Botanica Pte Ltd *v* Management Corporation Strata Title Plan No 2040 [2012] SGHC 98

Case Number	: Originating Summons No 1073 of 2011, Summons No 349 of 2012
Decision Date	: 08 May 2012
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Quek Mong Hua and Nicholas Poa (Lee & Lee) for the plaintiff; William Ricquier and Adrian Aw (Incisive Law LLC) as Counsel and Arfat Selvam (Selvam LLC) as Instructing Solicitors for the defendant.
Parties	: Botanica Pte Ltd — Management Corporation Strata Title Plan No 2040

Land law – easements – interference

8 May 2012 Judgment reserved.

Steven Chong J:

Introduction

1 This case concerns an application for a declaration against injunctive relief with the ultimate objective of facilitating the realignment of an access road occasioned by a proposed redevelopment. This application is made on the authority of the decision of the Court of Appeal in *Yickvi Realty Pte Ltd v Pacific Rover Pte Ltd* [2009] 4 SLR(R) 951 ("*Yickvi*"). The defendant seeks to strike out the application on the basis that unlike the present case, *Yickvi* was concerned with an *unregistered* easement and that in the case of *registered* easements, the court has *no* power to permit such realignment under the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA").

2 It is not disputed that no distinction was made in *Yickvi* between a registered and an unregistered easement. Neither was the point raised that the court lacks power under the LTA to modify registered easements. The key issue is whether the fact of registration of the easement in the present case would make the critical difference, as contended by the defendant, warranting its striking out or whether it is, in truth, a distinction without a difference.

Facts

The Parties

3 The plaintiff, a company incorporated in Singapore and a wholly owned subsidiary of Wheelock Properties (Singapore) Limited ("Wheelock"), is the owner of Lot No 658X of Town Subdivision 25 ("the Servient Tenement").

4 The defendant is the owner of Lot No 721C of Town Subdivision 25 ("the Dominant Tenement"), a plot of land adjoining the Servient Tenement.

Background

5 The existing easement ("the existing Easement") was granted on 2 January 1986 by the

plaintiff's predecessor-in-title, Robin Development (Private) Limited, to the defendant's predecessor-in-title, Fu Yun Siak. It was essentially an extended right of way ("the path") running across and connecting four adjourning plots of land: Lot No 638 of Town Subdivision 25 ("Lot 638"), the Servient Tenement, the Dominant Tenement, and Lot No 640 of Town Subdivision 25 ("Lot 640"). [note: 1] Access from the road to the path is through Lot 638.

6 Sometime in 1995, a condominium development ("the Heritage Apartments") was built on the Dominant Tenement. As part of this development, an electrical sub-station was built on the Dominant Tenement at the boundary with the Servient Tenement in order to service the Heritage Apartments. [note: 2]

7 In 2007, Lot 638 was redeveloped and the entrance to the existing Easement located at Lot 638 leading into the Servient Tenement from the road was closed. Nonetheless, the path continues to provide access *only* as between the Servient Tenement and Dominant Tenement. [note: 3]

8 Pursuant to an en-bloc redevelopment, sometime on or around 28 August 2006, provisional planning approval was obtained by the plaintiff for redevelopment of a new condominium project ("the Ardmore Three") on the Servient Tenement. [note: 4] The redevelopment would entail realigning the path to optimise the use of the land.

9 In 2011, the plaintiff sought to negotiate with the defendant with a view to reaching an agreement for the proposed realignment of the existing Easement, but to no avail. [note: 5]

Procedural History

10 On 13 December 2011, the plaintiff filed an application for a court declaration that, *inter alia*, the proposed realignment can constitute no wrongful interference with the enjoyment of the existing Easement and no reasonable objection could be taken to the proposed realignment. Alternatively, the plaintiff sought a declaration that the defendant has no right to injunctive relief against the plaintiff on the plaintiff's undertaking to reserve unto the defendant all rights under the existing Easement in the proposed realignment ("the Main Application").

11 On 25 January 2012, the defendant filed a summons ("Summons No 349 of 2012") to strike out the Main Application under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"), and/or for the court to determine under O 14 r 12 of the ROC that, as a matter of law, the plaintiff has no justifiable cause to apply to the court to realign the existing Easement ("the Striking Out Application").

