or anti-climb wall was built recently by the third party that was unknown to the Defendant and did not involve the Defendant.
- (j) the Defendant denies the Plaintiff's contention that the Plaintiff had suffered continuing loss due to the construction of the Road as the owner and/or owners of Lot 2269 had benefitted from the construction of the Road. The cost of the Road solely borne by the Defendant and the owner of Lot 2269 would save a substantial amount of money to construct the Road in Lot 2269 in the future. The Road would act as an access road to and fro Lot 2269 and the road users in the vicinity.
- (k) the construction of the Road would greatly increase the market value of Lot 2269 if it developed in future.
- (l) the Road was built and it would be unreasonable and illogical to remove the Road and the return the Land in its original condition to the Plaintiff. The Road is already under the control, management and maintenance of MBSJ for the public benefits of the entire community, especially for the residents who are occupying in the residential area.



- (m) the Defendant contends that the legal maxim of caveat emptor “let the buyer beware” is applicable against the Plaintiff as the Road was already in existence even before the Plaintiff acquired ownership of Lot 2269 from the Plaintiff’s brother. Hence, the Plaintiff is estopped from claiming that the Defendant had committed the act of continuing trespass and the principle of acquiescence should also be applied against the Plaintiff.

The decision

[20] On 22-11-2022, this Court had dismissed the Plaintiff’s claims with costs. The judgment as written and read to the parties were as follows:

Analisa Keterangan Lisan dan Dokumentar selepas Bicara Penuh & dapatan Mahkamah

[8] *Isu untuk dibicarakan telah difailkan secara berasingan oleh Plaintiff dan Defendan iaitu –*

oleh Plaintiff (C1):

- (a) *sama ada pada atau sekitar 7-4-2005, Nazman bin Puteh (No. K/P: 610724-08-6013) telah bersetuju berdasarkan undang-undang untuk menyerahkan sebahagian tanah (yang dijualnya kepada bapa Plaintiff) kepada Defendan untuk tujuan rizab jalan?*

Isu ini sama dengan isu oleh Defendan.



(b) sama ada Defendan telah melakukan pencerobohan sebahagian tanah Plaintiff?

oleh Defendan (C2):

- (c) sama ada pada setiap masa material semasa pembinaan projek perumahan Taman Bukit Serdang/Serdang Heights dari tahun 2007 hingga 2010, Majlis Perbandaran Subang Jaya (MPSJ) telah memberi kelulusan kepada Defendan untuk membina sebatang jalan raya atas rizab jalan seluas 50 kaki di bahagian selatan Lot tanah Plaintiff (Lot 2269) yang mana ianya kemudian dikenali sebagai Jalan Makmur 3/1 yang mana kini juga terdapat tembok pagar di sepanjang jalan raya di rizab jalan tersebut ataupun Jalan Makmur 3/1?
- (d) sama ada jalan raya yang dibina itu ditetapkan sebagai jalan umum oleh PBT (Pihak Berkuasa Tempatan)?
- (e) jika Nazman bin Puteh telah menyerahkan bahagian untuk membina sebatang jalan raya atas rizab jalan seluas 50 kaki di bahagian selatan Lot tanah Plaintiff, sama ada Plaintiff telah melepaskan hak dan kepentingannya ke atas bahagian Lot 2269?
- (f) sama ada Plaintiff boleh membawa kausa tindakan pencerobohan terhadap Defendan disebabkan Nazman bin Puteh tidak pernah mengambil tindakan undang-undang bagi pencerobohan terhadap Defendan?



- (g) sama ada *maxim undang-undang caveat emptor* “let the buyer beware” dan/atau *prinsip estoppel* dan/atau *prinsip acquiescence* terpakai kepada pemilik Lot 2269 selepas Nazman bin Puteh berkenaan dengan pembinaan jalan raya itu?
- (h) sama ada *Plaintif* mengalami kerugian yang berterusan dengan pembinaan jalan raya itu?

[9] Dalam perbicaraan penuh, Mahkamah ini telah mendengar keterangan saksi-saksi *Plaintif* dan *Defendan*.

[10] Berdasarkan kepada keterangan yang dikemukakan adalah didapati bahawa—

Isu (a): sama ada pada atau sekitar 7-4-2005, Nazman bin Puteh (No. K/P: 610724-08-6013) telah bersetuju berdasarkan undang-undang untuk menyerahkan sebahagian tanah (yang dijualnya kepada bapa *Plaintif*) kepada *Defendan Pertama* untuk tujuan rizab jalan?

