

**KERAJAAN NEGERI SELANGOR & ORS***a*

v.

**SAGONG TASI & ORS**

COURT OF APPEAL, PUTRAJAYA

GOPAL SRI RAM JCA

ARIFIN ZAKARIA JCA

NIK HASHIM JCA

[CIVIL APPEAL NO: B-02-419-2002]

19 SEPTEMBER 2005

*b*

**LAND LAW:** *Acquisition of land - Compensation - Customary land - Whether plaintiffs held land under customary communal title - Whether plaintiffs entitled to compensation for deprivation of gazetted and ungazetted land - Whether plaintiffs entitled to recover damages for trespass from defendants - Whether exemplary damages ought to be awarded to plaintiffs*

*d*

**LAND LAW:** *Customary land - Proof of custom - Whether established - Whether plaintiffs entitled to compensation for deprivation of gazetted and ungazetted land - Whether plaintiffs entitled to recover damages for trespass from defendants - Whether exemplary damages ought to be awarded to plaintiffs*

*e*

**NATIVE LAW AND CUSTOM:** *Land dispute - Customary rights over land - Whether plaintiffs held land under customary communal title - Whether plaintiffs entitled to compensation for deprivation of gazetted and ungazetted land - Whether plaintiffs entitled to recover damages for trespass from defendants - Whether exemplary damages ought to be awarded to plaintiffs*

*f*

**LAND LAW:** *Trespass - Damages - Whether plaintiffs entitled to recover damages for trespass from defendants - Whether second and third defendants entered onto land without consent - Whether exemplary damages ought to be awarded to plaintiffs*

*g*

**TORT:** *Damages - Trespass to land - Assessment of damages - Whether exemplary damages ought to be awarded*

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*a* These were four appeals by the four defendants against the judgment of the High Court granting the plaintiffs compensation under the Land Acquisition Act 1960 ('the 1960 Act') for the loss of certain land which the judge found to have been held under customary title. The plaintiffs and their ancestors, who were aboriginal people of the Temuan tribe, had occupied the land in question

*b* for at least 210 years and the occupation had been continuous up to the time of the acquisition. Although part of the land settled upon by the plaintiffs was gazetted as Aboriginal land under the Aborigines Peoples Act 1954 ('the 1954 Act'), the other parts upon which they had settled were not so gazetted. A large strip across all this land was excised for the purpose of an expressway

*c* that the second defendant was to construct. In consequence, the plaintiffs were dispossessed and their houses demolished. They were offered and paid compensation in accordance with s. 12 of the 1954 Act, which they accepted under protest and without prejudice to their rights. The plaintiffs, being dissatisfied, brought an action for several declarations, compensation and for damages for trespass.

*d*

The High Court judge ('the judge') held that the plaintiffs were the owners of the gazetted land under the customary title and awarded them compensation for deprivation of that land under the 1960 Act. The first and fourth defendants appealed against that decision. The judge also awarded damages against the

*e* second and third defendants for trespass to the plaintiffs' land, which the said defendants appealed separately against. The judge, however, denied the plaintiffs their claim for compensation for deprivation of the adjoining ungazetted land and this formed part of the cross-appeal. There was also a cross-appeal against the judge's finding against them on the issue of trespass against the first and

*f* fourth defendants. There were five issues of contention: (i) whether the plaintiffs as a matter of law held the land in question under a customary communal title; (ii) if they did, then whether upon deprivation of the land in question, they should be compensated under the 1954 Act or under the 1960 Act; (iii) whether the plaintiffs were entitled to receive compensation for deprivation of the ungazetted land; (iv) whether the plaintiffs or those whom

*g* they represented were entitled to recover damages for trespass from the defendants; and (v) whether an award of exemplary damages should be made.

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**Held (dismissing the appeals and allowing the cross-appeal in part)  
Per Gopal Sri Ram JCA:**

- [1] There was no doubt that the 1954 Act called for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them. Land being a very valuable socio-economic commodity, it was the undoubted intention of the Legislature not to deprive those in the class to whom the plaintiffs belonged of the customary title existing at common law. In any event the defendants could not now argue, in view of the Federal Court's affirmation in toto of the judgment of this court in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor*, that the 1954 Act excluded the plaintiffs' title at common law. There was also nothing in the National Land Code ('the Code'), the principal statute that regulated titles and dealings in land and interests in land, which struck at the recognition of lands held under customary title. Indeed, s. 4 of the Code expressly said that it did not apply to lands held under customary title. Furthermore, the fact that the plaintiffs enjoyed a community title by custom was nothing out of the ordinary. The evidence led in the court below and the findings of fact made by the judge which were unchallenged left no doubt that the plaintiffs had ownership of the land in question under a customary community title of a permanent nature. Therefore, the judge did not fall into any error when he held that the plaintiffs had customary community title to the land in question. (pp 186 b, 188 h & 189 a-e)
- [2] The judge was correct in holding that the plaintiffs were entitled to compensation for the deprivation of their land in accordance with the 1960 Act because the 1960 Act, by definition, applied to the plaintiffs' case. The plaintiffs were occupying their land under a customary right recognised by the 1954 Act and when they were compulsorily deprived of their land, they were entitled to payment of compensation in accordance with the principles laid down by the courts in cases decided under the 1960 Act. The judge, in dealing with this aspect of the case, had adopted a purposive approach in order to achieve the object of the 1960 Act to ensure that adequate compensation was paid for any land acquired. There was no misdirection on this point by the judge as his approach accorded entirely with the views of this court. The judge, by adopting a liberal interpretation, was merely giving full effect to art. 8(5)(c) of the Federal Constitution which sanctioned positive discrimination in favour of the aborigines. Thus, there was no appealable error in this part of the judge's judgment. (pp 191 h & 192 a-f)

- a* [3] The judge, after having correctly held that the plaintiffs' customary communal title attached itself to the first defendant's radical title and that the first and fourth defendants were under a fiduciary duty "to protect the welfare of the aborigines including their land rights", ought to have included the ungazetted area in question for purposes of
- b* compensating those settled there for the deprivation of their property rights. It was open to the judge to have made a finding that the failure or neglect of the first defendant to gazette the area in question also amounted to a breach of fiduciary duty. The first defendant had
- c* knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area and that as long as that area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant had committed a breach of fiduciary duty. While being in breach, it hardly
- d* could lay in their mouths to say that no compensation was payable because of non-gazettation which was their fault in the first place. For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the ungazetted area. This part of the cross-appeal was therefore allowed. (pp 195 f-h & 196 a-d)
- e* [4] Although this court disagreed with the judge on his reasons for refusing to accede to the plaintiffs' claim for trespass against the first and fourth defendants, that was not the end of the matter as there was a stronger reason for supporting the judge's decision on that point. Nowhere in their pleaded case had the plaintiffs claimed damages for trespass against the
- f* first and fourth defendants. That was the end of their complaint against the judge's refusal to make a finding in their favour on this point. (p 197 a-b)
- g* [4a] As far as the second and third defendants were concerned, their complaint that they ought not to have been found guilty of trespass by the judge was utterly devoid of any merit. The land they entered upon was not theirs and they had no title to it. If they were seeking to rely on any permission granted to them by the first and/or fourth defendants, then that was equally worthless because these defendants were not the absolute owners of the land. They were only nominal owners of the
- h* radical title; the true beneficial owners were the plaintiffs and they had given no consent. Accordingly, the judge's finding of trespass against the second and third defendants was upheld. (p 197 c-d)

