Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)
[2005] SGCA 22

Case Number : CA 89/2004, OS 825/2004

Decision Date : 12 April 2005

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Chao Hick Tin JA; Yong Pung How CJ

Counsel Name(s) : Tan Cheng Han SC (instructed) and Ernest Balasubramaniam (ASG Law Corporation) for the appellant; Edwin Lee and Looi Ming Ming (Rajah and Tann) for the respondent

Parties : Lee Tat Development Pte Ltd — Management Corporation of Grange Heights Strata Title No 301

Res Judicata – Issue estoppel – Whether appellant estopped from raising issue in present action because issue forming subject matter of previous proceedings between identical parties – Requirements for establishing issue estoppel

12 April 2005

Belinda Ang Saw Ean J (delivering the judgment of the majority):

1 This is an appeal from a decision of Woo Bih Li J in which he dismissed Originating Summons No 825 of 2004 on the grounds that the claims there were barred by issue estoppel arising out of the judgment of Punch Coomaraswamy J in *Management Corp of Grange Heights – Strata Title No 301 v Lee Tat Development Pte Ltd* [1990] SLR 1193 and the judgment of Goh Joon Seng J delivered for the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301* [1992] 2 SLR 865. The previous proceedings were commenced in 1989 and they are, for convenience, hereinafter referred to as "the 1989 proceedings".

2 Agreeing with Woo J, we dismissed the appeal. In our judgment, issue estoppel arises because the precise issue in this appeal, which is whether the residents of Grange Heights have a right of way over Lot 111-31 to gain access to and from Grange Road, has been finally and conclusively determined on the merits by courts of competent jurisdiction in the 1989 proceedings.

3 The facts are set out in the judgment of Woo J reported in [2004] 4 SLR 828 and for present purposes they can be restated quite briefly. It is also convenient to refer to previous proceedings on the same topic to make the history and the point of this appeal intelligible.

4 The subject matter of the present appeal concerns the right of way over Lot 111-31 (the servient tenement) granted to the respective owners of Lots 111-32 and 111-33 and the former Lot 111-34. All lots are situated in the Orchard Road vicinity.

5 The appellant, Lee Tat Development Pte Ltd ("Lee Tat"), formerly known as Collin Development (Pte) Ltd, is the owner of dominant tenements Lots 111-32 and 111-33. In January 1997, the appellant purchased the servient tenement subject to easements and rights affecting it. The dominant tenement, Lot 111-34, was amalgamated with Lot 561 (which was sub-divided from Lot 122) to create a new Lot 687. Hong Leong Holdings Ltd ("Hong Leong") was the developer of the condominium known as Grange Heights. Grange Heights was built on Lot 687. Standing on the former Lot 561 are three blocks of high-rise apartments comprising a total of 120 units, car parks, swimming pool and other facilities. The tennis courts and changing rooms stand on the former Lot 111-34. The

respondent in this appeal is the Management Corporation of Grange Heights ("the MCST"). For ease of reference, appended to this judgment, as Appendix 1, is a sketch (not drawn to scale) depicting the dominant tenements in relation to the servient tenement and the former Lot 561.

6 There has been a history of clashes between the appellant and Hong Leong over the right of way in connection with the development of Grange Heights. On one occasion, the appellant tried without success to stymie the development carrying and using the address nos 15, 19 and 23 Grange Road. The relevant authorities rejected the appellant's objections.

7 In the very first suit in 1976, *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1975–1977] SLR 457, Collin Development (Pte) Ltd ("Collin Development"), as owner of Lots 111-32 and 111-33, claimed for a declaration that Hong Leong, as owner of Lots 561 and 111-34, and its directors, officers, servants, workmen or agents and prospective or future residents of Grange Heights were not entitled to use Lot 111-31. The complaints then were that Hong Leong had, *inter alia*, permitted its contractors employed for the construction of Grange Heights to use the right of way for access to and egress from Lot 561. F A Chua J (as he then was) held that Collin Development had no cause of action, as it was unable to prove that Hong Leong and the prospective or future residents of Grange Heights had substantially interfered or would substantially interfere with Collin Development's enjoyment of the right of way over Lot 111-31. Hong Leong's counterclaim for a declaration that the company and its authorised persons were entitled to pass and repass Lot 111-31 was dismissed as Collin Development was not the owner of Lot 111-31. As an aside, Woo J did not agree with Chua J's reasoning for the dismissal of the counterclaim. No analysis of this first case is required as there was no cross-appeal by the respondent on Woo J's ruling that the judgment of Chua J, which was affirmed on appeal, did not give rise to any issue estoppel to bar the current proceedings from being re-litigated.

8 About 13 years later, a second suit (*ie*, the 1989 proceedings) was launched. Lee Tat erected an iron gate and fence on Lot 111-31 thus preventing the residents of Grange Heights from using Lot 111-31. This time, however, there was no complaint of excessive use of Lot 111-31 by the residents of Grange Heights. It was simply an issue of the respective parties' rights over Lot 111-31. This is an important point to note and we will elaborate on it later. It was also not disputed that Lee Tat was aware that the residents of Grange Heights had been using Lot 111-31 since the completion of Grange Heights in 1976. Initially, the MCST obtained an interim injunction against Lee Tat for interfering with its right of way over Lot 111-31 and the latter applied for the interim injunction to be discharged.

9 The application to discharge the interim injunction and the MCST's originating summons were heard together on 5 December 1990. Coomaraswamy J granted the MCST an injunction as sought in the originating summons. Lee Tat was also ordered to remove the iron gate and fence across Lot 111-31. The court held that although Lots 561 and 111-34 had been amalgamated into Lot 687, it was purely for purposes of survey and issue of documents of title. The easement over Lot 111-31 still ran with the land and enured to the benefit of the owner of Lot 111-34, now part of Lot 687. It was common ground that the MCST was the owner of Lot 111-34.

10 Lee Tat appealed and the Court of Appeal in upheld the first instance decision and reiterated that upon amalgamation of the plots of land, the dominant tenement did not cease to exist, nor was the right of way appurtenant thereto extinguished. So long as the user on the servient tenement was not excessive, the amalgamation did not affect the existence of the right of way. The Court of Appeal found that the residents of Grange Heights had, since 1976, only been using Lot 111-31 as a foot path and they were allowed to continue this activity. Lee Tat was not entitled to erect the gate and fence.

11 The current set of proceedings instituted on 26 June 2004 is the third time the parties have gone to court on account of the same easement. We need to only look at the multiple declarations and injunction sought by Lee Tat in Originating Summons No 825 of 2004 to see its motivation, which is to stop the residents of Grange Heights from using the easement. They are:

(a) a declaration that the grant of easement in favour of, *inter alia*, Lot 111-34 was not intended to be made appurtenant to Lot 122 (later Lot 561 and now Lot 687);

(b) a declaration that the amalgamation of Lot 111-34 with Lot 122 (later Lot 561) to form Lot 687 did not result in the conferment of any easement rights to Lot 561 and Lot 687, being land other than the dominant tenement (Lot 111-34).

