

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1997] SGCA 18

CA 132/1996

Between

Medway Investments Pte Ltd

... Appellant

And

Trustees of the Estate of
Cheong Eak Chong

... Respondent

GROUND OF DECISION

Land — Easements — Rights of support; Land — Easements — Rights of
water; Land — Easements — Rights of water

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**Medway Investments Pte Ltd v Trustees of the Estate of
Cheong Eak Chong**

[1997] SGCA 18

CA 132/1996

Karthigesu JA; L P Thean JA; Yong Pung How CJ

14 May 1997

1 **LP THEAN JA**

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(delivering the grounds of decision of the court):

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This was an appeal against the decision of the High Court and concerned a dispute between the owners of two neighbouring properties over the right of the higher property to drain rain water on to the lower property. The facts that gave rise to the appeal were as follows.

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2. The facts

5 The respondents are the trustees of the estate of Cheong Eak Chong and they own a large property known as No 5 Oxley Rise (the `higher property`). The appellants are the owners of the adjoining property known as Nos 35 and 41 Oxley Road (the `lower property`). The higher property is on the summit of a part of a hillock and on it stands, among others, a large two-storey mansion. On the south, immediately adjoining the higher property, is the lower property. The rear of the mansion faces southwards in the direction of the lower property and is connected by a covered walkway to a smaller building, next to which is a roofed structure which from the evidence appears to be a car park. From that point southwards the ground slopes downwards unevenly towards the lower property (`the slope`). Nearer to the lower property on the eastern side is what may roughly be termed a terrace, on which stands another roofed structure which we shall refer to as `the shed`.

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3.The natural incline of the slope on the side of the lower property has been altered by its owners. It had been excavated thereby creating a cliff at or near the common boundary, and retaining walls were constructed. At present, there are two roughly parallel retaining walls of differing lengths running along the common boundary, one along the top of the cliff and the other at the bottom. On the lower property are two houses known as Nos 35 and 41 Oxley Road and between them is the garage. The entrance to the property is from Oxley Road, and the surface of the land slopes towards Oxley Road.

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4.In the ordinary course of nature, rain water which falls on the higher property

will percolate through or flow over to the lower property. The learned judge who tried the case found that the rain which falls in the immediate vicinity of the mansion drains eastwards towards another neighbouring property known as No 43 Oxley Road (‘the neighbouring property’). According to the learned judge, none of the rain water falling there flows towards the lower property. The water that would naturally drain towards the lower property is that which falls on the area of the slope. Most of it will run down the slope or percolate through the ground. A perimeter drain, ‘D1’, runs from the neighbouring property along the common boundary between the higher and lower properties. The topography of the area is such that the land is depressed towards the middle of the common boundary. Surface water caught by D1 therefore flows away from the neighbouring property. The water that falls on the shed and its immediate vicinity is collected by a drain, ‘D2’ which runs towards the lower property and ends at a point where it meets D1 near the common boundary on the side of the higher property. At the point of their convergence is a sump.

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5. The water that percolates through the ground would accumulate at or behind the retaining wall. The retaining walls have weep-holes to relieve the lateral pressure exerted by the accumulated water behind the walls. Water collected by the drains D1 and D2 flows into the sump. Apparently, there is no outlet at the bottom of the sump for the water collected there to be discharged from the sump. As a result, where there is a heavy downpour, the water collected in the sump would overflow on to the lower property and also would percolate through the soil surrounding the sump. The water that percolates through the soil would then accumulate behind the retaining wall.

6. The dispute

10 In or just before 1992, part of the retaining wall collapsed. There also occurred a subsidence in the soil adjacent to this collapsed portion of the retaining wall. Officers from the Building Control Division (`BCD`) upon inspecting the site concluded that the slope in that state was dangerous. The BCD therefore issued an order dated 10 January 1992 under the Building Control Act (Cap 29) to the appellants and the respondents requiring them to take remedial measures to protect the slope from further erosion. As a result of this order, both the appellants and the respondents engaged professional engineers to advise them and to make proposals or recommendations to be submitted to the BCD for approval.

