

**IOI CORPORATION BHD v.
GEMENCHEH GRANITE SDN BHD**
HIGH COURT MALAYA, SHAH ALAM
ROZANA ALI YUSOFF JC
[CIVIL SUIT NO: 22NCVC-1040-08-2012]
20 FEBRUARY 2015

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TORT: Trespass to land – Damages – Defendant operated quarry activities – Deposit of quarry waste and materials on plaintiff's land – Encroachment – Whether defendant's activities destroyed plaintiff's land – Whether expert evidence tendered to show that plaintiff's land not viable for cultivation of palm oil – Measure of damages – Whether special damages for loss of use of land allowed – Whether claim for repair and rehabilitation of plaintiff's land allowed – Whether plaintiff took immediate steps to avoid defendant from trespassing on land – Whether plaintiff mitigated losses – Whether claim to prevent further trespass allowed although plaintiff obtained injunctive relief – Whether exemplary damages awarded

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The plaintiff was the owner of thousands of acres of palm oil estate located in Negeri Sembilan, including the land known as Geran 36738 Lot 10607 and Geran 3088 Lot 2942 ('the said land'). The defendant was the owner of the land adjacent to the said land and operated quarry activities which involved extraction of rocks, producing crusher run, gravels and other quarry by-products. In or about the year 2008/2009, the plaintiff commenced planting oil palm on a commercial basis on the said land. In March 2011, the plaintiff discovered that the planted area was actually smaller due to the encroachment/trespass by the defendant into the said land. As a result, numerous letters were issued to the defendant to cease and desist from further encroachment or trespass. *Vide* this suit, the plaintiff claimed for, *inter alia*, an injunction to restraint the defendant from encroaching and continuing any activities, quarry works and/or any action which caused blockage to the water flow from the stream and caused flooding on the said land. The plaintiff submitted that (i) the said land was originally a virgin forest land with good fertile and suitable soils for oil palm cultivation; (ii) the defendant had trespassed at the boundary between the defendant's land and the said land and part of the said land had been used as dumping zones; (iii) due to the defendant's act of trespass, two areas on the said land were barren; (iv) as a result of the defendant's quarry activities, the water flow at the stream that crossed the said land had been blocked and became prone to flood; (v) the defendant's act of blocking the stream flowing out of the said land was a form of trespass and nuisance; (vi) the defendant's quarry activities and failure to maintain their land and slopes had caused landslide on their land which later escaped and destroyed

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A part of the said land; and (vii) the defendant's act had destroyed part of the top soil on the said land and the usable area for planting became smaller and not economically viable for cultivation. The plaintiff alleged that the defendant's witness ('DW4') agreed during cross examination that the affected area on the said land was barren which meant that nothing could
B be grown. It was also submitted that the defendant had knowledge about the notice of trespass *vide* the plaintiff's letter dated 22 March 2012. However, the defendant only moved out from the said land on or about 31 March 2012 but again in July 2013, the defendant was found encroaching on the said land. The plaintiff claimed, *inter alia*, (a)
C RM682,930 for loss of use of the said land; (b) RM10,000 for restoration works to prevent flood and siltation on the said land; (c) RM5,000 for each day beginning on 11 March 2011 to 31 March 2012 and each day for encroaching the said land in future; (d) RM20,000 for the construction of fence/wall along the boundary of the said land and the land occupied by the defendant; and (e) general damages including aggravated and exemplary
D damages. The defendant, on the other hand, admitted that they had deposited quarry waste on part of the said land and did not deny the fact that they had trespassed or encroached into the said land. However, the defendant disputed the damages claimed by the plaintiff since the latter failed to produce expert witnesses to support their assertions.

E **Held (allowing plaintiff's claim in part):**

- (1) The defendant did not deny that they had trespassed or encroached into the said land. Therefore, the issue of trespass and liability were no longer in dispute and the defendant was found to have committed an act
F of trespass. As such, the injunctive reliefs sought by the plaintiff were allowed. (para 32)
- (2) In a claim for special damages, it has to be specifically pleaded and strictly proved. The plaintiff failed to provide scientific or technical evidence to prove that the soil samples from the affected area were
G no longer viable for the cultivation of oil palm. The plaintiff only made an assumption that the affected area was viable for cultivation but offered no independent evidence such as expert witnesses or at the very least produced soil analysis report of the affected area. At this stage, the plaintiff must prove its allegation. It was also unsafe to
H make an analysis and conclude that the land was barren through DW4's statement where it was not scientifically proven. (para 34)
- (3) The plaintiff offered no expert or technical evidence to show that the affected land was not viable for cultivation prior to the trespass and there was no evidence that the plaintiff had cultivated oil palm on the
I affected land earlier on. The plaintiff's contention that they had been cultivating oil palm on the other part of the land and concluded that the affected land was viable was a thin argument for lack of definitive

