Wee Siew Bock and another *v* Chan Yuen Yee Alexia Eve and another appeal [2012] SGCA 33

Case Number	: Civil Appeals Nos 103 and 151 of 2011
Decision Date	: 28 June 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Deborah Barker SC, Spring Tan (Khattarwong LLP) for the appellants in both appeals; Vinodh Coomaraswamy SC, Edmund Eng Zixuan, Vincent Lim and Benjamin Ng (Shook Lin & Bok LLP) for the respondent in both appeals.
Parties	: Wee Siew Bock and another — Chan Yuen Yee Alexia Eve

LAND – Easements

RES JUDICATA

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 261.]

28 June 2012 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 In land-scarce Singapore, a home is often a family's most prized possession. As a result, perceived interference with its use or enjoyment can provoke strong emotions. Homeowners, quite naturally, experience deep indignation when they feel that their "entrenched rights" are violated by a neighbour. This, in turn, often induces such homeowners to react obdurately to that neighbour's "high-handed" conduct. What inevitably follows is a cantankerous contest of wills that leaves in its wake a sour aftertaste.

2 Undoubtedly, it is preferable that such differences between neighbours be resolved by the application of neighbourly common sense based upon the golden maxim of "do unto your neighbour as you would have your neighbour do unto you", rather than based upon strict legal principles. The ethic of reasonable "give and take" ought to be the touchstone. If that cannot be invoked, it is always desirable to have such disputes resolved by mediation rather than by the courts. Nevertheless, when one or both parties insist on maintaining their strict legal rights (whether mistakenly or otherwise), mediation will not work, as in this matter. Acknowledging this, we have taken some pains in this judgment to explain and clarify the law on easements in the form of private rights of way to assist others in resolving similar issues in future. From that point of view, some good has come out of these proceedings.

3 Of the two appeals before us, Civil Appeal No 103 of 2011 ("CA 103") arises from the decision of the High Court judge ("the Judge") in Originating Summons No 85 of 2011 ("OS 85"), while Civil Appeal No 151 of 2011 ("CA 151") arises from the Judge's decision in Originating Summons No 350 of 2011 ("OS 350"). OS 85 and OS 350 were filed by the appellants in both appeals, Wee Siew Bock ("Wee") and his wife, Chia Foong Lin (collectively referred to hereafter as "the Appellants"), against the respondent in both appeals, Chan Yuen Yee Alexia Eve ("the Respondent"). At the heart of these

appeals is a fractious dispute between two neighbouring landowners about the extent of their respective rights in relation to an easement granted in favour of the Appellants over part of the land belonging to the Respondent. [note: 1] Some interesting legal issues have arisen. What is the true extent of the rights that each of these owners has over the land that is affected by the easement? How does the law strike an appropriate balance between the rights of a dominant owner (*viz*, the owner of a dominant tenement) *apropos* those of a servient owner (*viz*, the owner of a servient tenement)? For ease of discussion, we shall hereafter use the expression "easement land" to refer generically to that part of a servient tenement which is affected by an easement, the expression "the Easement Land" to refer specifically to the easement land in issue in the present appeals and the expression "the Easement" to refer to the easement granted in favour of the Appellants over the Easement Land. We shall also use the terms "use", "usage" and "enjoyment" interchangeably in discussing the exercise by a landowner of his rights over his land and the exercise by a dominant owner of his rights under an easement.

The plots of land involved

4 All the parcels of land in issue in the present appeals are registered under the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"). The Appellants have been the registered proprietors of the dominant tenement, No 22 Oei Tiong Ham Park, Singapore 267027 ("No 22"), since 2 January 2003, while the Respondent has been the registered proprietor of the servient tenement, No 23 Oei Tiong Ham Park, Singapore 267028 ("No 23"), since 14 April 2005. The plot of land on which No 22 stands originally comprised two parcels of land, and its boundaries were approved on 15 October 1968. As for the plot of land on which No 23 stands, its boundaries were approved on 20 July 1960. Both parties reside at present in their respective properties.

5 The disputes in both appeals revolve around the Easement, which is a registered easement conferring on "the Owner of the time being of [No 22] … a right of way at all times for all purposes over and along the [Easement] [L]and" [note: 2] and the right to "construct lay and use any drains pipes and cables on over or under the [Easement] [L]and and hereditaments hereby conveyed". [note: 3] Of these two rights, it is the right of way over the Easement Land which the present appeals turn on, and the references hereafter to the use or, conversely, the abandonment of the Easement should be understood in this light. The Easement Land is stated in the transfer dated 28 June 1983 to have a length of approximately 30m and a width of 8m. [note: 4] These are generous measurements. For perspective, we should add that two ordinary domestic vehicles can, even today (after the completion of all the reconstruction works described in this judgment), comfortably pass each other in opposite directions on the Easement Land.

6 In terms of the physical state of the Easement Land, it consists mainly of a paved driveway ("the Driveway"), which is the only means of access for both parties from their respective properties to the public road at Oei Tiong Ham Park. For ease of reference, we shall use the phrase "the end of the Easement Land" to refer to that part of the Easement Land adjoining the gates of No 22 and No 23, and the phrase "the entrance of the Easement Land" to refer to that part of the Easement Land adjoining the public road at Oei Tiong Ham Park. At the end of the Easement Land on the right-hand side of the Driveway (*ie*, on the side nearer to No 23), there is a raised kerb with a grass verge on which now stand three mature trees and a wall ("the Kerb Wall"). The Respondent's assertion that these trees have been growing at the same area of the Easement Land for approximately the past 20 years [note: 5] is not disputed by the Appellants. On the left-hand side of the Driveway (*ie*, on the side nearer to No 22) is a narrow strip of grass. At the entrance of the Easement Land, there is at present an automatic remote-controlled gate ("the Auto-Gate"), with a meter box and a pedestrian

access gate to the right of the Auto-Gate.

Background to the proceedings

7 We now set out in some detail the facts which set in motion the chain of events that precipitated these appeals. This will give context to the legal issues that have arisen for resolution.

8 In mid-2010, both parties concurrently commenced, without any prior notice to each other, reconstruction works at their respective properties. As the true extent of these works was revealed inchmeal, the seeds of mistrust between the parties began to take deep root. Their relationship soured and communications ceased, eventually triggering a flurry of legal proceedings by both parties.

9 As part of the reconstruction works in relation to No 23, the Respondent planned to install an automatic remote-controlled gate (*viz*, the Auto-Gate) at the entrance of the Easement Land. She offered the Appellants equal access to the Easement Land by means of a remote control and a set of manual keys for the Auto-Gate. (As will be seen at [83] below, the Respondent also offered to take other measures to allay the Appellants' concerns about the installation of the Auto-Gate.) However, this plan was strenuously objected to by the Appellants, who insisted that the Respondent was not entitled to close the Auto-Gate at any time. On the Appellants' part, they wanted to lay utility pipes and cables below the Easement Land as well as shift the position of No 22's gate along the Driveway towards the end of the Easement Land. This shift eventually took place. There is some disagreement in these proceedings between the parties about the precise distance by which No 22's gate was moved, with the Respondent saying that it was a 100cm shift, while the Appellants place the figure at 70cm. We shall return to this point later as it has a bearing on one of the Appellants' most spirited complaints (see below at [75] and [81]). The Respondent objected to the Appellants' plan to relocate No 22's gate, citing safety concerns for pedestrians and vehicles alike due to the creation of a blind spot and a reduced vehicular turning circle. [note: 6] She additionally complained that her property (No 23) had been damaged when the vehicle of the Appellants' contractor collided into her brick gate post. [note: 7] She also objected to the Appellants' laying of utility pipes and cables under the Easement Land without adequate prior notification because this affected her own reconstruction plans, such as her plan to build a porch and an angled wall (collectively referred to hereafter as a "P&A wall"). [note: 8] The Appellants did not view the Respondent's concerns sympathetically and concluded that she was acting in a high-handed manner. Communications between the parties became brusque and then ceased altogether.

10 To resolve this impasse, the Respondent filed Originating Summons No 46 of 2011 ("OS 46") on 20 January 2011. She sought the following orders: (a) an injunction to stop the Appellants from laying utility pipes and cables under the Easement Land without first providing her with detailed plans and drawings of the intended works; (b) a declaration that the Appellants did not have the right to lay utility pipes and cables under the Easement Land in any manner that they deemed fit, but could only do so in a manner that did not cause undue interference with her reasonable enjoyment of No 23; (c) a declaration that the Appellants' relocation of No 22's gate was in excess of their rights under the Easement; (d) a mandatory injunction directing the Appellants to either restore No 22's gate to its original position or take other measures to ensure that the changed position of No 22's gate did not pose any danger to her (the Respondent) and her family, and did not cause undue interference with her reasonable enjoyment of No 23; and (e) a declaration that she was entitled to install the Auto-Gate. [note: 9] It must be noted here that the decision in OS 46 is not the subject of either of the present appeals and has not been appealed against.