7. The appellants engaged a firm of professional engineers called Fusion Strength & Associates sometime in June 1992 to inspect the site and to submit proposals to the BCD. Mr Lim Hung Tjung, the principal of the firm, inspected the site and put up a proposal to BCD for approval. According to Mr Lim, the function of the sump was to divert water flowing along D2 to D1. This was because D2 was narrower and shallower than D1. The sump was not intended to collect water flowing along both the drains, which apparently it did under the present circumstances. In his opinion, the sump was too small to serve such a function. Furthermore, the water collected there had to be discharged through the ground. This threatened the stability of the retaining walls, as the weep-holes in the walls were not meant to drain the extra quantity of water discharged from

the sump. The weep-holes were only designed to relieve pore water pressure that was built up due to water percolating through the soil of the slope. His views on these matters were supported by another professional engineer consulted by the appellants, Mr Fong Weng Cheong.

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8. Mr Lim proposed that the existing brick wall be reinforced. This involved the building of a second wall buttressing a length of the lower level retaining wall. His proposal was implemented by a contractor, Mr Wong Jin Fah.

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9. The respondents on their part engaged an engineering firm called Messrs Tan Ee Ping & Partners. Mr Tan Ee Ping of the firm inspected the site and recommended remedial action. In his report dated 27 March 1992 submitted to BCD, Mr Tan stated, inter alia:

The failure [of the slope] was probably triggered by the retaining wall within 35 Oxley Road giving way resulting in a slip failure of the slope above.

It is also our considered opinion that some adjacent retaining walls within 35 Oxley Road are potentially unstable and could lead to further slope failures.

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10. To remedy this, it was recommended that the slope on the higher property be excavated to create a gentler gradient, and the slopes be returfed to prevent further erosion. Further, the engineer recommended the provision of drainage at both the top and bottom of the slope to reduce both erosion as well as prevent

the build up of pore water pressures.` This proposal would involve drainage work on both higher and lower properties with the drain at the bottom of the slope connected to the existing compound drains on the lower property.

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11.The respondents` proposed remedial measures met with objection from the appellants. In the letter dated 27 March 1992 accompanying the proposals to the BCD, Mr Tan said:

Despite our efforts over the last few weeks, an amicable solution has yet to be reached between our clients and the owner of 35 Oxley Road over the questions of sharing of costs, connections to existing drains and future responsibilities including long term liability for the proposed works as well as provisions for maintenance. We are therefore unable to proceed on further at present.

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The letter further requested BCD to convene a meeting of the owners for discussion with a view to resolving the dispute. In reply BCD, while finding the proposals acceptable, was of the opinion that the drainage connection on the lower property was a private matter and declined to have any involvement in the negotiations between the two parties.

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12.The parties failed to resolve the matter amicably. In the event, BCD instituted proceedings against the respondents for not carrying out the proposed rectification works and failing to comply with the order. They were fined \$7,000. The appellants were also prosecuted and fined a similar amount.

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13. On 16 July 1994 the respondents commenced this originating summons seeking the following reliefs: (a). A declaration that the owners of the property, No 5 Oxley Rise, are entitled to a right to drain or discharge surface water from that property onto the adjacent properties of the appellants, namely, Nos 35 and 41 Oxley Road.

19 (b). A declaration that this right entitles the respondents to discharge such surface or rain water through a drainage connection to the existing compound drains of the appellants' property or through some other connection and to enter the latter's property to effect, at their own cost and making good all damage to the lower property, the construction of such connection and all ancillary works; and

20 (c). An injunction restraining the appellants from interfering with this right.

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The application was resisted, and was heard before G P Selvam J.

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14. The decision below

23 In a reserved judgment (reported in [1997] 1 SLR 329) the learned judge allowed the application. First, he held that every landowner has a natural right of support from the adjacent and subjacent soil. The effect of this is that the

adjoining landowner is under an obligation not to excavate his land in a manner which may cause a subsidence of his neighbour's land. Consequently if the servient owner withdraws the natural support and substitutes it with an artificial support, such as a retaining wall, he must ensure that it is designed and constructed to be sound and strong to provide the support. Secondly, he held that the owner of land on a higher level has a right to let rain water flow naturally onto or into adjacent lower land, and that the owner of the lower land has an obligation to receive such water. Thirdly, he held in the alternative that this right is an adjunct right to the natural right of support. Fourthly, he held that the respondents had acquired an easement of drainage over the appellants' property and applied the doctrine of lost modern grant. In the result, he came to the following conclusion in [para] 28:

