

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 154

OS 687/ 1994

Between

Trustees of the estate of
Cheong Eak Chong

... Plaintiff

And

Medway Investments Pte Ltd

... Defendant

GROUND S OF DECISION

Land — Easements — Rights of support

4 The defendants own the property called Nos 35 and 41 Oxley Road, Singapore. The defendants' property is contiguous and approximately to the west of the plaintiffs' property. It is roughly rectangular. The defendants' property is at a level below the plaintiffs' property. In the natural state of the properties, rain falling on the slope must by the law of nature flow down from the plaintiffs' property on to the defendants' property. Furthermore, in its natural state the defendants' land-mass would have provided support to the plaintiffs' property. The defendants' property, however, is not in its natural state. It has been excavated and there are two houses built on it. The entrance to the property is from Oxley Road. Between the two houses is a garage facing the entrance to the property. The surface between Oxley Road and the garage is paved and slopes towards the road. One of the long boundaries of the defendants' property abuts Oxley Road. The other long boundary abuts the plaintiffs' property. There is a retaining wall of varying length approximately along the common boundary of the properties. The topography of the slope in the plaintiffs' property is such that near the middle of the common boundary, the plaintiffs' land is depressed with the result that rain falling at the ends of the boundary will flow toward the middle. In the fit of things, therefore, the plaintiffs' property is the dominant tenement and the defendants' the servient tenement.

5 **Rain on plaintiffs' property**

6 The properties, as they are now, are residential properties. After I made an inspection of the site it became obvious to me that in order to build the residential units on the defendants' property much earth had to be removed from that property. This created a cliff which is supported by a retaining wall. Without the retaining wall the defendant would not only risk a landslide but also

live with an unsightly muddy mess on a rainy day. The retaining wall not only provides protection to the defendants but also affords lateral support to the plaintiffs' property. There are weep-holes in the retaining wall which ease the lateral water pressure on the retaining wall. There are two perimeter drains in the defendants' property providing drainage for the water from the weep-holes. They meet next to the garage with the result that the water will flow into Oxley Road at entrance to the property.

7 Rain water that falls on the mansion and the outhouse and their vicinity and the open surface on the eastern side of the mansion is drained out to the eastern side into the neighbour's property. At all events no part of it flows towards the defendants' property or the slope. Accordingly, the defendants' property is not in the least affected by such water. The water that falls on the shed and its immediate vicinity is carried away by a drain which runs towards the defendant's property and ends at a sump next to the retaining wall somewhere in the middle of the common boundary. There is a perimeter drain on the plaintiffs' property from the far end of the common boundary leading to the sump. Thus the two drains meet at the sump. Rain water flowing through the two drains into the sump is predominantly from the roof of the shed that stands at the top of the slope. Very little rain water would be collected by the perimeter drain in the plaintiffs' property. The shed is very small compared to the total area of the mansion and the outhouse.

8 The defendants say that all the rain water that falls on the plaintiffs' property flows into their property via the sump. This is an inept allegation for two reasons. First, most of the water that reaches the sump is from the roof of the shed and the short perimeter drain in the plaintiffs' property. If the shed had not been there the rain that falls on the ground where the shed stands would

naturally flow towards the defendants' property. Part of the drain from the shed to the sump is underground. Only about one-third of the rain water that falls on the plaintiffs' property, that is the area of the slope, will run towards the defendants' property. Very little, if any, of the water that falls on the slope will find its way into the drains and the sump. Most of it will run down the slope and percolate through the slope. What happens to the water that percolates can only be a matter of conjecture. Part of it, however, will accumulate next to the retaining wall and exert pressure unless it can escape into the defendants' property through the weep-holes.

9 Overflow for water into the defendants' property

10 It was clear to me that the sump was intended to be an outlet for the water from the plaintiffs' property into the defendants' property. This sump is directly above the meeting point of the perimeter drains on the defendants' property that run along the retaining wall. It was clear to me that it was intended that the water from the plaintiffs' property collected in the sump and the water from the weep-holes would unite and flow towards on to Oxley Road. There is, however, no opening at the bottom of the sump. The water in sump, therefore, instead of underflowing at the bottom of the retaining wall, overflows on to the defendants' property. The defendants appeared to have accepted the overflow as they have not done anything to stop it. It was stated for the plaintiffs that there was in fact an outlet from the sump into the defendants' property at the bottom of the retaining wall at the point of the confluence of the perimeter drains in the defendants' property. While they dispute that there was an outlet at the bottom of the retaining wall, the defendants did not deny that there was a heavy overflow of rain water from the sump on to their property during a downpour.