11 Shortly after OS 46 was filed, the Appellants learnt about the Respondent's intention to build a

P&A wall on the boundary of the Easement Land opposite No 22's gate. Concerned that this would obstruct their use of the Easement, the Appellants filed OS 85 on 2 February 2011 to compel the Respondent to disclose her plans in relation to the building of the proposed P&A wall and to desist from carrying out the building works unless and until the plans had been provided. Specifically, they sought the following reliefs: (a) a mandatory injunction directing the Respondent to disclose her reconstruction plans for No 23, especially in relation to the building of the proposed P&A wall; (b) a declaration that the proposed P&A wall was an unauthorised encroachment on the Easement Land; (c) a mandatory injunction directing the Respondent to redesign and, if necessary, rebuild the proposed P&A wall "or any other structure near the Easement [Land] so that the Easement [Land] will not be encroached upon"; [note: 10] and (d) an injunction restraining the Respondent from constructing the proposed P&A wall unless and until she had provided them (the Appellants) with detailed plans and drawings evidencing that the Easement Land would not be encroached upon. [note: 11]

12 OS 85 and OS 46 were heard together by the Judge on 31 March 2011 and 6 April 2011. During the hearing on 31 March 2011, counsel for the Respondent disclosed that the Respondent had decided not to build the proposed P&A wall after all, but was instead planning to construct a 1.8m wall (*ie*, the Kerb Wall mentioned at [6] above) to replace the flower trough which then stood along No 23's wall. On 6 April 2011, the Judge delivered his oral judgment for OS 85 and OS 46 ("the 6 April 2011 Oral Judgment"). *Vis-à-vis* the Respondent's prayer in OS 46 for a declaration that she was entitled to build the Auto-Gate (which was prayer 6 of OS 46), the Judge expressly stated that he was not making any order as he did not think it was necessary (see [14] of the 6 April 2011 Oral Judgment). However, he also expressly stated his view (likewise at [14] of the 6 April 2011 Oral Judgment) that the construction of the Auto-Gate was within the Respondent's rights as a landowner so long as she did not render the Appellants' use of the Easement unreasonably inconvenient. In this regard, the Judge took into account the Respondent's offer to supply the Appellants with (*inter alia*) a remote control to operate the Auto-Gate. As for the rest of the prayers in OS 46 and all the prayers in OS 85, the Judge dismissed them, but gave the parties liberty to apply should there be any fresh works affecting the use and enjoyment of their respective properties (see [12] of the 6 April 2011 Oral Judgment).

13 On 11 April 2011, the Respondent commenced building the Kerb Wall opposite No 22's gate. This was completed on 27 April 2011. *Pertinently*,*the Kerb Wall did not encroach on the Driveway.* The Appellants, however, claimed that they now found it difficult to drive into and exit from No 22 due to an alleged reduction in vehicular "swing space" caused by the erection of the Kerb Wall.

14 Thereafter, the Appellants filed OS 350 on 6 May 2011. They sought the following orders: (a) a mandatory injunction directing the Respondent to forthwith dismantle the Kerb Wall; (b) an injunction to stop the Respondent from building other walls or structures on the Easement Land; (c) a declaration that they (the Appellants) and their visitors were entitled to use the Easement for unobstructed access to No 22; (d) a declaration that the Respondent was not to obstruct their use of the Easement by, *inter alia*, closing the Auto-Gate, parking vehicles on the Driveway and/or allowing her children to play on the Easement Land; and (e) an injunction restraining the Respondent from carrying out the aforesaid activities. [note: 12] Strangely, before OS 350 was heard, the Appellants filed Summons No 1971 of 2011 ("SUM 1971") on 9 May 2011 for an interim injunction to stop the Respondent from "building or continuing to build the [Kerb Wall]" [note: 13] even though the Kerb Wall had already been completed by then (see [13] above). The Judge, after hearing the parties' respective submissions, visited the Easement Land in the presence of counsel. He then dismissed SUM 1971. The Appellants promptly appealed against his decision (via Civil Appeal No 57 of 2011) on 11 May 2011. That appeal was dismissed.

15 Thereafter, the Appellants filed Originating Summons No 371 of 2011 on 12 May 2011 for an extension of time to appeal against the Judge's decision in OS 85. That application was acceded to by this court.

16 The Respondent had, in the meantime, also constructed beside the Auto-Gate the meter box and the pedestrian access gate mentioned at [6] above. Unsurprisingly, these structures were also vigorously objected to by the Appellants, who asserted that they further evidenced the Respondent's intention to curtail their use of the Easement. Further, the Appellants (as can be seen from the reliefs which they sought in OS 350) objected to the Respondent's plans to let her children play on the Easement Land and to park cars on the Driveway, saying that this would affect their use of the Easement.

17 The Judge heard OS 350 on 29 August 2011 and gave judgment in favour of the Respondent on 12 December 2011 (see *Chia Foong Lin and another v Chan Yuen Yee Alexia Eve* [2011] SGHC 261 ("*Chia Foong Lin*")). We shall now examine in greater detail the Judge's decisions in OS 350 and OS 85.

The decisions below

The decision in OS 85

18 As the Judge heard both OS 85 and OS 46 together (see [12] above), the 6 April 2011 Oral Judgment dealt with issues pertaining to both matters. However, as the decision in OS 46 is not being appealed against in either of the present appeals, we shall set out only the Judge's decision as regards OS 85 here.

19 As alluded to earlier (at [12] above), the Judge dismissed OS 85 (and also OS 46, save for prayer 6 of OS 46, in respect of which no order was made) "without prejudice to either side making a fresh application should fresh work not presently identified arise which might affect the use and enjoyment of [the] land and property of the respective parties" (see [12] of the 6 April 2011 Oral Judgment).

20 It bears mention again that during the course of the hearing on 31 March 2011, the Respondent's counsel confirmed that the Respondent had abandoned plans to build a P&A wall (see [12] above). As regards the Respondent's plan to build the Kerb Wall to replace the flower trough which then stood along No 23's wall, the Judge held that this would not result in any encroachment on any part of the Driveway that was actually in use. Although the Appellants complained that the building of the Kerb Wall would reduce the Driveway "into 'a tunnel', and [make] it difficult for driving through" (see [4] of the 6 April 2011 Oral Judgment), the Judge stated (at [9] of the 6 April 2011 Oral Judgment) that even if that were indeed the case, it would not be an "unreasonably intolerable" experience. We pause here to add that after our visit to the Easement Land in the presence of counsel, we were satisfied that this particular complaint by the Appellants was entirely without substance: there was simply no "tunnel" effect to speak of.

The decision in OS 350

21 We turn now to the Judge's decision in OS 350. The Judge held that the Appellants' contention that the construction of the Kerb Wall substantially interfered with their use of the Easement ("the Kerb Wall issue") was *res judicata* as he had already conclusively dealt with that issue on the merits by dismissing prayer 3 of OS 85, *viz*, the prayer for an injunction requiring the Respondent to redesign

and, if necessary, rebuild (*inter alia*) "*any other structure near the Easement [Land]*" [note: 14] [emphasis added]. The Judge was of the view that the italicised words just quoted "would certainly extend to the [K]erb [W]all as well" (see *Chia Foong Lin* at [5]).

22 In relation to the Appellants' contention that the installation of the Auto-Gate substantially interfered with their use of the Easement ("the Auto-Gate issue"), the Judge clarified that he had earlier not made any order on the Respondent's prayer in OS 46 for a declaration that she was entitled to install the Auto-Gate (*viz*, prayer 6 of OS 46 (see [12] above)) because the Auto-Gate had not been built yet at that time and, thus, any order on this particular prayer would have been premature (see *Chia Foong Lin* at [10]). He went on to express the view (likewise at *Chia Foong Lin* at [10]) that the Respondent had the right to build the Auto-Gate on her land, provided no substantial interference was caused to the Appellants' reasonable enjoyment of the Easement. He noted in this regard (at [11] of *Chia Foong Lin*) that: (a) the Respondent had offered to supply the Appellants with their own set of keys to the Auto-Gate, and had also offered to install an intercom system at the Auto-Gate so that visitors to No 22 could communicate with the Appellants or other persons in the property; (b) the Auto-Gate would be closed only at certain times; and (c) there was beside the Auto-Gate a pedestrian access gate which provided pedestrian access at all times to No 22 via the Easement Land.

23 The Judge also held that the Respondent's intention to park her cars on the Driveway did not amount to substantial interference with the Appellants' reasonable enjoyment of the Easement (see *Chia Foong Lin* at [12]).

24 In addition, he noted that the playing of the Respondent's children on the Easement Land would not substantially interfere with the Appellants' reasonable use of the Easement (see *Chia Foong Lin* at [13]). He therefore did not grant the *quia timet* injunction which the Appellants had sought to prevent the Respondent's children from playing on the Easement Land.

25 Finally, the Judge held that the construction of the meter box next to the Auto-Gate likewise did not substantially interfere with the Appellants' reasonable use of the Easement (see likewise *Chia Foong Lin* at [13]).