In the result I accept the points of law submitted on behalf of the plaintiffs [the respondents]. They were entitled to rely on the doctrine of natural right lateral support, natural right to discharge rain water into the defendants' property and the right based on lost modern grant. By applying the law I hold that from the topography of the properties and the outline of two principles of land law I have set out, it is unarguable that the defendants [the appellants] bear two responsibilities. First they have to provide support to the plaintiffs' land to prevent landslide or subsidence of the plaintiffs' land where the two properties have a common boundary. This can happen if water accumulates against the retaining wall above or below ground level in the plaintiffs' property. Water will naturally accumulate below and above the ground if there is no adequate drainage. Secondly, the defendants are under an obligation to receive rain water that falls on the slope and the shed naturally flows towards the plaintiffs' property.

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15. The appellants appealed against this decision. We dismissed the appeal, and now give our reasons.

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16. The appeal

26 Three issues were raised on behalf of the appellants: (a). whether the owner of a lower lying land is obliged to accept water percolating through or flowing on to his land from a higher land and whether he is entitled to pen it back;

27 (b). whether as an adjunct to the natural right of support, the lower lying land is obliged to receive the water and therefore the respondents are entitled to construct their drain or drains over the appellants` property; and

28 (c). whether the respondents have acquired an easement of drainage over the appellants` property.

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17. Natural right of drainage

30 On the first issue, the authorities relied upon by counsel for the appellants and respondents in support of their respective cases are in some conflict, and it is necessary to consider them in detail. The starting point is **John Young & Co v Bankier Distillery Co** [1893] AC 691. There, the respondents had for many years been using the water flowing downstream for the purpose of their distillery. The appellants, who were miners and whose property was further up the stream, in the course of their mining, had poured into the stream a large quantity of water which they had pumped up from their mines. The respondents found that the quality of such foreign water was different and

prejudicially affected the water of the stream which they had been using for distillery purposes. They brought an action against the appellants. The Court of Session held that the appellants were not entitled to discharge into the stream the water they had pumped up from their mines. The appellants appealed and their appeal was dismissed by the House of Lords.

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18. In that case, both the appellants and the respondents were riparian proprietors and the water flowed in a natural watercourse. Both Lords Macnaghten and Lord Shand in their respective speeches decided the case on the basis of the rights and obligations of riparian owners. Lord Macnaghten said, at p 698:

... A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.

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Similar pronouncement was made by Lord Shand (at p 701).

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19. On the other hand, Lord Watson decided the case on a broader basis grounded on the natural incidents of lands of higher and lower levels. His Lordship in the course of his speech said, at pp 696-670:

The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in aemulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream.

*The law of Scotland upon this point is the same with that of England. In **Blair v Hunter, Finlay & Co**, Lord Gifford said: 'Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible.' The rule that the upper heritor cannot interfere with the gravitation of the water so as to make it more injurious to the land below is clearly stated by Erle CJ in **Baird v Williamson**, which was rightly accepted by the First Division as establishing a principle conclusive of the present case.*

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From the tenor of his speech it is clear to us that his Lordship was expressing his opinion on the general principles governing the rights and obligations of adjoining owners of lands of different levels.

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20. The next authority which is more relevant and direct is the Privy Council's decision in **Gibbons v Lenfestey** [1915] 84 LJ PC 158 on an appeal from the decision of the Royal Court of Guernsey. In that case, the respondent had stopped up a hole in the wall between the appellant's land and his own which

had previously allowed the natural flow of water from the appellant's land to his land. The wall had been constructed in pursuance of a verbal agreement by the respective predecessors in title. The respondent's actions resulted in severe flooding of the appellant's land. The appellant, according to the law of Guernsey, could not rely on the verbal contract which had to be registered in order to have binding effect on successors in title. The Privy Council, however, held that the owner of the higher land had the right to have the water which naturally fell on his land discharged onto the contiguous lower land of another proprietor. Lord Dunedin, delivering the advice of the Board said, at p 160:

... But the true cause of action is not the agreement of 1872; it is the natural right of a superior proprietor to call on the inferior proprietor to receive the water that naturally flows from the higher to the lower level. The agreement of 1872 is nothing as regards binding force; it is merely narrative of how the natural flow of the water came to be as it was.