[11] Fakta yang tidak dipertikaikan ialah berlaku suatu transaksi jual beli tanah Lot 2269 di antara bapa *Plaintif* pada pertengahan tahun 2009 (bapa *Plaintif* meninggal dunia pada tahun 2015) sebagai pembeli dengan Nazman bin Puteh. Bapa *Plaintif* didaftarkan sebagai pemilik tanah Lot 2269 pada 16-12-2009. Pada tahun 2014 hingga 2016, tanah Lot 2269 dipindah milik kepada nama Wan Mohd Nazmi bin Wan Mohd Najib dan



Wan Mohd Hisham bin Wan Mohd Najib dan dipindah milik kepada Plaintiff pada 22-3-2021.

[12] Tanah yang dibeli oleh bapa Plaintiff daripada Nazman bin Puteh ialah tanah rizab Melayu dan transaksi jual beli antara kedua-duanya dalam ruang lingkup tanah Rizab Melayu. Isu mengenai serahan tanah kepada Defendan berbangkit berdasarkan paksi utama tuntutan Plaintiff iaitu pencerobohan tanah Lot 2269.

[13] Pemunya berdaftar tanah Lot 2269 itu kini ialah Plaintiff. Dalam keterangannya di hadapan Mahkamah ini, Plaintiff menafikan bahawa semasa bapanya membeli tanah itu, Nazman bin Puteh ada menyatakan perkara serahan untuk rizab jalan. Nazman bin Puteh hadir memberikan keterangannya.

[14] Plaintiff tidak mengetahui mengenai kewujudan jalanraya di Lot 2269 pada tahun 2009 dan Plaintiff tidak setuju dengan cadangan peguam Defendan bahawa bapa Plaintiff ada melawat tanah Lot 2269 bersama ejen dan Nazman bin Puteh. Menurut Plaintiff, pembinaan tembok berpagar itu disyaki dibina oleh Defendan.



Mahkamah ini mendapati keterangan Plaintiff tidak disokong dengan keterangan saksi lain khususnya adik beradik Plaintiff untuk memastikan mengenai penafian, ketiadaan pengetahuan dan ketidakpersetujuan bapa Plaintiff mahupun Wan Mohd Nazmi bin Wan Mohd Najib dan Wan Mohd Hisham bin Wan Mohd Najib.

[15] Plaintiff merujuk kepada suratan hakmilik Ikatan Dokumen B3 pada muka surat 414 dan menyatakan bahawa terdapat 1 garisan pada suratan hakmilik. Plaintiff tidak pasti sama ada 1 garisan pada petak itu ialah menunjukkan sebatang jalanraya. Plaintiff tidak mengemukakan dan tidak membawa salinan asal suratan hakmilik dan menyatakan bahawa dokumen pada muka surat 411 (B3) itu ialah salinan terkini yang Plaintiff ada.

[16] Plaintiff bersetuju apabila disoal balas oleh peguam Defendan bahawa dia dapat masuk ke Lot 2269nya itu melalui jalanraya tersebut.

[17] Tuan punya asal Lot 2269 iaitu Nazman bin Puteh yang menjual tanah tersebut kepada bapa Plaintiff ialah seorang saksi yang credible. Walaupun Nazman bin Puteh kini sudah berusia 61 tahun, beliau dalam keterangannya dapat mengingati bahawa transaksi jual beli dengan Wan Mohd Najib itu tidak mempunyai perjanjian jual beli bertulis. Harga jualan tanah tersebut ialah RM1 juta. Nazman bin Puteh mengguna khidmat ejen bernama En Chua berkenaan dengan penjualan tanah kepada bapa Plaintiff.



Sebagai pemunya/pemilik asal, keterangan di hadapan Mahkamah ini membentangkan bahawa Nazman bin Puteh mempunyai perancangan untuk memajukan tanahnya itu dan apabila dijual kepada Wan Mohd Najib, beliau juga mempunyai perancangan untuk memajukan tanahnya itu dan seterusnya Plaintiff yang menjadi pemunya/pemilik terkini juga mempunyai perancangan untuk memajukan tanahnya itu.

[18] Surat persetujuan yang dirujuk oleh pihak-pihak dalam kes ini ialah surat yang ditandatangani oleh Nazman bin Puteh sendiri. Nazman bin Puteh mengakui bahawa surat tersebut disediakan oleh En Shum Yew Choong. Isi kandungan surat Nazman bin Puteh dengan jelas menunjukkan serahan sah sebahagian tanah Lot 2269 bagi pembinaan jalanraya untuk kegunaan projek perumahan tersebut.

[19] Keterangan Nazman bin Puteh diasak dengan soalan peguam cara Plaintiff mengenai perkara “pemberian hakmilik” kepada Defendan perlu didaftarkan, Nazman bin Puteh menyatakan bahawa pembeli tanahnya itu iaitu Wan Mohd Najib sendiri akan buat di Pejabat Tanah. Nazman bin Puteh menyatakan bahawa tiada bukti daripadanya mengenai perkara ini.