The issues before this court

26 The issues to be determined in the present appeals are as follows:

(a) Are the Kerb Wall issue and the Auto-Gate issue *res judicata* ("Issue 1")?

(b) Has there been abandonment by the Appellants and/or their predecessors in title of the Easement in respect of any part of the Easement Land ("Issue 2")?

(c) Has there been substantial interference with the Appellants' reasonable enjoyment of the Easement as a result of: (i) the building of the Kerb Wall; (ii) the installation of the Auto-Gate; (iii) the parking of the Respondent's cars on the Driveway; and (iv) the playing of the Respondent's children on the Easement Land ("Issue 3")?

Issue 1 is a procedural issue, while Issue 2 and Issue 3 are the substantive legal issues which lie at the heart of the present appeals.

Our decision

Issue 1: Whether the Kerb Wall issue and the Auto-Gate issue are res judicata

Issue 1: Whether the Kerb Wall issue and the Auto-Gate issue are res judicata

27 We shall first address Issue 1, which the Respondent has raised in relation to CA 151. As mentioned above at [21], the Judge held in OS 350 that the Kerb Wall issue was *res judicata* because it fell within the scope of the words "any other structure near the Easement [Land]" [note: 15] in prayer 3 of OS 85, which prayer he had already conclusively dealt with on the merits at the joint hearing of OS 85 and OS 46. The Appellants disagree and argue that in relation to the Kerb Wall issue, the Judge's ruling in OS 85 was not on the merits and was neither final nor conclusive. Further, the Appellants contend, there was no identity of subject matter between OS 85 and OS 350. As regards the Auto-Gate issue, the Appellants likewise submit that it is not *res judicata* because of the same two factors (*viz*, the Judge's ruling on the issue was not on the merits, and there was no identity of subject matter between OS 85 and OS 350). In response, the Respondent argues that *res judicata* precludes the Appellants from proceeding on the Kerb Wall issue and the Auto-Gate issue as the Judge had already determined at the joint hearing of OS 46 and OS 85 that she was entitled to build both the Kerb Wall and the Auto-Gate.

28 In our view, the issue of *res judicata* simply does not arise in CA 151. The reliance by the Respondent's counsel on this issue is misplaced. In relation to the Kerb Wall issue, the Judge rightly observed in *Chia Foong Lin* at [8] that "[t]he proper forum for the [Appellants] to submit their arguments on the [K]erb [W]all is before the Court of Appeal in CA 103". The doctrine of *res judicata* applies to estop a party in a later proceeding from disputing the correctness of a previous decision by *the same* court on the same point in an earlier proceeding between the same parties. An appeal against such a previous decision to an *appellate* court plainly does not attract the application of this doctrine. Simply put, while the Kerb Wall issue, which was first addressed in OS 85, was held to be *res judicata* by the Judge in OS 350, it is not *res judicata* before this court in relation to an appeal against the Judge's decision in OS 350. We can therefore determine the substantive question of whether the erection of the Kerb Wall substantially interferes with the Appellants' reasonable use of the Easement. As regards the Auto-Gate issue, the Judge clearly stated in *Chia Foong Lin* at [10] that in OS 46, he had not made any order on the Respondent's prayer for a declaration that she was entitled to install the Auto-Gate. As no order was made, the doctrine of *res judicata* does not even arise *apropos* the Auto-Gate issue. In view of this, this court can proceed to address the substantive arguments raised in relation to both the Kerb Wall issue and the Auto-Gate issue.

Issue 2: Whether there has been abandonment by the Appellants and/or their predecessors in title of the Easement in respect of any part of the Easement Land

29 We turn now to Issue 2, *viz*, whether the Appellants and/or their predecessors in title have abandoned the Easement in respect of any part of the Easement Land. The consideration of this issue must of course logically precede the consideration of Issue 3, *viz*, whether there has been substantial interference with the Appellants' reasonable enjoyment of the Easement. Plainly, where abandonment of part of an easement – *ie*, abandonment by a dominant owner of an easement in respect of part of the easement land – is established, there is no need to consider, as regards that part of the easement land, whether the dominant owner's reasonable enjoyment of the easement has been or will be substantially interfered with. This is because where unqualified abandonment by a dominant owner of part of an easement is found, the dominant owner loses his right to use the easement over that part of the easement land in respect of which the easement has been abandoned. The consequence of this is that the servient owner can then exercise exclusive rights of ownership over that part of the easement land. The question of substantial interference with the dominant owner's reasonable enjoyment of the easement thus does not even arise in relation to that part of the easement land. Conversely, where abandonment (whether in part or in full) by a dominant owner of an easement is not established, the easement continues to subsist, with the dominant owner having the right to

reasonable use of the easement over the easement land. Only then does the question of substantial interference with the dominant owner's reasonable enjoyment of the easement become relevant whenever the servient owner seeks to modify the physical extent and/or the use of the easement land.

The burden of proof vis-à-vis abandonment

30 Acquiescence in acts inconsistent with the continuance of the right(s) under an easement may raise a presumption that that right (or one or more of those rights) has been abandoned in respect of either the whole or part of the easement land. The legal burden of proving abandonment of an easement, whether in full or in part, is of course on the party who asserts that there has been abandonment (typically, it is the servient owner who makes such an assertion). However, where the servient owner is able to show a long period of non-user of an easement by the dominant owner, the evidential burden shifts to the dominant owner to explain and show that he nonetheless consistently intended to preserve his rights under the easement. Lord Chelmsford LC succinctly summarised the evidential position in *Crossley and Sons*,*Limited v Lightowler* (1867) LR 2 Ch App 478 at 482 as follows:

> *The allegation by the Plaintiffs* [the servient owners] *of the abandonment of the prescriptive right, supposing it to have ever existed, and the burthen of establishing their substantive case is, of course, thrown upon them*.
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> …
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> With respect to the prescriptive right derived from the [previous owners of the dominant tenement], the Plaintiffs say, that if such right was ever acquired it had been abandoned long before the Defendants [the current dominant owners] commenced business at their works. The authorities upon the subject of abandonment have decided that *a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it*. ***But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it.*** The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. …
>
> [emphasis added in italics and bold italics]

31 In the present case, the legal burden of proving partial abandonment of the Easement falls on the Respondent as she alleges that the Appellants and their predecessors in title abandoned the Easement in respect of certain parts of the Easement Land ("the Disputed Areas") when they irrevocably acquiesced in certain permanent changes to the physical extent and usage of those areas. The Respondent relies on the fact that there has been no objection by the Appellants and their predecessors in title for at least the past 25 years to structures on the Disputed Areas such as the raised kerb with the grass verge at the end of the Easement Land as well as the trees planted on the grass verge. [note: 16] Such acquiescence, the Respondent says, is plainly an unequivocal manifestation of abandonment by the Appellants and their predecessors in title of the Easement in respect of the Disputed Areas. As such, the Respondent submits, the evidential burden of showing that the Easement has not been abandoned *vis-à-vis* those areas falls on the Appellants. We agree with this submission.

32 Having addressed the burden of proof *vis-à-vis* abandonment, we now examine in detail the applicable legal principles for determining whether an easement has in fact been abandoned, be it in

full or in part.

Abandonment of easements over registered land

33 The common law doctrine of abandonment continues to apply to easements over registered land (see John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (The Government of the State of Singapore, 1961) ("*The Singapore Torrens System*") at pp 176–177). In Singapore, there are now two methods which a party can rely on to establish abandonment (whether in full or in part) of an easement. The first is by adopting the procedure set out in s 106 of the LTA and the second, by establishing abandonment at common law curially.

34 Section 106 of the LTA reads as follows:

> **Cancellation of easements**
>
> **106.**—(1) The Registrar [*viz*, the Registrar of Titles appointed under s 5 of the LTA] shall cancel the registration or notification of an easement upon proof to his satisfaction that —
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> (*a*) any period of time for which the easement was intended to subsist has expired;
>
> (*b*) any event upon which the easement was intended to determine has occurred; or
>
> (*c*) the easement has been abandoned.
>
> (2) Where an application is made to the Registrar in the approved form and *evidence is furnished to the Registrar of non-user of an easement for a period exceeding 12 years*, he may, without further evidence of abandonment, give notice to the proprietor of the dominant tenement and, *in the absence of objection by that proprietor within one month from the service of the notice*,*treat the easement as abandoned.*
>
> [emphasis added]

35 Under the procedure prescribed by s 106(2) of the LTA, non-user of an easement for a period exceeding 12 years must first be established. While the common law, as we shall see later (at [40] below), does not prescribe a minimum period of non-user for the purposes of establishing abandonment, it seems to us that, as a matter of common sense, in the light of the statutory timeframe, it will be difficult for any claimant to establish abandonment at common law unless a lapse in the use of the easement for more than 12 years is likewise established. That said, we emphasise that non-user is only one element in the spectrum of considerations that the court will have to assess before making a finding of abandonment (see below at [39]). We should also add that where an easement appears in the certificates of title of both the dominant tenement and the servient tenement, the court will have regard to the acts of both the present dominant owner and the present servient owner, as well as (where applicable) the acts of their respective predecessors in title.