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[5] Looking at the evidence in totality, this was a proper case for an award of exemplary damages and the judge was in error for refusing to make an award under this head. Based on the incontrovertible evidence on record, the defendant was seeking to gain the plaintiffs' land at the expense of the plaintiffs. This was accordingly a case where it was necessary to teach the third defendant wrongdoer that tort does not pay. This was a case of deliberate trespass, the sole purpose of which was to gain the plaintiffs' land without paying them the full compensation due to them in accordance with the 1960 Act. The plaintiffs were subjected to harsh, cruel and oppressive treatment and exemplary damages ought to be awarded against both the second and third defendants. (pp 199 h & 200 a-c)

*[Bahasa Malaysia Translation Of Headnotes*

Terdapat empat rayuan oleh keempat-empat defendan terhadap keputusan Mahkamah Tinggi yang memberikan pampasan kepada plaintiff-plaintif di bawah Akta Pengambilan Tanah 1960 ('Akta 1960') kerana kehilangan tanah yang didapati oleh hakim sebagai dipegang di bawah geran adat. Plaintiff-plaintif dan nenek moyang mereka, yang merupakan orang asli dari kaum Temuan, telah menduduki tanah berkenaan selama tidak kurang dari 210 tahun dan pendudukan berterusan sehinggalah ke tarikh pengambilan. Walaupun sebahagian dari tanah yang diduduki oleh plaintiff-plaintif telah digazetkan sebagai tanah Orang Asli di bawah Akta Orang Asli 1954 ('Akta 1954'), bahagian-bahagian lain tanah yang diduduki mereka tidak digazetkan. Satu bahagian besar dari tanah-tanah ini telah dikenalpasti untuk satu lebuh raya yang hendak dibina oleh defendan kedua. Berikutnya, plaintiff-plaintif telah dikeluarkan dari tanah berkenaan dan rumah-rumah mereka dirobohkan. Plaintiff-plaintif ditawarkan dan dibayar pampasan mengikut s. 12 Akta 1954, bayaran mana telah diterima oleh mereka dengan bantahan dan tanpa prejudis kepada hak-hak mereka. Plaintiff-plaintif, yang merasa tidak puas hati, kemudian memulakan tindakan untuk mendapatkan deklarasi-deklarasi, pampasan dan gantirugi kerana pencerobohan.

Hakim Mahkamah Tinggi ('hakim') memutuskan bahawa plaintiff-plaintif adalah pemilik di bawah geran adat bagi tanah yang digazetkan sekaligus memberikan mereka pampasan di bawah Akta 1960. Defendan pertama dan keempat merayu terhadap keputusan ini. Hakim juga telah mengawardkan gantirugi terhadap defendan kedua dan ketiga kerana menceroboh tanah plaintiff-plaintif, di mana defendan-defendan tersebut telah juga merayu secara berasingan. Hakim, bagaimanapun, telah menolak tuntutan plaintiff-plaintif untuk pampasan kerana kehilangan bahagian tanah yang tidak digazetkan, dan ini menyebabkan sebahagian dari rayuan balas di sini. Terdapat juga rayuan balas terhadap

- a* dapatan hakim yang tidak menyebelahi mereka berkaitan isu pencerobohan oleh defendan pertama dan keempat. Kesemuanya lima isu telah dihujahkan, iaitu: (i) sama ada plaintif-plaintif, sebagai suatu perkara undang-undang, memegang tanah berkenaan di bawah geran adat kelompok; (ii) jika begitu, sama ada, dengan pengambilan tanah tersebut, mereka harus dipampasi di bawah Akta
- b* 1954 ataupun Akta 1960; (iii) sama ada plaintif-plaintif berhak menerima pampasan kerana kehilangan tanah yang tidak digazetkan; (iv) sama ada plaintif-plaintif atau orang-orang yang mereka wakili berhak untuk mendapat ganti rugi kerana pencerobohan defendan-defendan; dan (v) sama ada suatu award ganti rugi teladan harus dibuat.

*c* **Diputuskan (menolak rayuan dan membenarkan sebahagian rayuan balas)  
Oleh Gopal Sri Ram HMR:**