11 The overflow is not the only problem the defendants encounter. A more serious problem is that the weep-holes do not provide sufficient outlet for the escape of all the rain water that falls on the substantial area of the slope and percolates through the soil. As the egress of such water through the weep-holes is limited, substantial lateral water pressure built and exerted on the retaining wall. In fact part of the retaining wall collapsed and there was a landslide or subsidence in the plaintiffs' property adjacent to where the retaining wall failed. This occurred in 1992. Following that incident the Building Control Division (BCD) said that there was a danger and required both parties to do the following :

12 (i) to immediately protect the slope from further erosion;

13 (ii) to engage a professional engineer (civil/structural) to inspect the conditions of the collapsed retaining walls and slope;

14 (iii) to submit the professional engineer's inspection report and his recommendations on the remedial measures to be taken within four weeks from the date of the order;

15 (iv) to submit buildings/structural plans to the Building Authority for approval within three weeks after his recommendation had been accepted by the Building Authority;

16 (v) to execute such rectification works as recommended by the professional engineer within six weeks after his proposals had been approved by the Building Authority; and

17 (vi) to submit the professional engineer's certification that the rectification works had been carried out under his supervision and that the slope was rendered stable upon completion of the rectification works.

18 The plaintiffs took immediate steps to comply with the BCD's notice by submitting plans which were approved by the BCD. The plaintiffs' plans entailed the reconstruction of the drains that ended at a sump with an outlet into the defendants' property. Without such drains and an outlet, the rain water by the nature of things must flow on the defendants' property if not prevented by the retaining wall. As the weep-holes drain all the rain water that percolates through the soil there will be lateral water pressure on the retaining walls with potential danger of the collapse of the retaining wall - the precise danger envisaged by the BCD.

19 **Plaintiffs' application**

20 The plaintiffs approached the defendants for permission to enter the property to lay the drainage connection. The defendants flatly objected to the plaintiffs' plan and remedial measures. The defendants would not admit the flow of any rain water from the plaintiffs' property into the defendants'. The BCD declined to intervene in the dispute and took the view that draining connection was a private matter between the plaintiffs and the defendants. The plaintiffs therefore were unable to comply with the BCD's notice and a charge was proffered against them.

21 The plaintiffs, in these circumstances, have taken out this originating summons seeking the following reliefs :

22 (1) a declaration that the plaintiffs are entitled to a right appurtenant to the property at Lot 164 Town Sub-division 20 known as No 5 Oxley Rise, Singapore 0923 (hereinafter referred to as the `estate`s property`) for an interest equivalent to a freehold estate and/or easement and/or perpetual licence to drain and/or discharge surface water from the estate`s property onto the property at Lot 69 Town Sub-division 20 known as No 35 and 41 Oxley Road, Singapore 0923 (hereinafter referred to as the `neighbouring property`) belonging to the defendants;

23 (2) a declaration that the plaintiffs are entitled to so drain and/or discharge surface water from the estate`s property onto the neighbouring property through a drainage connection to the existing compound drains on the neighbouring property as indicated in red on the sketch plan annexed hereto;

24 (3) an order that the plaintiffs are entitled at their own cost and on giving reasonable notice and making good all damage done to the neighbouring property to enter thereon for the purpose of laying the said drainage connection and carrying out all works ancillary thereto;

25 (4) an injunction restraining the defendants, whether by themselves, their servants or agents or any of them or otherwise howsoever, from in any way preventing or hindering the plaintiffs from having the full use and enjoyment of the right to so drain and/or discharge surface water from the estate`s property onto the neighbouring property through the said drainage connection.

26 (The estate`s property is the plaintiffs` property.)

27 The defendants opposed the application.

28 **The law: Natural right to support**

29 The determination of the issues in this case rests on two fundamental principles of land law. There appears to be no reported case in Singapore in which the two principles of law have been discussed or applied.