The applicable legal principles on abandonment

36 Abandonment will not be readily inferred. This sentiment was accurately captured by Buckley LJ in *Gotobed v Pridmore and Another* (1970) 115 SJ 78 ("*Gotobed*"), where he observed (at 78):

> To establish abandonment [of an easement] the conduct of the dominant owner must have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any

successor in title should thereafter make use of the easement. … *Abandonment was not to be lightly inferred. Owners of property did not normally wish to divest themselves of [an easement] unless it was to their advantage, notwithstanding that they might have no present use for it.* [emphasis added]

37 It is always an objective question whether a dominant owner firmly intends to abandon an easement, be it in full or in part. As noted in *Cook v Mayor and Corporation of Bath* (1868) LR 6 Eq 177 at 179, whether an act amounts to abandonment or an intention to abandon is a question of fact to be ascertained from the surrounding circumstances.

38 One factor which appears relevant to whether abandonment is established is the nature of the altered features on the easement land, for example, whether the changes to the easement land by way of new structures or obstructions are permanent or temporary. In this regard, abandonment may also be established from changes to the *dominant* tenement. In *Frontfield Investment Holding (Pte) Ltd v Management Corporation Strata Title Plan No 938 and others* [2001] 2 SLR(R) 410 for instance, Judith Prakash J found it significant (at [44]) that permanent structures which could not be readily removed, including a driveway, a swimming pool and other amenities, had been constructed on the dominant tenement in such a way as to block access to the right of way over the easement land. She found abandonment on the facts. Plainly, the permanence of built-up structures or other features on the easement land and/or the dominant tenement is a matter of considerable significance to the court in cases involving alleged abandonment of easements. This has been emphasised in cases like *Gotobed* (see the commentary on *Gotobed* in Colin Sara, *Boundaries and Easements* (Sweet & Maxwell, 5th Ed, 2011) ("*Boundaries and Easements*") at para 17.06).

39 In most instances where abandonment of an easement is alleged, the party claiming abandonment typically seeks to rely on a period of non-user of the easement as its main plank. However, the length of non-user is only *one* of the elements from which the dominant owner's intention to retain or, conversely, abandon his easement may be inferred. At the end of the day, the length of non-user that suffices to establish abandonment depends very much on an assessment of all the surrounding circumstances (see *The Queen v Sarah Chorley and Another* (1848) 12 QB 515; 116 ER 960 ("*Chorley*") at 519; 962). Nevertheless, it can be said, as a general rule of thumb, that the longer the period of non-user, the more readily a finding of abandonment may be made, subject to there being a satisfactory explanation, gleaned from proof of facts or circumstances, negativing any intention on the dominant owner's part to abandon the easement in question. We should also point out that save in exceptional cases, mere non-user of an easement is *not* in itself sufficient to establish abandonment of that easement.

40 Lord Denman CJ rightly pointed out in *Chorley* that at common law, there is no minimum period of non-user which must be shown in order to establish abandonment. Nevertheless, he also added a note of caution (at 518; 962) that in cases where the evidence of abandonment took the form of "mere acquiescence in the interruption [of the use of the easement]", it would be prudent for the court not to rely on a period of non-user of less than 20 years. At the same time, he also recognised (at 518–519; 962) that where there was an act *clearly* evidencing an intention by the dominant owner to abandon his easement, a shorter period of non-user could suffice and "would have the same effect as an express release 'without any reference to time'" (see Jonathan Gaunt QC & Justice Morgan, *Gale on Easements* (Sweet & Maxwell, 18th Ed, 2008) ("*Gale on Easements*") at para 12-71, quoting from *Chorley* at 519; 962). We should point out here that it does not follow that there is a presumption of abandonment after non-user of an easement for 20 years. Also, as mentioned above at [35], it is unlikely that a period of non-user of less than 12 years would suffice, except in the plainest of cases.

41 As alluded to earlier, save in exceptional cases, mere non-user of an easement is in itself insufficient to amount to abandonment of that easement. This was reiterated by this court in *Lian Kok Hong v Lee Choi Kheong and others* [2010] 3 SLR 378 ("*Lian Kok Hong*") at [24] (see also *Benn v Hardinge* (1992) 66 P & CR 246). The non-user must instead be taken together with and examined in the light of the surrounding circumstances. For instance, where non-user occurs because the dominant owner does not need to use the easement, or (*vis-à-vis* an easement in the form of a right of way specifically) because he has a more convenient (or a preferred) mode of access through his own land, the court may incline towards finding abandonment of that easement (see *Ward v Ward* (1852) 7 Exch 838; 155 ER 1189).

42 If the circumstances as a whole clearly indicate the dominant owner's intention not to resume usage of the easement granted in his favour, then the courts may imply a *presumption of release* of the easement and the easement will be lost (see *Swan v Sinclair* [1924] 1 Ch 254 ("*Swan*") at 266). That said, *Gale on Easements* states at para 12-66 that a presumption of abandonment of an easement will only arise where: (a) the dominant owner acts in a manner clearly indicating a firm intention that neither he nor any of his successors in title should thereafter make use of the easement; or (b) there exist circumstances which are adverse to the use of the easement and which are sufficient to explain the non-user, coupled with a substantial length of time during which the dominant owner has acquiesced in that state of affairs (see, for instance, *Swan* at 267–268). A similar observation was made in *Chorley*, where it was stated (at 519; 962):

> It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, *or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury*. [emphasis added]

43 It can be seen from the above extract that acquiescence by the dominant owner in an adverse act by the servient owner is a relevant consideration in determining if there is abandonment of an easement. For example, it was held in *Lian Kok Hong* that a long period of acquiescence (about 30 years in that case) in the form of inaction and a lack of objection by the successive owners of the dominant tenement to the fencing off of their right of way over the easement land was sufficient acquiescence on their part to the right of way being rendered unusable. Given these circumstances, this court concluded that the conduct of the successive owners of the dominant tenement amounted to a conscious act of abandonment (see *Lian Kok Hong* at [29]).

44 In summary then, the general approach to be adopted in scrutinising claims of abandonment of an easement is that concisely stated in *Boundaries and Easements* at para 17.07, *viz*:

> The court will, therefore, look both at any period of non-user and at any acts by the dominant owner or by the servient owner and accepted by the dominant owner. It will then look at the reasons for non-user, the reasons for any actions by the dominant owner and the reasons why the acts of the servient owner have been accepted and decide, looking at all these facts, whether an intention to abandon can be inferred. It is, however, clear that abandonment will not be lightly inferred and that acquiescence in a temporary obstruction may be regarded as good-neighbourliness rather than abandonment.

45 Determining whether abandonment of an easement has been established is, at the end of the day, a highly fact-sensitive assessment. It is a question of fact that may be answered inferentially from proven circumstances. Prior decisions are only useful in so far as they establish principles which are generally applicable to similar cases. With the foregoing considerations in mind, we now turn to the facts of the present appeals to determine whether the Appellants and their predecessors in title

have indeed, as the Respondent contends, abandoned the Easement in respect of the Disputed Areas.

Application to the present facts

46 The Appellants argue that they (and, in effect, their predecessors in title) have never abandoned the Easement in respect of the area at the end of the Easement Land where (as mentioned at [6] above) there is at present a raised kerb with a grass verge on which the Kerb Wall and three mature trees now stand ("the First Disputed Area"). They contend that they have, from time to time, made use of that grass verge and the airspace above it by walking over the grass verge (the Appellants' "'walking' assertion") and by reversing their vehicles over it (the Appellants' "'reversing' assertion"). The Respondent, on the other hand, argues that the Appellants and their predecessors in title abandoned the Easement in relation to the First Disputed Area when they unmistakeably acquiesced for almost 25 years in changes to that area, including (among other things) the construction of the raised kerb. [note: 17] According to the Respondent, the building of the raised kerb was approved by the authorities and completed by 1988, and no objections were raised against it at all thereafter. [note: 18] Apart from contending that they have not abandoned the Easement in respect of the First Disputed Area, the Appellants also argue that they (and, in effect, their predecessors in title) have not abandoned the Easement *vis-à-vis* the area at the entrance of the Easement Land where there used to be concrete planter boxes and where the meter box mentioned at [6] above now stands ("the Second Disputed Area").

47 We affirm the Judge's finding that the Respondent has indeed established a firm intention by the Appellants and their predecessors in title to abandon the Easement in respect of both the First Disputed Area and the Second Disputed Area. We now give our reasons for affirming this finding.

48 In relation to the First Disputed Area, we observe that the veracity of the Appellants' "walking" assertion (see [46] above) appears questionable because the First Disputed Area is in fact situated right along the boundary of No 23 (the Respondent's house) and is directly *opposite* No 22 (the Appellants' property). Given the location of the grass verge in the First Disputed Area, it is unlikely that the Appellants walk along that part of the Easement Land to exit from or enter No 22. Further, we note that the Appellants have not adduced any evidence of prior usage of the grass verge in this manner by their predecessors in title. We infer from this conspicuous omission that such evidence, had it been adduced, would not support the Appellants' "walking" assertion. Separately, as we shall point out at [52] below, the Appellants' "reversing" assertion is also flatly contradicted by their own evidence.