12 At the pre-trial conference on 28 February 2012, the Assistant Registrar ("AR") decided that the Striking Out Application and the Main Application should be heard separately. The plaintiffs appealed against the decision of the AR (Registrar's Appeal No 75 of 2012) and the matter came before me on 8 March 2012 ("the 8 March hearing"). During this hearing, the plaintiff disclosed a letter from SP PowerGrid Ltd ("SP Power") stating that it does not have any objection to the proposed realignment of the existing Easement. Since the main user of the existing Easement was SP Power, for it to gain access to the electrical sub-station, this letter was clearly of some relevance. The defendant's counsel at that hearing, Mr Adrian Aw, however, informed the court that the SP Power letter was not previously brought to their attention. He further informed the court that the existing Easement is not "indefeasible", that is to say, the path may be realigned if the *Yickvi* principles are fulfilled. No distinction was made at this hearing between *registered* and *unregistered* easements. On the strength of the disclosure of the SP Power letter that was not before the AR as well as the

defendant's position that the existing Easement is not "indefeasible", I ordered that the Striking Out Application and the Main Application be heard together.

13 Both applications came before me for hearing on 3 April 2012 ("the 3 April hearing"). I directed the parties to first address the court on the Striking Out Application. The principal argument raised by counsel for the defendant at this hearing, Mr William Ricquier, ("Mr Ricquier") is that the court has no power under the LTA to modify *registered* easements. This was the first time such a distinction was drawn. I pause at this juncture to express some observations of the manner in which this argument was raised as it clearly took the plaintiff's counsel, Mr Quek Mong Hua ("Mr Quek"), as well as the court, by surprise given what had transpired at the 8 March hearing. First, this was a complete reversal of the defendant's position at the 8 March hearing when the defendant accepted that the existing Easement is not "indefeasible". Second, both parties filed and exchanged skeletal submissions prior to the 3 April hearing. The only hint of such an argument was in the form of a solitary paragraph – almost an afterthought – at the end of the defendant's skeletal submissions tendered just before the 3 April hearing, whereas the rest of the skeletal submissions sought to deal with *Yickvi* on its merits. Third, as this was a completely new point, the court did not have the benefit of the plaintiff's submissions at the 3 April hearing, and this necessitated an adjournment for both parties to specifically address this issue. As our system of adjudication is adversarial in nature, it is crucial for the court to have the benefit of submissions from both parties in order to arrive at a properly considered decision. There is little to be gained by surprising the opponent with a fundamentally new point, particularly in this case where the defendant had earlier informed the court of a contrary position. Just to be clear, I am not suggesting that litigants are not entitled to raise new points of law at hearings. I am merely expressing a strong recommendation that counsel should inform the other party of new points of law *prior* to the hearing, especially if it involves a significant departure from an earlier position. This would assist the court in arriving at an informed decision after taking into account arguments from both parties and would also avoid unnecessary delays. The necessity to adhere to this best practice becomes even more compelling when the merits or lack thereof of the defendant's principal argument is carefully scrutinised.

Principles governing striking out

14 Under O 18 rr 19(1)(a) to 19(1)(d) of the ROC, the court may strike out any pleading and dismiss the action on any of the grounds stated therein. In this case, the defendant's application to strike out the plaintiff's claim rested on the premise that it discloses no reasonable cause of action, is frivolous and vexatious and/or is an abuse of the process.

15 The principles governing the court's power to strike out a claim summarily are well established. Such power will only be exercised in plain and obvious cases, and the courts will generally allow a plaintiff to proceed with the action unless his case is "wholly and clearly unarguable" (see *Riduan bin Yusof v Khng Thian Huat and anor* [2005] 2 SLR(R) 188 ("*Riduan*") at [6], citing *Tan Eng Khiam v Ultra Realty* [1991] 1 SLR(R) 844 at [31]).

16 The question here is whether the plaintiff's cause of action is "certain to fail" when only the allegations in the pleading are considered (see *The "Osprey"* [1999] 3 SLR(R) 1099 at [7]). In other words, the plaintiff's cause of action must fail as a matter of law even without the need for the court to embark on a factual inquiry.

17 The Striking Out Application is principally premised on the defendant's argument that, as a matter of law, the court does not have the power to modify registered easements under the LTA. This argument must be examined in the context of the Main Application which it seeks to strike out. In this regard, it is critical to bear in mind that the Main Application seeks a declaration, *inter alia*,

that the proposed realignment can constitute no wrongful interference with the enjoyment of the existing Easement or, alternatively, that the defendant has no right to injunctive relief against the plaintiff (see [10] above). As such, the case would only be fit for striking out if I accept the defendant's submission that a finding that the court lacks the power to modify *registered* (as opposed to unregistered) easements is *fatal* to the specific declaratory reliefs sought in the Main Application. On the other hand, if I accept the plaintiff's submission that the Main Application is *not* dependent on the court's determination that it has the power to modify *registered* easements, then acceptance of the defendant's principal submission is not *per se* dispositive of the Main Application. In that event, striking out would be wholly inappropriate, and, in which case, I will hear the parties on the merits of the Main Application.