- or scientific basis. Therefore, the actual loss was not proved and the claim in respect of this damages for loss of use of the land was not allowed. (para 35) **A**
- (4) The affected land was damaged due to the defendant's conduct in depositing the quarry waste but the plaintiff failed to satisfy that the entire affected land was lost for its use. The court could not be expected to make assessment of what damages should be awarded based on the expected profit grounded on average oil palm price. It could not be agreed that the measure of damages should be based on costs of repair and rehabilitation since that there was no sufficient evidence that the whole of the plaintiff's affected land was not suitable for oil palm cultivation. Further, the estimate total costs of repair and rehabilitation amounting to RM1,215,800 should not be considered as it was not specifically pleaded. (paras 37 & 38) **B**
- (5) The defendant's quarry material and culverts built blocked the outflow of the natural stream that had accumulated and prevented water from flowing out which eventually caused a backwash and pond in the said land. A sum of RM10,000 was reasonable for the plaintiff to remove all the obstacles and for the restoration works. Therefore, the plaintiff's claim for the restoration of land to prevent flood and siltation on the said land was allowed. (para 39) **C**
- (6) Trespass to land is actionable *per se* without requirement of any proof. The tort of trespass requires the act of entering a land in the possession of another without lawful justification. On the facts, there were evidences of trespass on part of the defendant in carrying out their activities as a quarry operator. The plaintiff reminded the defendant to move out from the said land and to stop the encroachment. However, the defendant only moved out on or about 31 March 2012 but again in July 2013, the defendant was found to have encroached on the said land. The defendant had knowledge of the notice of trespass *vide* the plaintiff's letter dated 22 March 2012. As such, the defendant's act of trespass began on 22 March 2012 to 31 March 2013 (375 days). (paras 40 & 43) **D**
- (7) The amount of RM5,000 per day was reasonable taking into consideration the nature of usage of the said land by the defendant and given that the land was vacant and unoccupied at the material time where its use had been deprived. However, it took quite a time for the plaintiff to take an action against the defendant for trespass. An injunctive relief could have been sought by the plaintiff earlier and not allowing the act of trespass to continue for more than a year. Further, the plaintiff failed to mitigate its losses. As such, the sum of **E**
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- A RM937,500 was awarded as damages for trespass based on the following calculation: (RM5,000 x 375 days = RM1,875,000 minus 50% for failure to mitigate). (paras 44 & 45)
- (8) The claim for RM20,000 to build a fence/wall at the border as a measure to prevent further trespass did not fall within the ambit of damages since the objective was to place the aggrieved party in a position as if the tort had not been committed at all and not designed to profit the said party. The granting of injunction as a relief was sufficient to prevent the defendant from entering the said land. Therefore, this claim was not allowed. (para 46)
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- C (9) Exemplary damages are punitive in nature. Although the defendant had knowledge about the trespass and a notice had been sent by the plaintiff since March 2011, the defendant deliberately and intentionally carried out the act of trespass. This conduct resulted in a profit by maximising it through the disposal of quarry waste and storage of quarry stocks at the neighbouring land, *ie*, the said land. An award for exemplary damages was justified as the defendant felt that the gain from the deliberate trespass would outweigh any compensation it might have to pay. As such, an amount of RM50,000 was awarded to the plaintiff in respect of exemplary damages. (para 47)
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- E **Case(s) referred to:**
Esso Petroleum Co Ltd v. Southport Corporation [1955] 3 All ER 864 (*refd*)
Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC (*refd*)
Inverurie Investments Ltd v. Hackett [1995] 1 WLR 713 (*refd*)
Kwong Hing Realty Sdn Bhd v. Malaysia Building Society Bhd & Anor [1997] 1 CLJ Supp 167 HC (*refd*)
- F *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 1 LNS 52 FC (*refd*)
Penarth Dock Engineering Co Ltd v. Pounds [1963] 1 Lloyd's Rep 359 (*refd*)
Raphael Pura v. Insas Bhd & Ors [2003] 1 CLJ 61 FC (*refd*)
Rookes v. Barnard [1964] AC 1129 (*refd*)
- G *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35 CA (*refd*)
Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC (*refd*)
Thorp v. Holdsworth [1876] 3 Ch D 637 (*refd*)
- Legislation referred to:**
- H Rules of Court 2012, O. 40A r. 3
- Other source(s) referred to:**
Halsbury's Laws of England, 4th edn, vol 45(2) (London: Butterworths, 1999)
For the plaintiff - Joseph Ting (CM Tay with him); M/s Joseph Ting & Co
For the defendant - Murali Echan; M/s K Kulasekar, Achan & Assocs
- I *Reported by Kumitha Abd Majid*

JUDGMENT**A****Rozana Ali Yusoff JC:****Introduction****[1]** The plaintiff claims are as follows:

