Muthukumaran s/o Varthan and another *v* Kwong Kai Chung and others and another matter [2015] SGCA 69

Case Number	: Civil Appeal No 111 of 2014 and Summons No 6264 of 2014
Decision Date	: 14 December 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: George Barnabas Pereira and Keith Chua (Pereira & Tan LLC) for the appellants; Adrian Wong Soon Peng, Yan Yijun and Ang Leong Hao (Rajah & Tann Singapore LLP) for the first and second respondents; Choo Yean Lin and Rebecca Yeo (Tan Lee & Partners) for the third respondent.
Parties	: MUTHUKUMARAN S/O VARTHAN — INDIRA D/O SRINIVASA NAIDU — KWONG KAI CHUNG — KWONG WING YEN CATHERINE — MADRAS INVESTMENT PTE LTD

Land – Easements – Rights of way

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 4 SLR 1248.]

14 December 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The main issue presented in this appeal was whether the owners of a two-storey shophouse, who did not have a staircase built within their property, had an implied easement of a right of way over the staircase of an adjacent shophouse to gain access to the second floor of their own shophouse under s 99(1) read with s 99(1A) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"). The appeal raised issues concerning the proper scope and interpretation of those provisions – issues that our courts are likely to face in the future as Singapore becomes increasingly built-up, and disputes between neighbours over the creation or scope of easements become more frequent. Sections 99(1) and 99(1A) of the LTA read as follows:

> **Implied easements for right of way and other rights shown in subdivision plan**
>
> **99.**—(1) Where the competent authority has approved the development and subdivision of any land comprised in an estate before or after 1st March 1994 and the subdivision plan has been submitted to the competent authority, there shall be implied, in respect of each lot of the estate which is used or intended to be used as a separate tenement, in favour of the registered proprietor of the lot and as appurtenant thereto, all the easements referred to in subsection (1A).
>
> (1A) The easements which shall be implied under subsection (1) are all such easements of way and drainage, for party wall purposes and for the supply of water, gas, electricity, sewerage and telephone and other services to the lot on, over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority relating to the estate, as may be necessary for the reasonable enjoyment of the lot and of any building or part of a building at any time thereon.

…

2 We heard and dismissed the appeal on 30 September 2015. These are the detailed grounds for our decision.

Background facts

3 The background facts have been sketched out by the learned Judicial Commissioner ("the Judge") in his written grounds of decision reported in *Muthukumaran s/o Varthan and another v Kwong Kai Chung and others* [2014] 4 SLR 1248 ("the GD"). We do not propose to repeat them in their entirety, save to highlight the facts that are germane to this appeal.

4 The Appellants, Muthukumaran s/o Varthan ("the First Appellant") and Indira d/o Srinivasa Naidu were the joint registered proprietors of a two-storey shophouse at No 21 Madras Street, Singapore 208416 ("No 21"). The first and second respondents, Kwong Kai Chung ("the First Respondent") and Kwong Wing Yen Catherine ("the Second Respondent") were the owners of No 23 Madras Street, Singapore 208418 ("No 23"), the two-storey shophouse adjoining No 21. The third respondent, Madras Investment Pte Ltd ("the Third Respondent"), was the previous owner of both No 21 and No 23.

5 No 21 and No 23 were part of a row of four two-storey conservation shophouses in the Little India area. The other two shophouses in that row were No 17 Madras Street, Singapore 208414 ("No 17") and No 19 Madras Street, Singapore 208 415 ("No 19"). Each of the four shophouses stood on a separate lot of land, each with a separate certificate of title.

6 The four shophouses were purchased by the Third Respondent on 22 November 1993 following a tender concluded with the Singapore government on 27 August 1993. At that time, none of the shophouses had a permanent staircase; rather, each only had a bare ladder that allowed access to the second floor.

7 In 1995, the Third Respondent submitted a development plan to the Building and Construction Authority ("the BCA") and the Urban Redevelopment Authority ("the URA") for approval to carry out alteration and addition works ("the Works") on the shophouses. The scope of the Works included:

(a) the removal of the ladders in each of the shophouses;

(b) the building of two new timber staircases, one being inside No 19 and the other being inside No 23;

(c) the demolition of a portion of the firewalls on the ground floor between No 17 and No 19, and on the ground floor between No 21 and No 23; and

(d) the demolition of a portion of the firewalls on the second floor between No 17 and No 19, and on the second floor between No 21 and No 23.