18 I shall therefore first deal with the defendant's principal argument that the court lacks power under the LTA to modify *registered* easements and, if so, whether it makes *any* difference in the context of the reliefs sought under the Main Application. Before doing so, I should consider the preliminary question whether the LTA applies to both registered and unregistered easements and thereafter to examine whether anything turns on the fact of registration.

The LTA governs registered as well as unregistered easements

19 Section 46(1) of the LTA provides:

> **Estate of proprietor paramount**
>
> **46.** —(1) Notwithstanding —
>
> (a) the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority;
>
> (b) any failure to observe the procedural requirements of this Act; and
>
> (c) any lack of good faith on the part of the person through whom he claims,
>
> *any person who becomes the proprietor of registered land, whether or not he dealt with a proprietor, shall hold that land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register, but subject to —*
>
> ...
>
> (ii) *any subsisting easement or public right of way which was in existence at the date on which the land was brought under the provisions of this Act* and any right on, above or under any land created before or after 1st March 1994 in favour of a public authority under any statute and any statutory easement implied under sections 98, 99, 101, 102 and 104...
>
> [emphasis added]

20 In other words, s 46(1)(ii) preserves *subsisting unregistered* easements on land that subsequently becomes registered. John Baalman, the draftsman of the original Land Titles Act, explains in his commentary on the Land Titles Ordinance 1956, *The Singapore Torrens System* (The Government of the State of Singapore, 1961) ("*Baalman*") at 158:

> Any easement affecting land at the time when it is brought under the provisions of the [LTA], will continue to affect that land and to bind subsequent purchasers *whether the easement is notified*

in the land-register, or not. Pre-existing easements are among the exceptions from indefeasiblity.

Easements which are created after the land has been brought under the provisions of the Ordinance will bind the proprietor of that land only if the easements have been registered.

[emphasis added]

21 On the other hand, s 97 provides that registration is necessary to create *new* easements over land that is already registered. The relevant ss 97(1) and (5) read as follows:

Registration necessary for creation of easements

97. —(1) An easement shall not be acquired over registered land by long-continued user adverse to a proprietor, nor by prescription, nor by any presumption of a lost grant, nor by any implication of law except as may be provided in this Act; but where an easement is intended to be created, the proprietor may execute an instrument of grant in the approved form, or, if the easement is being created incidentally to a transfer or lease, by appropriate words in the transfer or lease.

...

(5) An easement shall be registered by the entry of a memorial thereof on the folio for the servient tenement.

22 As s 46 and s 97 of the LTA recognise that both unregistered and registered easements may be created over registered land, certain references to "easements" in the LTA apply to both categories of easements. For example, s 63 provides:

Form and effect of transfers

63. —(1) The proprietor of an estate in land, or of a lease, mortgage or charge, may transfer the same by an instrument of transfer in the approved form, and upon the registration of such instrument the estate or interest of the transferor as therein set forth, *together with all easements*, rights and powers belonging or appertaining thereto, *shall pass to and be vested in the transferee thereof as proprietor*.

[emphasis added]

23 Similarly, the term "easements" in s 101 refers to both unregistered and registered easements:

Easements to pass on transfer without express mention

101. —(1) Upon registration of a transfer or lease of land to which an easement is appurtenant, the easement shall pass to the transferee or lessee without any express mention in the transfer or lease.

(2) Where a transfer of part of a dominant tenement contains an express agreement that the easement shall not pass to the transferee, registration of the transfer shall operate to release the easement to the extent to which it had been appurtenant to the part transferred.

(3) Except as provided in subsection (2), an easement, so long as it subsists, shall continue to

be appurtenant to every part of the dominant tenement notwithstanding severance.

24 Other provisions make a clear distinction between unregistered and registered easements. Section 105 provides:

> **Release of easements**
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> **105.** —(1) An easement over registered land may be released by an instrument of release in the approved form.
>
> (2) Where an easement over unregistered land is made appurtenant to registered land, the easement may be released in any manner in accordance with law.

25 The reference to "[a]n easement over registered land" in s 105(1) must be read to mean "a registered easement". This provides the justification for "an instrument of release in the approved form" – an unregistered easement is not reflected on the land-register and therefore requires no such instrument in the approved form, which is for the benefit of the Registrar to cancel the registration or notification of easements under s 106. The reference to "an easement over unregistered land" in s 105(2) must, by definition, refer to "an unregistered easement". This is consistent with the explanation in *Baalman* at 175: "In the case of easements over Old System land appurtenant to registered land, it is a matter entirely for the parties themselves: the Registrar will not be concerned".