- (a) An order for injunction to restraint the defendant from encroaching the plaintiff's land known as Geran 36738 Lot 10607 and Geran 3088 Lot 2942 Mukim Gemencheh, Daerah Tampin, Negeri Sembilan (the said land). **B**
- (b) An Order for injunction to restraint the defendant from continuing any activities, quarry works and /or any action that cause or would cause blockage to the water flow from the stream which had resulted flooding to the said land. **C**
- (c) The defendant to pay the plaintiff RM682,930 for loss of use of the said land. **D**
- (d) The defendant to pay the plaintiff RM10,000 for restoration works to prevent flood and siltation in the said land and also in future.
- (e) The defendant to pay the plaintiff RM5,000 for each day beginning on 11 March 2011 to 31 March 2012 and for each day for encroaching the said land in future. **E**
- (f) The defendant to pay the plaintiff RM20,000 for the construction of fence/wall along the boundary of the said land and the land occupied by the defendant.
- (g) General damages including aggravated and exemplary damages for an act of trespassing by the defendant for assesment by the Senior Assistant Registrar. **F**
- (h) Interest at the rate of 5% per annum for item (c) to (f) above calculated from 11 March 2011 to the date of judgement. **G**
- (i) Interest at the rate of 5% per annum for item (c) to (g) above calculated from 11 March 2011 to the date of realisation.
- (j) Further relief as the court deems fit.
- (k) Costs on Solicitor-Client basis. **H**

Fact Of The Case**[2]** The plaintiff is the owner of thousands of acres of palm oil estate known as Regent Estate located near the Gemencheh town in Negeri Sembilan including the said land. The said land though form part of the Regent Estate are separated from the other main body of lands forming the Regent Estate and stand alone. **I**

A [3] The defendant is the owner of the land adjacent to the said land who operates quarry activities which involved extraction of rocks, producing crusher run, gravels and other quarry by-product.

B [4] In or about year 2008/2009, the plaintiff commenced planting oil palm on a commercial basis on the said land. On or about March 2011 the plaintiff discovered the planted area is actually smaller due to the encroachment/trespass by the defendant into the said land. Thereafter the plaintiff issued numerous letters demanding the defendant to cease and desist from further encroachment or trespass. Eventually the plaintiff filed an action that led to this claim.

C **List Of Witness**

[5] Plaintiff's Witnesses

| No | Name | Occupation |
|--------------|---------------------------------------|----------------------------------|
| D PW1 | Dato' Foong Hong Meng | Group Plantation Director of IOI |
| PW2 | Manimaran s/o Kuppusamy Estate Melaka | Assistant Manager at Regent |
| PW3 | Lim Eik Hoy | General Manager of IOI Resort |
| E PW4 | Tan Teck Hock | Manager of IOI |

[6] Defendant's Witness

| No | Name | Occupation |
|--------------|---------------------------------|-------------------------|
| F DW1 | Nor Azli bin Mohammad | Technician Surveyor |
| DW2 | Abdullah bin Md Yusop | Lab Assistant |
| DW3 | Mohd Fadzil bin Ahmad | Production Manager |
| DW4 | Alhagananthan a/l T.S Ganapathi | Lecturer and Consultant |

G **Plaintiff's Submission**

H [7] The plaintiff submitted that the said land was originally a virgin forest land with good fertile and arable soil. The soil composition in the said land is known as the Rengam Series soil which is one of the most suitable soils for oil palm cultivation. It has always been the plaintiff's business and intention to cultivate palm oil on a commercial basis on the said lands.

I [8] The plaintiff contended that the trespass committed by the defendant came from 2 major areas. The first area is at the boundary between the defendant's land and the said land. The defendant land sits on the high ground where the defendant dumped rocks, gravels, debris and other quarry materials onto the slope which fell onto the said land at the lower end of

the slope. The second area is where the defendant had used part of the said land for dumping zones to pile up their crusher run. As a result of the defendant's act of trespass, the two areas on the said land are currently barren.

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[9] The plaintiff also contended that as a result of the defendant's quarry activities, the water flow at the stream that crossed the said land had been blocked and becomes silted and prone to flood. The blockage had caused the water could not be discharged in sufficient volume when it rains or where there is high quantity of water flowing through the said land. The disrupted flow of water had caused the water to backwash and frequent occurrence of flooding that had washed away the top soil which caused siltation and rendering the area non-arable. Therefore, the defendant's act of blocking the stream flowing out of the said land is a form of trespass and nuisance.