8 The plans were approved by the BCA and the URA on 4 May 1995 and 20 June 1995, respectively. After obtaining approval, the Third Respondent then proceeded to carry out the Works.

9 The result of the Works was that No 17 and No 21 had no *direct* staircase access to their second floors. The only way to get to the second floors of No 17 and No 21 was through the staircases in No 19 and No 23, respectively. But that also meant that No 17 and No 21 retained

relatively larger floor areas as compared to No 19 and No 23 as a result.

10 On 3 June 2004, the Appellants purchased No 21 from the Third Respondent for $435,000, subject to an existing tenancy agreement. The transfer of No 21 to the Appellants was registered on 10 November 2004.

11 The Third Respondent claimed that when the Appellants purchased No 21, they were informed that there would be no staircase access to the second floor of that shophouse, and that they would have to build their own staircase should they wish to access that floor to their shophouse. The Appellants denied being informed of this, and claimed that they were able to use the staircase in No 23 ("No 23 staircase") to access the second floor of No 21 without incident until February 2010.

12 When the tenant in No 21 moved out in February 2010, the Appellants said that they discovered that the lock on the doorway to the No 23 staircase had been changed. The Appellants also claim that later in August 2010, the only entrance to the second floor of No 21 situated next to the upper stair landing of the No 23 staircase had been boarded up with wooden planks.

13 Between February 2010 and June 2010, the Appellants wrote to the Third Respondent asserting a right to use the No 23 staircase. The Third Respondent denied that the Appellants had such a right.

14 On 19 April 2010, the First and Second Respondents purchased No 23 from the Third Respondent for $640,000. The transfer of No 23 to the First and Second Respondents was registered on 16 July 2010.

15 Sometime between late July 2010 and early August 2010, the First and Second Respondents received a call from the Appellants. During that conversation, the Appellants alleged, amongst other things, that the No 23 staircase was a common staircase and meant to be shared by the registered proprietors of No 21 and No 23. The Appellants thus demanded that they be granted access to the No 23 staircase, but the First and Second Respondents refused.

16 On 2 August 2013, the First and Second Respondents received a letter from the Appellants' solicitors informing them that the Appellants would be commencing proceedings against them.

17 On 24 September 2013, the Appellants filed Originating Summons No 896 of 2013 ("OS 896/2013") against all three respondents ("the Respondents"). The prayers in OS 896/2013 were subsequently amended to eventually reflect the following relief claimed:

(a) A declaration that by reason of s 99(1) read with s 99(1A) of the LTA, the Appellants, as owners of No 21, were entitled to an easement of a right of way over the No 23 staircase to enable access to the second floor of No 21 for all purposes and reasons;

(b) An injunction restraining the First and Second Respondents from interfering with the Appellants' reasonable enjoyment of the said right of way over the No 23 staircase;

(c) Damages for loss suffered by the Appellants by reason of the Respondents denying them use of the No 23 staircase to access the second floor of No 21; and

(d) An order that the First and Second Respondents reinstate the only entrance to No 21's second floor.

Proceedings below and the Judge's decision

The respective parties' arguments

Appellants' arguments below

18 In the court below, the Appellants' counsel, Mr George Pereira ("Mr Pereira"), argued that the requirements of s 99(1) read with s 99(1A) of the LTA were satisfied, such that an implied easement of a right of way arose in his clients' favour over the No 23 staircase.

19 In this regard, Mr Pereira tendered two documents to the court. The first of these was a Certified Plan No 30670 for Lot No TS-16-00881P, *ie*, the lot on which No 23 was situated, dated 19 June 1997 ("the 1997 CP"), which Mr Pereira contended was the "subdivision plan" within the meaning of ss 99(1) and 99(1A) of the LTA. The other document Mr Peirera tendered was the development plan that was submitted to the BCA and the URA, which we mentioned earlier (see above at [7]). Mr Pereira submitted that, on the authority of *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 ("*Oei Hong Leong*"), a previous decision of this court, the court was entitled to have regard to other documents besides the subdivision plan, and indeed should look to the development plan in determining whether an easement should be implied under s 99(1) read with s 99(1A) of the LTA because the No 23 staircase was drawn on the development plan. We will say more on *Oei Hong Leong* later in the course of our grounds of decision as this decision was relied on considerably before us on appeal as well.