The law of Guernsey, differing in this respect from some other systems, does not allow of the constitution of ordinary servitude or easements except by grant. But the right of the superior proprietor to throw the natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude. Their Lordships do not doubt that the law of Guernsey in this matter is the same as that of every other country whose jurisprudence is traceable to Roman sources. Indeed, even the countries ruled by the common law have accepted the Roman rules. ... The law may be stated thus: Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior.

21. This decision was followed by the New Zealand Court of Appeal in **Bailey v Vile & Anor** [1930] NZLR 829. In that case, the appellant and the

respondents were owners of adjoining agricultural farms with the latter's farms on a higher level than that of the appellant's farm. In farming on their property the respondents kept open certain surface drains constructed long ago and these drains conveyed the surface water from their farms to the appellant's. The appellant claimed that this flow of water caused his land to be flooded and claimed an injunction which was refused at first instance. He appealed, and his appeal was dismissed by the Court of Appeal following the decision of the Privy Council in **Gibbons v Lenfestey**. Blair J said, at p 839:

*The question here is as to the extent of liability of appellant's lands to take the natural water from respondents' properties, notwithstanding that such natural waters have been more or less confined into drains, and notwithstanding that no easement is registered on the title. As already pointed out, the natural fall of the land is from the respondents' properties towards the appellant's. There is thus created by nature itself a servitude whereby the lower-lying property is required to take the water flowing naturally from the higher to the lower land. It has never been questioned that an owner of land has to take it with all its natural burdens. This liability has to some extent been defined. The necessity for this definition arises from what is called the natural use of the land. The law on this subject has been definitely settled by the Privy Council in **Gibbons v Lenfestey** 84 LJ PC 158.*

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22. The case of **Gibbons v Lenfestey** was also followed in India. In **Sheik Hussain Sahib v Pachipulusu Subbayya** [1925] ILR 49 Mad 441, the plaintiff's land was on higher ground than the defendant's land, and rain water from the plaintiff's land naturally flowed to the defendant's land. The defendant erected a bund on his land, the effect of which was to pen back the plaintiff's water. The plaintiff brought an action seeking an injunction restraining the defendant from obstructing the flow. It was held by the appellate court in Madras that an owner of lower land to which the surface water from the adjacent

higher land naturally flowed was not entitled to deal with his land so as to obstruct the flow of water from the higher land and that ***Gibbons v Lenfestey*** was a direct authority binding on the court.

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23. Before us, counsel for the appellants, while conceding that the owner of a higher land has the right to let surface water flow naturally on to or into adjacent lower land, contended that the owner of the lower land has no obligation to receive such water and is entitled to pen it back to the higher land. They relied on the decision of the Supreme Court of Canada in ***Scott Rural Municipality v Edwards*** [1934] 3 DLR 793; the decision of the High Court of Australia in ***Gartner v Kidman*** (1961-1962) 108 CLR 12; and a recent decision of the court of first instance in England in ***Home Brewery plc v William Davis and Co (Loughborough) Ltd*** [1987] 1 All ER 637. Relying on these authorities, counsel submitted that the principle laid down in ***Gibbons v Lenfestey*** (supra) is not the principle of common law in Canada, Australia and England and urged us to reject it as a principle of common law in Singapore.

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24. We turn first to the decision of the Supreme Court of Canada in ***Scott Rural Municipality v Edwards*** (supra). There, the Supreme Court upheld the decision of the Saskatchewan Court of Appeal that a right of drainage of surface water does not exist *jure naturae* and the owner of a lower property may lawfully erect a dam on his own property to keep out the water or pen it back to the land of the higher proprietor. Martin JA delivering the judgment of the Saskatchewan Court of Appeal (with which the Supreme Court concurred) said, at p 796:

*I cannot but conclude that the weight of authority in the Provinces of Canada where the English common law prevails is that the principles which apply to water flowing in a defined channel do not apply to surface water - water of a temporary and casual character - which does not flow in any regular channel and has no certain course but which merely squanders itself over the surface of the ground. A right of drainage of surface water does not exist **jure naturae** and the plaintiff was within his rights in attempting by the erection of the drain on his own property to keep the surface water which had accumulated on sec 20 and on the road allowance from draining onto sec 21.*

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25. The next authority is the decision of the High Court of Australia in **Gartner v Kidman** (supra). There, rain water was collected in a swampy basin that was mainly on the plaintiff's property and also partly on the defendant's. In wet weather, the water from the basin would overflow onto the defendant's land and travel along a depression on the defendant's land into a sandpit whereupon it escaped into the ground. The predecessor in title of the plaintiff had dug a drain along the depression and this drain was subsequently enlarged by another predecessor. These works were executed without any objection from the defendant's predecessors in title. The drain helped to drain the plaintiff's land so that less of it was submerged under water during the rainy season. The defendant subsequently discovered that the sand from the sandpit had a commercial value. He therefore built two sand banks across the drain which kept the water from entering the sandpit. This had the effect of penning the water back into the swamp and flooding it. Consequently, the plaintiff had less grazing land and his vegetation in the flooded area was destroyed. He therefore commenced an action for an injunction and damages. The Supreme Court of South Australia granted these reliefs. On appeal, the High Court of Australia allowed the appeal and found for the defendant.

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26. Windeyer J who delivered the leading judgment of the court, considered the case as one of 'an artificial watercourse, that is water channel constructed by man as distinct from a natural stream' where the common law position is well established. In his view, the resolution of the issue depended on the law of nuisance. This raised the question whether the plaintiff had any legal right to drain water from his land to the defendant's land which had been interfered with by the defendant. He declined to follow the Privy Council's decision in **Gibbons v Lenfestey** (supra) preferring an approach grounded on the concept of reasonable user of land. At p 46, he held:

After considering a great number of authorities in addition to those I have referred to, but which I do not find it necessary to discuss in detail, I have come to the conclusion that the correct view is that the so-called rule of the civil law that the owner of higher land has a right to insist upon his lower neighbour receiving surface water running off his land is not part of the common law as it exists in Australia and that so far as the dicta in the Privy Council case suggest that it is they should not be followed by this court. ... the law is, I think, that he may block it by any works on his own land, so far as they are reasonably necessary to protect his land for his reasonable use and enjoyment; but that in doing so he must not act recklessly of his neighbour so as to cause wanton damage to him.

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27. Windeyer J conducted a review of various authorities and summarised the position of the rights and obligations of the 'higher proprietor' and 'lower proprietor' at pp 48-49:

The higher proprietor: *he is not liable merely because surface water flows naturally from his land on to lower land.*

He may be liable if such water is caused to flow in a more concentrated form than it naturally would.

It flows in a more concentrated form than it naturally would if, by the discernible work of man, the levels or conformations of land have been altered, and as a result the flow of surface water is increased at any particular point.

If a more concentrated flow occurs simply as the result of the 'natural' use of his land by the higher proprietor, he is, generally speaking, not liable. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased: ...

...

The lower proprietor: *He may recover damages from, or in appropriate cases obtain an injunction against, the proprietor of the higher land who is, for any of the reasons given above, liable to an action because he has concentrated or altered the natural flow.*

Although he has no action against the higher proprietor because of the natural unconcentrated flow of water from his land, he is not bound to receive it. He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances.

It may be added that the proprietor's right to defend his land against water coming upon it by erecting barriers, is generally speaking restricted to penning it back on to the higher land whence it would otherwise have naturally come. It does not entitle him to divert it on to the land of a third proprietor to which it would not have naturally gone to the damage of that proprietor.