(c) a declaration that the right of way over Lot 111-31 shall not be used as an access to Lot 687;=

(d) a permanent injunction to prohibit all the owners, residents, occupants and/or visitors of the apartments in the condominium known as Grange Heights from using any part of Lot 111-31 to access Grange Heights from Grange Road and *vice versa* absolutely and indefinitely;

(e) an order directing the Registrar of Titles and Deeds to expunge any and all entries, notices and registration of any easements or orders of court registered against Lot 111-31 in the Index to Land Books in the Registry of Deeds and Land Register comprised in Certificate of Title Vol 464 Folio 159;

(f) further and/or alternatively, a declaratory order that all the owners, residents, occupants and/or visitors of the apartments in the condominium known as Grange Heights are not entitled to use any part of Lot 111-31 to access Grange Heights from Grange Road absolutely and indefinitely.

12 Counsel for the appellant, Mr Tan Cheng Han SC, argues against issue estoppel. This is how Mr Tan has characterised the issue so that there is no issue estoppel. The easement is in respect of Lot 111-31 and on the principle enunciated in *Harris v Flower and Sons* (1904) 91 LT 816 ("*Harris v Flower*"), which principle is discussed in detail in Chao Hick Tin JA's dissenting judgment at [52] to [62] below, the MCST cannot use the easement in respect of Lot 561. Such user beyond the geographical scope of the express grant is improper and amounts to trespass on the servient tenement. On this occasion, the appellant has sued as the owner of the servient tenement. The elements required for the present cause of action are different from the previous cause of action. In the 1989 proceedings, the appellant was the owner of the dominant tenements and its rights were limited. In an action for substantial interference with a dominant tenement's right of way, the key question is whether the easement is being used in such a manner as to substantially interfere with the applicant's legitimate user of the easement. Counsel has referred us to a number of cases where the *Harris v Flower* principle was followed. In particular, he relies on *Re Gordon and Regan* (1985) 15 DLR (4th) 641, a decision of the Ontario High Court, to underscore and drive home his point that the respondent would still offend the principle in *Harris v Flower* if the improper use of the servient tenement was minimal. This is because such user is outside the terms of the original grant and hence unauthorised.

13 What is relied on here by the MCST is a previous decision on a particular issue or issues. Counsel for the respondent, Mr Edwin Lee, argues that in the 1989 proceedings, *Harris v Flower* was relied upon by Lee Tat for the argument that the MCST was not entitled to use Lot 111-31 as a right of way for the residents to gain access from their apartments at Lot 561 to Grange Road and *vice*

versa and that the point was decided by the court. Mr Tan submits that the record of the judgments relied on did not mention *Harris v Flower* and the silence of the High Court and the Court of Appeal in the 1989 proceedings might indicate that the court made no decision on the point at all. If that were the case, then there would hardly be a previous decision which could blight the chances of there being fresh proceedings. Separately and in response to Mr Tan's contention that the only party with *locus standi* to advance the *Harris v Flower* principle is the owner of the servient tenement, Mr Lee drew our attention to *Re Gordon and Regan,* the very case relied upon by Mr Tan. In that case, the respondents, who were objecting to the user as placing an added burden on the right of way by extending the use of that right of way to the owner and occupants of the newly-created semi-detached house to access the nearby garage on land adjoining the dominant tenement, did not own the servient tenement, but were owners of the dominant tenement. The Ontario High Court agreed with the respondents and found in their favour. We also note that none of the cases cited by Lee Tat stood for the proposition that a dominant tenement owner could never question the inappropriate scope of use of the right of way by a fellow dominant tenement owner. Accordingly, we reject the appellant's *locus standi* argument.

14 A convenient starting point is to ascertain what is required of an issue estoppel and then determine whether the requirements are fulfilled. First of all, there needs to be a final and conclusive judgment on the merits. The judgments relied upon were those in the 1989 proceedings. That would seem to be satisfied. Secondly, that judgment has to be by a court of competent jurisdiction. Again, that would seem to be satisfied. Then there has to be identity between the parties to the two actions that are being compared. Again, that is satisfied here. The reality is that the effective parties are the same. The same parties in both actions have either sued or defended claims in their own right (*ie*, personal capacity as opposed to representative capacity) and that did not change even though the cause of action in the earlier proceedings was not identical with the cause of action in the present proceedings. In our judgment, the difference between the available remedies is one of the factors to establish whether there is a difference in causes of action. The present case is not about cause of action estoppel and it was not put forward as such at the appeal. This court in *Official Assignee of the estate of Tang Hsiu Lan, a bankrupt and Pua Ai Seok* [2001] 2 SLR 436 at [20], following *Arnold v National Westminster Bank Plc* [1991] 2 AC 93, held:

> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action, to which the same issue is relevant, one of the parties seeks to re-open that issue.

15 The final requirement is that there must be an identity of subject matter in the two proceedings. The correct approach to identify the issue is to ask what had been litigated and, secondly, what had been decided. In the case of issue estoppel, the decision on the issue must have been a "necessary step" to the decision or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision": see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 965 *per* Lord Wilberforce quoting from *R v The Inhabitants of the Township of Hartington Middle Quarter* (1855) 4 El & Bl 780 at 794; 119 ER 288 at 293.

16 What it comes to is that in our judgment there is the necessary identity of subject matter between the two proceedings such as of itself leads to issue estoppel. We are of the view that the change in status of Lee Tat from owner of two dominant tenements in the previous proceedings to owner of the servient tenement in this current action makes no difference to the rights of the MCST (and hence the residents of Grange Heights) over the servient tenement which were decided in the 1989 proceedings. It was decided in the 1989 proceedings that it was lawful for the residents of Grange Heights to use the servient tenement as a foot path to access Grange Road and *vice versa*.

Coomaraswamy J held the right of way ran with the dominant tenement even though it had become part of a larger plot of land. The easement continued depite the amalgamation and enured to the benefit of the MCST (and hence the residents of Grange Heights). The ruling was necessary and essential to the High Court's decision that Lee Tat was not entitled to erect the iron gate and fence. We give no credence to the appellant's assertion that the MCST's rights were irrelevant to Coomaraswamy J's decision, and that the judge had confined his decision to the finding that Lee Tat was only entitled to complain of any substantial interference with its enjoyment of the right of way.