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[10] The plaintiff submitted that the defendant's quarry activities and failure in maintaining their land and slopes had caused landslide to occur in their land which later escaped and destroyed part of the said land. This event had caused a substantial part of the top soil in the said land been destroyed and had rendered the usable area for planting become smaller and not economically viable for cultivation. As a result the plaintiff had no alternative except to abandon the cultivation on entire part of the said land. The defendant's expert witness, DW4, claimed that the said land can be planted if the soil is amended, but in the cross examination, DW4 could not give any indication at all as to what kind of yield the plants would produce and unable to explain what is the yield that would be required of the oil palm trees per hectare to make the oil palm cultivation commercially viable. The plaintiff submitted that if the oil palm trees cannot yield enough fruit, the plaintiff cannot proceed with the cultivation for a profitable commercial business.

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[11] The plaintiff submitted that DW4 has agreed during cross examination that the affected area of the said land is barren which means that nothing can be grown. This barren state had existed at the time when this suit was filed in 2012 and even after two years, the said land remained barren. DW4 admitted that the said land will remain barren unless and until is amended. The evidence of photographs at pp. 179, 180, 181 and 182 of Bundle I depict such barren state.

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[12] The plaintiff also submitted in respect of loss and damages, DW4 had testified that it is impossible for the said land to be reinstated into its original state and condition and thus restitution is no longer possible. The defendant had not shown any evidence that the said land can be amended so as to render commercial cultivation of oil palm trees viable or profitable.

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- A** The DW4 testimony as an expert witness is of no help to the defendant in the defence and did not establish that the said lands can be amended sufficiently so that the plaintiff could continue to cultivate oil palm on a commercial basis. The plaintiff submitted with regards to their losses and damages, they had suffered loss of use of said land to cultivate oil palm.
- B** [13] As to the calculation for the loss and damages suffered by the plaintiff, PW3 had based the said calculation on the average oil palm prices over the past 24 months prior to the filing of this suit and on the production rate calculated at tons per hectare for the oil palm trees which would have grown on the said land taking into account of the yield based on the result produced by Malaysia Palm Oil Board Record. The claimed nett value of RM682,930 is derived from the outcome after having considered and deducting all costs. Therefore if not because of the defendant's activities and trespass, this would be the income that the plaintiff would have reasonably received from the cultivation of oil palm on the said land. Furthermore
- C** PW3's evidence was not disputed in cross examination.
- D** [14] The plaintiff submitted that RM682,930 can be awarded as general damages instead of as special damages. The amount is fair and a reasonable sum for the loss which the plaintiff had suffered from the loss of use of the said land. In the alternative, the plaintiff submitted that the measure of damages should be based on costs of repair and rehabilitation of the plaintiff's land, although it would not be practical or economical viable to do so.
- E** [15] The plaintiff contended that the said land was all along intended for agricultural purposes and the quantification of the damages should be based on the costs of repair and rehabilitation of the land to the extent that the said land can be cultivated on a commercial basis. From the evidence of PW1, the amount would be more than RM1,215,800. The estimated total costs of acquiring top soil required in oil palm plantation is around RM880,000, the estimated cost of excavating and removal of quarry waste is around RM277,400 and the estimated cost of filling up and compact the top soil evenly over the land is around RM58,400. All these costs have not taken into consideration of the supervision costs and other costs incidental for the rehabilitation of the said land. Therefore the plaintiff submitted that if the compensatory damages is to be awarded, the amount should not be less than RM1,215,800 as these costs have not included other expenses incidental to the rehabilitation of the said land.
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- I** [16] The plaintiff also prayed for exemplary damages to be awarded and assessed in order to set an example so that in future the defendant would be more careful not to wantonly trespass into the plaintiff's lands for their own benefit or profit. The plaintiff relied on the legal principle laid down in *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35 where the Court of Appeal held that:

[4] the trial judge in awarding the damages had taken into consideration what was just and fair to all parties concerned; taking into consideration the sufferings of the respondent who saw his intention to developing the whole of the said land being demolished and the attitude of the appellant in total disregard and disrespect of the rights and properties of its neighbours. The learned judge, in his judgment, found that the appellant's conduct of trespassing was a conduct calculated to result in profit to the appellant. Despite the notice being given by the respondent in respect of the trespass, the appellant persisted in the trespass until the project in respect of that part of its land has been completed. The appellant did not deny the trespass and as a result of that the respondent's land was damages. Taking the circumstances and the scenario of what happened and the attitude of the parties, the Court of appeal was of the view that the learned judge was justified in arriving at his award.

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[5] The trial judge correctly pointed out that the conduct of the parties was a relevant consideration in the calculation of exemplary damages. On the facts, the conduct of the appellant was not only calculated to result in a profit but also of total disregards to its neighbours. The appellant would ignore any complaint as long as it could get benefit in terms of money from what it was doing. The appellant wanted to get the full benefit from its land at the expense of others. The award of exemplary damages was calculated at the rate of 25% of the compensatory damages awarded. On the whole, there was no reason to disturb the finding of the learned judge and the award made by him. His judgment was supported by findings of facts and the law. By majority, the decision of the learned judge in respect of liability and quantum was upheld ...