28. We now come to **Home Brewery plc v William Davis and Co (Loughborough) Ltd** (supra), a decision of the High Court in England. In that case, water from the plaintiff's land was drained to the adjoining lower land which had two disused clay pits and an osier bed. The defendants bought over the adjoining land for the purpose of developing it for a housing project. They

filled up the pits. This had the effect of restricting the flow of water from the osier-bed to the pit and in turn restricting the flow of water from the plaintiffs' land. In effect, the defendants had erected a partial barrier against the flow of water from the plaintiffs' land. The plaintiffs' land became flooded during heavy rainfalls, and pumps had to be installed to alleviate the flood. The plaintiffs brought an action against the defendants claiming damages for nuisance. Mr Piers Ashworth QC, sitting as a Deputy High Court judge, declined to follow the Privy Council's decision in **Gibbons** which was not binding on him. He rejected the rule that the owner of higher land could insist on the lower land receiving surface water as one of the civil law which did not represent the common law. He expressed his views on the common law position in the following terms, at p 644:

I hold that the common law rule is that the lower occupier has no ground of complaint and no cause of action against the higher occupier for permitting the natural, unconcentrated flow of water, whether on or under the surface, to pass from the higher to the lower land, but that at the same time the lower occupier is under no obligation to receive it. He may put up barriers, or otherwise pen it back, even though this may cause damage to a higher occupier.

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29. There are thus two lines of authorities which are irreconcilable, and neither is binding on us. In our opinion, the rights and obligations of owners of neighbouring lands with different levels are determined by the natural incidents of their respective lands. In this respect, we can do no better than adopt the words of Lord Watson in **John Young** (supra) at pp 696-697 which merits repetition:

The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural

water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in aemulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; ...

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The pronouncement, although an obiter, was wholly consistent with the decision of the Privy Council in **Gibbons** .

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30. The right of the owner of the higher property is not absolute but is subject to certain qualifications. In *Gibbons*, Lord Dunedin said, at p 160: The right, however, of the superior proprietor is not quite absolute. The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land - eg by procuring a pipe-supply or draining another watershed - and then insist that all the water so brought on the land should be received by the inferior proprietor to his detriment.

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His Lordship also considered the effect of man-made structures on the higher property, and said, at p 160:

No doubt a proprietor may not build on the extreme verge of his property and then throw water off his roof on to the neighbour's land; ... But if the water from the roof of a building falls on the

proprietor's own grounds it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there.

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31. In this connection, it is helpful to refer to two cases of the High Court of New Zealand which have usefully clarified the position. In **Wilsher v Corban & Ors** [1955] NZLR 478 at p 490, North J carried out a comprehensive review of the authorities and held that **Gibbons** established the following principles:

First, the obligation of the inferior proprietor to receive the natural waters flowing from higher land was not an ordinary servitude which required to be supported by an express grant, or by registration to bind successors. Secondly, it could never be said as a matter of law that the collection of surface waters into one body per se was not a natural user of land for this was a question of fact which required to be determined in each case with due regard to the whole of the surrounding circumstances. Thirdly, if the facts disclosed that the natural waters from the superior tenement had been cast on the inferior tenement in a certain place over a period of years, then prima facie, at all events, the inferior proprietor was obliged to receive the surface waters in this way. Fourthly, the mere circumstance that surface waters had been collected into one body and so discharged on to the inferior tenement did not necessarily alter the nature of the right and, therefore, no question of the need of an express grant or of registration need arise.

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32. The next New Zealand case is **Davies & Anor v Lethbridge & Anor** [1976] 1 NZLR 689. This case is of particular relevance, as the facts bore some similarity to those in the present case. The plaintiffs and the defendants were owners of adjoining residential properties. The plaintiffs' land was slightly below that of the defendants' and the surface water would flow from the defendants' land to the plaintiffs'. The prior owner of the defendants' land had

built a concrete retaining wall along the common boundary and part of the back boundary. This deflected the flow of water from the defendants' land to the plaintiffs' and it flowed along the wall and then crossed the plaintiffs' back fence. The defendants after they had bought the land filled the rear part of the land to the level of the top of the concrete wall. On heavy rainfalls the surface water from the defendants' land ran over the top of the wall and in some cases percolated through the wall discharging on to the plaintiffs' land. On the plaintiffs' complaint, the defendants dug a ditch on their side of the wall to lead the water down to the bottom of their land. Notwithstanding that, the plaintiffs brought an action against the defendants complaining that the ditch was insufficient to drain the water and obtained damages in the magistrates court.