17 The ruling roundly rejected Lee Tat's contention that:

> (a) the amalgamation of Lot 111-34 with Lot 561 into Lot 687 extinguished the plaintiffs' right of way over Lot 111-31; and
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> (b) as all the apartments in Grange Heights stand on Lot 561, the residents therefore are not using Lot 111-31 as a right of way for the dominant tenement which is Lot 111-34 but for Lot 561, and this the plaintiffs are not entitled to do.

The complaint in contention (b) was that the MCST had extended the right of way to non-dominant land. The MCST could not enforce the right of way with the condominium built on the amalgamated plots. From the other corner, the MCST's claim was for the benefit of the easement for the whole condominium. As stated earlier, in the 1989 proceedings, there was no complaint of excessive use of Lot 111-31 by the residents of Grange Heights. The dispute was simply an issue of the respective parties' rights over Lot 111-31. The complaint then was identical to the complaint before Woo J. Woo J characterised the issue before him in this way: Whether the residents of Grange Heights could use the right of way on Lot 111-31 for the benefit of not only the dominant land, Lot 111-34, but also the adjoining non-dominant land, Lot 561. It is clearly part of the subject matter of the present proceedings as it was an issue that was so clearly part of the subject matter of the 1989 proceedings.

18 By Coomaraswamy J's restraining order of 5 December 1990 (and affirmed by the Court of Appeal), the residents of Grange Heights, through the MCST, were entitled to an unobstructed use of the right of way to get from Lot 111-34 to Lot 561 and *vice versa*. The incontrovertible effect of the High Court's decision is reinforced as one reads on to the undertaking given on 17 December 1997 by Ching Mun Fong ("Ching"), a director of the appellant, on behalf of Lee Tat, which conveyed the clear message that residents of Grange Heights using the servient tenement would not be trespassing. Sometime in 1997, Lee Tat placed a chain across the Grange Road end of the servient tenement. The MCST took out committal proceedings. The undertaking to the court was in the following terms:

> The MC of Grange Heights are at liberty to send a notice to all residents of Grange Heights that they have a right of way over Lot 111-31 and that the sign against trespassers does not apply to them.

19 It is to be noted, as did Woo J, that at the time the undertaking was given, Lee Tat was already the owner of the servient tenements, having purchased it in January 1997. Lee Tat took no further legal action soon after 17 December 1997 despite the express reservation that the undertaking did not prohibit Lee Tat from commencing any legal action as it may be advised.

20 Some one and a half years later, Lee Tat was back in court again in July 1999 for contempt of the order of 5 December 1990. On that occasion, it had affixed a low chain across the right of way. Tay Yong Kwang JC (as he then was) held Lee Tat to be guilty of contempt of court and ordered Ching, as director of Lee Tat, to pay a fine of $3,000 and the MCST's costs fixed at $10,000.

Tay JC was satisfied that Lee Tat had disobeyed the Order of Court dated 5 December 1990 which, *inter alia*, restrained Lee Tat and its officers from preventing or interfering with the exercise of the right of way of the MCST over the servient tenement.

21 Another four years later, fresh committal proceedings were again brought against Lee Tat and Ching for breach of the order of 5 December 1990. This time, the appellant had erected two concrete cones to block the right of way. The contempt was purged before the date of the hearing. Lee Tat and Ching were nonetheless ordered on 26 March 2004 to be jointly and severally liable to pay the MCST costs on an indemnity basis fixed at $13,000.

22 Reverting to the judgment of Goh J in *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301* ([1] *supra*) in which *Graham v Philcox* [1984] QB 747 was referred to, a right of way in that case was granted to the upper flat in a coach house. Counsel for the defendants, Mr Gerald Godfrey QC, submitted that in enlarging the physical dimensions or in altering the nature of the dominant tenement by turning two individual flats into one dwelling house, the plaintiffs could no longer use that right of way, either because the benefit for which the right of way was originally granted was different or it was lost because the alteration had increased the burden of the use on the servient tenement. Mr Godfrey cited *Harris v Flower* in his submissions.

23 The English Court of Appeal rejected Mr Godfrey's submissions. May LJ said that *Harris v Flower* must be considered in the context of the facts of that particular case. *Harris v Flower* involved enlargement of the easement but did not suggest that the enlargement of the dominant tenement would extinguish the easement. The appellate court held that the mere alteration of the coach house from two flats into one dwelling could not have any effect on the existence of the right of way appurtenant to the first floor flat of the coach house which survived the alteration, nor could the alteration affect the entitlement to its use. However, the overriding consideration was that the character and extent of the burden imposed on the servient tenement must not be enlarged and on the facts it was not enlarged based on a reasonable user of the easement.

24 It was in this context that the Court of Appeal in the 1989 proceedings considered whether actual or anticipated user by the respondent of the way was in any way excessive, either in quantity or quality. The Court of Appeal was not concerned with the effect of amalgamation which produced a different lot number. It was well understood that the dominant tenement had been redeveloped and had become part of a condominium. It was recognised by the High Court and the Court of Appeal that the area of the dominant tenement had been enlarged upon amalgamation of the plots of land. Goh J reached the conclusion that the easement (which was acquired by express grant) over the servient tenement could be used in connection with the enlarged area of the dominant tenement as so changed if the court was satisfied that the change did not and could not result in an increase in the quantum or nature of user of the easement to that enjoyed originally. In considering whether there was excessive user in the sense of a greater or different burden on the servient tenement, on the facts there was no evidence of excessive user and there was no likelihood as such. The residents of Grange Heights had, since 1976, only been using Lot 111-31 as a foot path and not for vehicular traffic. (That we understand is still the position in the current proceedings.) Accordingly, Goh J found no basis for concluding that the easement could not continue to be exercised by the MCST in connection with the enlarged area of the dominant land.

25 Mr Tan argued that, on principle and authority, an amalgamation of dominant land and non-dominant land did not displace the rule in *Harris v Flower* such that a grant of a right of way now extended to the enlarged plot. By ruling that the easement subsisted and that it enured to the benefit of the enlarged dominant tenement, the High Court, whose decision was upheld by the

appellate court, did not follow the general rule in *Harris v Flower* forbidding enlargement or extension of the dominant tenement beyond the original grant. The real point is that for the purposes of this appeal, the correctness of the judgments relied on for issue estoppel is completely irrelevant: see *Spencer Bower, Turner and Handley on The Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996) at para 15. Moreover, it was not argued, and indeed no "special circumstance exception" exists, in the present appeal such as to prevent the operation of issue estoppel: see *Arnold v National Westminster Bank Plc* ([14] *supra*) at 109 *per* Lord Keith of Kinkel.

26 For all these reasons we dismissed the appeal with costs and ordered the security deposit to be released to the respondent to account of its costs. We should mention that in the end, and on the whole of the case, it was not necessary to examine the many authorities that were referred to by either party or deal with the other contentions canvassed by the respondent.