20 Mr Pereira also argued that an implied right of easement over the No 23 staircase was, pursuant to s 99(1A), "necessary for the reasonable enjoyment" of No 21 as there was no other way of gaining access to the second floor of No 21.

Respondents' arguments below

21 At the court below, the Respondents argued that:

(a) The Appellants were aware that they had to build their own staircase in No 21 when they purchased No 21;

(b) The right of way over the No 23 staircase was a licence that had "expired" when No 23 was sold to the First and Second Respondents; and

(c) The requirements of ss 99(1) and 99(1A) of the LTA were not met because:

(i) There was no subdivision plan admitted into evidence;

(ii) The court in *Oei Hong Leong* had regard only to plans annexed to the certificate of title, but in the present case, there were no similar plans annexed to the certificate of title; and

(iii) An implied right of easement over the No 23 staircase was not "necessary for the reasonable enjoyment" of No 21 as the Appellants themselves could have built their own staircase in No 21.

The Judge's decision and reasons

22 The Judge dismissed the Appellant's application for relief in OS 896/2013 and awarded the First and Second Respondents one set of costs fixed at $10,000 plus reasonable disbursements. He also

ordered that the Third Respondent be paid $10,000 in costs plus reasonable disbursements.

23 The Judge first held that it was clear that ss 99(1) and 99(1A) of the LTA had no application unless the competent authority had approved *both* the development and subdivision of land over which the easement was claimed (see the GD at [24]). While he accepted that development approval was granted under s 99(1) (see the GD at [26]), he found that the Appellants had failed to produce the approved subdivision plan in evidence for two reasons (see the GD at [29]–[31]):

(a) First, the 1997 CP was nothing more than a *survey* which showed *pre-existing* subdivided lots, and was not a plan submitted to the competent authority for subdivision approval (see the GD at [29]).

(b) Second, it was plain from the title documents adduced in evidence that the subdivision of the land into the lots upon which the shophouses were situated had occurred *before* the Third Respondent became the registered proprietor of the shophouses. In particular, when the certificate of title for No 21 was registered by the Third Respondent on 4 July 1995, No 21 was already situated on its present lot, *ie*, Lot No TS 16-882T. The plan of Lot No TS16-882T dated 16 July 1994 ("the 1994 CP") that was annexed to the certificate of title for No 21 also showed that subdivision of the land on which the shophouses were situated had occurred by that time. Likewise, the 1994 CP was not the subdivision plan contemplated in ss 99(1) and 99(1A) of the LTA (see the GD at [30]).

24 The point considered in the preceding paragraph was significant having regard to the wording of s 99(1A) of the LTA, which states that an easement will only be implied "over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority" (see the GD at [32]).

25 Based on the relevant parliamentary material, the Judge opined that the easement had to be both clearly and specifically indicated on the approved subdivision plan in the sense that the subdivision plan must contain a legend describing the easement and the dominant and servient tenements (see the GD [33]–[37]). The Appellants' failure to produce the subdivision plan was thus fatal to its case (see the GD at [37]).

26 The Judge distinguished *Oei Hong Leong* on the basis that the approved subdivision plan was adduced in evidence in that case. In addition, the subdivision plan showed the word "Access" where one bungalow abutted the other. It was in this context that the court held that it was permissible to read the subdivision plan together with the other plans attached to the certificates of title; *Oei Hong Leong* therefore did not stand for the proposition that the court was entitled to disregard the subdivision plan altogether and consider the development plan instead (see the GD [39]–[41]).

27 Finally, the Judge finally held that even if the court could consider whether the alleged easement was "appropriated or set apart" within the meaning of s 99(1A) by only relying on the development plan, the development plan still had to clearly and specifically indicate that the Appellants were to have a right of way over the No 23 staircase. This requirement was, however, *not* satisfied in the present case (see the GD at [42]).

28 Dissatisfied, the Appellants filed their notice of appeal on 17 July 2014.

Application for leave to adduce further evidence

29 After the filing of the notice of appeal, the Appellants wrote a letter to the Land Survey

Department of the Singapore Land Authority ("the SLA") on 26 November 2014 ("the Letter to the SLA"), requesting information concerning the following matters:

(a) Whether there was any submission made to the SLA or any other authority for the subdivision of the land on which the shophouses were situated and, if so, when this was done.