[20] Mahkamah mendapati transaksi jual beli di antara Nazman bin Puteh dengan Wan Mohd Najib dibuat tanpa dokumen bertulis dan balasan bagi penjualan tanah tersebut adalah berjumlah RM1 juta dan pemberian tanah bagi membina jalan raya adalah sebagaimana terkandung dalam surat Nazman bin Puteh.

Ketiadaan tukar milik melalui Borang 12B dijelaskan oleh Nazman bin Puteh. Jika ada kehadiran 2 waris lain Wan Mohd Najib untuk memberikan keterangan mengenai perkara ini dapat menjelaskan kepada Mahkamah. Mahkamah hanya mendengar keterangan Plaintiff. Keterangan Nazman bin Puteh lebih diyakini.

[21] Mahkamah ini memutuskan bahawa berdasarkan undang-undang Nazman bin Puteh telah menyerahkan sebahagian tanah (yang dijualnya kepada bapa Plaintiff) kepada Defendan untuk tujuan rizab jalan.

Isu (b): sama ada Defendan telah melakukan pencerobohan sebahagian tanah Plaintiff?

[22] Isu pencerobohan yang dialegasikan oleh Plaintiff tidak berbangkit. Keterangan Defendan dengan jelas menyatakan bahawa sebagai pemaju perumahan, Defendan adalah tertakluk kepada undang-undang semua pihak yang terlibat termasuk arahan bagi pembinaan jalanraya dan/atau jalan akses ke projek perumahan tersebut. Mahkamah ini mendapati Defendan telah melaksanakan tugasnya untuk memastikan



pembinaan jalanraya dan/atau jalan akses diselesaikan mengikut peraturan yang menjadi obligasi Defendan kepada pembeli rumah di Taman Bukit Serdang/Serdang Heights.

Isu kerugian yang dialami dan berterusan dialami oleh Plaintiff.

[23] Berdasarkan keterangan Plaintiff, beliau menyatakan bahawa beliau masih boleh akses ke Lot 2269 melalui jalanraya yang ada iaitu Jalan Makmur 3/1. Plaintiff juga bercadang untuk memajukan Lot 2269 bagi pertanian dan akan membina jalan aksesnya sendiri.

[24] Saksi kedua Plaintiff ialah jurunilai yang dipanggil untuk memberitahu Mahkamah ini harga pasaran bagi sebahagian tanah Plaintiff yang dikatakan diceroboh itu. Selepas mendengar keterangan SP 2 dan menilai Laporan Penilaian PW2, Mahkamah ini mendapati Laporan Penilaian PW2 semata-mata untuk menyokong hal kerugian Plaintiff mengenai harga pasaran bagi penggunaan tanah Lot 2269 yang dituntut sebagai diceroboh.

[25] Dalam menilai keterangan yang ada di hadapan Mahkamah ini, tidak berlaku pencerobohan dan tuntutan ganti rugi sebanyak RM1,250,000.00 yang merupakan nilai pasaran kawasan yang diceroboh; ganti rugi teruk dan ganti rugi teladan untuk ditaksirkan adalah ditolak.



Isu lain untuk dibicarakan.

[26] Dalam mengupas 2 isu utama, Mahkamah telah menjawab isu lain yang disenaraikan oleh Defendan.

Keputusan

[27] Berdasarkan penelitian Mahkamah ini selepas meneliti semua dokumen dan keterangan lisan dan dokumentar yang dibentangkan oleh pihak-pihak di hadapan Mahkamah ini, dan hujahan bertulis, Mahkamah ini mendapati atasimbangan kebarangkalian Plaintiff gagal untuk membuktikan kesnya dan oleh yang demikian, **saya memutuskan tuntutan Plaintiff adalah ditolak dengan kos sebanyak RM18,000.00 (tertakluk kepada fi alokatur) dibayar oleh Plaintiff kepada Defendan.**

Evaluation and Findings of this Court after the full trial

[21] Based on the authorities such as **MBf Property Services Sdn Bhd v. Madhill Development Sdn Bhd (No. 2)** [1998] 4 CLJ 136 and **Senik v. Hassan & Anor** [1963] 1 LNS 120; [1963] 1 MLJ 368, a claim in trespass must show an unjustifiable intrusion; and a right to possession at the time the trespass is committed.

It is in essence and substance that the Plaintiff who had testified before this Court firmly believed that the Defendant had trespassed the Land.