Appeal dismissed.

Chao Hick Tin JA (delivering the dissenting judgment):

27 This appeal concerned an application by the appellant, Lee Tat Development Pte Ltd ("Lee Tat"), the owner of a servient tenement, to restrict the use of the right of way by the residents of a condominium known as "Grange Heights" which were represented by the respondent. The application was heard by Woo Bih Li J ("Woo J") who held that as the central issue raised in the present proceeding had already been conclusively determined in earlier proceedings between the parties, Lee Tat was estopped from relitigating the same issue (see [2004] 4 SLR 828).

28 The appeal came up for hearing before the Court of Appeal on 24 February 2005 and, by majority, it was dismissed. I dissented from the majority on the grounds that follow.

The background

29 In 1919, a large piece of land along Grange Road, then owned by Mutual Trading Ltd (a company which had long ceased to exist), was subdivided into smaller lots, namely, Lots 111-30, 111-31, 111-32, 111-33 and 111-34. All these lots came under Town Sub-Division 21. The positions of the various lots are shown in a rough sketch (not drawn according to scale) attached to the judgment of the majority which I will adopt for reference.

30 It will be seen that Lot 111-31 is a narrow irregular strip, with a total area of about 9,300 sq ft. It was earmarked as a road reserve. In selling and conveying the other four lots ("the dominant tenements"), Mutual Trading Ltd granted to each purchaser a right of way over Lot 111-31 ("the servient tenement") in the following terms:

> And together with full and free right and liberty for the Purchaser his executors administrators and assigns being the owner or owners for the time being of the land hereby conveyed or any part thereof and their tenants and servants and all other persons authorised by him or them in common with others having a similar right from time to time and at all times hereafter at his and their will and pleasure to pass and repass with or without animals and vehicles, in along and over the Reserve for Road coloured yellow in the said plan.

31 In 1974, Hong Leong Holdings Ltd ("Hong Leong"), which then owned Lot 111-34, as well as the adjacent Lot 561 (see the sketch), erected three blocks of high rise apartments and other amenities on the two lots. This development became known as "Grange Heights". The three blocks were built on the part falling within Lot 561, with the garden and tennis courts erected on Lot 111-

34. A new lot number, Lot 687, was given to the combined site, consisting of the two lots. At the time, Lee Tat, which was then known as Collin Development (Pte) Ltd, owned Lots 111-32 and 111-33. For consistency, hereinafter in this judgment, Collin Development (Pte) Ltd will be referred to as "Lee Tat".

32 The contractors for the development used Lot 111-31 to gain access into and egress from the building site. Lee Tat took out an action for an injunction to restrain Hong Leong, as the owner of Lot 561, as well as its contractors and purchasers of units in the development, from using the right of way over Lot 111-31, the servient tenement. Hong Leong, in response, said that as the owner of Lot 111-34, it was entitled to use the right of way over Lot 111-31. Hong Leong also counterclaimed for a declaration that it was entitled to authorise others to use the servient tenement for the purposes of gaining access to Lot 561, provided that such use did not substantially affect Lee Tat's enjoyment of the right of way.

33 In the High Court, F A Chua J held that Lee Tat, being the owner of a dominant tenement, did not have a cause of action against Hong Leong, unless it could prove that Hong Leong's action had substantially interfered with Lee Tat's enjoyment of its right of way and as there was no evidence of such interference, Lee Tat's claim was dismissed. However, the court also dismissed Hong Leong's counterclaim and refused the declaration sought, on the ground that the owner of the servient tenement was not a party to the proceedings: see *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1975–1977] SLR 457.

34 On appeal, the Court of Appeal (see [1975–1977] SLR 202) upheld Chua J's ruling that there was no substantial interference with Lee Tat's right of way at the time to warrant the issue of an injunction. This court also added (at 204, [12]) that the ruling would "not preclude [Lee Tat] in the future, if and when the true facts and circumstances have changed, from seeking whatever remedy it may be advised to seek".

35 The hearing before Chua J and the appeal therefrom will be referred to as "the first action".

36 I should add that under the development plan approved by the relevant authorities, vehicular access to and from Grange Heights are located at River Valley Road and St Thomas Walk. Since the completion of Grange Heights in 1976, its residents have been using the servient tenement as a footpath only for gaining access to and from Grange Road.

37 In April 1989, Lee Tat caused to be erected an iron gate across the Grange Road end of the servient tenement and a fence across Grange Heights end thereof, thus closing the right of way and preventing the residents of Grange Heights from using the servient tenement for gaining access to and from Grange Road by foot. The Management Corporation of Grange Heights ("MCST 301"), which was also the respondent in this proceeding, and as the successor of Hong Leong, obtained an interim injunction against Lee Tat from preventing the residents using the servient tenement to gain access to and from Grange Road. Lee Tat applied to have the injunction discharged. These proceedings, together with the subsequent appeal, will be referred to as "the second action".

38 Punch Coomaraswamy J, who heard the application for the discharge of the interim injunction, said that the question before him was whether Lee Tat was entitled to erect the gate at one end and the fence at the other end of the servient tenement, thus preventing the residents of Grange Heights from exercising any right of way. He noted that Lot 111-34, as well as the two lots owned by Lee Tat, had a right of way over the servient tenement. While Lot 111-34 had been amalgamated with Lot 561 to become Lot 687, the land of what was previously known as Lot 111-34 was still there. He said such amalgamation was only for the purposes of survey and issue of document of title and could

not affect the right of way enjoyed by Lot 111-34. The judgment of Coomaraswamy J was reported as *Management Corporation of Grange Heights – Strata Title No 301 v Lee Tat Development Pte Ltd* at [1990] SLR 1193. He said at 1195, [8]:

> [The amalgamation] does not destroy or extinguish the right of way which runs with the land and enure[s] to the benefit of the owners for the time being of the land. Accordingly, … [MCST 301] … still [has] the right of way over the servient tenement, and [Lee Tat] in erecting the gate and the fence [has] interfered with [MCST 301's] right of way.

39 Coomaraswamy J, having noted that Lee Tat was not the owner of the servient tenement and had a right of way in common with others and was not complaining that the residents of Grange Heights had made excessive use of the servient tenement so as to interfere with Lee Tat's enjoyment of its right of way over the servient tenement, said that Lee Tat was only entitled to take the necessary steps to protect its right of way but not to erect the gate and the fence. As no interference with Lee Tat's right was alleged, he ordered the removal of the gate and the fence and restrained Lee Tat from interfering or obstructing the right of way enjoyed by MCST 301 by virtue of its ownership of Lot 111-34.