49 On her part, the Respondent asserts that her predecessor in title had built in the First Disputed Area, on the right-hand side of the Easement Land, a flower trough and a retaining wall encroaching on the Easement Land. [note: 19] As mentioned at [46] above, the Respondent also points out that the raised kerb in the First Disputed Area was built by 1988 and therefore has been there for "almost 25 years" [note: 20] now. Additionally, she states that the three mature trees now present on the grass verge in the First Disputed Area have been growing there "for the last 20 years". [note: 21] We are satisfied that the Appellants, like their predecessors in title, did not take issue with the presence of the raised kerb and the three mature trees on the grass verge in the First Disputed Area after acquiring and moving into No 22 some nine years ago in 2003. This is not unlike the circumstances which prevailed in *Lian Kok Hong*, where the successive owners of the dominant tenement knew about the right of way granted in their favour when the dominant tenement was conveyed to them, but thereafter failed to make any protest despite the right of way being obstructed by a fence. The absence of any objection for about 30 years to this state of affairs by the successive owners of the

dominant tenement was held, as stated earlier (at [43] above), to amount to acquiescence which was sufficient to establish their abandonment of their right of way.

50 Also, as rightly pointed out by the Respondent, the raised kerb and the three mature trees on the grass verge in the First Disputed Area are permanent structures that clearly demarcate the area required for the reasonable enjoyment of the Easement. These structures are not readily removable without expending a not insubstantial amount of money and effort. These are all relevant considerations which incline in favour of finding abandonment of the Easement in respect of the First Disputed Area. We note too that the aforesaid structures prevent vehicles and individuals from driving and walking through the First Disputed Area, and are thus factually incompatible with the Appellants' present belated attempts to insist on their right to use the Easement over the full extent of the Easement Land, including over the First Disputed Area.

51 To summarise, the long period of acquiescence by the Appellants and their predecessors in title in the physical unavailability (or non-accessibility) of the First Disputed Area for the purposes of using the Easement clearly indicates a firm intention on their part to abandon the Easement in respect of that area. The permanent nature of the raised kerb with the grass verge on which (*inter alia*) the Kerb Wall now stands and the maturity of the trees on the grass verge have also been important considerations in this matter.

52 At the end of the day, the main complaint of the Appellants *vis-à-vis* the First Disputed Area now appears to be reduced to that of there being (so they allege) insufficient room for them to reverse their cars out of No 22 after the construction of the Kerb Wall. Crucially, we note, however, that the first appellant in CA 103, Wee, has unequivocally and paradoxically affirmed that the Appellants have always driven head-out first from No 22 onto the Easement Land after performing a three-point turn within No 22's compound. The relevant paragraph in Wee's affidavit filed on 8 February 2011 states as follows: [note: 22]

> We have ***always*** *driven in and out of our compound head-in first* in the interest of safety in the past, doing a 3-point turn in our compound. ***We intend to continue with this familiar practice, which has been proven to be a safe practice all these years*** . [emphasis added in italics and bold italics]

53 This entirely undermines the Appellants' subsequent assertion that it is their practice to reverse their cars out of No 22 and that they do so often. In the circumstances, we find that the Appellants' complaint about the erection of the Kerb Wall depriving them of manoeuvring airspace to reverse their cars out of No 22 is implausible and, indeed, appears contrived. We also find that the amount of airspace allegedly lost by the Appellants as a result of the erection of the Kerb Wall is *de minimis* and, in any event, is unlikely to be the substantial cause of their present alleged difficulties in reversing their cars out of No 22 (see below at [77]–[81]).

54 We are therefore of the view that the Appellants have failed to displace the evidential burden, placed on them by the prevailing facts, of showing that they and their predecessors in title have not abandoned the Easement in relation to the First Disputed Area. On the contrary, on the basis of the established facts, we are satisfied that the Appellants and their predecessors in title acquiesced in significant changes to the usage and physical extent of the First Disputed Area – that is to say, in the presence there of the raised kerb with the grass verge on which the Kerb Wall and three mature trees now stand – for a long period of time, which changes have rendered the Easement unusable *vis-à-vis* the First Disputed Area.

55 In relation to the Second Disputed Area, we find that there has likewise been abandonment of

the Easement in respect of that area for reasons similar to those set out above in relation to the First Disputed Area. In her affidavit filed on 23 June 2011 in respect of OS 350, the Respondent deposed that concrete planter boxes (which have since been removed following the reconstruction works at No 23) had been in the Second Disputed Area since 1988, and neither vehicles nor individuals could drive or walk through this area. [note: 23] In *Chia Foong Lin* at [13], the Judge accepted that:

> … [T]here were concrete planter boxes where the meter box [*ie*, the meter box mentioned at [6] above] will be. *This meant that that part of the right of way had already been inaccessible to pedestrians and vehicles*. [emphasis added]

The aforesaid concrete planter boxes were undoubtedly permanent man-made structures built on the Second Disputed Area which were relatively difficult to remove. Their presence constituted a clear adverse circumstance as regards the use of the Easement. However, for a significant period of over 20 years, the Appellants and their predecessors in title accepted the presence of these concrete planter boxes. There was therefore a long period of acquiescence in the existence of these structures and, consequently, in the fact that this part of the Easement Land (*viz*, the Second Disputed Area) was inaccessible. There was no credible contrary evidence that the Appellants and their predecessors in title sought to use this area for passage to and from No 22 as part of their rights under the Easement. As such, we find that the Appellants have not displaced the evidential burden of showing non-abandonment of the Easement on the facts.

56 We now turn to address Issue 3, *viz*, whether there has been substantial interference with the Appellants' reasonable enjoyment of the Easement as a result of the four factors outlined at [26(c)] above (namely, the construction of the Kerb Wall, the installation of the Auto-Gate, the parking of the Respondent's cars on the Driveway and the playing of the Respondent's children on the Easement Land).

Issue 3: Whether there has been substantial interference with the Appellants' reasonable enjoyment of the Easement

57 Before we examine the facts relevant to Issue 3, we think it will be helpful if we first set out generally the essential characteristics of an easement as well as the incidental rights and obligations of the dominant owner and the servient owner.

What is the nature of an easement?

58 An easement is an appurtenant right that one landowner (*viz*, the dominant owner) has to use land belonging to another (*viz*, the servient owner) *in a certain manner*. It is a right to *do an act* or to *prevent an act from occurring*, but it is not a right to have something done (see *Jones v Price* [1965] 2 QB 618 at 631). An easement thus requires no more than sufferance on the part of the servient owner (see *Rance v Elvin and Another* (1985) 50 P & CR 9 at 13). Wrongful interference with the reasonable use of an easement is a nuisance that may be injuncted. Often, the key issue in disputes involving easements is whether the nature of the interference justifies the injuncting of the activities causing the interference. The following illuminating passage from *The Singapore Torrens System*, authored by John Baalman, the accomplished draftsman of the Land Titles Ordinance 1956 (No 21 of 1956) (the then equivalent of the LTA), has, with remarkable conciseness and penetration, captured the essence of the attributes of an easement (at pp 178–179):

> *The owner of land who grants an easement does no more than to part with a fraction of his dominion over the servient land.* He simply enables the grantee to do that which, without the grant, would have been unlawful; in other words, to commit what o*therwise* would have been an

act of trespass, or of nuisance. *The grantor continues to be the owner of the soil, and the only obligation which rests on him is to refrain from doing anything which would substantially interfere with the enjoyment of the easement by the grantee.* Thus *if the grantor of a right of way wishes to use the way himself he can do so without needing any express provision in the grant, for the simple reason that he is the owner of the soil.* And he can allow other persons to use it also, either informally, or by granting them easements. In fact the number of additional licences or easements which a servient owner can create is limited only by the test above mentioned – i.e. whether the additional grants increase the burden on the servient land to an extent (e.g. by congesting traffic on a right of way) which substantially interferes with the rights of the original grantee. [emphasis added]

59 The key points that emerge from this summary are as follows.

60 First, the servient owner (the grantor of the easement) does *not* part with ownership and/or all of his ownership rights in relation to the easement land. He merely parts with a *fraction* of his dominion rights over the easement land.

61 Second, the dominant owner (the grantee of the easement) only acquires a *limited interest* over the easement land. He is merely permitted to do lawfully what would otherwise be unlawful. The dominant owner acquires no particular right as to how the easement land might be used or dealt with, other than the right to enjoy the reasonable use of the easement granted to him.

62 Third, the servient owner may use the easement land as he pleases, provided he does not do anything that would *substantially interfere* with the reasonable enjoyment of the easement by the dominant owner.