[22] The Plaintiff's as the first Plaintiff's witness said in her witness statement (marked as "PSP-1") –

- (a) *tiada "easement" didaftarkan dalam Rekod Ketuanpunyaan, Rekod Urusan dan Perkara Lain Yang Melibatkan Hakimilik Tanah tersebut. (refer to PSP-1 at Answer no. 15).*
- (b) *saya dan suami telah pergi ke tanah tersebut untuk melihat keadaan tanah itu kerana saya tidak pernah ke sana sebelum itu. (refer to PSP-1 at Answer no. 17).*
- (c) *Tanah tersebut masih merupakan tanah yang belum dibangunkan dengan apa-apa projek. Tanah tersebut masih berkeadaan berhutan dan semak samun. Namun, apa yang memmeranjatkan saya ialah saya mendapati bahawa telah ada pembinaan jalan dan tembok pagar di atas sebahagian tanah milik saya itu.*

Di sebelah tanah saya itu terdapat satu kawasan perumahan dan saya percaya jalan tersebut dibina untuk kegunaan penduduk-penduduk di situ dan tembok pagar itu dibina untuk keselamatan penduduk-penduduk di situ.

Untuk memastikan dengan lebih lanjut sama ada jalan dan tembok pagar itu telah menceroboh tanah saya, saya telah melantik Juru Nilai untuk membuat satu Laporan Penilaian. (refer to PSP-1 at Answer no. 18).



[23] I observe from the fact as pleaded and during the cross examination by the learned counsel for the Defendant, the Plaintiff had stated –

- (a) did not know the condition of the Land. The Land was transferred atas “kasih sayang” from the Plaintiff’s brother to the Plaintiff on 22-3-2021. In reply to the learned counsel for the Defendant, the Plaintiff cannot remember the date when she and her husband visited the Land. According to the Plaintiff, she visited the Land in Year 2021 and maybe in March or April.
- (b) Plaintiff understand that in order to enter Lot 2269, she has to use Jalan Makmur 3/2 and finally enter into Jalan Makmur 3/2. The entrance location to Lot 2269 was contained in Laporan Penilaian.
- (c) Plaintiff disagreed that eventhough there is no access road to Lot 2269 and she has to use Jalan Makmur 3/1, the Trespassed Area was her Land. Plaintiff stated that the Defendant had encroached and trespassed to her land without any approval in law and without any legal documents.
- (d) Plaintiff agreed that the only access to Lot 2269 is Jalan Makmur 3/1 because Lot 2269 is a locked land.
- (e) Plaintiff doubted and disbelieved on the letter signed by Tn Haji Nazman and she said that in that letter there was no mentioned about Lot 2269.



[24] Next, the facts are derived from the Plaintiff during the cross examination by the learned counsel for the Second Defendant (before discontinuance of suit against the Second Defendant), the Plaintiff had stated –

- (a) Plaintiff's designation is Ketua Penolong Pengarah, Bahagian Pendidikan Menengah MARA.
- (b) Plaintiff has 7 siblings and Wan Mohd Nazmi and Wan Mohd Hisham are her brothers.
- (c) Lot 2269 is "harta sekeluarga".
- (d) Plaintiff had no personal knowledge about the sale and purchase agreement and any transactions pertaining to Lot 2269 between her late father and the seller (Tn Haji Nazman). The reasons were because she was 39 years old at that time and she lived in Kulim and only transferred to Kuala Lumpur in year 2015. Plaintiff said that "saya jarang bercakap dengan ayah tentang tanah" dan "maybe abang saya tahu tentang tanah".
- (e) the sale and purchase agreement was not produced in Court and not in the Bundle of Documents.
- (f) Plaintiff had admitted that the condition of the Road (Jalan Makmur 3/1) was fine and the Road is "bukan Jalan yang baharu dibina".



- (g) Plaintiff “percaya yang bina Jalan itu ialah Defendan dan tidak pasti tembok berpagar itu dibina oleh siapa”.
- (h) Plaintiff said that “Jalan Makmur 3/1 ada jalan berpagar, hanya penduduk dan tetamu sahaja yang boleh masuk”.
- (i) the Road was built not at the reserved land but on her land (Lot 2269) and also the fencing wall or anti-climb wall was built on her land (Lot 2269). The construction of the Road had taken 40% out of her land (Lot 2269).
- (j) Plaintiff said that “sekiranya tanah saya kekal, saya akan bina jalan masuk. Untuk akses ke tanah saya, saya akan bina jalan sendiri. Saya tak perlu guna samapai 50’.”.

[25] The Plaintiff’s two brothers that are Wan Mohd Nazmi and Wan Mohd Hisham were not called as the Plaintiff’s witnesses. The Land was first transferred to Wan Mohd Nazmi and then Wan Mohd Hisham. If the Plaintiff did not know the condition of the Land especially about the Road, it can be presumed that Wan Mohd Nazmi and Wan Mohd Hisham might know about the Land and also the Road.

[26] The Plaintiff clearly stated that she was caught by surprise that the Road was built and she admitted that “*saya percaya jalan tersebut dibina untuk kegunaan penduduk-penduduk di situ dan tembok pagar itu dibina untuk keselamatan penduduk-penduduk di situ.*”.