40 At this juncture, I would pause to make one observation. Woo J at [30] of his judgment seemed to say that as Lee Tat did not raise the question of substantial interference by MCST 301 with Lee Tat's enjoyment of right of way, Coomaraswamy J must have decided that Lee Tat could not obstruct MCST 301's right of way because Lot 561, and all the residents of the apartments of Grange Heights, were entitled to a right of way over the servient tenement. With respect, I do not see how that follows. There is not a word in the judgment of Coomaraswamy J which points to that.

41 Lee Tat again took the matter up on appeal: see *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301* [1992] 2 SLR 865. There, this court, in affirming the decision of the High Court, first noted at 868, [13] that the main contentions of Lee Tat before Coomaraswamy J were that:

> (i) the amalgamation of Lot 111-34 with Lot 561 into Lot 687 extinguished [MCST 301's] right of way over Lot 111-31; and
>
> (ii) as all the apartments in Grange Heights stand on Lot 561, the residents therefore are not using Lot 111-31 as a right of way for the dominant tenement which is Lot 111-34 but for Lot 561, and this [MCST 301 is] not entitled to do.

This court then went on to opine as follows at 869, [19]:

> Sub-division and amalgamation are only for purposes of survey, conveyance and transfer of land and the issue of documents of title. On sub-division and amalgamation of land, the dominant tenement does not cease to exist and the right of way appurtenant thereto is not thereby extinguished. On amalgamation, so long as the user on the servient tenement is not excessive, the enlargement of the dominant tenement by such amalgamation does not affect the existence of the right of way. In [*Graham v Philcox* [1984] QB 747] in an action by the owner of a dominant tenement against the owner of the servient tenement, it was held that the right of way appurtenant to the first floor of a coach house was not affected by the whole of the coach house being turned into one dwelling. May LJ, at pp 756–757, said:
>
> > In none of the judgments in any of the cases to which Mr Godfrey referred us is there suggestion that a mere alteration of a dominant tenement to which a right of way may be

appurtenant is sufficient to extinguish it, or indeed to affect the entitlement to its use unless as the result of that alteration the extent of the user is thereby increased.

In my opinion, therefore, the mere alteration of the coach house into one dwelling cannot have had any effect upon the existence of the right of way. It should be borne in mind that there was no evidence whatever before the judge that the actual or anticipated user by the plaintiffs of the way was in any way excessive, either in quantity or quality.

42 There, this court also referred to its earlier decision in the first action and noted that the right of Lee Tat, as far as the right of way was concerned, was to ensure that its easement right over the servient tenement was not substantially interfered with by Hong Leong, the predecessor of MCST 301. The court accordingly held at 870, [23]:

The residents of Grange Heights have not subjected Lot 111-31 to such heavy vehicular traffic as to substantially interfere with the right of way of the defendants. In fact, they do not use it for vehicular traffic at all but only as a footpath.

43 The next significant event occurred on 17 January 1997 when Lee Tat acquired the servient tenement. It is, therefore, now the owner of Lot 111-31. On 26 June 2004, Lee Tat, as the owner of the servient tenement, instituted an originating summons ("OS 825") seeking various reliefs, the important ones of which were these:

(a) a declaration that the grant of easement in favour of, *inter alia*, Lot 111-34 was not intended to be made appurtenant to Lot 122 (later Lot 561 and now part of Lot 687);

(b) a declaration that the amalgamation of Lot 111-34 with Lot 122 (later Lot 561) to form Lot 687 did not result in the conferment of any easement rights to Lot 561 and/or Lot 687 being land other than the dominant tenement (Lot 111-34);

(c) a declaration that the right of way over Lot 111-31 shall not be used as an access to Lot 687;

(d) a permanent injunction to prohibit all the owners, residents, occupants and/or visitors of Grange Heights from using any part of Lot 111-31 to access Grange Heights from Grange Road and *vice versa* absolutely and indefinitely.

44 OS 825 came before Woo J who put the issue which he had to decide in these terms (at [17]):

In OS 825, Lee Tat's counsel, Mr Tan Cheng Han SC, argued that as the right of way was originally granted to the former lot 111-34, the right of way did not extend to the former lot 561. Therefore the right of way could not be used by the residents of Grange Heights to reach the former lot 111-34 and then to cross over to the former lot 561. This was the issue before me …

45 On the authorities cited to him by Mr Tan Cheng Han SC (who was also the counsel before the Court of Appeal), Woo J was persuaded that the proposition advanced by Mr Tan was valid. However, he found that there was one major obstacle in the way of Mr Tan's argument and that was the question of issue estoppel.

46 Woo J then examined the issues that were raised and decided upon in the first action (before Chua J as well as the Court of Appeal) and came to the conclusion that the decisions in the first

action did not give rise to issue estoppel.

47 However, Woo J felt that the decisions in the second action, particularly that of the Court of Appeal, precluded Lee Tat in instituting OS 825. He highlighted the fact that this court in the second action noted that the contentions of Lee Tat in that appeal (see [41] above) were the same issues now being raised again in OS 825.

48 While I agree that the contentions made by Lee Tat in the second action as listed above are in substance rather similar to the main issue raised in OS 825, I do not think that this court there had, in fact, answered the second contention. I shall return to this aspect in a moment.

Issue estoppel

49 The rationale for issue estoppel, which is an aspect of estoppel by record, is two-fold. First, it is in the public interest that there should be an end to litigation. Second, no one should be proceeded against twice for the same cause: see *Halsbury's Laws of England* (LexisNexis UK, 4th Ed Reissue, 2003) vol 16(2) at para 964. The scope of issue estoppel is defined by Diplock LJ (as he then was) in *Thoday v Thoday* [1964] 1 All ER 341 at 352 as follows:

> "[I]ssue estoppel", is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

50 In *Official Assignee of the estate of Tang Hsiu Lan, a bankrupt v Pua Ai Seok* [2001] 2 SLR 436, this court adopted a similar sense on the principle of issue estoppel, namely, that where a particular issue forming a necessary ingredient in a cause of action had been decided upon, the same parties were not entitled, in a subsequent proceeding involving a different cause of action to which the same issue was relevant, to re-open the issue.

51 However, for estoppel to arise, the party must sue or defend the later action in the same right. As stated in *Halsbury's Laws of England* ([49] *supra*) at para 1002:

> It is necessary to an estoppel by record that the parties to the litigation or their privies should have claimed or defended in the same right in the former proceedings as they represent in the later ones.

52 Woo J recognised that, on the substantive point, the argument which Mr Tan sought to advance had merits. It is a well-settled principle of law that an easement expressly granted for the benefit of one parcel of land cannot be used for the benefit of an adjacent parcel of land which is not the beneficiary of the easement. This principle was illustrated most succinctly in this example given by Romer LJ in *Harris v Flower and Sons* (1904) 91 LT 816 ("*Harris v Flower*") at 819:

> The law really is not in dispute. If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B.