30 First of the two principles is that every landowner has a natural right to support from the adjacent and subjacent soil. It is a natural right in the sense that it arises from the ownership of land. It is not an easement and it is enforceable by legal and equitable remedies. See *Dalton v Henry Angus & Co* (1881) 6 App Cas 740. The right to support for convenience is called an `easement of support` but that is not an accurate expression. As Meggry J explained in *Byard v Co-operative Permanent Building Society Ltd* (1970) 21 P & CR 807 at p 820 :

The name `easement of support` is not perhaps the most eloquent and precise description of what, in essence, is merely a right not to have the support removed without replacement.

31 The right of support of a land owner is defined in *Gale on Easements* at pp 312-313:

*If every proprietor of land were at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the land of his neighbours, it is obvious that the withdrawal of the lateral support would, in many cases, cause the falling in of the land adjoining. As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence; and in all those cases, at least, in which the owner of land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, he has a right to the support of it, not as an easement but as an ordinary right of property, necessarily and naturally attached to the soil. The leaning of the courts appears to have been in favour of this doctrine at least from the 17th century: thus, in **Rolle's Abridgment**, it is laid down: `It seems that a man who has land closely adjoining my land cannot*

dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie.`

32 It is important to note the following points stated in ***Gale on Easements*** (15th Ed) p 316: (i) A right of support of a proprietor of land is not a right to have the whole or any part of the adjacent or subjacent soil left in its natural state, but simply a right not to have the land appreciably affected by anything done, however, carefully, in the adjoining soil subjacent or adjacent. (ii) Hence, if on the working of the adjacent or subjacent soil a subsidence is prevented by the use of artificial means of support, no cause of action arises. (iii) The obligation of the servient owner is negative, namely, to refrain from any act which will diminish support. He is not obliged to take active steps to maintain the thing that gives support. (iv) No action lies for subsidence caused by operation of nature on adjoining land after this has been used in a normal manner not itself diminishing support.

33 The following qualification stated by Sir Wilfred Greene MR in ***Bond v Nottingham Corporation*** [1940] 1 Ch 429 at pp 438-439 should be added to the statement of law in ***Gale on Easements*** :

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

34 The practical effect of the right to support is that an adjoining land owner is under an obligation not to excavate the land in a manner which may cause a subsidence of his neighbours' land. It goes without saying that if the servient owner withdraws the natural support and substitutes it with an artificial support such as a retaining wall he must ensure that it is designed and constructed to be sound and strong but need not repair wear and tear due to natural causes.

35 **Natural right in respect of flow of rain water**

36 The next principle is the right of the owner of a higher land to let rain water flow naturally on to or into the adjacent lower land provided there is a natural user of the high ground. This principle was taken from civil law but is now well established in common law. It was stated by Lord Gifford in a Scottish case, *Blair v Hunter, Finlay & Co* (1870) 9 Macph (Ct of Sess) 204; 43 Sc Jur 169: 'Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible.' (This quotation is taken from *John Young & Co v Bankier Distillery Co* [1893] AC 691 at p 697.) In *John Young* Lord Watson said that the law of Scotland and England on this point was the same and restated the principle as follows at pp 696-697 :

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

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principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream.

37 In **Gibbons v Lenfestey** (1915) 113 LT 55 the Privy Council added the following rider to the principle at p 57:

... if water from the roof of a building falls on the proprietors' own grounds it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there.

38 More recently in **Wilsher v Corban** [1955] NZLR 478 at p 490 it was stated that 'the mere circumstance that surface waters had been collected into one body and so discharged on to the inferior tenement did not necessarily alter the nature of the right.' Further it is also accepted that, 'In modern society where land use is controlled by zoning Ordinances it is now impossible to contend ... that the building of a house and the laying-out of paths and other amenities is not a reasonable and natural user of land zoned by law for that use alone, even though the resulting impermeability of the land surface now diverts surface water elsewhere, and not wholly into the storm-water drains prescribed by the controlling local authority. Earlier cases which founded liability for discharge of surface water on the "artificial structure" principle may in such circumstances need to be reviewed. The same altered approach may be necessary in cases where residential sections, especially in hillside areas, reasonably require modification of their pre-existing contours or levels, as occurred in the present case. In all cases the judicial assessment of an elected mode of user will be a question of degree, but the building of a house and its appurtenant structures in a residential zone, involving necessary or reasonable raising of ground levels by filling, or lowering of ground levels by excavation, may be thought prima facie to amount to reasonable and natural user of that land even though the result may be to cast upon lower land a greater burden of rainfall than before.' See **Davis**

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v Lethbridge [1976] 1 NZLR 689 at p 698. Finally, `So long as there is no change in contour and no eavesdrop, it may be that reduction of permeability (in the soil by the building of eg drains) is natural user in a city`. See **Dijkmans v Howick Borough** [1971] NZLR 400 at p 408.