26 Read as such, s 105 makes a clear distinction between the machinery to release registered easements (instrument in the approved form) and unregistered easements (release under the common law), clearly demonstrating that both categories of easements operate within the framework of the LTA.

27 On the other end of the spectrum, certain provisions in Part X of the LTA, which "deals principally with easements created after the land has been brought under the [LTA]" (*Baalman* at 158), refer exclusively to registered easements. For example, s 106 provides for the Registrar's power to cancel registered easements:

> **Cancellation of easements**
>
> **106.** —(1) The Registrar shall cancel the registration or notification of an easement upon proof to his satisfaction that —
>
> (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.

28 Thus, in a situation where an unregistered easement exists over registered land, the provisions of the LTA operate to govern the registered land, but the common law operates in parallel to govern the unregistered easement. Such was the case in *Lian Kok Hong v Lee Choi Kheong and others* [2010] 3 SLR 378 ("*Lian Kok Hong*"), where the Court of Appeal decided that an unregistered easement over registered land had been abandoned, making reference only to common law principles of abandonment (at [22]–[32]). This was also the case in *Yickvi*, where the Court of Appeal considered only common law principles in granting the declaratory relief in respect of an unregistered easement following the English High Court decision in *Greenwich Healthcare National Health Service Trust and Quadrant*

Housing Trust [1998] 1 WLR 1749 ("*Greenwich*").

29 Indeed, it is my view that the procedure of registration of an easement under the LTA does not create an overhaul of the law governing easements. Tan Sook Yee *et al, Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rdEd, 2009) at para 20.130 shares the same view: "The LTA does not fundamentally alter the nature or characteristics of easements in respect of registered land". Apart from creating a different method of acquisition (s 97) and release (s 105(1)), the only other discernible and discrete difference relates to the extinguishment of easements: while under the common law, mere non-user by itself, however long, is not sufficient to establish abandonment of an easement justifying extinguishment (*Lian Kok Hong* at [24]), s 106(2) of the LTA provides that non-user for more than 12 years is sufficient to constitute abandonment.

30 It is necessary to highlight that the provisions of the LTA are not only applicable to registered easements because the defendant contends that the LTA does not expressly empower the court to modify registered easements. As explained at [31] to [48] below, I agree with the defendant that there is no such express power under the LTA. However, the same is true even in the case of unregistered easements. Therefore, how does the lack of express power to modify registered easements under the LTA impact the plaintiff's claim for various declaratory reliefs under the Main Application?

Does the court have the power under the LTA to modify easements?

31 I agree with the defendant's submission that there is no express or implied statutory power to modify registered easements under the LTA. However, my finding is not peculiar to registered easements.

32 First, the internal blueprint of Part X of the LTA points towards the absence of any judicial power to modify easements. Part X contains no express provision for the court's power to modify easements. The courts are slow to imply powers where it is not expressly provided for in the LTA. In *Frontfield Investment Holding (Pte) Ltd v Management Corporation Strata Title Plan No 938 and others* [2001] 2 SLR(R) 410, the plaintiff sought a declaration that an easement was extinguished on the basis of, *inter alia*, obsolescence, a ground that was not provided for within the LTA. Judith Prakash J rejected this argument, explaining at [61]:

> As the law stands at present, I do not accept that there is any doctrine that entitles me to do what Mr Shanmugam wants me to. Case after case has emphasised the value of an easement to the dominant tenement and the weight of evidence that must be adduced to allow the court to infer that the easement has been voluntarily given up. Such a situation is inimical to any right on the part of the court to unilaterally strike down an easement because it considers the easement obsolete. In other jurisdictions it has been found necessary to statutorily empower the courts to do this. It is clear that such powers do not spring from the common law as it currently stands. *Our Parliament has not given the court any powers of extinguishment of easements. It has only empowered the court to, in certain circumstances, extinguish or vary restrictions on land which has been brought under the land titles system. For the time being, Parliament has not seen fit to legislate on the extinguishment of easements for obsolescence. In the absence of such legislation, I do not think that I can, sitting as a judge of first instance, exercise any such power*.
>
> [emphasis added]

33 Secondly, s 160 of the LTA provides for a *general statutory power* of the court to rectify the

land-register in limited circumstances. As the Court of Appeal stated in *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [43], this power is only restricted to the registered proprietor's fraud, omission or mistake in the act of obtaining registration of the instrument. It is clear that this general power of rectification cannot be applied to modify easements.