- [1] Tidak diragukan bahawa Akta 1954 menganjurkan pentakrifan yang liberal dan memihak kepada masyarakat orang asli dengan cara yang mengembangkan, dan tidak mengecilkan, hak-hak mereka. Tanah adalah komoditi sosio-ekonomi yang berharga, dan kerana itu, menjadi tujuan badan penggubalan yang tidak boleh diragui lagi untuk tidak merampas geran adat yang wujud di sisi common law dari orang-orang yang berada dalam golongan sepertimana plaintif-plaintif berada. Apapun, dengan Mahkamah Persekutuan mengesahkan keseluruhan keputusan mahkamah ini dalam *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor*, defendan-defenda kini tidak lagi boleh berhujah bahawa Akta 1954 telah menghapus hak plaintif-plaintif di sisi common law. Juga tidak ada sesuatu pun di dalam Kanun Tanah Negara ('Kanun'), yang merupakan statut terpenting yang mengawalselia hak-hak, transaksi serta kepentingan
- d* berhubung tanah, yang menidakkan pengiktirafan tanah-tanah yang dipegang di bawah geran adat. Malah, s. 4 Kanun memperuntukkan secara nyata bahawa ia tidak terpakai kepada tanah yang dipegang di bawah geran adat. Lagipun, fakta bahawa plaintif-plaintif memiliki geran kelompok secara adat bukanlah sesuatu yang luar biasa sangat. Dengan keterangan yang dikemukakan di mahkamah di bawah, serta dapatan fakta yang dibuat oleh hakim, yang tidak dicabar, plaintif-plaintif tidak syak lagi mempunyai milikan tanah terbabit di bawah geran kelompok kaum yang bersifat kekal. Oleh itu, hakim tidak khilaf apabila memutuskan bahawa plaintif-plaintif memiliki geran adat kelompok terhadap tanah tersebut.
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- [2] Hakim betul apabila merumuskan bahawa plaintif-plaintif berhak kepada pampasan di bawah Akta 1960 kerana pengambilan tanah mereka, sebab Akta 1960, berdasarkan takrifnya, terpakai kepada kes plaintif-plaintif. Plaintif-plaintif menduduki tanah mereka di bawah hak adat yang diiktiraf oleh Akta 1954, dan apabila mereka dikeluarkan dari tanah mereka secara paksa, mereka berhak dibayar pampasan berdasarkan prinsip yang digariskan oleh mahkamah di dalam kes-kes yang diputuskan di bawah Akta 1960. Hakim, ketika menangani aspek ini, telah memakai pendekatan tujuan (purposive) dengan hasrat untuk mencapai tujuan Akta 1960 dan menentukan bahawa pampasan yang mencukupi dibayar bagi setiap tanah yang diambil. Tidak terdapat sebarang salah arahan oleh hakim atas perkara ini dan pendekatan beliau dipersetujui sepenuhnya oleh mahkamah ini. Dengan memakai pendekatan liberal, hakim hanya memberi kesan sebenar kepada per. 8(5)(c) Perlembagaan Persekutuan yang membenarkan diskriminasi positif yang memihak kepada orang asli. Maka itu, tiada kekhilafan yang boleh dirayui telah berlaku pada bahagian penghakiman ini. *a*
- [3] Hakim, selepas mendapati dengan betulnya bahawa geran adat kelompok plaintif-plaintif terikat dengan geran radikal defendan pertama, dan bahawa defendan pertama dan keempat berada di bawah tanggungjawab fidusiari untuk “melindungi kebajikan orang asli termasuk hak-hak tanah mereka”, seharusnya memasukkan sekali tanah yang tidak digazet bagi maksud memberi pampasan kepada mereka yang menduduki di situ disebabkan penghapusan hak-hak harta mereka. Adalah terbuka kepada hakim untuk membuat dapatan bahawa kegagalan atau keengganan defendan pertama mengazetkan kawasan terbabit adalah juga suatu kemungkiran tanggungjawab fidusiari mereka. Defendan pertama mempunyai pengetahuan atau berupaya mengetahui bahawa plaintif-plaintif telah menduduki kawasan yang tidak digazetkan, dan bahawa selagi kawasan tersebut terus tidak digazetkan ia berada dalam bahaya yang serius. Dalam halkeadaan sedemikian, dengan meninggalkan plaintif-plaintif terdedah kepada kerugian serius berkaitan hak-hak mereka kepada tanah, defendan pertama dan/atau defendan keempat telah melakukan kemungkiran tanggungjawab fidusiari. Sementara kemungkiran tersebut berterusan, tentulah amat janggal untuk mereka berkata bahawa pampasan tidak harus dibayar kerana ketiadaan gazet kerana yang menyebabkan keadaan itu adalah mereka sendiri. Bahagian rayuan balas yang ini, dengan itu, adalah dibenarkan. *b*
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- a* [4] Walaupun mahkamah ini tidak bersetuju dengan hakim berkaitan alasan-alasan beliau atas keengganannya membenarkan tuntutan plaintif-plaintif terhadap defendan pertama dan keempat kerana pencerobohan, itu bukanlah penghujung perkara kerana terdapat sebab yang lebih kuat untuk menyokong dapatan beliau berhubung perkara itu. Tidak ada sesuatupun
- b* di dalam penyata tuntutan mereka di mana plaintif-plaintif menuntut ganti rugi kerana pencerobohan. Maka di situ jugalah harus berakhirnya bantahan mereka terhadap keengganan hakim membuat dapatan yang memihak kepada mereka atas perkara ini.
- c* [4a] Berhubung defendan kedua dan ketiga, bantahan mereka bahawa mereka tidak seharusnya didapati bertanggung kerana pencerobohan oleh hakim adalah tidak bermerit sama sekali. Tanah yang mereka masuki bukan tanah mereka dan mereka tidak mempunyai apa-apa milikan terhadapnya. Jika mereka berharap untuk bergantung kepada kebenaran yang diberi kepada mereka oleh defendan pertama dan/atau keempat, maka itu juga
- d* tidak bermakna apa-apa kerana pihak terkemudian tersebut bukan pemilik mutlak tanah. Mereka hanyalah pemilik nominal geran radikal tersebut; pemilik benefisial sebenar adalah plaintif-plaintif dan mereka tidak memberikan keizinan. Maka itu, dapatan hakim bahawa defendan kedua dan ketiga adalah penceroboh adalah dikekalkan.
- e* [5] Melihat kepada keseluruhan keterangan, ini adalah kes yang sesuai untuk mengawardkan ganti rugi teladan dan hakim khilaf atas kegagalannya memberikan award tersebut. Berdasarkan keterangan jelas pada rekod, defendan cuba mengambil tanah plaintif secara yang merugikan plaintif. Ini dengan itu adalah kes sesuai untuk mengajar pelaku tort defendan
- f* ketiga, bahawa melakukan tort sedemikian rupa adalah tidak berbaloi. Ini juga suatu kes pencerobohan yang disengajakan, dengan maksud untuk mengambil tanah plaintif-plaintif tanpa membayar kepada mereka pampasan yang sewajarnya seperti kehendak Akta 1960. Plaintif-plaintif telah diberikan layanan yang kasar, kejam dan menindas dan ganti rugi
- g* teladan perlu diaward terhadap kedua-dua defendan kedua dan ketiga.

**Case(s) referred to:**

*Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (*fol*)

*Alexkor Ltd v. Richtersveld Community* [2003] 12 BCLR 130 (*fol*)

*Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399 (*refd*)

*h* *Assa Singh v. Menteri Besar Johor* [1969] 2 MLJ 30 (*fol*)

*Broome v. Cassell & Co Ltd* [1971] 2 QB 354 (*refd*)

*Canadian National Railway Co v. Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 (*refd*)

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- Cassell v. Broome* [1972] AC 1027 (foll) a  
*Dickason v. University of Alberta* [1992] 2 SCR 1103 (refd)  
*Hj Abdul Rahman v. Government of Malaysia & Anor* [1966] 2 MLJ 174 (not foll)  
*Insurance Corporation of British Columbia v. Heerspink* [1982] 2 SCR 145 (refd)  
*Kanda v. Government of Malaya* [1962] MLJ 169 (foll)  
*Lai Seng & Co v. Government of Malaysia & Ors* [1973] 2 MLJ 36 (foll)  
*Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd*  
[1979] 1 MLJ 135 (refd) b  
*Premachandra v. Major Montague Jayawickrema* [1994] 2 Sri LR 90 (refd)  
*R v. Secretary of State for the Environment, Transport and the Regions, ex p Spath  
Holme Ltd* [2001] 2 AC 349 (foll)  
*Rookes v. Barnard* [1964] AC 1129 (foll)  
*Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 HC (refd) c  
*Savrimuthu v. PP* [1987] 2 MLJ 173 (refd)  
*State of Bihar & Ors v. Bihar Distillery Ltd* AIR [1997] SC 1511 (refd)

**Legislation referred to:**

- Aborigines Peoples Act 1954, ss. 6, 7, 8, 9, 11, 12 d  
Federal Constitution, arts. 5, 8(5)(c), 13(2)  
Government Proceedings Act 1956, ss. 5, 6(1), (4), 18  
Land Acquisition Act 1960, s. 2  
National Land Code, s. 4

**Other source(s) referred to:**

- HWR Wade, *Administrative Law*, 5th edn e

*For the 1st appellant - Badariah Hassan*

*For the 2nd appellant - Zaki Tun Azmi (Harjinder Kaur with him); M/s Sharizat Rashid  
& Lee*

*For the 3rd appellant - Ramesh Sanghvi; M/s Kassim, Tadin, Wai & Co*

*For the 4th appellant - Abdul Rahim Uda (Pretam Singh Darshan Singh, Mohd Taufik  
Mohd Yusoff, Norinna Bahadun & Syahrina Shahrir with him)* f

*For the respondents - Cyrus Das (Jerald Gomez, Abdul Rashid Ismail & Sarmila  
Sekaran with him); M/s Jerald Gomez & Assoc*

[Appeal from High Court, Shah Alam; Suit No: MT1-21-314-1996] g

Reported by Suresh Nathan

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*a***JUDGMENT****Gopal Sri Ram JCA:****Facts, Background And The Issues**