39 In the light of the above, it will be seen that the natural right to let rain water to naturally flow into a neighbour's property is an adjunct right to the natural right to support when it has been substituted by an artificial support such as a retaining wall. In the nature of things, therefore under common law these two rights exist in perpetuity provided there is no radical alteration of the topography of the upper tenement. It will also been seen that it is not only in their interest for the defendants to accommodate the plaintiffs by agreeing to the latter proceeding with their remedial work but it is their obligation to permit the plaintiffs to carry out the works. In other words, the plaintiffs are entitled to demand of the defendants that they permit the remedial measures to repair the retaining wall, put right the landslide and construct adequate drainage for rain water that falls on the shed and the area between the mansion and the defendants' property.

40 **The defendants' arguments**

41 The defendants argued that they were not under an obligation to receive the rain water from the defendants' property because it is based on `natural servitude` which is a civil law doctrine which is not recognized by the common law. Accordingly it is not part of Singapore law. I have no hesitation in rejecting this contention as it is contrary to authorities. The plaintiffs do not found their claim on civil law but common law. The right claimed by them is recognized by common law as I have set out.

42 The defendants relied on ***Gibbons v Lenfestey*** as their principal authority. That case was an appeal from the Island of Guernsey. The defendant stopped up a hole in a wall through which the surface water from the plaintiff's land flowed on to his land from a pipe. This fact has a close parallel to the fact in the present case. The wall had been constructed under a verbal agreement made between the predecessors in title of the respective hereditaments then owned by the plaintiff and the defendant, as part of a surface drainage scheme agreed to be carried out in 1872 with a view of lessening the damage caused to their respective properties by heavy rains. By the laws of the Island of Guernsey, where the property in question was situated, servitude in relation to hereditary property could not be created by prescription but only by some written instrument duly registered proper for constituting heritable rights. In an action for an injunction and damages for stopping up the hole and loss from flooding consequent thereon, the Privy Council held that the plaintiff was as a matter of law entitled, if he could establish the facts, to claim the relief because he had not elected on an agreement alone, but on the natural rights possessed by every owner of land obliged to receive surface water to pass such water on to the land of an adjoining owner situated at a lower level if it found its way there by mere force of gravitation. In his judgment Lord Dunedin said at p 57 :

*The law of Guernsey, differing in this respect from some other systems, does not allow of the constitution of ordinary servitude or easements except by grant. But the right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. **It is natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude.** Their Lordships do not doubt that the law of Guernsey in this matter is the same as that of every other country whose jurisprudence is traceable to Roman sources. **Indeed, even the countries ruled by the common law have accepted the Roman rules.** It is true that the Romans designated this right as servitude, but they explained the distinction by dividing servitude into three classes - natural, legal and conventional - and it is to the first class that*

this belongs. The law may be stated thus: Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property.

43 The right, however, of the superior proprietor is not quite absolute. The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land, eg by procuring a pipe-supply or draining another watershed - and then insist that all the water so brought on the land should be received by the inferior proprietor to his detriment. At the same time exception No 2, which has been sustained, betrays a wrong view of the law - indeed, as expressed, is self destructive. It speaks as if `changer` and `aggraver` were convertible terms, which they are not. Nor does the mere fact of building forfeit the right. No doubt a proprietor may not build on the extreme verge of his property and then throw water off his roof on to the neighbour's land; that would require the constitution of a servitude which the Romans called *stillicidium*, and which in English law is called `eavesdrop.` ***But if the water from the roof of a building falls on the proprietor's own grounds it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there.*** [Emphasis added.]

44 It is clear from the above and other authorities that the principle of natural right is not only part of the civil law but also forms part of the common law. Cases decided in England, New Zealand and India have established that it is part of the common law. The plaintiffs are therefore entitled to rely on it.