34 Thirdly, the LTA confers a discrete, or specific, statutory power on the court to vary registered *restrictive covenants* under s 140(5) which, as I will elaborate below (at [44] to [48]), cannot be invoked for easements. The provision reads:

> (5) Without prejudice to subsection (1), upon the application of any person interested in land affected by a restriction, the court shall have power, by order, wholly or partially, to extinguish or vary the restriction, upon being satisfied —
>
> (a) that by reason of a change of user of the land affected, as approved by the competent authority or the Minister for National Development, as the case may be, under the Planning Act (Cap. 232), the continued existence of the restriction will impede the development of the land for public or private purposes; or
>
> (b) that the proposed extinguishment or variation will not materially injure the person entitled to the benefit of the restriction.

35 Next, both parties rely on s 46 of the LTA for different purposes. Mr Quek claims that s 46(1)(vii) (read in conjunction with s 160) empowers the court to make "an order to rectify the land-register" and that such power must necessarily include the power to rectify any registered interest, including registered easements. Mr Ricquier, on the other hand, submits that s 46 of the LTA merely declares the indefeasible nature of registered land subject to the exceptions set out therein, including "any subsisting easements" under s 46(1)(ii). As explained at [19] to [20] above, I agree with Mr Ricquier that s 46(1)(ii) is necessary to preserve existing easements which, by definition, will not be registered at the time of registration of the servient tenement. I am not persuaded by Mr Quek's submission that the power to make "an order to rectify the land-register" under s 46(1)(vii) of the LTA is tantamount to a power to modify any registered interests including registered easements. As explained at [34] above, such a discrete or specific power would have to be statutorily provided as in the case of restrictions under s 140 of the LTA.

Other jurisdictions with statutory power to modify easements

36 The absence of an express statutory power to modify easements under the LTA should be contrasted against the express provisions empowering the courts to modify easements in Torrens statutes of other jurisdictions.

37 In Australia, s 129C of the Western Australia Transfer of Land Act 1893 (56 Vict No 14) ("Western Australia Transfer of Land Act") provides that:

> (1) Subject to subsection (1a), where land under this Act is subject to *an easement or to any restriction* arising under covenant or otherwise as to the user thereof or the right of building thereon, the court or a judge may from time to time on the application of any person interested in the land burdened or benefited, or any local government or public authority benefited, by the easement or restriction, by order wholly or partially extinguish, discharge or modify the easement or restriction upon being satisfied —
>
> (a) that by reason of any change in the user of any land to which *the easement or the*

benefit of the restriction is annexed, or of changes in the character of the property or the neighbourhood or other circumstances of the case which the court or a judge may deem material *the easement or restriction* ought to be deemed to have been abandoned or to be obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction whether in respect of estates in fee simple of any lesser estates or interests in the land to which *the easement or the benefit of the restriction* is annexed have agreed to the same being wholly or partially extinguished, discharged or modified or by their acts or omissions may reasonably be considered to have abandoned the easement or to have waived the benefit of the restriction wholly or in part; or

(c) that the proposed extinguishment, discharge or modification will not substantially injure the persons entitled to *the easement or to the benefit of the restriction.*

[emphasis added]

38 In almost identical terms, s 89 of the New South Wales Conveyancing Act 1919 (Act 6 of 1919) confers on the court the power to modify or extinguish (wholly or in part) easements, profits *à prendre*, and restrictions and obligations arising from covenants. The position is the same under s 181 of the Queensland Property Law Act 1974, s 84C of the Tasmania Conveyancing and Law of Property Act 1884 (Act 19 of 1884) and s 90B of the South Australia Real Property Act 1886.

39 Likewise, in New Zealand, s 317 of the New Zealand Property Law Act 2007 (No 91 of 2007) provides, in almost identical terms as the Western Australia Transfer of Land Act, for an express power to modify or extinguish (wholly or in part) easements or covenants. This was also the case under its predecessor statute, the New Zealand Property Law Act 1952 (No 51 of 1952) (at s 126G).

40 In Canada, s 35 of the British Columbia Property Law Act 1996 (RSBC 1996, c 377) gives the court the power to modify or cancel "charges or interests against the land". Such charges and interests are defined to include, *inter alia*, easements and restrictive or other covenants burdening the land or the owner (ss 35(1)(a), (e)).

41 In Northern Ireland, s 5 of the Property (Northern Ireland) Order 1978 (No 459 of 1978) allows the Land Tribunal to modify, or wholly or partially extinguish "impediments to the enjoyment of land". Section 3 defines "impediments" as including both restrictive covenants (s 3(1)(a)) and easements (s 3(1)(c)).

42 Finally, in Scotland, s 90 of the Title Conditions (Scotland) Act 2003 (2003 asp 9) gives the Land Tribunal the power to discharge or vary "real burdens" in relation to property. Section 1 defines "real burden" as "an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land". Section 2(1) allows the creation of a real burden as "an obligation to do something" (s 2(1)(a)) or "an obligation to refrain from doing something" (s 2(1)(b)), which clearly refers to restrictive and positive covenants. Section 2(3)(a) allows the creation of a real burden which "consists of a right to enter, or otherwise make use of, property", which clearly refers to easements.