- b* There are 4 appeals and a cross appeal before us. For convenience, I will refer to the parties according to the titles assigned to them in the court below. The appeals have been brought by each of the 4 defendants. Their complaints are directed against the judgment of the High Court granting the plaintiffs compensation under the Land Acquisition Act 1960 (“the 1960 Act”) for loss of certain land which the judge found to have been held under customary title.
- c* His judgment is reported in [2002] 2 CLJ 543. The facts of this case have been – to adopt the expression currently in vogue – sufficiently ‘interrogated’ in that judgment. That spares me regurgitating the facts here. I need only say something about them for the limited purpose of understanding the arguments that have been canvassed before us.
- d* The plaintiffs (which expression appearing throughout this judgment includes all those whom they represent) are aboriginal peoples of the Temuan tribe. They are the First Peoples of the States of Malaya. They are, by their custom and tradition, settled peoples. In other words, they are not nomadic as are some of their other aboriginal brothers and sisters. They settle on the land.
- e* They cultivate it with crops. They put up buildings on the land. They also exercise rights of usufruct over the surrounding area. In other words they forage and fish in that area. In this case the lands in question are in Bukit Tampoi.
- f* Now, the judge made several findings of fact in the plaintiffs’ favour. None of these are the subject of challenge before us by the defendants. That is hardly surprising. His findings of fact which form the substratum of the case for making out customary community title are amply supported by cogent evidence. All the facts as found by the judge are therefore accepted by the defendants. Some of his primary findings of fact are as follows:
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- (a) the Bukit Tampoi lands, including the land, have been occupied by the Temuans, including the plaintiffs, for at least 210 years and the occupation was continuous up to the time of the acquisition;
  - (b) the plaintiffs had inherited the land from their ancestors through their own adat;
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- (c) the Temuans who are presently occupying the Bukit Tampoi lands including the plaintiffs in respect of the land are the descendants of the Temuans who had resided thereat since early times and that the traditional connection with the Bukit Tampoi lands have been maintained from generation to generation and the customs in relation to the lands are distinctive to the Temuan culture; and a
- (d) the Bukit Tampoi lands, including the land, are customary and ancestral lands belonging to the Temuans, including the plaintiffs, and occupied by them for generations. b

The first defendant is the State Government of Selangor. And by written law, namely, the National Land Code 1965 (“the Code”) it is the owner of all unalienated land within its geographical boundaries, including the land settled upon by the plaintiffs. The second defendant is a public limited company. It carries on, *inter alia*, the business of road construction. The third defendant is the Malaysian Highway Authority. It is a statutory authority which is, in very general terms, in charge of the highways in this country – or at least in the Peninsular. The fourth defendant is the Government of Malaysia. It is the owner of all Federal land. c

Part of the land settled upon by the plaintiffs was gazetted as Aboriginal land under the Aborigines Peoples Act 1954 (“the 1954 Act”). The other parts upon which they had settled were not so gazetted. A large strip across all this land was excised for the purpose of an expressway which the second defendant was to construct. In consequence, the plaintiffs were dispossessed. Their houses were demolished. The evidence is crystal clear that they were evicted rather unceremoniously and left to fend for themselves and their families. They were offered and paid compensation in accordance with s. 12 of the 1954 Act which they accepted under protest and without prejudice to their rights. Later, I will refer to and deal with s. 12 and some of the other sections of the 1954 Act. d

The plaintiffs were dissatisfied with the way in which they were dealt with by the defendants. They brought an action for several declarations, compensation and for damages for trespass. The latter claim was directed only against the third defendant. But the judge thought that it was also directed against the second and fourth defendants. He purported to dismiss it for reasons which are, in my judgment, fatally flawed. But I will say no more than necessary about it later in this judgment since nothing in these appeals turns upon it in so far as the first and fourth defendants are concerned. e

At the trial of the action a mass of evidence was led by the plaintiffs to prove their claim. Some of it was archival. All of it was strictly relevant to the issues the High Court was trying. The defendants did not even try to rebut the plaintiffs’ claim to title. Most of their evidence appears to have been directed f

*a* upon matters of subsidiary importance. After a fairly lengthy hearing, the judge held that the plaintiffs were the owners of the gazetted land under customary title. He awarded them compensation for deprivation of that land under the 1960 Act. The first and fourth defendants have appealed against it. He also awarded damages against the second and third defendants for trespass to the

*b* plaintiffs' land. They have each appealed separately against that award on principle. Put another way, these defendants are saying that on a point of pure principle they ought never to have been found guilty of trespass. The judge however denied the plaintiffs their claim for compensation for deprivation of the adjoining ungazetted land and this forms part of their cross appeal. There

*c* is also a cross appeal against the judge's finding against them on the issue of trespass against the first and fourth defendants. With that I now turn to the issues.

*d* Five issues were argued before us. First, whether the plaintiffs as a matter of law hold the land in question under a customary communal title. Second, if they do, then whether upon deprivation of the land in question, they must be compensated under the 1954 Act or under the 1960 Act. Third, whether the plaintiffs were entitled to receive compensation for deprivation of the ungazetted land. Fourth, whether the plaintiffs or those whom they represent are entitled to recover damages for trespass from the defendants. Fifth, whether an award

*e* of exemplary damages should be made. I will address each of these issues in turn.

#### **The First Issue: Customary Title**

*f* The defendants say that the plaintiffs cannot in law maintain a right to any such thing as a customary community title. According to learned senior federal counsel (whose arguments on this part of the case were adopted by the other defendants) the plaintiffs had no rights in the land itself. All that the plaintiffs had at best was a right to occupation in the nature of a tenancy at will. And the first defendant in whom the land is vested is entitled to deal with the gazetted land as it pleases; including alienating it to anyone it wanted, including

*g* the fourth defendant. The plaintiffs join issue on this. They argue that although the first defendant may have the radical title to the Bukit Tampoi land, the plaintiffs had a customary community title at common law. The first defendant therefore holds the radical title that is encumbered by the plaintiffs' customary title.

*h* At the intersection of these opposing arguments lies the heart of this case. It is this. Does our common law recognise the existence of customary title in the plaintiffs? To answer that question I have to take this part of the case through two stages. First, the position at common law must be examined. Second, the 1954 Act must be looked at to see if there is anything in that statute that deprives any common law right the plaintiffs may have.

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I begin with the common law. The definitive position at common law is that stated by Viscount Haldane LC in *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399 where after saying that it was “necessary to consider, in the first place, the real character of the native title to the land” he proceeded as follows:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. *A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.* Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. See 14 App. Cas. 46 and [1920] 1 AC 401. But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. *Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case.* Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading. (emphasis added.)

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*a* As respects the present appeal two important principles emerge from the Advice of the Board. First, that the fact that the radical title to land is vested in the Sovereign or the State (as is the case here) is not an ipse dixit answer to a claim of customary title. There can be cases where the radical title is burdened by a native or customary title. The precise nature of such a

*b* customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as it was decided in

*c* this case) by the primary trier of fact based on his or her belief of where, on the totality of the evidence, the truth of the claim made lies. In accordance with well established principles, it is a matter on which an appellate court will only disagree with the trial judge in the rarest of cases. Here, of course, there is complete acceptance by the respondents of the facts as found by the learned judge. I have already set out his conclusions on the proved facts. Based on

*d* those facts and on the authorities he concluded that the plaintiffs had established their claim to a customary title to the land in question.

So far as authority is concerned, there is *Amodu Tijani* to which the judge referred. There is also the decision in *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 where this court upheld a finding by the High Court that aborigines had rights at common law over land vested in the State and that such rights existed despite the 1954 Act. This is what I said in that case:

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*f* According to the learned State Legal Adviser, the respondents' rights and the manner of their enforcement are exclusively governed by the Aboriginal Peoples Act 1954 ('the Act'). Consequently, there is no room for the co-existence of common law rights.

A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law.

*g* *Adong* went to the Federal Court. That court dismissed the appeal but gave no reasoned judgment, probably because it agreed in entirety with the reasoning of the High Court and of this court. It is therefore too late in the day for the second and fourth defendants to contend that our common law does not recognise aboriginal customary title.