53 The facts in *Harris v Flower* are pertinent to our present case. There, a piece of land (called "pink land" in the judgment) was conveyed to M together with a right of way over another piece of land (called "yellow land") which was conveyed to J. M also owned another piece of land (called "the blue land") adjoining the pink land. The blue land, on which was a public house, abutted a highway. M erected assembly rooms partly on the pink land and partly on the blue land. Later, it was proposed that the assembly rooms be severed from the public house and be used as a factory. The question that arose was whether M was entitled to use the right of way which was a right appurtenant to the pink land for the purpose of approaching the buildings which were built partly on the pink land and partly on the blue land. On being challenged by the owner of the yellow land, the English Court of Appeal held that the intended use would be an excessive user of the right of way. The reasoning was plainly put by Vaughan Williams LJ, who gave the leading judgment, as follows at 819:

> A right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right, and the court will not allow that which is in its nature a burden on the owner of the servient tenement to be increased without his consent and beyond the terms of the grant … The burden imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of the grant.

54 In a sense one can say that MCST 301 in the present action had a weaker case than M in *Harris v Flower* because there the factory was a single building sitting on both plots of land whereas here all the three residential blocks are sited on what was previously Lot 561, a plot with no right of way over the servient tenement.

5 5 *Harris v Flower* did not make new law. It reiterated the existing law. In *Williams v James* (1867) LR 2 CP 577 at 580, Bovill CJ said:

> It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere.

56 Similarly in the Canadian Supreme Court case of *Purdom v Robinson* (1899) 30 SCR 64, Strong CJ said at 72:

> The case of *Lawton v Ward* shows that the restriction of an easement to the purposes for which it is originally granted is no new law but is an old and well established rule of the law of property.

57 Another Canadian case cited by Lee Tat and which is extremely germane to our case in hand is *Re Gordon and Regan* (1989) 66 DLR (4th) 384 where the Ontario Court of Appeal, in a short judgment, impliedly accepted the principle in *Harris v Flower* when it said at 384:

> The appellant seeks to extend the benefit of the right of way to lands purchased by the dominant tenement after the right of way was obtained. No authority for that entitlement has been offered and in this case it would be particularly inappropriate because the added lands have an exit which does not require any passage over the right of way.

58 However, if the new land acquired by the owner of a dominant tenement has no access at all, it could perhaps have made some difference in terms of relief. This was a factor which was taken

into account by the court in *Bracewell v Appleby* [1975] Ch 408 where the defendant bought one of six houses in a *cul-de-sac* with access over a private road. Later, the defendant bought a plot of land which adjoined the grounds of his house. The defendant decided to build a new house over both pieces of land and hoped to use the same private road for access. Graham J, while accepting the *Harris v Flower* principle, declined to grant an injunction and instead awarded damages in lieu thereof because the plaintiffs (the neighbouring dominant owners) had delayed in bringing proceedings with the result that the building of the new house was almost completed. The court felt that if an injunction were to be granted at that juncture, it would render the house uninhabitable.

59 The application of the principle in *Harris v Flower* does not depend on the actual extent of use made by the additional non-dominant land. This is illustrated in *Peacock v Custins* [2001] 2 All ER 827 where the plaintiffs owned a 15-acre piece of land which enjoyed a right of way over the land owned by the defendant. The plaintiffs also owned another adjoining smaller plot of land. The plaintiffs farmed both pieces of land as one unit and they used the access way for the purposes of both plots of land. The court noted that in a year the right of way was used six times for both plots. Without the farming needs of the smaller plot, the right of way would probably be used four or five times in a year. So with the smaller plot, the right of way would be exercised one or two times more. The English Court of Appeal held that the frequency of use was not the relevant consideration. It was a question of entitlement. The fact of the matter was that the smaller plot had no such right of way. Schiemann LJ reiterated the point (at [25]) that "the burden on the owner of the servient tenement is not to be increased without his consent". The decision in *Peacock v Custins* was followed in *Das v Linden Mews Ltd* [2003] 2 P & CR 58.

60 Before I move away from this line of authorities I ought to mention the cases of *Massey v Boulden* [2003] 2 All ER 87 and *Macepark (Whittlebury) Ltd v Sargeant* [2003] 1 WLR 2284 which seem to suggest that where the use of the right of way by the additional non-dominant land is trivial, it can be treated as ancillary to the use by the dominant tenement and be permissible. In *Massey v Boulden* the house on the dominant tenement was enlarged by the addition of two rooms which extended beyond the dominant land to an adjoining land. One way to look at this case would be to regard the two additional rooms as mere appendages to the dominant land so that the benefit to the non-dominant land was really insignificant or *de minimis*.

61 On the facts of our case, by no stretch of the imagination can the "ancillary use" concept be invoked. It is clear that the Grange Heights development has sought to extend drastically the right of way beyond the terms of the original grant. The grant was and is to benefit Lot 111-34. Now MCST 301 wants to unilaterally extend the right of way to also benefit Lot 561. This, it is, in my view, not entitled to do.

62 Finally, it is important not to confuse cases such as *Harris v Flower* with a case where the dominant tenement is put to more intensive use. *White v Grand Hotel, Eastbourne, Limited* [1913] 1 Ch 113 was such a case which held that a change in user of the dominant tenement did not affect the right of way granted to the dominant tenement.

Different capacity

63 For issue estoppel to arise, a party must be suing in the same capacity as in the prior proceedings. Mr Tan submitted that suing in a different capacity did not mean it had to be between a representative capacity and a personal capacity. He said one could be suing in a different capacity even if in both actions one was suing in one's own right. Mr Tan relied on *Bainbrigge v Baddeley* (1847) 2 Ph 705; 41 ER 1115 where the plaintiff sued in his personal capacity in both proceedings, in the first as the assignee under a contract and in the second as a beneficiary under a will and it was

held that estoppel did not arise. However, in that case there was no estoppel because there was no identity of issues.

64 Following from the above, Mr Tan argued that issue estoppel could not apply here because, unlike the two previous actions, Lee Tat was now suing as the owner of the servient tenement and not as the owner of a dominant tenement. On this point, I think one must distinguish between cause of action estoppel and issue estoppel. This argument would be valid if it is a case concerning cause of action estoppel. However, if it is in relation to issue estoppel, it does not matter whether the first and second proceedings relate to the same cause. The question is whether the same issue was raised in the first proceeding and finally decided upon. As stated in *Halsbury's Laws of England* ([49] *supra*) at para 980:

> Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties and their privies.