43 It seems clear to me after an extensive examination of the provisions in the LTA, as well as

Torrens statutes from various Commonwealth jurisdictions, that in the Torrens system, the court's power to modify or extinguish easements can only be derived from the statute itself. In the absence of an express provision, the court cannot imply or import any power to modify or extinguish easements into the context of the LTA.

Whether the power to vary restrictive covenants under s 140(5) is applicable to easements

44 Mr Quek argued at the 3 April hearing, as well as in his further submissions, that the statutory power to modify restrictive covenants under s 140(5) of the LTA is equally applicable to easements. I cannot agree with that proposition for a number of reasons. First, it is clear from the parliamentary debates that s 140 was introduced to empower the courts to remove or modify only restrictive covenants. This was explained by the late Mr EW Barker (who was the Minister for Law and National Development) in the *Singapore Parliamentary Debates, Official Report* (2 September 1970) vol. 30 at col. 192): "This amendment will meet in some measure the representations of the Law Society for the enactment of legislation for *the discharge or modification of restrictive covenants"* [emphasis added].

45 Secondly, the structural framework of the LTA strongly suggests, if not dictates, that restrictive covenants and easements are governed differently: restrictive covenants are governed by Part XIV, while easements are governed by Part X. This distinction is accentuated by the different modes of cancellation of restrictive covenants and easements prescribed in Parts XIV and X respectively.

46 Thirdly, restrictive covenants and easements are inherently different legal constructs such that they cannot be referred to interchangeably:

(a) The characteristics of restrictive covenants and easements are different. An easement must have four characteristics: (i) there must be a dominant and servient tenement; (ii) there must be accommodation of the dominant tenement; (iii) the tenements must be owned by different persons; and (iv) the easement must be capable of forming the subject matter of a grant (see *Re Ellenborough Park* [1956] Ch 131). On the other hand, the burden of a restrictive covenant passes in equity if (i) the covenant is negative in substance; and (ii) it accommodates a dominant tenement (see *London County Council v Allen* and others [1914] 3 KB 642).

(b) The nature of restrictive covenants and easements are different. An easement is a species of real property that is "parasitic upon the land" (see *London and Blenheim Esates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 at 1283) while a restrictive covenant is a right *in personam* (a contractual right) which may acquire proprietary consequences (see *Tulk v Moxhay* (1948) 2 Ph 744).

47 Fourthly, where other jurisdictions had enacted Torrens statutes that similarly provide for judicial modification of restrictive covenants but not easements, it has been generally considered that the power to modify restrictive covenants cannot interchangeably be used to modify easements. The English High Court in *Greenwich* at 1755C recognised that judicial power to modify restrictive covenants under s 84, UK Law of Property Act 1925 (c 20) ("UK LPA 1925") could not be translated into a power to modify easements. Similarly, legislation in Ontario, Canada and Victoria, Australia only allows for judicial modification of restrictive covenants, and not easements (s 61 of the Ontario Conveyancing and Law of Property Act, RSO 1990 (c. C34 of 1990) and s 84 of the Victoria Law of Property Act 1958 (No 6344 of 1958) respectively). Although there appears to be no case law on this specific issue, the Victorian Law Reform Commission in its *Easements and Covenants: Consultation Paper* (Victorian Law Reform Commission, 2010) ("*Victoria Law Commission Consultation Paper*") stated at paras. 16.23–16.25:

Section 84 applies only to the removal and modification of covenants. It does not apply to easements.

Section 84 of Victoria's Property Law Act is based on section 84 of the English Law of Property Act 1925. Many other jurisdictions whose equivalent provisions were also based on section 84 of the English Act have amended them to provide for judicial removal and variation of easements.

Easements and restrictive covenants serve similar functions and there is no compelling reason why they should not be subject to similar provisions for judicial removal and variation. It appears that they are treated alike under the NSW provision corresponding to section 84, where case law relating to the removal of covenants is applied to the removal of easements to the extent that it is appropriate.

[emphasis added]

48 Fifthly, the statutes of the various Commonwealth jurisdictions surveyed at [36] to [43] above also make a distinction between easements and restrictions. If restrictions are intended to encompass easements, it would be otiose to refer to "an easement or to any restriction arising under covenant or otherwise" (see s 129C(1), Western Australia Transfer of Land Act).