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With that I now turn to the 1954 Act to see if there is anything in it that excludes the common law position. This is not strictly necessary in the light of the decision in *Adong*. But the matter was argued at length before us on the basis that *Adong* had to do with usufructuary rights whereas the present

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instance concerns a claim for proprietary interest in what is State land. I therefore think I owe it to the efforts of counsel on both sides to deal with the point. *a*

The starting point is the purpose for which the 1954 Act was passed. That purpose is to be discovered from the proximately contemporaneous material. First, there is the article in the Malay Mail newspaper published on 28 November 1953. It reproduces the following two quotes from Dato' Sir Onn Jaafar's speech in the Federal Legislature: *b*

- (a) Now I bring this bill for the protection and welfare of a community – a comparatively large community – who are peoples of this country, *c*
- (b) The aborigines are human beings with human reactions and the idea of this bill is to provide for their protection as human beings and not as museum pieces or exhibits,

Next, there is the debate in the Federal Legislative Assembly from which I quote: *d*

Tok Pangku Pandak Hamid asks Minister of Education to state whether Government has taken any steps to ensure that the hereditary lands of the Aborigines are reserved for their use; and if so, what progress has been made.

Enche' Mohamed Khir Johari: Yes. Under the Aboriginal Peoples Ordinance (No, 3 of 1954 Clause 7) there is provision for the gazetting of Aborigine Reserves. Steps are now being taken to create these reserves and there are also in existence others which were gazetted prior to the introduction of the Ordinance. *e*

At the moment there are in existence in the Federation 58 Gazetted Aborigine Reserves covering in all approximately 30 square miles, and including some 5,200 aborigines. An additional 120 areas are currently under consideration, with a view to gazetting as Reserves. They cover about 389 sq. miles and include approximately 21,000 aborigines. *f*

Tok Pangku Pandak Hamid asks the Minister of Education to state whether it is Government policy to grant financial aid to the aborigines to enable them to develop their lands. *g*

Enche' Mohamed Khir Johari: Yes. It is Government policy to grant financial and material aid to the aborigines to enable them to develop their lands when this is considered necessary for the well-being of the Communities concerned, and within the limits of current financial restrictions. *h*

The other document is the policy statement issued by the Jabatan Hal Ehwal Orang Asli (the Department of Aboriginal Affairs) which I will, following the judge, refer to as the JHEOA. The document is referred to by the judge in his judgment. This is what he says about it and another equally important document brought into existence in 1955: *i*

*a* The JHEOA was set up pursuant to the Act and was charged with the responsibility of looking after the welfare of the orang asli. It made a significant policy statement in 1961 called 'Statement of Policy Regarding the Administration of the orang asli of Peninsular Malaysia' (see ikatan C at p 45-49), which it considers still applicable and forming the policy of the department (see DW 7 at p 171 of the notes of evidence). In respect of the land rights of the aborigines, the statement states:

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(d) The special position of aborigines in respect of land usage and land rights shall be recognized, that is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically in line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent.

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In a 1955 document, the then adviser on aborigines in the Colonial Government expressly declared responsibility for the welfare of the orang asli in the Bukit Tampoi area (see ikatan B at p 105). Part of it reads:

*d* 'Batin Pa' Lapan is the overall Senior Headman of all the Orang Blandas Aborigines) in Selangor. He lives on his own land with his aborigine group at Bukit Tampoi near Dengkil. This department is responsible for him and his people **on behalf of the government of the Federation of Malaya and the Selangor State Government.**

*e* In any matters concerning Batin Pa' Lapan and his people, please refer to the adviser on aborigines at the address given above.

DW7 confirmed that the JHEOA still accepts the contents of the letter (see at p 173 of the notes of evidence). (emphasis added.)

*f* There was no challenge taken either in the court below or before us that resort may not be had to the foregoing extrinsic material to determine the purpose of the 1954 Act. However, lest the defendants are seized by sudden appellate inspiration after reading this judgment, let me say at once that there is ample authority to support the approach that has commended itself to me. And I need do no more than quote the following passage from the speech of Lord Nicholls of Birkenhead in *R v. Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 where he re-affirmed the availability of non-statutory material to a court interpreting a statute:

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*h* Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide': *Heydon's Case* [1584] 3 Co Rep 7a, 7b. Nowadays the courts look at external aids for more than merely identifying the mischief the statute is

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intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool. a

Now, the extrinsic material to which I have referred makes it abundantly clear that the purpose of the 1954 Act was to protect and uplift the First Peoples of this country. It is therefore fundamentally a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation. There is high authority that establishes these propositions. b

In *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 SCR 145, Lamer J when concurring with the majority of the Supreme Court of Canada said (on behalf himself Estey, McIntyre JJ): c

When the subject matter of a law is said to be the comprehensive statement of the ‘human rights’ of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. d

In *Canadian National Railway Co v. Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at p 1134, Dickson CJ said: e

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. f

Lastly, there is *Dickason v. University of Alberta* [1992] 2 SCR 1103 at 1154, where L’Heureux-Dube J said: g

In order to further the goal of achieving as fair and tolerant a society as possible, this Court has long recognized that human rights legislation should be interpreted both broadly and purposively. Once in place, laws which seek to protect individuals from discrimination acquire a quasi-constitutional status, which gives them pre-eminence over ordinary legislation. h

Now, although L’Heureux-Dube J (speaking for herself and McLachlin J) was in dissent on the final outcome of the case, she was in agreement with the majority who, speaking through Cory J, held that: i

*a* In the construction of human rights legislation, the rights enunciated must be given their full recognition and effect, while defences to the exercise of those rights should be interpreted narrowly.

*b* There is therefore no doubt in my mind that the 1954 Act calls for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them. And it is with that approach in mind that I now examine the relevant provisions of the 1954 Act. These now follow. I must add that I have placed emphasis on particular words appearing in the provisions which in my judgment are of importance to this case.

*c* First, s. 6 the marginal note to which reads "Aboriginal areas":

(1) The State Authority may, by notification in the Gazette, declare any area predominantly or exclusively inhabited by aborigines, which has not been declared an aboriginal reserve under section 7, to be an aboriginal area and may declare the area to be divided into one or more aboriginal cantons:

*d* Provided that where there is more than one aboriginal ethnic group there shall be as many cantons as there are aboriginal ethnic groups.

(2) Within an aboriginal area:

*e* (i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;

(ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds;

*f* (iii) *no land shall be alienated, granted, leased or otherwise disposed of to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General; and*

*g* (iv) no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area or to any commercial undertaking without consulting the Director General and in granting any such licence it may be ordered that a specified proportion of aboriginal labour be employed.

(3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal area made under subsection (1).

*h* Next, s. 7 which deals with aboriginal reserves and reads:

7(1) The State Authority may, by notification in the Gazette, declare any area exclusively inhabited by aborigines to be an aboriginal reserve:

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Provided:

- (i) when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and *a*
- (ii) an aboriginal reserve may be constituted within an aboriginal area. *b*
- (2) Within an aboriginal reserve:
  - (i) no land shall be declared a Malay Reservation under any written law relating to Malay Reservations;
  - (ii) no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds; *c*
  - (iii) no land shall be declared a reserved forest under any written law relating to forests;
  - (iv) *no land shall be alienated, granted, leased or otherwise disposed of except to aborigines of the aboriginal communities normally resident within the reserve; and* *d*
  - (v) *no temporary occupation of any land shall be permitted under any written law relating to land.*
- (3) The State Authority may in like manner revoke wholly or in part or vary any declaration of an aboriginal reserve made under subsection (1). *e*

Next is s. 8. It reads:

- 8(1) The State Authority may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any aboriginal area or aboriginal reserve. *f*
- (2) Rights of occupancy may be granted:
  - (a) to:
    - (i) any individual aborigine; *g*
    - (ii) members of any family of aborigines; or
    - (iii) members of any aboriginal community;
  - (b) free of rent or subject to such rents as may be imposed in the grant; and *h*
  - (c) subject to such conditions as may be imposed by the grant, and shall be deemed not to confer on any person any better title than that of a tenant at will.