45 The defendants further contended that the principle in any event is confined to agricultural land. Authorities prove otherwise. It applies to urban and rural as well as agricultural land.

46 **Lost modern grant**

47 In addition to the natural right the plaintiffs relied on the doctrine of lost modern grant. The defendants contended that this doctrine has no application in Singapore. I do not accept their contention. It was held by Judith Prakash J in *Lim Hong Seng v East Coast Medicare Centre Pte Ltd* [1995] 2 SLR 685 that prescription under the doctrine of lost modern grant is part of the law of Singapore. The learned judge arrived at the conclusion by applying the reasoning of the Privy Council in *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 and Atkin AJA in *Yim Yip Kae v Kwong Hock Cheong Sawmill & Co Ltd* [1954] MLJ 21 I have no doubt about the correctness of the two Singapore decisions of Atkin AJA and Judith Prakash J.

48 **Application of the law**

49 In the result I accept the points of law submitted on behalf of the plaintiffs. They were entitled to rely on the doctrine of natural right lateral support, natural right to discharge rain water into the defendants' property and the right based on lost modern grant. By applying the law I hold that from the topography of the properties and the outline of two principles of land law I have set out, it is unarguable that the defendants bear two responsibilities. First they have to provide support to the plaintiffs' land to prevent landslide or subsidence of the plaintiffs' land where the two properties have a common boundary. This can happen if water accumulates against the retaining wall above or below

ground level in the plaintiffs' property. Water will naturally accumulate below and above the ground if there is no adequate drainage. Secondly, the defendants are under an obligation to receive rain water that falls on the slope and the shed naturally flows towards the plaintiffs' property.

50 As to the weep-holes, Mr Fong Weng Cheong, a professional civil and structural engineer and an accredited checker, said in his affidavit filed on behalf of the defendant that 'The weep holes are not designed to accommodate the relief of the immense water pressure on the retaining wall that would arise in a deliberate accumulation of water such as at the sump. Water that collects at such a sump will soften and weaken surrounding soil and cause relatively high and unacceptable water pressure and lateral earth pressures to act upon the retaining wall. In other words, the retaining wall is not structurally designed to resist lateral pressure from water accumulated with the intensity (as would be found at the sump) and from the weakened soil'. I agree with his observation and hold that this only goes to accentuate the plaintiffs' rights and the defendants' obligations.

51 I shall now consider the issue of fact relating to an outlet from the sump. The plaintiffs said that there was such an outlet but the defendants denied it. After an inspection of the site I came to the conclusion that there was such an opening but it had been stopped up by the defendants. It could be observed from the defendants' property that there is a patch of mortar in the retaining wall below the sump which was new when compared with the surrounding area. Furthermore, it would make no sense to sink the sump without providing for an opening into the defendants' property. In any event, as the plaintiffs have an unassailable right to drain the rain water that falls on the shed and the slope into the defendants' property it is more sensible to provide for an opening at the

bottom of the retaining wall than to allow it to overflow on to the defendants' property.

52 Apart from this there was positive and cogent oral evidence from the plaintiffs' witnesses that there was such an out from the sump into the defendants' property

53 It, however, does not matter whether there was such an out because once it is established that the plaintiffs have a right to drainage they are entitled to channel it by constructing a drain on their property and an outlet into the defendants' property.

54 Another point raised for the defendants was that the construction of drains might have been affected by illegalities. As regards the past, any illegality under building control laws is not a matter which concerns the defendants. As regards the proposed construction the BCD has given its approval. If any changes are to be made such changes must of course be approved by the BCD.

55 For the reasons stated above I make an order in terms of prayers 1, 2, 3 and 4 with an addition that the defendants, if they so wish, be at liberty to make such reasonable amendment to the plaintiffs' proposed plan and remedial measures consistent with the principles of provided that such amendments are acceptable to the BCD.

56 I give liberty to apply particularly in respect of the details of the proposed remedial measures and I shall hear counsel for the parties on the question of costs.

57 ***Application allowed.***

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G P Selvam J

Alvin Yeo and Chris Wong (Wong Partnership) for the plaintiff
Vangat Ramayah and Jerry Loo (Wee Ramayah & Partners) for the
defendants