[27] There is no complaints by the Plaintiff to MBSJ regarding the Road that was said to be *telah ada pembinaan jalan dan tembok pagar di atas sebahagian tanah milik saya itu*. The claim in this suit was against the Developer and the “Penghuni dan/atau Pemilik Rumah” at the housing area. The Plaintiff did not at all sue MBSJ and did not call any of MBSJ’s officials to clear her “surprise” about “*telah ada pembinaan jalan dan tembok pagar di atas sebahagian tanah milik saya itu*.”.

Easements

[28] I would like to quote my Law School “teacher” text book (Student Edition) Land Law In Malaysia Cases and Commentary by Teo Keang Sood and Khaw Lake Tee, at page 463 –

“Easements, as a form of dealings, are provided for in sections 282-291 of the National Land Code 1965. An easement is a right granted by a proprietor of the servient land to the proprietor of the dominant land for the beneficial enjoyment of the latter’s land. An easement, under the National Land Code 1965 can only arise by way of express grant under section 284 of the said Code.

...

Rights able to be granted as easements under subsection (1) of section 283 of the National Land Code 1965 may be negative or positive in nature. The former usually requires the proprietor of the servient land to abstain from doing something which would interfere with the enjoyment of the dominant land, such as not to build on a specified portion of his land so as to preserve the access of light to



the dominant land. The latter allows the proprietor of the dominant land to do something in, over or upon the servient land, such as having a right to lay pipes under the servient land so as to convey water to the dominant land or a right to advertise on the outer wall of a building on the servient land.

An easement, once validly created under the National Land Code 1965 gives rise to a legal interest in the land which binds third parties taking from the proprietor of the servient land under paragraph (a) of subsection (3) of section 215 of the National Land Code 1965 or subsist for the advantage of the land for the benefit of persons taking from the proprietor of the dominant land under subsection (2) of section 215 of the National Land Code 1965.

It should be noted that an easement is an acquired right granted only with the consent of the proprietor of the servient land. While the right to support of land in a natural state under paragraph (b) of subsection (1) of section 44 of the National land Code 1965 is a natural incident of land ownership, the right to support of building from adjacent land must be acquired by way of an easement under subsection (1) of section 283 of the National Land Code.



In Tam Kam Cheong v. Stephen Leong Kon Sang [1980] 1 MLJ 36, the Federal Court (Salleh Abas FJ) held that for a claim of easement to be established, every easement must possess four characteristics, ie

- (1) There must be a dominant and servient tenement;*
- (2) An easement must accommodate the dominant tenement. ie appurtenant to it and connected with the normal enjoyment of the dominant tenement;*
- (3) Dominant and servient owners must be different persons; and*
- (4) An easement must be of such status as can be the subject-matter of a grant, ie its nature and extent should be capable of exact description.*

[29] The learned counsel for the Plaintiff submitted that –

“11. PW1 further said that her document of title did not reveal the existence of any easement or any registered interest by any other party on her land.”.



[30] PW1 in answering to the learned counsel for the Defendant's question "Kamu ada surat asal?", said that "Saya tak bawa. Bundle B3 muka surat 411 itu ialah salinan terkini yang saya ada."

[31] The document referred to by the PW1 is Borang 5DK Geran Mukim for Lot 2269 dated 1-7-2014.

[32] PW1 is unsure about the Road at Lot 2269. What is seen by her on the Pelan Tanah (Bundle B3 at page 414) there is one line (satu garisan) on the Lot 2269.

[33] Based on the land search conducted by him, PW2 explained that there is no easement registered on Lot 2269; Lot 2269 was overgrown with thick shrubs and secondary jungle; there is a housing development known as Taman Bukit Serdang adjacent to Lot 2269 separated by an anti-climb wall; and there is a service road known as Jalan Makmur 3/1 being the access road of Taman Bukit Serdang.

Based on the comparison method of valuation, PW2 testified that the value of the Trespassed Area of Lot 2269 is RM1,250,000.00.

[34] The fact that the Plaintiff had appointed PW2 is to value of the Trespassed Area and to prepare a legal claim against the trespassers. Therefore, the burden is on the Plaintiff to prove that the Defendant is the trespasser.



[35] The learned counsel for the Plaintiff had submitted in length about the concept of indefeasibility of title under the Torrens system and the related cases pertaining to the rights of the owner based on the title and interest by registration that is derived from the Torrens System.

[36] In this case, I concluded that there is no dispute that the Plaintiff is the proprietor and obtains an indefeasible title to Lot 2269. The encroachment and trespass as believed by the Plaintiff were done by the Defendant as the Developer of the housing area and who built the Road of part of Lot 2269. The Plaintiff averred that there is no surrender of part of Lot 2269 by the previous owner.