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33. On appeal, Mahon J allowed the appeal. The learned judge adopted the principles laid down by North J in ***Wilsher v Corban*** (supra). He found that the land of the plaintiffs was at all times on a level lower than the defendants' land and when both properties were in their natural state the plaintiffs' land received the natural flow of the surface water from the defendants' land. When the concrete retaining wall was built it deflected temporarily the flow of water from the plaintiffs' land. But when the defendants filled the section of their land to the level of the top of the retaining wall, the surface water which had been deflected returned and flowed over the wall to the plaintiff's land in the same quantity as before and without any altered velocity or concentration. He held that the right of the higher owner of land to allow surface water to flow to the lower land is subject to three limitations. He said, at p 695:

Once the civil law natural servitude is seen to form part of the common law of New Zealand it then applies subject to three

*principal limitations. First, the lower tenement is not obliged to accept 'foreign water', meaning thereby water arriving on the upper tenement from elsewhere by means of active collection by the occupier, this being an exception specifically nominated by Lord Dunedin in **Gibbons v Lenfestey**. Secondly, there is the 'artificial structure' exception exemplified by **Whalley v Lancashire and Yorkshire Railway Co** [1884] 13 QBD 131 and **Hurdman v North Eastern Railway Co** [1878] 3 CPD 168, whereby the superior occupier will be liable if by artificial means, including the erection of buildings or raising of soil level, he causes natural surface water to pass on to the lower tenement in a way different from before and causes damage which was absent when the lower tenement received the surface waters by natural flow. Thirdly, the user of the superior tenement will be held not to be natural user if the result is to discharge surface water on to the lower land with an altered concentration or velocity, causing damage which did not occur when the lower tenement received the surface water by natural flow.*

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34. We now revert to the facts in the instant case. In the ordinary course of nature, rain water falling on the respondents' land percolates through and flows over to the appellants' property. The learned judge found that the rain water which falls on the mansion and the immediate vicinity flows eastwards towards the neighbouring property, 43 Oxley Road. Only at the slopes and parts of the property at or around the shed does the rain water flow to the appellants' property. It is true that the drains D1 and D2 and the sump which collect the surface water are 'artificial structures', but, as the learned judge also found, the water collected by the drains D1 and D2 is that which would have fallen on the ground and would naturally have flowed onto the appellants' property, and the appellants are obliged to receive the water in this way. As has been laid down in the cases referred to, the mere circumstance that surface water has been collected into one body and so discharges on to the lower property does not necessarily alter the nature of the right of the proprietor of the higher property, unless by such collection the flow has been altered with such concentration or

velocity causing damage which did not occur when the lower property received the water by the natural flow.

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35. The genesis of the problem was the water pressure behind the retaining walls which had been built up over the years and this had caused the collapse of parts of the retaining wall and the landslip nearby. The evidence was incontrovertible that the cause of the collapse and the slip was the lack of adequate drainage and not the natural weathering of the retaining wall or other natural factors. The respondents were therefore entitled to enter the appellants' property to carry out remedial measures by providing reasonable drainage of the water naturally flowing from their property.

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36. An adjunct right of the natural support

54 The learned judge also relied, as an alternative and discrete ground for his decision, on the natural right of support to justify the right of the respondents to enter the lower property to build the connecting drain. He began with the proposition that the higher land has a natural right of support from the adjacent and subjacent soil and that it is a natural right in the sense that it arises from ownership of land. It is not an easement and does not depend on any grant: see **Dalton v Henry Angus and Co** [1881] 6 App Cas 740. But that is merely a right not to have the support removed without replacement; it does not impose a positive duty on the owner of servient tenement. It does not prevent the servient tenement from being altered from its natural state. It only insists that if

such alteration occurs, the servient owner is obliged to provide an alternative, albeit artificial, means of support.

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37. In the present case, the alternative means of support were the retaining walls. Once the retaining walls were provided, no cause of action lay against the owner of the lower land for any damage occasioned by operation of nature on the land. The owner of the lower land is not obliged to take any active steps to maintain or repair the retaining wall. On the other hand, the higher owner could not stand by and let the retaining wall deteriorate and jeopardise the support of his land. He may enter and take the necessary steps to ensure that the support continues by effecting repairs.