65 Another case cited by Counsel for Lee Tat was *Leggott v The Great Northern Railway Company* (1876) 1 QBD 599. There, the plaintiff sued, as administratrix of the estate of the deceased for the benefit of herself as the wife of the deceased husband and of his children, against the defendant for damages suffered by them by her husband's death. Later, the plaintiff, again as administratrix of the estate of her husband, sued for damages caused to the estate as a result of the defendant's negligence. The court held that there was no estoppel as the plaintiff was suing in two different capacities even though in both suits she was suing as administratrix. Quain J explained at 606:

> The rule about the estoppel is very correctly, I think, laid down in the note to the *Duchess of Kingston's Case*. It is this: "It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person in law." In other words it is generally put in the books that the plaintiff must not be only the same person, but he must be suing in the same right. I think that in these two actions before us, although the administratrix nominally is the plaintiff, yet the administratrix is not suing in these two actions in the same right, but in very different rights altogether, and, therefore, that the estoppel does not arise.

66 Accordingly, in my opinion, the fact that Lee Tat was involved in the first and second actions as the owner of the two dominant tenements and here as the owner of the servient tenement does not mean that estoppel cannot arise. It depends on the issues raised and the decisions made by the courts in the two previous actions.

Issue not decided upon

67 I now turn to the more critical matter: What did the courts in the two previous actions decide? Mr Tan argued that in the two previous actions, Lee Tat fought them on the basis that it was merely the owner of two dominant tenements, namely, Lot 111-32 and Lot 111-33. There was no other basis upon which Lee Tat could have pursued or defended those proceedings. Mr Tan submitted that in that capacity, Lee Tat would only be entitled to claim relief if its interest as a dominant tenement had been interfered with. The rights of the owner of a servient tenement were different from those of an owner of a dominant tenement. For example, a dominant owner could not claim for trespass and obtain damages therefor. Accordingly, Mr Tan said that Lee Tat could not have raised the issues which the owner of the servient tenement could.

68 It was quite clear that the courts had approached the claim in the first action purely from the point of view of whether the use of the servient tenement by the contractors of Hong Leong, or the anticipated use by the purchasers of the apartments upon completion of the development, would be such that it would interfere with the enjoyment of the right of way of Lee Tat. The court found no evidence of that. Neither did it think that the anticipated use by the owners of the apartments in Grange Heights would interfere with Lee Tat's enjoyment of its right of way.

69 Turning to the second action, it is indisputable that Lee Tat did argue, in order to justify its action in putting up the gate and the fence, that Lot 561 was not a dominant tenement and therefore not entitled to exercise a right of way over Lot 111-31. However, when one examines the judgment of Coomaraswamy J, it is clear that it was based entirely on the ground that Lee Tat could only challenge MCST 301's claim to a right of way, as the owners of Lots 111-34 and 561, if Lee Tat could show that MCST 301's exercise of the right of way had been excessive and had substantially interfered with Lee Tat's enjoyment of the same right of way over the servient tenement. Coomaraswamy J, in particular, noted that Lee Tat was not the owner of the servient land and was not complaining that Grange Heights residents' use of the right of way was excessive. When the second action came on appeal, while Lee Tat did try to argue that the residents of Grange Heights could not use the right of way as all the apartments were erected on what was previously Lot 561, the question is whether this court did, in fact, answer the contention and whether it was a submission which the court needed to answer in relation to the matter in hand.

70 In *Blake v O'Kelly* (1874) 9 IR 54 it was held that where an issue was raised in an earlier action but was not decided, that did not preclude the plaintiff from instituting a second action raising the same issue. The facts of the case are succinctly set out in the headnote as follows:

> B.'s executor filed a bill against K., as executor *de son tort*, for an administration of B.'s personal estate, and raising issues as to the validity of the transfer of a sum in bank from B.'s name to the joint names of B. and K., as also as to B.'s mental capacity at the time. At the hearing, it was objected that relief of such a nature could not be given, and an ordinary decree for administration was pronounced. B.'s executor subsequently filed a bill raising the same issues, and impeaching also a second transfer to K. from the joint names of B. and K., and praying that both transfers should be declared fraudulent and void …

71 The court below came to the conclusion that the issue raised in the present action was raised in the second action and was answered by this court in the passages which I have quoted in [41] above. While it was raised, I do not think it was answered. It may be useful to retrace some steps. As I have said, in the first action, Chua J refused to make a declaration prayed for by Hong Leong, the predecessor of MCST 301, in the absence of the owner of the servient tenement. No appeal was taken against that part of Chua J's decision. In the second action, Coomaraswamy J held, and I respectfully concur, that the amalgamation of Lot 111-34 with Lot 561 did not extinguish the right of way which Lot 111-34 had over the servient tenement. This principle was reaffirmed on appeal by this court. The court threw out Lee Tat's defence on the ground that it had not shown that there was excessive user by the residents of Grange Heights *which interfered with Lee Tat's enjoyment of the right of way over the servient tenement*. The court noted, in particular, that the residents only used the servient tenement as a footway.

72 The case which this court relied upon in that regard, namely, *Graham v Philcox* [1984] QB 747, was not concerned with the amalgamation of two plots of land, a dominant tenement and a non-dominant tenement, but with two dwellings in a single building which were converted into one. There, the right of way was appurtenant to the first floor of the building. The owner of the first floor flat later acquired the ground floor flat and converted both flats into a single dwelling. The

English Court of Appeal held that *this change could not affect the right of way enjoyed by the first floor flat.* I will quote again what May LJ said at 756–757 (see [41] *supra*):

> In none of the judgments in any of the cases … is there suggestion that *a mere alteration of a dominant tenement to which a right of way may be appurtenant is sufficient to extinguish it*, or indeed to affect the entitlement to its use *unless as the result of that alteration the extent of the user is thereby increased*.
>
> In my opinion, therefore, the mere alteration of the coach house into one dwelling cannot have had any effect upon the existence of the right of way. It should be borne in mind that there was no evidence whatever before the judge that the actual or anticipated user by the plaintiffs of the way was in any way excessive, either in quantity or quality.
>
> [emphasis added]

73 In my view, *Graham v Philcox* only decided the point that the amalgamation of a dominant tenement and a non-dominant tenement does not *ipso facto* affect the existing right of way of the dominant tenement. It did not hold that as a result of the conversion of the two dwellings into one, the ground floor flat was thus entitled to the same right of way. I would imagine that in that case, as the same individuals would be occupying the first floor flat as well as the ground floor flat, distinguishing the capacity in which they exercised the right of way over the servient tenement would be difficult, if not impossible. Thus May LJ had to add the caveat, namely, "unless as the result of that alteration the extent of the user is thereby increased". In the circumstances there, the conversion of the two dwellings into one could not *per se* cause any excessive use of the right of way. Another way to look at the case is this. If sometime in the near future the single dwelling were to be reverted to the previous position of two separate dwellings, the occupants of the ground floor flat could hardly be able to contend that they should be entitled to the same right of way as the first floor flat.