[37] The Plaintiff's evidences about the encroachment and trespass to Lot 2269 were lashed out by the Defendant when the Defendant called the previous owner of Lot 2269 that is Tn Haji Nazman. Tn Haji Nazman's testimony is credible and clear that before Tn Haji Nazman sell the Land to the Plaintiff's late father, Tn Haji Nazman had consented and authorized the Defendant to use a part or a portion of his land (Lot 2269) to build the Road.

[38] The learned counsel for the Defendant submitted that "... if the Plaintiff is still dissatisfied about the surrender of the portion of Lot 2269 for the construction of the said Road, Jalan Makmur 3/1, the correct Defendant could only be MBSJ but not the Defendant". I agree.



[39] The learned counsel for the Plaintiff asked this Court to determine whether the said promise of the previous owner of Lot 2269 to surrender part of the land, which is an unregistered interest, could defeat the Plaintiff's registered and indefeasible title over Lot 2269 pursuant to sections 89 and 340 of the National Land Code.

[40] The person who dealt with Tn Haji Nazman regarding the Road is En. Shum Yew Choong (DW2) who was the director of the Defendant and also the Project Manager for the Project. In DW1 witness statement, DW2 affirmed that –

- (a) the Project included the construction of a 50 feet reserve road in the Southern Part of Lot 2269.
- (b) Lot 2269 was owned by Tn Haji Nazman bin Puteh at that material time.
- (c) on or about 2004 to 2005, DW2 had approached Tn Haji Nazman (DW1) to discuss about the possible use of the Land. DW2 proposed that the Defendant will be responsible to build the Road Reserve which will be accessible for DW1 (and any subsequent owner of the Land), the residents of the surrounding properties and the public road users.



- (d) on or about 7-4-2005, DW1 wrote a letter dated 7-4-2005 to the Defendant (during the cross examination by the learned counsel for the Plaintiff, DW2 affirmed that DW2 was the one who prepared the letter), whereby DW1 agreed with the Defendant's proposal. DW1 had given out a part of Lot 2269 to the Defendant for the construction of the Road Reserve. All costs and expenses for the construction of the Road is borne by the Defendant.
- (e) upon receiving DW1's letter, the Defendant had engaged PEQ Consult Sdn Bhd to prepare Laporan Cadangan Pemajuan which was submitted to MBSJ. The Report is to enable the Defendant to make an application to MBSJ for Kebenaran Merancang to change the condition use for the lands from agriculture to building (housing). This is also allowed the Defendant to request from MBSJ for the permission to sub-divide the lands.
- (f) on 28-7-2005, MBSJ approved the Project and allowed the sub-division of the lands subject to the conditions as stated in MBSJ's letter.
- (g) the Project was completed by the Defendant and also the construction of the Road.
- (h) on 1-8-2011 MBSJ had notified the Defendant in writing that MBSJ had taken over maintenance works for the Road.



- (i) the Land was sold to the Plaintiff's late father on 16-12-2009 and at that material time, the Defendant had completed the construction of the Road. No complaints made by DW1 and the Plaintiff's late father about the construction of the Road on a part or portion of Lot 2269.

- (j) the Plaintiff only made the demand for the removal of the Road more than 10 years after the completion of the construction of the Project and the Road.

[41] Before Tn Haji Nazman (DW1) stepped down from the witness box after giving his evidence DW1 said that "Yang Arif, jika susah macam ni saya sanggup pulangkan duit bayaran pembelian tanah Lot 2269 sebanyak RM1,000,000.00 dan saya akan usahakan bayar."

[42] The Plaintiff had relied solely on the Juru Nilai that was appointed by the Plaintiff that is Tetuan Trasasia Property Consultancy Sdn Bhd.

The Valuation Report by the Valuer

[43] En. Amar Akmal bin Zakaria, the Plaintiff's second witness (Plaintiff Witness 2/PW2) is the person who prepared and wrote the Valuation Report (refer to Bundle B4 at pages 769 to 788).

[44] During the cross examination, PW2 answered that the objective/purpose of the Valuation Report is to value the Plaintiff's Land; and PW2 did the site visit to the Land on 25-3-2021 and the Valuation Report is ready on 2-4-2021.



[45] The Report and Valuation for An Agricultural Land with Development Potential Identified as Lot No. 2269, Title No. GM 675, Locality of Sungai Kuyow Settlement, Mukim and District of Petaling, State of Selangor Darul Ehsan; Locality: Lot 2269, Jalan Makmur 3/1, Taman Bukit Serdang, 43300 Seri Kembangan, Selangor Darul Ehsan (refer to Bundle B4 pages 769 to 788) stated that –

- (a) Opinion on Market Value: RM3,100,000.00.
- (b) Market Value of the Trespassed Area: RM1,250,000.00.
- (c) Purpose of Valuation: Expressing fair market value.
- (d) Date of Valuation: 25 March 2021.
- (e) Sales Evidence (the Valuer noted the transactions of comparable properties in the locality in particular Lot 2182, Lot 2194 and Lot 2150). The Source: Jabatan Penilaian dan perkhidmatan Harta (JPPH).