63 Fourth, plainly, the dominant owner has no right to insist on maintenance of the *status quo* if changes to or on the easement land do not substantially interfere with his reasonable enjoyment of the easement. The powerfully evocative terms "dominant" and "servient", while conceptually coherent, can be factually misleading. *The rights of the dominant owner over the easement land do not trump those of the servient owner. The rights of the former are limited to reasonable enjoyment of the easement.*

64 Fifth, the dominant owner has *no* proprietary interest in the easement land and *can only prevent actions that will substantially interfere with his reasonable enjoyment of the easement.* The operative test is not that of any interference with the reasonable enjoyment of the easement, but rather, that of *substantial interference.* It follows that the servient owner has *an absolute right* to improve and/or use the easement land for his own benefit if this does not cause substantial interference with the dominant owner's reasonable enjoyment of the easement.

65 We shall further explicate these points below at [66]–[72].

The applicable law on substantial interference with the reasonable use of an easement

(1) General principles

66 Often, when disputes involving easements arise, the focus is usually on the dominant owner and his rights. However, as mentioned earlier, this is only part of the "*sharing equation*" between the dominant owner and the servient owner (see [58]–[64] above). The rights of the dominant owner must be balanced against those of the servient owner in relation to the easement land, which (being part of the servient tenement) belongs to the servient owner. The servient owner has rights of

ownership, possession and usage over the easement land, and the existence of an easement over the easement land does not confer any right on the dominant owner (the grantee of the easement) to prevent the servient owner from using the easement land in any way which is not significantly inconsistent with the dominant owner's reasonable enjoyment of the easement. *As the owner of the easement land, the servient owner can exercise all incidents of ownership over that land as well as make practical use of it, subject only to the restriction that he cannot substantially interfere with the dominant owner's reasonable enjoyment of the easement.* Therefore, in disputes over easement usage, the court has to strike an appropriate balance between allowing the servient owner practical usage of the easement land and ensuring that the dominant owner's right to reasonable enjoyment of the easement is not substantially interfered with.

67 It is only where there is interference of a substantial nature with the dominant owner's reasonable use of the easement that a claim for relief in nuisance will succeed. The test, in essence, is that of "'substantial interference' with the [easement] … in a form which is plainly obstructive of its reasonable use" (see Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) ("*Gray & Gray*") at para 5.1.87). This test has also been affirmed by this court in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875.

68 The "substantial interference" test has been described in *B&Q Plc v Liverpool and Lancashire Properties Limited* (2000) 81 P & CR 246 ("*B&Q*") at [48]–[49] as turning on convenience, *ie*, whether the interference with the easement land renders the continuance of the dominant owner's reasonable use of the easement "*materially less convenient than before*" [emphasis added] (at [71]). The dominant owner "can only object to such activities, including obstruction, as *substantially interfere* with the exercise of the defined right *as for the time being is reasonably required by him*" [emphasis added] (*per* Mummery LJ in the English Court of Appeal decision of *West v Sharp* [2000] 79 P & CR 327 at 332). In substance, this test requires the court to assess whether the interference with or the obstructions present on the easement land disturb the dominant owner's reasonable enjoyment of the easement in a materially significant way. This, of course, depends on the nature of the easement and what it is used for.

(2) Private rights of way

69 In relation to easements in the form of private rights of way specifically, John Leybourn Goddard, *A Treatise on The Law of Easements* (Stevens and Sons Limited, 8th Ed, 1921) ("*Goddard*") authoritatively summarised the position almost a hundred years ago thus (at p 389):

> … *[A] right of way along a private road belonging to another person does not generally give the dominant owner a right that the road shall in no respect be altered, or the width decreased; for his right does not entitle him to the use of the whole of the road, unless the whole width of the road is necessary for his purpose – and it is merely a right to pass with the convenience to which he has been accustomed*; the right, therefore, merely extends to that portion of the centre of the road which is necessary for the due exercise of the right of passage; and the only obligation upon the servient owner is, that he shall not unreasonably contract the width of the road, or render the exercise of the right of passing substantially less easy than it was at the time of the grant. This general rule may of course be altered by circumstances, as was the case in *Nicol* v. *Beaumont* [(1883) 53 LJ Ch 853; 50 LT 112], in which there was a grant of right to pass "in the same manner and as fully as if the same were public roads". [emphasis added]

70 *Gray & Gray* reiterates this view in the modern context. It rightly observes (at para 5.1.87):

> Unlike the case of the public highway (where any 'appreciable' obstruction is wrongful), *not every form of interference with a private right of way is actionable*. *The courts are increasingly anxious to uphold an ethic of 'reasonableness between neighbours' and frequently endorse the idea that in the law of nuisance there must be a large element of 'give and take'.* ***A right of way cannot, by definition, confer rights of exclusive user. It necessarily follows that the threshold of actionable nuisance is reached only when there is 'substantial' interference with the way as granted in a form which is plainly obstructive of its reasonable use*** . [emphasis added in italics and bold italics]

71 In this regard, *Goddard*'s reference (at p 389) to the usage of "the whole width of the [easement land]" is instructive. The court will have to assess usage pragmatically and apply as its touchstone the test of reasonableness. Plainly, the court will not readily frown upon every alleged interference by the servient owner with a private right of way. The alleged interference must be material and plainly obstructive, and thereby constitute a substantial interference with the dominant owner's reasonable enjoyment of the right of way. Careful consideration will, in particular, be accorded to the *reasonableness* of the conduct of both the dominant owner and the servient owner. This approach is also affirmed in *Gale on Easements* as follows (at para 13-06):

> ***... [I]n the case of a private right of way the obstruction is not actionable unless it is substantial*** *. Again, it has been said that for the obstruction of a private way the dominant owner cannot complain unless he can prove injury … In Hutton v Hamboro* [(1860) 2 F & F 218], where the obstruction of a private way was alleged, Cockburn C.J. laid down that ***the question was whether practically and substantially the right of way could be exercised as conveniently as before.*** [emphasis added in italics and bold italics]

72 It should also be noted that an ordinary right of way does not as a matter of course confer by implication on the dominant owner the right to park on the easement land, or even to turn or reverse his vehicles on it. Such rights are not always necessary to the effective reasonable enjoyment of a right of way (see *Richard Frank Horton Berryman and Anor v Robert Sonnenschein and Anor* [2008] NSWSC 213 at [34]–[35]). We note also the observations made by the High Court in *Lim Hong Seng v East Coast Medicare Centre Pte Ltd* [1994] 3 SLR(R) 680 at [44], where it was stated that:

> … [T]he express easement enjoyed by the plaintiff would not, even if … construed … as a general right of way, have allowed him to park his car on the driveway. The easement was for access not storage.

Application to the present facts

(1) The structures and activities complained of

73 In the light of our finding (at [47] above) that there has been abandonment by the Appellants and their predecessors in title of the Easement in respect of (*inter alia*) the First Disputed Area (*ie*, the area at the end of the Easement Land where there is a raised kerb with a grass verge on which the Kerb Wall and three mature trees now stand), it is, strictly speaking, not necessary for us to address the issue of whether the erection of the Kerb Wall has caused substantial interference with the Appellants' reasonable enjoyment of the Easement. The First Disputed Area is now *not* subject to any easement and, thus, the Respondent, as the owner of that area (along with the rest of the plot of land on which No 23 stands), had an absolute right to build the Kerb Wall on her land. For completeness, however, we shall nonetheless consider the Appellants' complaint that the Kerb Wall substantially interferes with their reasonable use of the Easement.

74 We should also point out that even though we have found that the Appellants and their predecessors in title have abandoned the Easement in respect of the Second Disputed Area as well, we still need to consider the Appellants' allegation of substantial interference with their reasonable enjoyment of the Easement arising from the installation of the Auto-Gate, the parking of the Respondent's cars on the Driveway and the playing of the Respondent's children on the Easement Land (*cf* what we have just said at [73] above *vis-à-vis* the Appellants' complaint about the Kerb Wall). This is because these factors relate to parts of the Easement Land which are outside both of the Disputed Areas.

(A) The Kerb Wall

75 It became apparent to us, after analysing the Appellants' complaints, that the effect of the Kerb Wall on the Appellants' ability to execute three-point turns to exit from No 22 is effectively the remaining real bone of contention between the parties where the Kerb Wall is concerned. The Appellants assert that the Kerb Wall encroaches on the airspace above the First Disputed Area, thus depriving them of vehicular "swing room" when they reverse their cars out of No 22. As a result, they claim that they are now required to execute intricate driving manoeuvres to avoid hitting the Kerb Wall whenever they reverse their cars out of No 22. They also state that the Kerb Wall creates a safety hazard because drivers may now decide to reverse their vehicles down the entire length of the Driveway in order to reach the public road at Oei Tiong Ham Park. They add, for good measure, that due to the difficulties presented by the Kerb Wall's presence, they are now restricted in the choice and the number of cars which they can purchase.

76 In response, the Respondent argues that the Kerb Wall does not encroach on the Easement Land at all. She maintains that three-point turns at the end of the Easement Land can still be made, and that there has been no substantial interference with the Appellants' reasonable use of the Easement. She disagrees that the Appellants frequently reverse their cars out of No 22 and thus need turning space at the end of the Easement Land for this purpose. To drive home her point, the Respondent has adduced up-to-date photographs to illustrate how the Appellants ordinarily drive out from No 22. She insists that any difficulties which the Appellants may have in reversing their cars out of No 22 are solely attributable to the altered position of No 22's gate. In short, the Respondent claims that the Appellants are the authors of their own alleged predicament, assuming it exists.

