IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Dr. Badariah Sahamid, JCA; Kamardin Hashim, JCA

Wah Shen Development Sdn Bhd v Success Portfolio Sdn Bhd

Citation: [2018] MYCA 244 **Suit Number:** Civil Appeal No. Q-02(NCVC)(W)-10-01/2016

Date of Judgment: 12 March 2018

Tort – Private nuisance – Smell from the adjoining defendant's pig farm adversely affecting the sale of residential houses and shophouses developed on the plaintiff's land – Action for injunctive relief and damages

Tort – Private nuisance – Scope of the tort of private nuisance – Whether the plaintiff entitled to a perpetual injunction to restrain the defendant from continuing with the rearing of pigs on the defendant's land – Whether damages recoverable

Tort – Private nuisance – Whether the trial court had given undue consideration to the fact that the defendant's pig farm had pre-existed the plaintiff's development of the land – Whether the trial court had given due consideration to the current usage of land by the plaintiff in determining whether there was nuisance – Whether the duration of a particular activity a material consideration – Application of "the eggshell skull rule" – Whether appellate intervention warranted

JUDGMENT

Introduction

[1] This is an appeal against the decision of the learned High Court Judge at Kuching delivered on 7.12.2015, dismissing the Plaintiff's claim against the Defendant for injunctive relief and damages on account of private nuisance.

[2] For ease of reference parties will be referred to as they were in proceedings before the High Court.

Background Facts

[3] A summary of the background facts are derived from the learned trial Judge's grounds of

judgment with suitable modifications.

[4] The Plaintiff and Defendant are neighbours, being owners of parcels of land situated next to each other. The Plaintiff's two parcels of land are described as Lot 274 and Lot 407 and that of the Defendant, Lot 1991. In addition, the Plaintiff has been granted a Power of Attorney over three parcels of land described as 'Leases of Crown Land' No. 11148, 11149 and 11150. These three parcels of land adjoin Lot 274 and Lot 407. For the sake of simplicity all five parcels of land will be referred to as the Plaintiff's land. All the aforesaid land is situated in the Sentah-Segu Land District along the Kuching-Samarahan Expressway.

[5] The Plaintiff is a property developer whilst the Defendant is in the business of pig-rearing.

[6] The Plaintiff had developed its five parcels of land into a mixed development comprising residential houses as well as shophouses. The mixed development had been completed.

[7] Whilst the mixed development was in the process and at all material times, the Defendant's pig-rearing business was in operation.

[8] It was also an undisputed fact that the State Government in an announcement reported in the Borneo Post on 25.03.2015, had disclosed the State initiative to locate or re-locate all pig farms in the Kuching and Samarahan areas to a designated area called Pasir Puteh Pig Farming Area which is near another rural town in Sarawak's First Division i.e. Simunjan.

[9] The Plaintiff had instituted an action in private nuisance against the Defendant, alleging that the smell from the Defendant's pig farm had adversely affected the Plaintiff's sale of its residential houses as well as shophouses on the Plaintiff's land, causing the Plaintiff to incur a loss of RM10,989,111.80.

[10] The Plaintiff have therefore prayed for a perpetual injunction to restrain the Defendant from continuing with the rearing of pigs on their land, special damages in the sum specified above as well as general damages and costs.

[11] The Defendant's defence was that the smell from the Defendant's pig farm was minimal and not unreasonable. The Defendant also claimed their pig-rearing business was licensed by the relevant governmental authorities including the Department of Agriculture. In addition, the Defendant claimed they had been operating the pig farm well before the Plaintiff bought the adjoining land, and the Plaintiff was aware of the pig farm business. In addition, the adjoining land bought by the Plaintiff was originally categorised as agricultural land before the category of land use was converted to the present usage.

[12] Prior to delivering her decision, on the application of the Plaintiff, the learned trial Judge had visited the Plaintiff's land which was adjoining the Defendant's pig farm.

Issue

[13] The issue before the trial Judge was whether the Plaintiff was entitled to a perpetual injunction to restrain the Defendant from continuing with the rearing of pigs on the Defendant's land and whether damages are recoverable?.