The court's power to grant declaratory reliefs as regards easements

49 Having arrived at the conclusion that the court indeed lacks power under the LTA to modify easements, does this determination oust the application of the *Yickvi* principles such that the Main Application is doomed to fail? Not so in my view. To understand why I have reached the opposite outcome having accepted the defendant's principal submission, it is necessary to revisit the decisions in *Yickvi* and *Greenwich*.

50 In *Yickvi*, the Court of Appeal affirmed the decision of the High Court in granting a declaration that the owner of the dominant tenement was not entitled to an injunction to restrain the owner of the servient tenement from realigning a road which interfered with the enjoyment of the easement. Effectively, the order paved the way for the owner of the servient tenement to realign a right of way running across the servient tenement. The court explained the circumstances under which it would allow such a declaratory relief, citing *Greenwich* at 1755 (*Yickvi* at [11], [13]): (a) the proposed realignment does not substantially interfere with the enjoyment of the right of way; and (b) the proposed realignment is necessary to achieve an object of substantial public and local importance and value. No argument was raised in *Yickvi* that the court lacked power under the LTA to *modify* the easement in question. In my view it was not raised simply because it was irrelevant to the issues before the court as I shall explain below.

51 It is pertinent to highlight that in *Greenwich*, the English High Court made the same declaratory relief as in *Yickvi*. In granting the declaratory relief, Lightman J observed at 1755C that "there is (unfortunately) no statutory equivalent in case of easements to the jurisdiction vested by statute in the Lands Tribunal in case of restrictive covenants to modify the covenant to enable servient land to be put to a proper use". Section 84 of the UK LPA 1925 confers the Lands Tribunal with the power to modify restrictive covenants, but is silent on the power to modify easements. No distinction appeared to have been made in *Greenwich* between registered and unregistered easements and in my view, there is no intelligible reason why the distinction would make any difference as there is no express power under the UK LPA 1925 to modify any easement, both registered and unregistered. In fact, notwithstanding the court's finding that it lacked the statutory power to modify easements, Lightman J nevertheless granted the declaratory relief. In this regard, it is crucial not to lose sight of the fact

that the declaratory orders made in *Greenwich* and *Yickvi* were not to modify the easements in question. Modification of an easement entails an amendment to the terms of the grant of the easement (see, *eg*, ss 129C(6a) and (7), Western Australia Transfer of Land Act. It appears that the procedure under the LTA is a slightly more convoluted one: parties, after reaching agreement, would have to apply for release of the existing easement under s 105, and subsequently register the new modified easement under s 97). Instead, the orders in those cases were to grant a negative declaration that the owner of the dominant tenement was not entitled to injunctive relief in the event the owner of the servient tenement should proceed to realign the road over which the easement was enjoyed. It cannot be overemphasised that the plaintiff here is seeking the exact same relief which was granted in *Yickvi* and *Greenwich*. For this reason, the lack of an express power of modification under the LTA is irrelevant to the Main Application. In this regard, I agree with Mr Quek that "there are no additional rights conferred or liabilities imposed on either a registered easement or an unregistered one so long as it is one subsisting at the date when the land was brought under the [LTA]". [note: 6]

52 The Court of Appeal in *Yickvi* explained that, because of the scarcity of land in Singapore, there is a public interest element in allowing land to be developed to its optimal potential as permitted by planning law, provided that the party whose easement is affected suffers no injury or inconvenience as a result, and a further public interest to avoid litigation. Chan Sek Keong CJ in *Yickvi* at [15]–[16] made the following salient observations:

> We disagreed with counsel's submission that there was no element of public interest in the present case. In our view, there were *two* elements of public interest in the present case. First, because of the scarcity of land in Singapore, land should be allowed to be developed to its optimal potential as permitted by planning law and the claimant suffers no injury or inconvenience as a result. In the present case, the competent authority had already given Pacific Rover permission to realign the original road and, in our view, it was not reasonable on the part of Yickvi to deny Pacific Rover the opportunity to do so when it would not suffer inconvenience from the realignment of the original road. Yickvi would continue to enjoy a right of way over the realigned road. In fact, Yickvi would stand to *benefit* from the realignment as it would be getting a right of way over a *new* road leading to Newton Road. Otherwise, Yickvi would have to incur more expenditure in having to redevelop the original road to cater to the needs of the occupiers of its new development that might arise from the substantially increased usage as a result of the new development on its plot.
>
> The second public interest element discernible from the facts of this case was the avoidance of more litigation over Yickvi's right to enjoy the right of way that might arise should the injunction be granted. The circumstances in which the right of way was granted to Yickvi's predecessors in title have changed dramatically since 1903 when it was first granted ... and this might affect the degree to which it could be enjoyed by the purchasers or occupiers of the apartments under construction by Yickvi. The right of way was granted *only* for the enjoyment of the occupiers of *one* residential house on the Servient Land. But, with the completion of Yickvi's development, at least ten households (as compared with the original single household) would now be entitled to enjoy the right of way. This could constitute excessive use of the right of way not contemplated by the grant (see this court's decision in *Lee Tat Development Pte Ltd v MCST Plan No 301* [2009] 1 SLR(R) 875) and might lead Pacific Rover, by way of retaliation, to commence proceedings to restrain Yicvki and its purchasers and/or occupiers from such excessive use.
>
> [emphasis added]