77 We find that the erection of the Kerb Wall on its own has not substantially interfered with the Appellants' reasonable enjoyment of the Easement. In any event, the ability to reverse their cars at the end of the Easement Land is not reasonably required by the Appellants. The following are our reasons.

78 First, it is relevant that the size of the Driveway on the Easement Land has not been decreased in any way. This is pertinent, given that the Easement consists of a right of way. *That the physical dimensions of the Driveway have remained effectively the same before and after the reconstruction works at No 23 is indicative that there has been little or, at most, only minor interference with the Appellants' reasonable use of the Easement since the Kerb Wall was constructed.*

79 Second, the essence of the Appellants' complaint *vis-à-vis* the Kerb Wall is their loss of turning space when reversing their cars out of No 22. We find this complaint unmeritorious. It appears that prior to the construction of the Kerb Wall, the horizontal distance over the grass verge at the end of the Easement Land which the Appellants could in reality actually have enjoyed when reversing their cars out of No 22 could only have amounted to 280mm at most. This is the distance from the Kerb Wall to the trunk of the innermost tree at the end of the Easement Land, with the thickness of the Kerb Wall included. [note: 24] We also note that that tree slants *towards* the Driveway, effectively

reducing the amount of space which could have been used for reversing even before the erection of the Kerb Wall. We therefore agree with the Respondent that the horizontal distance lost as a result of the building of the Kerb Wall is *de minimis* at best. The resultant diminution in turning radius thus does not amount to a substantial interference with the Appellants' reasonable enjoyment of the Easement. In any case, even if the Appellants are now required, when driving out of No 22, to make a few more turns instead of the typical three-point ones, we are of the view that this does not meet the requisite threshold of *substantial* interference with the reasonable enjoyment of the Easement. As mentioned at (*inter alia*) [64], [68] and [71] above, not all inconveniences which interfere with the reasonable use of an easement are legally actionable.

80 Third, it has been established that the usual practice of the Appellants has all along been to drive out of No 22 head-out first (see above at [52]). Ordinarily, the user of an easement (*ie*, the dominant owner) ought not to be deprived of his preferred *modus operandi* of using the easement (see *B&Q* at [40]–[45]). Here, the preferred *modus operandi* of the Appellants in exiting from No 22 is that of driving head-out first, and that mode of using the Easement has clearly not been restricted by the erection of the Kerb Wall.

81 Fourth, it appears to us likely that the shifting of No 22's gate along the Driveway towards the end of the Easement Land has contributed significantly to the Appellants' present alleged difficulties in reversing their cars out of No 22, over and above the small degree of interference caused by the erection of the Kerb Wall as noted earlier. While the parties disagree on the precise extent of the shift (the Appellants state the figure as 70cm while the Respondent states it as 100cm (see [9] above)), it cannot be gainsaid that the necessary consequence of the shift, whether by 70cm or 100cm, is an appreciable reduction in the amount of manoeuvring space available for the Appellants' cars to execute turns on the Easement Land immediately upon exiting from No 22. We therefore find that the erection of the Kerb Wall cannot possibly have been the primary cause of this alleged inconvenience.

82 Fifth, the Appellants have no absolute right to use the Easement Land for particular manoeuvres such as reversing because the Easement consists of a right of way (see [72] above), *ie*, a right of *passage* through the Easement Land for access to and from No 22. Besides, the evidence shows that there was previously no need for such manoeuvres before No 22's gate was shifted.

(B) The Auto-Gate

83 We now turn to the Appellants' complaints about the Auto-Gate. The Appellants allege that the Auto-Gate substantially interferes with their reasonable enjoyment of the Easement. Specifically, they say that if the Auto-Gate were to be closed, they will be adversely affected in the following ways: (a) they will lose the unimpeded access to and from the Easement Land which they currently enjoy when the Auto-Gate is not closed; (b) postmen and visitors to No 22 will be unaware of the presence of No 22; and (c) they (*ie*, the Appellants) will be impeded in the discharge of their professional obligations as medical doctors when they are required to attend to medical emergencies. They add that providing them with a remote control for the Auto-Gate and installing an intercom system there will not mitigate the loss (when the Auto-Gate is closed) of their right to unimpeded access to and from the Easement Land. The Respondent argues, on the other hand, that the installation of the Auto-Gate has not substantially interfered with the Appellants' reasonable use of the Easement. She affirms that she had previously offered to provide the Appellants with a remote control and a set of manual keys for the Auto-Gate, as well as to install at the Auto-Gate at her own expense an intercom system linked to No 22. In addition, she had previously offered to incorporate an open pedestrian access route leading to the Easement Land, provide a post box for No 22 as well as display No 22's unit number on the pillar of the Auto-Gate in order to quell the Appellants' worries about the lack of visibility of No 22 should the Auto-Gate be closed. The Respondent has also informed us that the

Auto-Gate will be closed only when her children play on the Easement Land.

84 The legal position in respect of gates and barriers which are alleged to interfere with the reasonable enjoyment of an easement coheres with the general position stated above (at [60]–[64]) *vis-à-vis* the respective rights of a servient owner and a dominant owner. Simply put, the servient owner, in exercise of his rights of ownership, is entitled to fence up the easement land. However, his entitlement is circumscribed by his obligation not to substantially interfere with the dominant owner's reasonable enjoyment of the easement (see *Gale on Easements* at para 13-14). *Gray & Gray* rightly states (at para 5.1.89, citing *Sunset Properties Pty Ltd v Johnston* (1975) 3 BPR 9185 at 9195) that the true test in respect of interference arising from the erection of gates and barriers is "whether the gate is 'locked against enjoyment'".

85 We agree with the Judge that the installation and the closure of the Auto-Gate will not amount to substantial interference with the Appellants' reasonable enjoyment of the Easement. Our reasons are as follows.

86 First, it is pertinent to note that there has always been a gate at the entrance of the Easement Land, although the previous gate was a manual one. This undermines the Appellants' present stance in respect of the Auto-Gate. That the existence of the previous manual gate was never objected to by the Appellants and their predecessors in title evinces an implicit acceptance on their part that any gate at the entrance of the Easement Land can be closed as and when required. Otherwise, why have a gate at all? Further, as we have just mentioned (see [84] above), a servient owner does in law have a right to fence up the easement land, provided no substantial interference with the dominant owner's reasonable use of the easement is caused. Where an easement takes the form of a right of way, the locking of a gate leading to the right of way is not in itself inconsistent with the reasonable enjoyment of the easement, especially if the dominant owner is provided with a key or a combination lock code for the gate (see *Gray & Gray* at para 5.1.89). Given that the Respondent has offered to provide the Appellants with a similar level of access in the present case (see [83] above), the installation of the Auto-Gate does not substantially interfere with the Appellants' right to reasonable enjoyment of the Easement.

87 Second, the Auto-Gate, being remote-controlled, would appear to be easier and more convenient for the Appellants to operate as compared to the previous manual one. Previously, whenever the manual gate happened to be closed, the Appellants would have had to walk over to the gate to manually push it open. The Appellants' argument that the Auto-Gate may malfunction too frequently and thus prevent easy access from the Easement Land to the public road at Oei Tiong Ham Park and *vice versa* is a strained one, especially given that the Appellants too have installed an automatic remote-controlled gate for No 22.

88 Third, the Respondent has offered to display No 22's unit number on the pillar of the Auto-Gate, erect a post box for No 22 at the Auto-Gate and provide at the Auto-Gate at her own expense an intercom system linked to No 22. She has also stated that she intends to leave unlocked the pedestrian access gate beside the Auto-Gate so as to facilitate third-party access (for instance, by postmen or visitors) to No 22 via the Easement Land. With these facilities offered to the Appellants to facilitate third-party access, we find it difficult to understand their complaints about the Auto-Gate.

89 Pertinently, the Respondent does not intend to close the Auto-Gate unless her children are playing on the Easement Land. As such, the Appellants are perhaps unnecessarily exercised about the closure of the Auto-Gate.

(C) The Parking of the Respondent's cars on the Driveway

9 0 *Vis-à-vis* the parking of the Respondent's cars on the Driveway, the Appellants claim that the Respondent's plans to create permanent car park lots on the Driveway to park her cars for extended periods of time would substantially interfere with their reasonable enjoyment of the Easement. They also cite concerns about contacting the Respondent to shift her car(s) whenever required, and about having to take additional care when driving past other vehicles parked on the Driveway. The Respondent, on the other hand, states that she does not have any plans to create permanent parking spaces on the Driveway, and that any difficulties cited by the Appellants about driving through the Driveway when other vehicles are parked on it have been dramatically overstated.