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- a* (3) Nothing in this section shall preclude the alienation or grant or lease of any land to any aborigine.

Now for s. 9 which is of much importance. According to its marginal note it regulates dealings by aborigines with their land. It says this:

- b* No aborigine shall transfer, lease, charge, sell, convey, assign, mortgage or otherwise dispose of any land except with the consent of the Director General and any such transaction effected without the Director General's consent shall be void and of no effect.

- c* Learned senior federal counsel argued that ss. 6, 7 and 9 when read together do not permit the plaintiffs a customary title to the land in question. According to him, all that these sections do is to enable the Government to alienate land within an aboriginal area to aborigines and once this is done, the aborigine who is the alienee of the land cannot deal with it by transfer or charge etc., without the consent of the Director of Aboriginal Affairs. With respect I do not agree. Such an interpretation of these sections will curtail or restrict aboriginal land rights and therefore would run counter to the purpose of the 1954 Act.

- e* In my judgment, what s. 6 does is to prohibit the alienation or dealing by the State of land in aboriginal area to a non-aborigine. It merely reflects the permanent nature of the title vested in the plaintiffs. And all that s. 8 does is to enable the Government to create merely occupational rights not being higher than a tenancy at will. Further, neither of these types of title can be dealt with in the absence of the Director General's consent.

- f* The crucial question which is overlooked by the submission of learned senior federal counsel is this: what title vests in the aborigines if the alienation permitted by s. 6 never takes place? According to him, in such an event, the aborigines have nothing in the manner of any title to or interest in the land. With respect, that submission is devoid of any merit. If, in the absence of a specific alienation to him, an aborigine is to receive no interest in the land that he and generations of his forefathers have lived and worked upon, then the 1954 Act was a wasted piece of legislative action. Remember that the purpose of the 1954 Act was to provide socio-economic upliftment of the aborigines. Land being a very valuable socio-economic commodity, it was the undoubted intention of the legislature not to deprive those in the class to whom the plaintiffs belong of the customary title existing at common law. In any event the defendants cannot now argue, in view of the Federal Court's affirmation in toto of the judgment of this court in *Adong*, that the 1954 Act excludes the plaintiffs' title at common law. I would add for good measure there is also nothing in the Code, which is the principal statute that regulates

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titles and dealings in land and interests in land which strikes at the recognition of lands held under customary title. Indeed, s. 4 of the Code expressly says that it does not apply to lands held under customary title. a

There is another matter. The fact that the plaintiffs enjoy a community title by custom is nothing out of the ordinary. The Privy Council in *Amodu Tijani* recognised the existence of such title in other jurisdictions. That concept has been re-affirmed by the Constitutional Court of South Africa in *Alexkor Ltd v. Richtersveld Community* [2003] 12 BCLR 130. Chaskalson CJ said: b

In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and the LCC (Land Claims Court), we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was **a right of communal ownership under indigenous law**. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law. (emphasis added.) c

So too here. The evidence led in the court below and the findings of fact made by the learned judge which are unchallenged before us leave no room for doubt that the plaintiffs had ownership of the lands in question under a customary community title of a permanent nature. Therefore, it is my considered judgment that the learned judge did not fall into any error when he held that the plaintiffs had customary community title to the land in question. I would accordingly affirm his judgment on this point. d

**The Second Issue: Compensation** e

The trial judge held that the plaintiffs were entitled to compensation for deprivation of their land in accordance with the 1960 Act. The defendants say that the judge was wrong. They say that compensation ought to have been awarded in accordance with ss. 11 and 12 of the 1954 Act. These two sections are as follows: f

11(1) Where an aboriginal community establishes a claim to fruit or rubber trees on any State land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just. g

(2) Any compensation payable under subsection (1) may be paid in accordance with section 12 h

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- a* 12. If any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefor and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the Minister.
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*c* After careful consideration, I do not agree with the defendants' submissions. I think that the judge in the court below was right. And I will explain why.

So far as s. 11 is concerned, it deals only with any claims the plaintiffs may have to fruit or rubber trees on their land. It has nothing to do with the deprivation of their customary community title to the land. As regards s. 12, *d* it is a pre-Merdeka provision. It must therefore be interpreted in a modified way so that it fits in with the Federal Constitution. In *Kanda v. Government of Malaya* [1962] MLJ 169, Lord Denning when delivering the advice of the Board said:

*e* In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.

This is exactly what art. 162(6) of the Constitution says. That article reads:

*f* Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

The way in which s. 12 is to be brought into conformity with the Constitution is to make it yield to art. 13(2) which reads:

*g* 13(2) No law shall provide for compulsory acquisition or use of property without adequate compensation,

That is achieved by not reading the words "the State Authority may grant compensation therefor" as conferring a discretion on the State Authority *h* whether to grant compensation or not. For otherwise it would render s. 12 of the 1954 Act violative of art. 13(2) and void because it will be a law that provides for the compulsory acquisition of property without adequate compensation. A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any *i* compensation. It is therefore a law that does not provide for the payment of

adequate compensation and that is why s. 12 will be unconstitutional. Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution. As Jeevan Reddy J said in *State of Bihar and Others v. Bihar Distillery Ltd.* AIR [1997] SC 1511:

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The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should to try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.

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How then do you modify s. 12 to render it harmonious with art. 13(2)? I think you do that by reading the relevant phrase in s. 12 as “the State Authority shall grant adequate compensation therefor.” By interpreting the word “may” for “shall” and by introducing “adequate” before compensation, the modification is complete. I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation.

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A not dissimilar approach was taken in *Assa Singh v. Menteri Besar Johor* [1969] 2 MLJ 30. In that case, the former Federal Court was concerned with the validity of the Restricted Residence Enactment (Cap. 39 of the Laws of the Federated Malay States). The task of the court in that case was much lighter than the one we face here. That is because the Enactment did not contain any provision that violated the fundamental rights prescribed under art. 5 of the Federal Constitution. So the way in which the court carried out the modification was to read the Enactment as being subject to those rights. Suffian FJ made that quite clear in his judgment. He said:

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Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it must be applied with modifications to bring it into accord with the Constitution. **To bring it into accord with the Constitution, there must be read into the Enactment the constitutional rights conferred on an arrested person by article 5.** (emphasis added.)

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This is indeed the approach I have adopted in para. 37 of this judgment.

Now, it is all very well to say that the first and/or fourth defendants must pay adequate compensation. But how does the court work out adequate compensation? As I said, the judge thought that it should be done on the basis of the 1960 Act. He was entirely correct of course because the 1960 Act by definition applies to the plaintiffs’ case. For s. 2 of the 1960 Act defines land as follows:

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*a* 'land' means alienated land within the meaning of the State land law, **land occupied under customary right** and land occupied in expectation of title; (emphasis added.)

There it is then. The plaintiffs were occupying their land under customary right recognised by the 1954 Act. So when they were compulsorily deprived of their

*b* land, they were entitled to payment of compensation in accordance with the principles laid down by our courts in cases decided under the 1960 Act.

The learned judge when dealing with this aspect of the case said:

*c* The expression 'land occupied under customary right' is not defined. Hence, in construing its meaning, I adopt a purposive approach and hold that it should be given a wider interpretation so as to achieve the object of the LAA (the 1960 Act), that is to say, to ensure adequate compensation be paid for the land acquired.