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[17] The plaintiff emphasised on the point that despite the defendant had knowledge about the boundary of said land, they continue to trespass deliberately and intentionally without regard to the plaintiff's right and had resulted to a permanent encroachment which had affected the future remedial works.

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Defendant's Submission

[18] The defendant admitted that they had deposited quarry waste on part of the said land. However, the defendant disputes the damages claimed by the plaintiff on the basis that the plaintiff failed to produce expert such as hydrologist or engineer or technical witnesses to support their assertions. Even though the plaintiff has the resources to produce expert and technical evidence to support its claim but it has not done so. The same situation applies to the natural stream flowing through the said land which the plaintiff had alleged that the defendant's act in any way impeded the flow of the stream and caused flooding. Further, no map or survey plan or other technical report showing the natural flow of the stream was produced by the plaintiff. PW1's evidence was based on the alleged observation made

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A with his naked eyes and did not personally witness the defendant had dumped quarry material on the said land. The defendant submitted the plaintiff has failed to prove the causal link between the damage and the acts of the defendant.

B [19] The defendant also submitted that all of the plaintiff's witnesses are not independent witnesses since they are the employees of the plaintiff. Additionally, in so far as the plaintiff seeks to present those witnesses as experts, their evidence ought not to be taken into account for failing to comply with O. 40A r. 3 of the Rules of Court 2012.

C [20] The defendant submitted that they had produced an independent survey plan of the said land and showed that the area that they had placed the quarry material is a different area where the landslide occurred. At the same time the plaintiff had failed to prove that the area of the said land is not suitable for oil palm cultivation due to the defendant's encroachment or trespass. In turn, the defendant submitted that the areas are still suitable for planting oil palm which is evident from the plan itself that describes it as "Planted Area" and thereby it is not true to say that the entire land was lost.

D [21] The defendant contended that since the plaintiff realised a large part of the said land is muddy, the plaintiff would not have started planting since it was no longer commercially viable for cultivation. On the contrary, the plaintiff did begin plantation activities and this casts doubt on its claim that the land is no longer viable. PW2 testified that when he entered the land in 2009 he realised that the area was muddy. Nevertheless, he began plantation activities on the land and this act of starting plantation activities negates the plaintiff's allegation that the land is not commercially viable for oil palm cultivation. The defendant refers to the Federal Court case of *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99 where the respondent was in the business of rearing fish. He alleged that as a result of mining operations conducted by the appellant, his fish ponds were polluted and he claimed damages, *inter alia*, for the loss of fish and profits. At the High Court the respondent's claim was allowed and he was awarded damages. On appeal the decision of the High Court was reversed. The Federal Court in reversing the judgment held, *inter alia*, as follows:

H In the third place, there was no evidence whatsoever that the death of any fish seen floating on the surface during those three weeks was due to pollution of water by the appellants' mining operations. If the pollution was in truth the real cause of death in December 1964, it is surely logical that the continuance of mining operations thereafter must have rendered the waters of the pond progressively unsuitable for any further pisciculture. Yet out of the respondent's own mouth, was divulged the fact that in 1965 he had restocked these same waters with still more fish, without any evidence of detriment to such fry.

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[22] The defendant submitted that the plaintiff failed to prove that the defendant had caused part of the said land to be in a state of barren. The plaintiff's conclusion that the land is barren by relying on the evidence of DW4 who testified that part of the said land looks barren by only referring to photographs. The defendant contended that it is an incorrect analysis of the evidence because there are no soil samples been analysed and no scientific conclusion that part of the said land was in fact barren.

[23] The defendant submitted that the plaintiff's pleaded case is that the entire land is no longer viable for cultivation of oil palm. In essence the plaintiff pleads that the entire land is lost to it in so far as planting oil palm is concerned. It is on this basis that the plaintiff claims loss of profits. If the plaintiff fails to prove that the defendant was responsible for the damage to the whole of its land then the plaintiff is not entitled to any substantial damages and if at all, is only entitled to nominal damages.

[24] The defendant submitted that the plaintiff has failed to prove that the damage in the encroached area had caused the oil palm to become not suitable for cultivation. The evidence of PW3 should not be given any weigh since his calculation was based on the assumption that the entire land was not suitable for the cultivation of oil palm. In addition, no soil analysis report of the encroached area has been produced. No explanation was offered as to why when scientific evidence of the state of the soil could have been obtained was not produced.

[25] As to the claim for general damages in respect of repairs and rehabilitation works, the defendant submitted that it is an afterthought since there is no reference been made in the statement of claim. The defendant submitted that the cost of repair and rehabilitation should fall under the category of special damage in that it can be calculated and quantified and must be specifically pleaded.