Findings and Decision of the High Court

[14] The learned trial Judge had dismissed the Plaintiff's claim for an injunction and damages. The findings and decision of the learned trial judge are summarised as follows.

1. The Defendant's pig farm was a licensed operation. The licence was subject to certain conditions. Conditions 8 and 10 are pertinent to the instant matter.

"8. Suitable trees or plants should be placed around the farm to control malodour and to act as buffer zone. Hoarding should be erected at the farm boundary.

9. The licence is revocable under section 44-6 (b) of the Veterinary Public Health Ordinance, 1999, should the owner breach the conditions or caused pollution to any watercourse.

10. This farm is to be moved to the Pig Farming Area(PFA) once it is established".

2. The Defendant had breached condition 8 of the licence. However, this matter is for the relevant authority to consider before the yearly renewal of the licence. At p. 9 of her Judgment, the learned trial Judge had stated as follows:

"Mr. Granda (PW1) in Q & A 12 of his witness statement (marked WSPW1) said that condition 8 has been breached in that there were no trees and plants planted to act as a buffer zone, the absence of which I have noted when during the site visit. To be fair to the defendant, there were indeed trees planted on the farm but ones which were meant to act as a buffer zone were not there but absence of which cannot be strictly held against them because prior to the plaintiff's development, as stated earlier, the chicken farm was on the plaintiff's land."

3. The Plaintiff had brought the nuisance upon themselves as the Defendant's pig farm had existed before the Plaintiff had altered the category of land use for mixed development. At p. 11 of her Judgment, the learned trial Judge had stated as follows:

"It is clear from the undisputed fact of the prior existence of the pig farm on the defendant's land before development of the plaintiff's land and the original title conditions of the plaintiff's land i.e. agricultural that the plaintiff brought the nuisance upon themselves. There is a principle in tort commonly known as the egg shell skull principle which simply said means that a defendant must take the plaintiff as he is. It works the reverse here-the plaintiff have to take the defendant as it is because it was there first-legitimately operating the in pig farm before the plaintiff decided to come in, bought what is agricultural land and vary the title condition to build the houses and the shophouses without any concrete assurance whatsoever that the pig farm next door would be relocated."

Grounds of Appeal

[15] The Plaintiff's grounds of appeal may be summarised as follows:

1. The learned Judge had erred in her failure to consider the current status of the land use by the plaintiff viz a viz the land use by the Defendant as a pig farm to determine whether private nuisance was caused by the Defendant.

2. The learned Judge had erred in her failure to appreciate that the Defendant, being earlier in time, in using their land as a pig farm did not give the Defendant any rights to create private nuisance to the Plaintiff's land where the land use had been changed from agricultural to mixed development involving shophouses and townhouses. The case of **Sturges v Bridgman** 11 Ch D. 852 (1897) applies.

3. The requisite approval by the relevant authorities to vary the Plaintiff's land to mixed development show that the location of the Defendant's pig farm was no longer suitable. The State Government had also developed Pig Farming Area (PFA) at Simunjan.

4. The learned Judge had erred in her finding that the smell from the Defendant's pig farm was strong, yet failed to find that the Defendant had created a private nuisance to the Plaintiff.

5. The learned Judge had erred in her failure to appreciate that a breach of the condition 8 of the Defendant's Licence meant that the Defendant had failed to plant trees and erect hoarding to prevent the smell of the pig farm from reaching the Plaintiff's adjoining land and had caused the private nuisance to the Plaintiff.

6. The learned Judge had erred in her finding that the Plaintiff had brought the nuisance upon themselves. The learned Judge had misdirected herself on the application of the "egg shell skull principle" which applies to negligence cases where the Defendant must take the Plaintiff as he finds him.

7. The learned Judge had failed to appreciate that the private nuisance created by the Defendant entitled the Plaintiff to injunctive relief as well as damages for the losses suffered by the Plaintiff.

Our Decision

[16] After careful consideration of learned counsels oral and written submissions as well as a perusal of the Appeal Records, we were of the unanimous view that there were merits in this appeal. We therefore allowed this appeal in part in that we allowed only the injunctive relief prayed for by the Plaintiff, but made no order in respect of specific or general damages. The reasons for our decision are stated below.