*d* I find no misdirection on this point by the learned judge. Indeed, as may be seen, his approach accords entirely with the view I have taken of the matter. The learned judge by adopting a liberal interpretation was merely giving full effect to art. 8(5)(c) of the Federal Constitution which sanctions positive discrimination in favour of the aborigines. That article reads:

*e* (5) This article does not invalidate or prohibit:

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

*f* In view of what I have said thus far, I am unable to discover any appealable error in the judgment of the trial judge. I would therefore affirm his conclusion on this part of the case.

### **The Cross Appeal**

*g* (i) *The Under-gazetting Claim*

I now turn to the cross-appeal. The first ground of complaint is that the learned judge erred in failing to make an award of compensation in respect of the second and contiguous area of land on which some of the plaintiffs had settled.

*h* This area was not gazetted. The learned judge's judgment does not contain any argued reasons for rejecting the claim. The main argument advanced before us by the defendants in opposition to this claim is twofold. First that the land in respect of which the claim for compensation is being made is not gazetted as an aboriginal reserve. Second, there is no duty on the part of

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the first or fourth defendants to gazette the land in question. As such no liability can attach to the first and the fourth defendants to pay compensation for depriving those aborigines settled on the ungazetted land. a

When dealing with the plaintiffs' claim against the defendants in respect of the gazetted portion, the learned judge found the first and fourth defendants to be fiduciaries. This finding was never attacked before us during argument. The judge's judgment on this point is as follows: b

The content of the fiduciary duties has been described in many (*sic*) ways. But in essence, it is a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs. In *Mabo No 2, (Mabo & Ors v. State of Queensland & Anor* [1986] 64 ALR 1) it was said that the obligation on the Crown was to ensure that the traditional title was not impaired or destroyed without the consent of or otherwise contrary to the interests of title holders. And in the *Wik People's* case, (*The Wik Peoples v. The State of Queensland & Ors* [1996] 187 CLR 1) it was reiterated that the fiduciary must act consistent with its duties to protect the welfare of the aboriginal people. The remedy, where the government as trustee or fiduciary has breached its duties, is in the usual form of legal remedies available, namely by declaration of rights, injunctions or a claim in damages and compensation. c  
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There is nothing startling in the trial judge holding the first and fourth defendants to be fiduciaries in public law. In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power – the public body – may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that is to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty. e  
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So, in *Premachandra v. Major Montague Jayawickrema* [1994] 2 Sri LR 90, at p. 105, G.P.S. De Silva CJ when delivering the judgment of the Supreme Court of Sri Lanka said: h

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*a* There are no absolute or unfettered discretions in public law; **discretions are conferred on public functionaries in trust for the public**, to be used for the public good, and **the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.** (emphasis added.)

*b* In the course of his judgment the learned Chief Justice referred to the following passage extracted from *Administrative Law* by HWR Wade (5th edn):

*c* Statutory power conferred for public purposes is conferred as if it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.

*d* Our courts have adopted a similar approach. In *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, Raja Azlan Shah CJ (Malaya) used language that merits recall ever so often to remind ourselves of our constitutional role:

*e* Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite (ante)* (*Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. *The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.* I would once again emphasise what has often been said before, that “public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place”, (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434, 442.) (emphasis added.)

*h* Similarly, in *Savrimuthu v. Public Prosecutor* [1987] 2 MLJ 173, Salleh Abas LP said:

... public interest, reason and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

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In my view, all these important pronouncements are merely different ways of saying the same thing. They all support the proposition that power conferred by Parliament is held in trust. Hence, those who are the repository of that power are fiduciaries. Whether they have breached their fiduciary duty in a given case is a question that must perforce be resolved in accordance with the peculiar facts of the particular case. *a*

In the present case, the trial judge, after setting out the circumstances that create the fiduciary duty; some of which I have alluded to in the context of statutory interpretation (at paras. 16-18 of this judgment); added: *b*

However, to my mind, unfortunately notwithstanding its good efforts, the government had breached the fiduciary duties owed to the plaintiffs by: *c*

- (i) the deprivation of their proprietary rights without adequate compensation;
- (ii) by the unlawful eviction of the plaintiffs from their lands. It is unlawful as the 14 day notice was unreasonable and insufficient, not being compliant with the LAA (the 1960 Act) procedure. *d*

Therefore, had it not been for the reasons as stated in order (3) below the loss in consequence of the breach must be made good, and that loss would be the value of the lands lost as a result of the first and fourth defendants failing to protect it. *e*

I have given this part of the case anxious consideration and have arrived at the conclusion that the learned judge erred in not holding against the first defendant in respect of the ungazetted portion of the land. In my judgment after having correctly held: *f*

- (i) that the plaintiffs' customary communal title attached itself to the first defendant's radical title; and
- (ii) that the first and fourth defendants were under a fiduciary duty "to protect the welfare of the aborigines including their land rights", *g*

the trial judge ought to have included the ungazetted area in question for purposes of compensating those settled there for the deprivation of their property rights. *g*

In my judgment, it was open to the judge to have made a finding that the failure or neglect of the first defendant to gazette the area in question also amounted to a breach of fiduciary duty. Here you have a case where the first defendant had knowledge or means of knowledge that some of the plaintiffs had settled on the ungazetted area. It was aware that so long as that area remained ungazetted, the plaintiffs' rights in the land were in serious jeopardy. It was aware of the 'protect and promote' policy that it and the *h*  
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*a* fourth defendant had committed themselves to. The welfare of the plaintiffs, on the particular facts of this case, was therefore not only not protected, but ignored and/or acted against by the first defendant and/or the fourth defendant. These defendants put it out of their contemplation that they were ones there to protect these vulnerable First Peoples of this country. Whom else could these

*b* plaintiffs turn to? In that state of affairs, by leaving the plaintiffs exposed to serious losses in terms of their rights in the land, the first and/or fourth defendant committed a breach of fiduciary duty. While being in breach, it hardly now lies in their mouths to say that no compensation is payable because of non-gazettation which is their fault in the first place. I am yet to see a clearer

*c* case of a party taking advantage of its own wrong. For these reasons, the plaintiffs were plainly entitled to a declaration that they had customary title to the ungazetted area which is more clearly demarcated in the plan exh. P1 and marked in green and yellow. The strip of land that was excised out of the whole area runs across the portions marked green and yellow as well as

*d* the gazetted portion marked in orange. It is the former area in respect of which compensation must be paid in accordance with the 1960 Act. This part of the cross appeal must therefore be allowed.

*(ii) The Claim For Trespass*

*e* The learned judge refused to award damages against the first and fourth defendants on the ground that the concerned officers who committed the wrongdoing were not named as defendants. This was as a result of an objection raised by the first defendant as a preliminary issue in a written submission put in after the close of the whole case. I must confess that I am utterly mystified as to how a party to a suit may raise a preliminary point at the end of the whole case. Though I eagerly waited for the learned State

*f* legal adviser to proffer an explanation for this procedural invention, hitherto unknown to the legal profession across the Commonwealth, none was forthcoming. If the suit was ab initio improperly constituted, that was a matter that ought to have been raised by the first defendant by way of a pre-trial written application specially made in that behalf.

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*h* The learned judge in deciding the so-called preliminary point in the first and fourth defendants favour relied on ss. 5, 6(1), 6(4) and 18 of the Government Proceedings Act 1956 as interpreted by Abdul Aziz J in *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 2 MLJ 174. In my judgment that case was wrongly decided because the sections relied on by the first and fourth defendants do not require the specific tortfeasor to be added as a party or identified in a plaintiff's pleaded case. Further, it was not followed by Chang Min Tat J (later FJ) in *Lai Seng & Co v. Government of Malaysia & Ors* [1973] 2 MLJ 36. For myself, I prefer to accept *Lai Seng & Co v. Government of Malaysia & Ors* as having been correctly decided. It follows

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that I find myself in disagreement with the learned judge on his reasons for refusing to accede to the plaintiffs' claim for trespass against the first and fourth defendants. But that is not the end of the matter. For, there is a stronger reason for supporting the judge's decision on this point. Nowhere in their pleaded case have the plaintiffs claimed damages for trespass against the first and fourth defendants. That, I think, is the end of their complaint against the judge's refusal to make a finding in their favour on this point. I would therefore affirm the trial judge's decision on this part of the case.