74 Having regard to the foregoing, that part of the judgment of this court in the second action (quoted in [41] above) only decided the first contention. It did not discuss the implications of the fact that all the three residential blocks of Grange Heights stand on what was previously Lot 561. To hold that this court had in the second action decided the issue would be to say that this court had rejected *Harris v Flower*, and all other authorities before and after it, by a side wind, when *Graham v Philcox* itself did not reject *Harris v Flower* but thought that it was inapplicable on the facts of the case. It is unthinkable that such a monumental change to the common law was intended by the court there without even discussing *Harris v Flower* and the other related cases and without offering any reasons why a different approach should be adopted in Singapore. Not a word was uttered disapproving *Harris v Flower*. I cannot see any compelling reasons why we should deviate from *Harris v Flower* especially where the implications of such a deviation would be immense. At that juncture, Lee Tat's rights were purely those of a dominant tenement, its interest being to ensure that its enjoyment of the right of way was not interfered with: see 869, [20] of the decision of this court in the second action ([41] *supra*). Though it tried to, it could not really raise the issue of trespass. What Lee Tat could raise was that its enjoyment of the right of way had been interfered with but it did not do so, and not having raised that, it had no basis to question MCST 301's exercise of the right of way, far less to obstruct the right of way which the land (previously Lot 111-34) enjoyed over the servient tenement.

Decision was collateral

75 Moreover, even if I were wrong and this court did, in fact, hold that Lot 561 was entitled to a

right of way over the servient tenement, it does not follow that every prior decision on an issue must necessarily give rise to issue estoppel. *Spencer Bower, Turner and Handley on the Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996) states at para 201:

> Even when the court has expressly determined the same issue in the earlier proceeding an issue estoppel will not necessarily result. Only determinations which are necessary to the decision, and fundamental to it, will found an issue estoppel. Other determinations, however positive, cannot.

76 At the next paragraph, para 202, *Spencer Bower* sets out how one can distinguish the fundamental from the collateral as follows:

> "The difficulty in the actual application of these conceptions", continued Dixon J, "is to distinguish the matters fundamental or cardinal to the prior decision or judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment". In order to make this distinction one has to inquire whether the determination was so fundamental to the decision that the latter cannot stand without it. Even where this condition is met, it is suggested by Dixon J that there is another test to pass, viz. whether the determination is the "immediate foundation" of the decision or merely "a proposition collateral or subsidiary only, i.e. no more than part of the reasoning supporting the conclusion". A mere step in the reasoning is insufficient. What is required is a determination fundamental to the decision.
>
> One test which has been suggested is: was it possible to appeal against the determination? This will not decide the question in all cases; but is often a useful test. There are many determinations which cannot effectively be challenged on appeal. If there can be no effective appeal against a particular determination it is not fundamental to the judgment. But this is not the only test; the inquiry must always be – is the determination such that without it the judgment cannot stand?

77 Therefore, even if I should hold that the issue was decided in the decision of this court in the second action, this part of the decision was certainly not needed, nor was it the foundation upon which relief was granted to MCST 301 in that action. Not having there alleged that the exercise of the right of way by the residents of Grange Heights was excessive and had interfered with its enjoyment thereof, Lee Tat must fail in its defence. It had no right to obstruct the right of way which Lot 111-34 (although it has now become a part of the larger Lot 687) was entitled to enjoy as the dominant tenement. The decisions in the second action (both at the High Court and at the Court of Appeal) really reaffirmed the decisions made in the first action that Lee Tat could only ask for relief if its enjoyment of the right of way over the servient tenement had been substantially interfered with. As that was not alleged, its defence in the second action must fail *in limine.* As Woo J, in my respectful view, rightly observed at [41] of his judgment:

> [A]n owner of some dominant tenements can raise the issue on the scope of the right of way enjoyed by another owner of another dominant tenement if it were alleged that the right of way enjoyed by the other owner affected the first owner's enjoyment of his own right of way.

Not having made such an allegation of interference, it had no right to complain and take the law into its own hands by putting up the gate and the fence.

78 It was suggested by MCST 301 that on the authority of *Bracewell v Appleby* ([58] *supra*), Lee Tat had the right to seek substantive relief even though as the owner of a dominant tenement its

enjoyment of the right of way was not substantially interfered with. However, on close scrutiny of that case it would appear that the plaintiff in *Bracewell v Appleby* did own a part of the private road over which each of the six houses in the *cul-de-sac* had a right of way: see 411 and 414 of the report.

Ancillary reasons

79 In passing, I would point out that the judge below also seemed to have thought that issue estoppel was applicable because:

(a) otherwise it would mean that if Lee Tat were to subsequently acquire another dominant tenement (if that were possible) it could start the battle all over again; and

(b) it would render the decision of this court in the second proceedings nugatory.

80 It would be clear from the above that these concerns were, with respect, not well-founded. If Lee Tat were to acquire another dominant tenement, it is clear that it could not by virtue of that fact alone initiate a new action to raise the same issue because acquiring an additional dominant tenement would not have altered Lee Tat's rights. It would make no difference whether Lee Tat had then owned two dominant tenements or three. Neither would allowing the present action to proceed render the decision of this court in the second action nugatory. As I have said, all that was decided there was that Lee Tat, as the owner of a dominant tenement, was not entitled to put up the gate and fence at both ends of the servient tenement to stop people from getting into or from what was previously Lot 111-34.

Laches/acquiscence

81 A subsidiary point raised by MCST 301 was that if issue estoppel did not arise, the action by Lee Tat should still be dismissed on the ground of laches or acquiescence. There was no allegation of time bar. It is true that Lee Tat could have instituted the present action soon after it acquired the servient tenement instead of waiting for several years. In the meantime, a number of ancillary proceedings involving Lee Tat and MCST 301 took place after Lee Tat had acquired the servient tenement and where MCST 301 alleged that Lee Tat had failed to comply with the injunction granted by Coomaraswamy J. Yet Lee Tat did not raise the point which it raised in OS 825. Be that as it may, the fact remained that there was no assertion, or evidence tendered to show, that the delay in instituting the action had caused MCST 301 any irreparable prejudice. Costs incurred in those proceedings had been paid. Thus there was clearly no merit in this point. I do not need to belabour it further.

Judgment

82 In the premises, I would hold that no issue estoppel arose in relation to OS 825 for two reasons. First, although the main issue raised in OS 825 was earlier raised as a defence in the second action, it was not ruled upon by either the High Court or this court. Second, even if the courts in the second action could be treated as having decided the issue (that the land which was previously Lot 561, and the apartment erected thereon, had a right of way over the servient tenement) it was a decision which was not necessary in relation to the main question in the second action as I have discussed above.