[46] I observe that PW2 in his evidence firmly hold on the Valuation Report but the answers given by PW2 during the cross examination, had failed to consider certain facts and documents tendered in the trial, –

- (a) PW2 agreed that he failed to ascertain whether the previous owner of Lot 2269 had given consent or agreed to surrender the portion of Lot 2269 for the construction of the Road.



- (b) PW2 admitted that without ascertaining the facts from the previous owner, he would not be able to determine whether there was an act of trespass by the Defendant.
- (c) PW2 failed to conduct any boundary check on site as he is not a registered surveyor. Hence, PW2 could not determine whether there was an act of trespass by the Defendant. PW2 also had assumed the boundaries corresponded with the configuration based on the site plan.
- (d) PW2 had advised the Plaintiff to appoint a licensed land surveyor in order to verify and to confirm the exact site at the Trespassed Area. The Plaintiff nor the Valuer had not ascertained that a licences land surveyor was appointed.
- (e) in preparing and finalizing the Valuation Report, PW2 had admitted that he was not been given and/or provided with Tn Haji Nazman's letter dated 7-4-2005; Laporan Cadangan Pemajuan oleh PEQ Consult Sdn Bhd (Jururancang Bertauliah); Sijil Layak Menduduki by MBSJ to 114 Unit Rumah Teres 2 Tingkat, 5 Unit Rumah Teres 2 1/2 Tingkat dan 1 Unit Pencawang Elektrik; MBSJ's letter to Defendant in notifying that MBSJ is taking over the control, management and maintenance of cleaning work for Jalan Makmur 3/1.



[47] The learned counsel for the Defendant submitted that PW2 prepared the Valuation Report without evaluating the facts of the case thoroughly. I agree. The documents as referred by the Defendant to PW2 were important documents in order to establish whether the Defendant had trespass to the Land.

[48] In the notice of demand dated 20-5-2021 (Bundle B5 at page 810), the learned counsel for the Plaintiff stated –

“We are further informed that via an inspection done by our client’s Valuer on 25-3-2021, it is found out that you, without our client’s consent and permission, have wrongfully encroached and entered upon the Land and thus, have committed the act of trespass to the Land.”.

[49] Having carefully considered the Valuation Report, I am of the view that the main purpose of the Valuation Report is “Expressing fair market value” of the Land. The inspection by PW2 and his team did not at all showed that the Defendant had wrongfully encroached and entered upon the Land and had committed the act of trespass to the Land. I am agreed with the learned counsel for the Defendant that the inspection by PW2 could not carry any weight to prove that the Defendant had wrongfully encroached and entered upon the Land and had committed the act of trespass to the Land.

[50] As to the question raised by the learned counsel for the Plaintiff about the indefeasible of title that based on the document of title, it is conclusive evidence of ownership in the name of the Plaintiff, this Court fully agreed that the Plaintiff was the registered owner of Lot 2269.



[51] After Lot 2269 was sold by DW1 to Wan Mohd Najib on 16-12-2009, the title of the Land was transferred and registered to Wan Mohd Najib. The second transfer was from Wan Mohd Najib to his son (Wan Mohd Nazmi/the Plaintiff's elder brother) dated 25-3-2014 and then the third transfer was 2 years after that (dated 13-6-2016) the Land was transferred by Wan Mohd Nazmi to Wan Mohd Hisham/younger brother. The fourth transfer was from Wan Mohd Hisham to the Plaintiff.

From the evidence before me, even though the transfer of the title was made to Wan Mohd Najib and his children, the transfers of the title was undisputed. The condition of the Land is as of what was sold by DW1 to Wan Mohd Najib at the material time.

[52] Tn Haji Nazman's letter dated 7-4-2005 is in Bundle B5 at page 850 stated as follows:

“CADANGAN UNTUK MEMBINA 44 UNIT BUAH RUMAH BERKEMBAR 2 TINGKAT DARIPADA LOT PT 2263 HINGGA KE LOT PT 2268, MUKIM PETALING, DAERAH PETALING, SELANGOR DARUL EHSAN UNTUK TETUAN PESAT BUMI SDN BHD – 50' Road Reserved (Letter of Consent)

...

As agreed, I will like to pledge my consent to surrender and build the 50' road reserved (Simpanan Jalan) with the road level as indicated in the copy of the master plan attached, connecting with the surrounding proposed roadways benefiting both parties.



Further to the above, I will also like to take this opportunity to confirm M/S Pesat Bumi Sdn Bhd intention to provide the connecting 50' roadways between Lot PT 2267 and Lot PT 2268 as indicated in your master plan (copy attached).”.

This letter was signed by DW1 and DW1 affirmed that this is the letter given by DW2 for him to sign.