[26] The defendant submitted that the plaintiff cannot relied on the evidence of quotations from a supplier and earthworks contractors as to the cost of restoration produce by PW1 who is not an earthwork contractor and is not in the business of selling soil. The evidence of PW1 is a hearsay because he obtained the costs from a general survey that he had conducted.

[27] In relation to the exemplary damages, defendant submitted that it's workers had unwittingly deposited quarry material onto the said land believing that the land belonged to the defendant because the boundary between the said land and of the defendant's land was not clearly demarcated. The defendant contended that it had resolved the matter with the plaintiff by removing the quarry material from the said land.

A [28] The defendant submitted that plaintiff has failed to prove that the defendant was responsible for causing any flood and did not provide any evidence to establish the cost of RM10,000 for draining the flooded area. The defendant also submitted that the same reasoning applies to the cost of building a fence. There is no quotation from a contractor was produced to establish the sum of RM10,000 and RM20,000 being the cost of drainage and building a fence/wall respectively. In fact the plaintiff should bear the cost of it, if it wishes to build a fence/wall around the perimeter of the boundary of the said land.

C [29] The defendant submitted that the plaintiff's claim for a sum of RM5,000 a day for trespass was not established because the calculation has no basis and has not been established. It is an arbitrary amount unsupported by evidence. In any event, the defendant has cleared the quarry material on the said land.

D [30] As to the injunction sought by the plaintiff in para. 19 (a) and (b) of statement of claim, the defendant submitted that the plaintiff has failed to prove that the defendant is responsible for blocking the stream. Thus, the injunctive relief should be dismissed on the grounds that; by the plaintiff's own admission any future trespass can be prevented by the building of a fence/wall around the perimeter of the boundary between the plaintiff's and the defendant's lands and this could prevent future trespass. The plaintiff is aware that its neighbour's land was a quarry and some minimal encroachment should be anticipated. Since the plaintiff's own admission that a fence around the boundary is sufficient, the defendant submitted that there is no need for an injunction.

F **Findings**

G [31] The plaintiff claims for special and general damages in an action of trespassed by the defendant into the said land. The issue before this court is whether there was an act of trespass by the defendant. If the answer is in the affirmative, what damage had the plaintiff suffered and the amount of quantum to be awarded.

H [32] The defendant did not deny to the fact that they had trespass or encroached into the said land but contended that they had innocently done so. Therefore, the court ruled that the issue of trespass and liability are no longer in dispute. At this juncture, the court finds that the defendant had committed an act of trespass on the said land and accordingly allowed Prayer 19(a) and (b) of the statement of claim. The only question before this court is: what damages did the plaintiff suffer or would have suffered.

Special Damages For Loss Of Use Of The Land

I [33] The plaintiff contended that the affected land is no longer viable for cultivation of oil palm. They claimed special damages for loss of use to cultivate oil palm and loss profit of the affected land area of 3.8529 hectare

for RM177.251 per hectare based on an average oil palm price for the past 24 months. Thus, the total amount claimed is $RM177.251 \times 3.8529 = RM682,930$. The nett value of RM682,930 was derived from the outcome less costs, that the income of the plaintiff would had reasonably be able to generate from the cultivation of oil palm on the affected land.

[34] It is well established principle that in a claim for special damages, it has to be specifically pleaded and strictly proved. The basis advanced by the plaintiff that the affected land had become not viable for cultivation *inter alia* barren for oil palm was the result of the said trespass. The plaintiff contended that their land was originally virgin forest land with good fertile and arable soil and suitable for oil palm cultivation on a commercial basis. However, the plaintiff fails to provide scientific or technical evidence to prove that the soil samples from the affected area were no longer viable for the cultivation of oil palm. The plaintiff only makes an assumption that the affected area was viable for cultivation but offers no independent evidence such as expert witnesses or at the very least produced soil analysis report of the affected area. The court is mindful that at this stage the plaintiff must first prove his allegation and cannot rely on the evidence from the DW4 to prove his case. Furthermore, it is unsafe to make an analysis and concluded that the land is barren through the statement of DW4 where it is not scientifically and technically proven so. The court also is not convinced with the hectare calculation claimed by the plaintiff since they have failed to satisfy this court in respect of the area affected. The court is also unable to accept the plaintiffs' witnesses as expert witnesses despite of their experiences and qualification for reason that before any evidence of an expert witness to be accepted, there are established guidelines that must be followed and in this case the plaintiff failed to do so. On the same premise, the court is unable to agree with the plaintiff that it does not require an expert witness to determine the viability of the affected land because in determining such viability, this court is of the view that a scientific and technical input must be sought and that it can only be done by an expert.

[35] The court finds that plaintiff failed to prove that the affected land had become not viable for cultivation for oil palm resulting from the trespass neither they had substantiated the material basis of their contention. In other word, the plaintiff offered no expert or technical evidence to show that the affected land was not viable for cultivation prior to the trespass and there were no evidences that the plaintiff had cultivated oil palm on the affected land earlier. In fact the affected land was left undeveloped. The plaintiff's contention that they had been cultivating oil palm on the other part of the land and concluded that the affected land was also viable is a thin argument for lack of definitive or scientific basis. Therefore the court finds the actual loss was not proven and that the claim in respect of this damages is disallowed.