[17] The tort of private nuisance is an interference with the use and enjoyment of land. The acts which constitute nuisance may include sounds, smells and vibrations which unduly interferes with the Plaintiff's enjoyment of his land. In Clark & Lindsell on Torts (18th Ed.) London, Sweet & Maxwell,

2000, at p. 979, the pertinent considerations which amount to private nuisance is stated thus:

> *"It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained as constituting the nuisance, such as voice, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as time, place, extent or the manner of performance. In organised society everyone must put up with a certain amount of discomfort and annoyance caused by the neighbours... No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society."*

(See also the cases of **Dr. Christian Jurgen Kaul & Anor v Meru Valley Resort Bhd.** [2014] 9 MLJ 539; **Ong Koh Hou v Perbadanan Pembangunan Bandar & Anor** [2009] 8 MLJ 616; **Chin Lih Lih & Ors v Sunrise Alliance Sdn Bhd & Anor** [2011] 11 MLRH 32).

[18] In the case of **Woon Tan Kan (Deceased) & 7 Ors v Asian Rare Earth Sdn Bhd** [1992] 4 CLJ 2299; [1992] 3 CLJ Rep. 786 HC, the Plaintiff sued the defendants, principally for an injunction to restrain the defendant company (ARE) from operating and continuing to operate its factory on the grounds that the activities of the factory produced dangerous radioactive gases harmful to the residents of Bukit Merah. The High Court granted a *qua timet* injunction and held that the tort of private nuisance was established.

[19] The learned Judge who had visited the Plaintiff's land which adjoins the Defendant's pig farm had unreservedly found that the Defendant's pig farm emanated a strong stench. In addition, from all the evidence in court, documentary and oral, there was evidence that private nuisance had been created by the Defendant to the Plaintiff.

In her judgment (at p. 5) the learned Judge states as follows:

> *"Sharing the immediate border with the pig farm are two rows of shop houses and behind them are the residential units...The pig farm ends at about where the first row of the residential units begins...I noted there is also a large pond on the pig farm which according to Dr. Ng Siew Thiam is the oxidation pond where all the wastes from the pig farm are channelled to.*
>
> *When we arrived at the site it was about 3.00 p.m. The air was not pristine and though no noticeable wind was felt, the smell especially at the vicinity of the shophouses was strong. That would be unavoidable, of course and the source of that stench could not be from any other place but the pig farm."*

[20] Having correctly referred to the law of torts and relevant authorities that smells can constitute a nuisance in law, and following that, after making an unreserved finding that the Defendant's pig farm emanated a strong stench that reached the Plaintiff's land, in particular the shophouses and residential units, the learned Judge had erred in her failure to make a finding that the Defendant had committed the tort of private nuisance to the Plaintiff.

[21] We are also of the view that the learned Judge had misdirected herself in her conclusion that although the Defendant had breached condition 8 of his licence in his failure to plant trees that would act as a buffer to prevent the smells from reaching the Defendant, it was not a material factor for consideration by the court but a matter for the relevant licensing authorities to consider in the process of yearly renewal of the licence. On the contrary, we find the omission of the Defendant a pertinent factor in the cause of the commission of the tort of private nuisance.

[22] We are also in agreement with the submissions of the Plaintiff/ Appellant that the learned Judge had erred in law when she made a finding that the Plaintiff, by altering the land use to mixed development when he was aware of the existence of the Defendant's pig farm in the adjoining land had "*brought the nuisance upon themselves*". From the learned Judge's own findings, it was the Defendant who had committed the tort of nuisance. We are not aware of any legal authorities that a party can bring a nuisance upon themselves.

[23] We also agree with the Plaintiff/ Appellant that the learned Judge had erred in law in her application of "*the egg shell skull rule*" to the facts of this case. According to the learned Judge the Defendant's pig farm preceded the Plaintiff's purchase and development of his property, therefore the Plaintiff is compelled to accept the nuisance created by the Defendant as the Plaintiff has to take the Defendant as he finds him. In this context the Plaintiff's pig rearing activity with the resultant stench constitutes the "*egg shell skull principle*". This is an incorrect statement of the "*egg shell skull principle*".