[53] When the Plaintiff's late father wants to buy the Land, he had visited the Land and at that material time the construction of the Road was in progress. The Plaintiff has no personal knowledge about this information either from her late father or from her two brothers.

[54] On the issue about Borang 12B, the learned counsel for the Defendant asked DW1 the reason for not submitting Borang 12B to the Land Office, DW1 in re-examination answered and explained that –

“Okay masa tu Wan Mohd, dia kata dia akan uruskan sendiri, padahal ejen saya pun nak tolong dia, mungkin lah takut lah keluar lagi duit, dia tak nak kot. Saya pun tak tahu lah.”.

[55] The evidence before me had established that the buyer of the Land that is Wan Mohd Najib (the Plaintiff's late father) had full knowledge about the surrender of a portion of Lot 2269 to the Defendant for the construction of the Road.



[56] The statements by the Plaintiff that “*Namun, apa yang memeranjatkan saya ialah saya mendapati bahawa telah ada pembinaan jalan dan tembok pagar di atas sebahagian tanah milik saya itu. Di sebelah tanah saya itu terdapat satu kawasan perumahan dan saya percaya jalan tersebut dibina untuk kegunaan penduduk-penduduk di situ dan tembok pagar itu dibina untuk keselamatan penduduk-penduduk di situ.*” cannot changed the fact that the construction of the Road was built by the Defendant with the Letter of Consent from DW1.

[57] The learned counsel for the Defendant emphasized on the legal maxim *nemo dat quod non habet* (means “no-one can transfer what he has not got”) that was quoted from the Federal Court’s case **Sia Hong Tee & Ors v. Chong Su Kong & Ors** [2015] 4 MLJ 188. This maxim applies to all the subsequent owners of Lot 2269 (that are the Plaintiff and her 2 brothers) as they are bound by the actions of the previous owners of Lot 2269 (that are Tn Haji Nazman and Wan Mohd Najib) to the Defendant for the construction of the Road. The subsequent owners of Lot 2269 (that are the Plaintiff and her 2 brothers) are estopped from claiming the portion of Lot 2269 from the Defendant.

[58] It is trite law that the Plaintiff has the legal burden to prove the alleged trespass and encroachment on a balance of probabilities - please refer to the Federal Court’s judgment delivered by Richard Malanjum CJ (Sabah & Sarawak) (as he then was) in **Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd** [2015] 5 AMR 497, at [48] to [53].



[59] The Court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In the present case, I had to take into consideration the witnesses' power of observation, their accuracy for recollection, and capacity to explain what they remember.

[60] The Plaintiff had failed to prove to this Court that she is entitled to the damages of RM1,250,000.00 being the fair market value of the Trespassed Area of the Land. There is no act of trespass committed by the Defendant.

[61] Regarding the fencing wall or anti-climb wall that was build adjacent to Lot 2269, the Defendant denied that there is any discussion with DW1 and MBSJ on the construction of the fencing wall or anti-climb wall. The building of the fencing wall or anti-climb wall was not part of the Planning Permission or Building Plan that was approved by MBSJ before the commencement of the Project.

[62] The learned counsel for the Defendant had suggested to the Plaintiff that she can remove the fencing wall or anti-climb wall by all means.

[63] The Plaintiff only concerned and focussed on the trespass to her land and the Plaintiff had forgotten that the Lot 2269 is a locked land whereby there is no direct access to and fro Lot 2269. The Plaintiff also testified that when she and her husband visited Lot 2269, they used the access road that is Jalan Makmur 3/1. The Road had benefitted DW1, Wan Mohd Najib and his children. They would be able to access to Lot



2269 via Jalan Makmur 3/1. This is also highlighted in paragraph 3.4 Laporan Cadangan Pemajuan. Another positive side is that by constructing the Road as required by MBSJ in the Project, it would greatly increase the value of the surrounding lands including Lot 2269.

[64] The Plaintiff is dissatisfied and told this Court that she has to get permission from the security since there is the boom gate. The Plaintiff stated that the fencing wall or anti-climb wall and the boom gate were not built by the Defendant. Therefore, the suggestions that the Plaintiff can restore Lot 2269 back to its original by removing or demolishing fencing wall or anti-climb wall and the boom gate are the Plaintiff's rights and choices.

Conclusion

[65] For the foregoing reasons, it is my judgment that having evaluated the evidence adduced at trial, I find that the Plaintiff has failed to establish its claims against the Defendant. As such, I dismissed the Plaintiff's claims with costs to all the Defendants (subject to allocator fee).

Dated: 3 February 2023.

Rozi Bainon

(ROZI BINTI BAINON)

Judicial Commissioner

High Court NCvC12

Shah Alam



Counsels:

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For the Defendant (Repondent):

Dato' Ringo Low Kim Leng bersamanya Melvin Chong Jia Shern (Pupil In Chambers)
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