A *General Damages For Loss Of Use The Plaintiff's Land*

[36] The plaintiff submitted that in the event that the court disallowed the claim of RM682,930 as special damages, in the alternative the amount can be used as the basis for assessment of general damages. If the trespass has caused the claimant actual damage he is entitled to received such an amount as will compensate him for his loss. The plaintiff contended in that the amount of RM682,930 is to be used as a basis for loss of use instead of having general damages to be assessed. The measure of damages is therefore not what the plaintiff had lost but the benefit of gain the defendant had obtained by having use of the property (See *Penarth Dock Engineering Co Ltd v. Pounds* [1963] 1 Lloyd's Rep 359).

[37] From the evidence it is clear that the affected land was damaged due to the defendant's conduct in depositing the quarry waste but the plaintiff failed to satisfy this court that the entire affected land was lost for its' use. This court cannot be expected to make assessment of what damages should be awarded only on the basis of calculation of expected profit grounded on average oil palm price. Furthermore, the area of the affected was disputed for the cultivation of oil palm. At the very least, evidence of costs of rental value for that piece of affected land be put forth for the court to consider, guided and quantify before awarding the damages sought which is absence in this case.

[38] The court also is unable to agree with plaintiff that the measure of damages should be based on costs of repair and rehabilitation for reason that there was no sufficient evidence that the whole of the plaintiff's affected land was not suitable for oil palm cultivation. Above all, the court finds that the estimate total costs of repair and rehabilitation amounting RM1,215,800 should not be considered as it was not specifically pleaded. The courts are familiar with the learning and authorities on the importance of parties formulating their case on the basis of their pleaded case that it would be waste of judicial time to traverse ground so well known as in *Raphael Pura v. Insas Bhd & Ors* [2003] 1 CLJ 61, *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 1 LNS 52; [2005] 3 MLJ 97, *Thorp v. Holdsworth* [1876] 3 Ch D 637 and *Esso Petroleum Co Ltd v. Southport Corporation* [1955] 3 All ER 864. The court is guided by this principle that it is a basic rule of pleading that a party is bound by his/her pleadings. The function of pleadings in an action is to define the issues between the parties where the evidence led in this action goes beyond the strict letter of a pleading.

Restoration Works Of The Affected Land To Prevent Flood

[39] It was not disputed that as a result of the defendant's quarry material and culverts built were blocking the outflow of the natural stream that had accumulated and prevented water from flowing out and eventually causing

a backwashed and pond in the said land. Having heard the evidence the court is of the view that a sum of RM10,000 is reasonable for the plaintiff to remove all the obstacles and for the restoration works. Therefore the court allowed the plaintiff's claim of RM10,000 for works relating to the restoration of land to prevent flood and siltation on the said land. Accordingly Prayer 19(d) of statement of claim is allowed.

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The Claim For Amount Of RM5,000 A Day For Everyday Trespass

[40] It is trite that trespass to land is actionable per se without requirement of any proof. The tort of trespass requires the act of entering land in the possession of another without lawful justification. In the case of *Kwong Hing Realty Sdn Bhd v. Malaysia Building Society Bhd & Anor* [1997] 1 CLJ Supp 167; [1997] 5 MLJ p 671 KC Vohrah J held:

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Trespass to land consists of any unjustifiable intrusion by one person upon the land in the possession of another. Any trespass is actionable *per se*, there being no necessity for pure actual damage. Whether the Defendant did or did not build the wall was of no importance in this case as there was no dispute that there was encroachment and if the encroachment was unjustifiable or unwarrantable, the Defendant was liable.

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[41] Any person having entered and continued to remain without authorisation, had placed objects upon such land, is said to have committed an act of trespass. In the case of *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657 pp. 11 & 13; [2006] 6 MLJ, pp. 24 & 25 Abdul Malik Ishak J held:

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... And liability is certainly strict. If the entry is intentional, it is actionable even though that entry was made under a mistake or the Defendant honestly believed that the Land was his own or, like the present case, the Land was unoccupied and un-alienated or that the Defendant believed that he had a right of entry on the Land. It is a trespass that will last so long as the ground anchors are inserted into the Plaintiff's Land and it gives rise to actions *de die in diem* - for so long as it lasts, and it is sufficiently obvious ...