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38. The learned judge referred to the following passage of the judgment of Lord Wilfred Greene MR in **Bond v Nottingham Corporation** [1940] 1 Ch 429 at p 438:

The nature of the right of support is not open to dispute. The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If it does so, and support is removed, the owner of the dominant tenement has no cause for complaint. On the other hand, the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his neighbour's building. He is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs, and so forth, to the part of the building which gives the support. But what the owner of the servient tenement is not entitled to do is, by an act of his own, to remove the support without providing an equivalent. There is the qualification upon his ownership of his own building that he is

bound to deal with it, and can only deal with it, subject to the rights in it which are vested in his neighbour.

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39. In the present case, the land slip and the collapse of part of the retaining wall were caused by the build-up of water behind the retaining wall which could not be adequately drained through the weep-holes. On the principles just stated, the learned judge held that the respondents had a right to enter and carry out measures to remedy the weakness in the slope and such measures would include, inter alia, the construction of reasonable drainage. We agree entirely with the learned judge.

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40. The appellants' argument is that they had never prevented the entry of the respondents onto their land for the purpose of repairing the retaining wall. They argued, however, that while there was such a right to repair the retaining wall, that right did not extend to the right to construct the drainage connection. We were unable to agree. The cause of the slope instability was the pore water pressure behind the retaining wall which was not adequately relieved by the provision of weep-holes. The proposals of the respondents would reduce the amount of water building up in such manner by the provision of drains which would then be linked to the appellants' compound drains. Such proposals are intended to tackle the problem at its root. The appellants' suggestion of merely repairing the retaining walls would merely postpone the need to deal with the problem in the future.

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41. The learned judge was therefore justified in granting the relief sought by the respondents. The relief granted was in general terms and the parties were, and are, at liberty to go before him for necessary directions with the details of the proposed drainage.

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42. Easement of drainage

61 We turn to the final issue in this appeal. The learned judge found that the respondents had acquired an easement of drainage over the property of the appellants, and this finding was challenged by the appellants.

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43. A crucial fact which the respondents must establish in order to found the easement is the existence of a defined drain or channel for such drainage. Without a sufficiently defined drain or channel, such an easement cannot arise. There is no such thing as an easement of drainage at large over the appellants' land. The learned judge found that there was such a defined drain on the basis of his observation of a relatively new patch of mortar on the retaining wall below the sump. He concluded that this was the opening of the drain connecting the higher property to the lower and had been stopped up by the appellants. Secondly, he held that as a matter of logic, it did not make any sense to sink a sump without providing an opening. Thirdly, he accepted the evidence of two

of the trustees that there was such an outlet from the sump to drain water into the appellants' property.

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44. Counsel for the appellants pointed out that no plans were adduced to show the construction of the drain. The respondents failed to take up an offer to break up the masonry of the retaining wall, nor did they dig up their own land around the sump to determine the existence of the subterranean drain. The evidence pertaining to the existence of the subterranean drain given by the two witnesses was extremely weak and tenuous. Further, the contractor and the consultant engineer engaged by the appellants to construct the retaining wall in 1992 did not notice any outlet in the existing wall linking the two drains.

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45. Counsel for the appellants further submitted that what the learned judge found was a patch of mortar on the retaining wall. This retaining wall is about 20 feet vertically and 32 feet laterally from the compound drain on the lower property, and laterally the sump is about 6 feet off the compound drain. The evidence of the two trustees was to the effect that all the rain water collected in both D1 and D2 had always flowed into the compound drains of the appellants through the sump. Given the description of the site, this means that the easement, if it exists, consists of water travelling through this subterranean drain and through the outlet represented by the mortar patch and then plunging onto the compound of the lower property and somehow finding its way into the compound drains therein. An easement of drainage founded on these facts is clearly unsustainable.

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46. We agreed with the submissions made on behalf of the appellants. In our judgment there was, with respect, simply insufficient evidence to support the learned judge's finding of a subterranean drain, and the respondents' claim based on an easement of drainage failed. It is unnecessary for us to consider the further questions relating to the mode in which the respondents claimed that they acquired the easement.

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47. The appellants, however, did not succeed on the first two issues raised before us. Accordingly, the appeal was dismissed.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Vangat Ramayah (Wee Ramayah & Partners) for the appellants
Alvin Yeo and Lena Chan (Wong Partnership) for the respondents