53 The Main Application is premised on satisfying the two public interests articulated in *Yickvi*

which is not strictly before me in the Striking Out Application. They would, instead, be considered in the Main Application. However, I should add that at the 3 April hearing, when confronted with the defendant's new argument, I did ask the parties whether the easement in *Yickvi* was, at the material time, registered under the LTA as no distinction appeared to have been made in *Yickvi* or even *Greenwich* on the effect or lack of registration of the easement. Mr Ricquier invited me to draw the inference from a plain reading of *Yickvi* at [4] that the easement must have been unregistered. I was not prepared to draw any such inference particularly when it was capable of verification by a simple search. Pursuant to my direction, both parties have since conducted the relevant searches and confirmed in their further submissions that the easement in *Yickvi* was not registered under the LTA. [note: 7] It remains a common law easement. However, having considered the matter further with the benefit of full arguments from both parties, I concluded that the distinction made no practicable difference to the relevance or applicability of the *Yickvi* principles in the Main Application (see [49] to [51] above).

Conclusion

54 For the reasons above, I find that the defendant's argument is without merit. The lack of an express power to modify registered easements under the LTA does not preclude the court from granting the declaratory reliefs sought in the Main Application. Accordingly, the defendant's Striking Out Application is dismissed with costs which I fixed at $10,000 inclusive of disbursements.

55 The Main Application will be heard on a date to be fixed though I hope that with this decision, parties can arrive at a sensible commercial resolution. Though the merits of the Main Application have not been fully ventilated before me, it seems clear to me that the public interest element, on the facts of the present dispute, is satisfied given the purpose to optimise the redevelopment of the land. As for inconvenience/injury to the defendant, I shall say no more other than to observe that the main user of the existing Easement, SP Power, has confirmed that they have no objection to its proposed realignment. The defendant alleges that the proposed realignment would effectively extinguish the existing Easement. This is a curious submission since it does not appear to be disputed that the entrance to the path from Lot 638 has been closed since 2007. There is no material before me to suggest that the defendant or even SP Power has suffered any injury or inconvenience arising from the closure of the entrance. How would the realignment of the existing path which would reopen the entrance cause substantial injury or inconvenience to the defendant?

56 My survey of the Torrens systems of other Commonwealth jurisdictions has revealed that the power to modify easements is expressly provided in most of them. I have not been able to discern any particular reason why the express power has not been included in the LTA. It is no coincidence that in the three Commonwealth jurisdictions where no statutory power exists to modify easements, namely, the UK, Victoria, Australia and Ontario, Canada, the respective Law Commissions have taken steps to address that lacuna in the law to "achieve the more efficient use of the land subject to [easements]" (see UK Law Commission, *Easements, Covenants and Profits àPrendre: A Consultation Paper* (Consultation Paper No. 186) (London: The Stationery Office, 2008) ("*UK Law Commission Consultation Paper*") at paras 14.24–14.32; *Victoria Law Commission Consultation Paper*, cited above at [47]; Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (Toronto: The Commission, 1996) at pp 154–155). Indeed, another compelling factor which the Court of Appeal took into account in granting the declaratory relief in *Yickvi* was the public interest to avoid litigation. As the *UK Law Commission Consultation Paper* stated at para 14.32: "to give free rein to [the] self-help [mechanism under the common law] would in all likelihood provoke disputes between neighbours, developers and objectors that would tend to lead to contested litigation". Given the increased activity in the property redevelopment sector, it is perhaps timely for the Legislature to review the necessity to introduce into our LTA the express power to modify easements. I believe it will go some

way to further reduce litigation such as the present case.

[note: 1] Tan Bee Kim's Affidavit ("TBKA") at paras. 6 – 7.

[note: 2] *Id.* at para. 9.

[note: 3] *Id.* at paras. 8 and 10.

[note: 4] *Id.* at para.11.

[note: 5] *Id.* at paras. 21-25.

[note: 6] Plaintiff's Submissions at para 35.

[note: 7] Plaintiff's Written Submissions at [25]; Defendant's Written Submissions at [4], Appendices 3 and 4.

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