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[42] Before this court, the plaintiff claimed the damages for trespass a sum of RM5,000 per day as a reasonable amount from 11 March 2011 to 31 March 2013 and for each day trespass in future. In *Halsbury's Laws of England*, 4th edn., vol. 45(2) (London: Butterworths, 1999) at 343, para. 526, addresses the law on damages for trespass to land as follows:

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In a claim of trespass, if the claimant proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use.... where the defendant cynically disregards the rights of the

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A claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

B [43] The defendant did not deny the act of trespass but argued that the basis calculation of RM5,000 has not been established. The evidence revealed that the plaintiff had reminded the defendant to move out the said land and to stop the encroachment. However, the defendant only moved out on or about 31 March 2012 but again in July 2013 the defendant was found encroaching on the said land. From the evidence the court finds that the defendant had knowledge of the notice of trespass *vide* the plaintiff's letter dated 22 March 2012. Taking this into consideration the court is of the view that the defendant's act of trespass begin on the 22 March 2012 to 31 March 2013 (375 days). Therefore the amount claimed by the plaintiff is $375 \times \text{RM}5000 = \text{RM}1,875,000$. From the photograph tendered and the evidence of the plaintiff's witnesses, it clearly shows that there were evidences of trespass on part of the defendant in carrying out their activities as a quarry operator.

C [44] The court finds the amount of RM5,000 per day is reasonable taking into the consideration of the nature of usage of the said land by the defendant and given that the said land was at the material time vacant and unoccupied and been deprived of its use. The Privy Council in *Inverugie Investments Ltd v. Hackett* [1995] 1 WLR 713, at 715B and 718A-B elaborated as follows:

D The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

E [45] However, from the evidence it took quite a time for the plaintiff to take an action of trespass against the defendant. The court is of the view that an injunctive relief could have been sought by the plaintiff earlier and not allowing the act of trespass to continue more than a year. It is a settled law that the plaintiff must mitigate the loss and here the court is of the view that the plaintiff failed to do so. In determining the amount to be awarded, the court allows the damages for trespass based on the following calculation.

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- $\text{RM}5,000 \times 375 \text{ days} = \text{RM}1,875,000$
 - $\text{RM}1,875,000 \text{ minus } 50\% \text{ for failure to mitigate} = \text{RM}937,500$.

For this reason the court allows RM937,500 as damages for trespass as per Prayer 19(e) of statement of claim.

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The Claim For RM20,000 To Build Fence/Wall At The Border

[46] The court of the view that the claim does not fall within the ambit of damages since it objective is to place the aggrieved party in a position as if the tort had not been committed at all and not to design to profit the said party. The court is also of the view that if the plaintiff wishes to build a fence around the perimeter of their boundary and bear its cost. In this aspect the granting of injunction as a relief is sufficient to prevent the defendant from entering the said land. Therefore the court disallowed the plaintiff's claim of RM20,000 for costs of building a fence as measure to prevent further trespass and accordingly disallowed Prayer 19(f) of statement of claim.

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Exemplary Damages

[47] The court is guided by the principle laid down in *Rookes v. Barnard* [1964] AC 1129. In this case, the defendant continuing trespassing is seeking to gain at the expense of the plaintiff. In other word, the defendant's conduct of trespassing was a conduct calculated to result in profit to the defendant. From the evidence, the defendant showed no remorse in their action and continued to trespass into the said land and make a profit for itself. Their lorries are still crossing into the boundary and there are still some crusher run/stones/gravels deposited on part of the said land. It was clear from the evidence that the attitude of the defendant is a total disregard and disrespect of the rights and properties of the plaintiff. (See *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35). Despite the defendant had the knowledge of trespass and a notice had been sent by the plaintiff since March 2011 reminding the defendant to move out of from the said land and also to stop the encroachment, the defendant deliberately and intentionally carried out the act trespass. The defendant conduct was calculated to result in a profit by maximising it through the disposal of quarry waste and storage of quarry stocks at the neighbouring land ie, the said land. In this aspect the court without any hesitation finds that exemplary damages to be awarded for reason mentioned earlier. This court is mindful that exemplary damages are punitive in nature. The underlying policy behind a court's award for punishment, deterrence and denunciation is to send a strong message to the defendant and potential tortfeasor. An award of exemplary damages was also justified as the defendant obviously felt that the gain from the deliberate trespass would outweigh any compensation it might have to pay. For this reason, the court finds that an amount of RM50,000 is to be awarded to the plaintiff and Prayer 19(g) statement of claim in respect of exemplary damages is allowed.

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A [48] Having heard the evidences before me and submissions from both learned counsels and after having given much consideration, I, on the balance of probabilities, finds that the plaintiff's claims against the defendant is hereby ordered as follows:

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- (a) Prayer 19(a), (b), (d), (e) and (g) are allowed.
 - (b) Prayer 19(c), (f) and (j) are disallowed.
 - (c) Interest of 5% per annum of the judgment sum calculated from the date of the judgment to the date of realisation.
 - (d) Costs of RM30,000 to be paid to the plaintiff by the defendant.
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