91 We agree with the Judge's finding of fact (at [12] of *Chia Foong Lin*) that there will be no substantial interference with the Appellants' reasonable enjoyment of the Easement if there is limited parking usage of the Driveway by the Respondent. The Respondent is entitled to reasonable practical usage of her land. Essentially, the question is whether her intended usage in terms of parking her cars on the Driveway is excessive and thereby substantially interferes with the Appellants' reasonable enjoyment of the Easement.

92 Here, the issue of exclusion does not arise as there is no assertion by the Respondent that she is entitled to create permanent parking lots on the Driveway to park her cars. In assessing the right balance to be struck between the parties' respective rights, we do not think there is any substance in the Appellants' complaint about the parking of the Respondent's cars on the Driveway. In any event, a significant consideration in assessing the merits of this complaint is that (as mentioned at [5] above) there is ample space on the Driveway for two ordinary domestic vehicles to comfortably pass alongside each other. For the avoidance of doubt, we point out that the Respondent's right to park her cars on the Driveway, be it at the end of the Easement Land or at the entrance of the Easement Land, must be exercised reasonably, and should not be exercised in such a way as to obstruct at any time the passage of vehicles to and from No 22. Subject to this condition, the Respondent's right to park her cars on the Driveway includes the right to allow visitors to No 23 to park their cars on the Driveway. This right does not, however, extend to overnight parking on the Driveway of the Respondent's cars or the cars of visitors to No 23, unless the Respondent is unable to park her cars, or to allow visitors to No 23 to park their cars, in No 23's compound due to extenuating circumstances (*eg*, if renovation or construction works are being carried out to those areas in No 23's compound which are normally used for parking, or if the Respondent has several house guests with cars staying overnight at No 23). Should such circumstances arise, the Respondent must give adequate prior notice to the Appellants of her intention to park her cars (or to allow visitors to No 23 to park their cars) on the Driveway overnight.

(D) The playing of the Respondent's children on the Easement Land

93 The fourth and last factor raised by the Appellants *vis-à-vis* their allegation of substantial interference with their reasonable use of the Easement relates to the playing of the Respondent's children on the Easement Land. The Appellants complain that this substantially interferes with their reasonable enjoyment of the Easement. They claim that the Respondent intends to convert the Easement Land into a playground, and that this will pose a safety hazard whenever they need to drive through or reverse their cars out of No 22 onto the Easement Land. In response, the Respondent states that she has no plans to create a children's playground on the Easement Land and only intends to allow her children to play there from time to time. She also says that there will be no safety hazard posed by her children playing on the Easement Land as her children will simply step to the side whenever any vehicles drive through.

94 We are unable to find sufficient merit in this complaint that will justify injuncting the Respondent's children from playing on the Easement Land. There is no evidence to suggest that the

Respondent is planning to construct permanent play facilities there. Also, as noted above (at [93]), the Respondent's children will play on the Easement Land only from time to time. This cannot be said to substantially interfere with the Appellants' reasonable enjoyment of the Easement. Granted, there will be a need for the Appellants (and visitors driving to No 22) to drive more carefully (or even more slowly) along the Easement Land whenever the Respondent's children play there, but this cannot be regarded as a substantial interference with the reasonable use of the Easement, given especially that the right of way under the Easement is a *private* right of way.

(2) Non-derogation from grant

95 As an additional string to their legal bow, the Appellants also argue that the erection of the Kerb Wall, the construction of the meter box and the pedestrian access gate next to the Auto-Gate, the parking of the Respondent's cars on the Driveway and the playing of the Respondent's children on the Easement Land effectively result in a derogation from the Easement granted to them. In response, the Respondent argues that these structures and activities on the Easement Land do not result in a derogation from grant as the Easement remains fit to be used for the purposes for which it was granted. The Respondent also contends that a mere reduction in the dimensions of the Easement Land does not substantially interfere with the Appellants' reasonable use of the Easement.

96 The test of whether there is derogation from the grant of an easement is likewise that of whether there is substantial interference with the dominant owner's reasonable use of the easement (see above at [67]). This was emphasised by the High Court in *Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court and others* [1989] 2 SLR(R) 180 and reiterated by this court in *Cold Storage Singapore (1983) Pte Ltd v Management Corporation of Chancery Court and others* [1991] 2 SLR(R) 992 at [4]–[6]. Simply put, in order to establish derogation from grant, it is insufficient that some interference with the dominant owner's reasonable use of the easement exists or is threatened; rather, it is crucial that the alleged interference is significant.

97 In the present case, the Appellants' allegation of derogation from grant is no more than a mirror image of their contention that their reasonable enjoyment of the Easement has been substantially interfered with. Indeed, the Appellants are relying on similar arguments for both of these complaints. For the reasons stated above at [73]–[94], we find that none of the structures and activities complained of can be said to cause substantial interference with the Appellants' reasonable use of the Easement. Therefore, there is no derogation from the grant of that easement. The Easement Land, as it presently stands, can still be used effectively as a passageway for both vehicular and pedestrian access to and from No 22. In other words, the Easement has not been rendered materially less fit to be used for the purposes for which it was granted.

Concluding remarks

98 It is plain that the Appellants have fundamentally misapprehended their fractional rights in relation to the Easement Land. They are not and have never been the co-owners of that land. While they are the owners of the dominant tenement (*viz*, No 22), they are not entitled to assert their fractional rights over the Easement Land in so domineering a manner as to prevent the Respondent from making reasonable use of that part of her land (see [58]–[64] above). They are therefore not entitled to unreasonably object to each and every change in the Respondent's usage of the Easement Land (see [61], [63] and [64] above). They also have no absolute right to doggedly insist that every existing aspect or feature of the Easement Land be immutably preserved for posterity (see [63] above), especially when they and their predecessors in title have already abandoned the Easement in relation to the Disputed Areas (see [47] above). All that the Appellants had prior to the reconstruction works at No 23 and all that they currently have now that those works have been

completed is an enforceable right to ensure that the Respondent does not *substantially interfere* with their right to *reasonable* use of the Easement Land for entry to and exit from No 22 at any time (see [61]–[64] above). In this regard, we have found that none of the structures and activities complained of in these proceedings cause substantial interference with the Appellants' reasonable enjoyment of the Easement.

Conclusion

99 In the result, both CA 103 and CA 151 are dismissed with costs, save that in relation to CA 151, the Appellants are entitled to the costs incurred in relation to the getting-up work done on Issue 1, which the Respondent has raised unsuccessfully before this court (see [28] above). The usual consequential orders are to apply for both appeals.

[note: 1] See the layout plan in the Core Bundle dated 27 February 2012 filed by the Appellants for CA 103 ("CB (CA 103)") at Vol 2, p 51; see also the transfer dated 28 June 1983 (in CB (CA 103) at Vol 2, pp 48–49).

[note: 2] See the deed dated 22 October 1958 (CB (CA 103) at Vol 2, p 56).

[note: 3] *Ibid*.

[note: 4] See the layout plan in CB (CA 103) at Vol 2, p 51.

[note: 5] See the Respondent's Case for CA 151 ("RC (CA 151)") at p 145.

[note: 6] See the Respondent's Supplemental Core Bundle dated 3 April 2012 for CA 103 ("RSCB (CA 103)") at p 21.

[note: 7] See RSCB (CA 103) at p 24; see also the Respondent's Case for CA 103 ("RC (CA 103)") at pp 20–22.

[note: 8] See RSCB (CA 103) at pp 16–17; see also RC (CA 103) at pp 22–23.

[note: 9] See CB (CA 103) at Vol 2, pp 7–9.

[note: 10] This was prayer 3 of OS 85, which is one of the matters in issue in CA 103. The full prayer reads as follows: "A mandatory injunction requiring the Defendant [*ie*, the Respondent] to redesign and if necessary rebuild the proposed [P&A wall] or any other structure near the Easement [Land] so that the Easement [Land] will not be encroached upon" (see CB (CA 103) at Vol 2, p 20).

[note: 11] See CB (CA 103) at Vol 2, pp 20–21.

[note: 12] See the Core Bundle dated 27 February 2012 filed by the Appellants for CA 151 ("CB (CA 151)") at Vol 2, pp 7–9.

[note: 13] See CB (CA 151) at Vol 2, p 12.

[note: 14] See CB (CA 103) at Vol 2, p 20.

[note: 15] See CB (CA 103) at Vol 2, p 20.

[note: 16] See the Respondent's Supplemental Core Bundle dated 3 April 2012 for CA 151 ("RSCB (CA 151)") at pp 202–203.

[note: 17] See RC (CA 151) at pp 143–144; see also RSCB (CA 151) at pp 9–10.

[note: 18] *Ibid*.

[note: 19] See RC (CA 151) at p 148.

[note: 20] See RC (CA 151) at p 143.

[note: 21] See RC (CA 151) at p 153.

[note: 22] See RSCB (CA 151) at p 179.

[note: 23] See the Joint Record of Appeal for CA 103 and CA 151 ("ROA") at Vol 3 (Part 4), p 242.

[note: 24] See ROA at Vol 3 (Part 8), pp 150–151.