[24] The authorities refer to the "*egg shell skull principle*" as vulnerabilities or weaknesses of specific Plaintiffs in negligence cases. According to this principle, a Defendant cannot plead the peculiar vulnerabilities or sensitivities of a Plaintiff to avoid liability to a Plaintiff. In this respect the Defendant through DW1 had agreed in cross-examination that the Plaintiff is not particularly sensitive to odour emanating from the Defendant's pig farm. (At p. 115 Part B Record of Appeal).

> *"Q. Do you agree that the plaintiff's claim for private nuisance created by your pig farm is not due to the fact that the plaintiff is peculiarly sensitive to your pig farm's bad odour or smell?*
>
> *A. I agree"*

Thus, the learned Judge had clearly misdirected herself in this respect.

[25] In addition to the above, the learned Judge had given undue consideration to the fact that the Defendant's pig farm had pre-existed the Plaintiff's mixed development which she had construed as giving him certain rights, including apparently, the right to commit private nuisance. It was not disputed that the category of land use of the Plaintiff's land had been altered to mixed development by the relevant authorities. Thus the learned Judge had erred in her failure to give due consideration to the current usage of land by the Plaintiff in determining whether the Defendant had created the private nuisance to the Plaintiff.

[26] In the case of **Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd** [1992] 3 All

ER 923, planning permission had been granted to change the use of an old naval dockyard into a commercial port (which turned out to be very noisy at night). Buckley J held that, "*where planning permission is given...the question of nuisance will thereafter fall to be decided by reference to a neighbourhood with...[the new] development or use and not as it was previously.*"

[27] It would appear too that the duration of a particular activity is not a material consideration. What is material is the changes within a locality that may render the existing activities a nuisance to its current neighbours. In the case of **Sturges v Bridgman** 11 Ch D 852 (1897), the Defendant, a confectioner had for more than twenty years used large mortars in his back kitchen, which abutted on the garden of a physician. Subsequently, the physician erected in his garden a consulting room, one of the side walls of which was the wall between the confectioner's kitchen and the garden. The noise and vibration caused by the use of mortars, which had previously caused no material annoyance to the physician, then became a nuisance to him. It was held that the Defendant had committed a nuisance and thus the Plaintiff was entitled to an injunction.

[28] For all the above reasons stated, we are of the view that the learned Judge had made perverse findings and misdirected herself in law to warrant our appellate intervention.

[29] We however, do not find that the Plaintiff had proven specific and general damages.

[30] In conclusion we order the injunctive relief prayed for by the Plaintiff in the following terms:

> We allowed the appeal in part, that is to say we allowed the appeal only in respect of the injunction as prayed for in the Plaintiff's Statement of Claim, *paragraph* 19 (a), "*the perpetual injunction to restrain the Defendant from continuing with the rearing of pigs in their land with an open pond to collect the faeces of the pigs forthwith*". The injunction to be effective six (6) months from the date of this Order. Decision of the learned High Court Judge is set aside. Costs of RM 10,000 subject to allocator. Deposit to be refunded to the Appellant.

Signed

DR. BADARIAH SAHAMID
Judge,
Court of Appeal, Putrajaya

12 MAC 2018

COUNSEL

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JUDGMENTS REFERRED TO:

Chin Lih Lih & Ors v Sunrise Alliance Sdn Bhd & Anor [2011] 11 MLRH 32

Dr. Christian Jurgen Kaul & Anor v Meru Valley Resort Bhd. [2014] 9 MLJ 539

Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd [1992] 3 All ER 923

Ong Koh Hou v Perbadanan Pembangunan Bandar & Anor [2009] 8 MLJ 616

Sturges v Bridgman 11 Ch D. 852 (1897)

Woon Tan Kan (Deceased) & 7 Ors v Asian Rare Earth Sdn Bhd [1992] 4 CLJ 2299; [1992] 3 CLJ Rep. 786 HC