So far as the second and third defendants are concerned, their complaint that they ought not to have been found guilty of trespass by the judge is utterly devoid of any merit. The land they entered upon was not theirs. They had no title to it. If they were seeking to rely on any permission granted them by the first and/or fourth defendants, then that was equally worthless because these defendants were not the absolute owners of the land. They were only nominal owners of the radical title. The true beneficial owners were the plaintiffs and they had given no consent. Accordingly I would uphold the learned judge's finding of trespass against the second and third defendants. So far as the extent of the trespass is concerned, I would include, for the purpose of assessing damages under this head, the trespass committed upon those settled on the ungazetted green and yellow portions marked on the plan exh. P1.

*(iii) Exemplary Damages*

The trial judge refused to award exemplary damages – and I quote him – “because the first and the fourth defendants are not liable for trespass and unlawful eviction.” With respect I am unable to agree with the reasoning that merely because the first and fourth defendants are not liable in damages, the third defendant who was primarily responsible for taking steps to forcibly eject the plaintiffs from their land must not pay aggravated damages.

It is settled law that aggravated damages need not be pleaded. In *Broome v. Cassell & Co Ltd* [1971] 2 QB 354, Lord Denning MR at p. 378 said:

During the trial counsel for the plaintiff made it clear that he was claiming exemplary damages. A question was raised whether this should be pleaded. The judge held that it should be. The statement of claim was amended accordingly. I do not myself think an amendment was necessary. Exemplary damages can be given for all the conduct of the defendant right up to the end of the trial, including the speeches of counsel; and I do not see that those need be pleaded in advance. It never has been done hitherto.

Whilst the views of the Master of the Rolls on the substantive question as to the circumstances in which aggravated or exemplary damages did not survive the heavy fire it came under in the House of Lords, the pleading point received no adverse comment.

- a* When as a matter of law exemplary or aggravated damages may be awarded was settled by the speech of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 which was re-affirmed by the House in *Cassell v. Broome* [1972] AC 1027. He said that there were two categories in which exemplary damages may be awarded and three considerations that operate in the making of the award. It is best that I reproduce the whole of the passage in which Lord Devlin deals with the point. This is what he said:

- c* [T]here are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range.
- d* I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

- e* The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category, – I say this with particular reference to the facts of this case, – to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful.
- f* In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

- g* Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle CJ, in *Bell v. Midland Ry. Co.* [1861] 10 CBNS at p. 304. Maule, J, in *Williams v. Currie* [1845] 1 CB at p. 848, suggests the same thing; and so does Martin, B., in an obiter dictum in *Crouch v. Great Northern Ry. Co.* [1856] 11 Exch. 742 at p. 759. It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is

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necessary for the law to show that it cannot be broken with impunity. *This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object, – perhaps some property which he covets, – which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.* To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute.

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I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, *the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour.* The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case (1763), Lofft. 1, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling* [1941] AC 157, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant. (emphasis added.)

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Now for the present case. The evidence in relation to the methods adopted by the third defendant to evict the plaintiffs was rehearsed before us at length during argument. No purpose will be served by its repetition here. Suffice to say that very highhanded tactics were employed. It is fortunate that the police were present to keep the peace. It may well be imagined what may have happened if they had not agreed to oversee the eviction. In summary what was done was to forcibly demolish the plaintiffs' houses and meeting hall. The plaintiffs and their families were unceremoniously asked to go and fend for themselves in unkind weather. Looking at the evidence in totality I am satisfied that this is a proper case for an award of exemplary damages. The judge should have granted them. He did not. He was in error in refusing to make an award under this head. This court is, in my judgment, entitled to – and on the facts obliged to – intervene and set the matter right. In my considered judgment this is a case where the plaintiffs are the victims of the third defendant's punishable behaviour.

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- a* Based on the incontrovertible evidence on record, the defendant was seeking to gain the plaintiffs' land at the expense of the plaintiffs. This is accordingly a case where it is necessary to teach the third defendant wrongdoer that tort does not pay. Here you have a case of deliberate trespass the sole purpose of which was to gain the plaintiffs' land without paying them the full compensation due to them in accordance with the 1960 Act. This was a case where the third defendant with the positive assistance of the first and fourth defendants had gone onto and committed a deliberate act of trespass. The second defendant is a joint and several tortfeasor in the act of trespass. My reading of the evidence is that the plaintiffs were subjected to harsh, cruel and oppressive treatment. Accordingly, in my judgment this is a proper case to award exemplary damages against both the second and third defendants.

### **Conclusion & Result**

- d* This is a case which involved a large quantity of evidence in the court below. However, the judge, assisted by skilled counsel on both sides, had no difficulty in making his findings of fact. As I have earlier said, those findings are not under challenge. At the end of the day, when all the dust of conflict has settled, this is a really a case that turns on its peculiar facts. The law as applied by the trial judge to the facts consists of principles settled by high authority. But this is nevertheless a sad case. Sad, because of the treatment that the plaintiffs received in the hands of the defendants. Here you have a case where the very authority – the State – that is enjoined by the law to protect the aborigines turned upon them and permitted them to be treated in a most shoddy, cruel and oppressive manner. It is my earnest hope that an episode such as this will never be repeated.
- e*
- f* For the reasons already given, I would make the following orders:
- (i) The appeals are hereby dismissed.
  - (ii) All orders of the High Court save those that form the subject matter of the cross appeal are affirmed;
- g*
- (iii) The cross appeal is allowed to the following extent:
    - (a) the order of the High Court refusing the plaintiffs' claim in respect of the ungazetted portion is set aside. In its place is substituted an order that the first and fourth defendants shall compensate the plaintiffs for the deprivation of so much of their land in the ungazetted area marked in yellow and green on the plan exh. P1. I would state in parentheses that I find it unnecessary to make a separate declaratory
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- decree in the plaintiffs' favour in respect of the ungazetted portion as the issue of ownership is subsumed in the order directing the payment of compensation; *a*
- (b) the second and third defendants shall pay damages to the plaintiffs for trespassing on the plaintiffs' land in the ungazetted area marked in yellow and green on the plan exh. P1; and *b*
- (c) the second and third defendants shall pay the plaintiffs aggravated damages for trespass.
- (iii) The plaintiffs shall have the costs of these appeals and the cross appeal. They shall be entitled to present a separate bill before the taxing registrar in each appeal with separate items of getting up against each appellat. *c*
- (iv) Having regard to all the circumstances and the way in which the defendants ran their respective cases in the court below, I would order that the plaintiffs do recover all their costs, both here and in the court below from either the second or the third defendant at the option of the plaintiffs and leave those defendants or either of them to seek contribution of those costs from the other defendants. *d*
- (v) All the deposits in court in each appeal shall be paid out to the plaintiffs to account of their taxed costs. *e*
- (vi) The compensation and damages awarded by the High Court and by this court and under this judgment shall be assessed by the senior assistant registrar of the High Court at Shah Alam. *f*
- My learned brothers Arifin bin Zakaria and Nik Hashim bin Nik Ab. Rahman, JJCA have seen this judgment in draft and have expressed their agreement with it. *g*
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