(b) Whether there was an approved subdivision plan for the land on which the shophouses were situated and, if so, for a copy of that plan to be given.

(c) In the event that there was no approved subdivision plan, whether the 1997 CP was "the appropriate plan to ascertain the approved subdivision" of the land on which the shophouses were situated.

30 The Appellants attached a copy of the 1997 CP in their letter to the SLA's Land Survey Department.

31 On 15 December 2014, the Land Survey Department replied as follows ("the SLA's reply"):

…

2. The parent lots were State Land and the Requisition of Survey for the subdivision by the then Land Office was issued to [Land] Survey Department on 19 Jan 1994.

The Registered Surveyor for the subdivision was Mr Quah Kee Soo. The subdivision of the lots is to follow existing party walls and existing boundaries.

Requisition of Survey plan (R/S plan) for the subdivision of the land parcel plots attached for your information. The dark bold lines are the proposed subdivision land parcels.

Plot 15 is the land lot of your property number 21 Madras Street.

3. The cadastral survey (title survey) was carried out and the survey plan following the intention of the R/S plan was approved by the Chief Surveyor on 19 Jun 1997 as shown in in [the 1997 CP] in your attachment.

…

32 The "Requisition of Survey plan" referred to in the SLA's reply was attached in the SLA's reply.

33 The Appellants thereafter filed Summons No 6264 of 2014 ("SUM 6264/2014") for leave to adduce the Letter to the SLA, the SLA's reply and the Requisition of Survey plan into evidence on appeal. The First Appellant, in his affidavit in support of the summons, had this to say of the evidence sought to be adduced:

I am advised that the email makes it clear that the Requisition of Survey for the subdivision of the land made on 19 January 1994 by the then Land Office to the Survey Department is effectively a "submission" for a survey and subdivision of the land within the meaning of s 99(1) of the Land Titles Act (Cap. 157) in the particular circumstances of this case. The subsequent [1997 CP] approved on 19 June 1997 is *in effect* the approved subdivision plan. To quote [the SLA's reply], it followed the intention of the [Requisition of Survey] plan which is to subdivide the land in accordance with the [Requisition of Survey] plan. As [the 1997 CP] was approved on 19 June 1997, it is clear that the learned Judicial Commissioner erred in finding that the

subdivision occurred before the 3rd Respondents became the owners of No. 23 on 4 July 1995. [emphasis added]

34 As the Respondents did not raise any objections to the Appellants' application for leave to adduce further evidence, we granted the Appellants' application in SUM 6264/2014.

Arguments on appeal

35 On appeal, Mr Pereira argued yet again that the requirements of s 99(1) read with s 99(1A) of the LTA were satisfied, with the result that an implied easement of a right of way arose in his clients' favour over the No 23 staircase. He argued that the Judge erred in holding that there was no subdivision plan tendered into evidence because the 1997 CP was, in fact, the subdivision plan contemplated within the meaning of ss 99(1) and 99(1A) of the LTA. In support of his contention, Mr Pereira said that there was a table in the 1997 CP which showed the subdivision history of all of the lots shown in that document, including those on which No 21 and No 23 were located. Moreover, the *proposed* subdivision of the land was set out in the Requisition for Survey plan, which was then approved by the Chief Surveyor on 19 June 1997 as indicated in the 1997 CP.

36 Mr Pereira relied, once again, on *Oei Hong Leong* and argued that a court is entitled to have regard to other documents other than the subdivision plan, and that indeed this court should have regard to the development plan, which showed that the only way to gain access to the second floor of No 21 was through the No 23 staircase.

37 We did not see the need to call on the Respondents' counsel, Mr Adrian Wong, who appeared for the First and Second Respondents, and Ms Choo Yean Lin, who appeared for the Third Respondent, to respond to the Appellants' arguments during the hearing as it was clear to us that the appeal lacked merit and should therefore be dismissed. Nonetheless, for completeness, we set out the salient points made by them in their *written* submissions, which broadly speaking are as follows:

(a) First, the Appellants came under a burden to adduce the subdivision plan into evidence but have not. In this regard, the 1997 CP was not the subdivision plan contemplated within the meaning of ss 99(1) and 99(1A) of the LTA.

(b) Second, even if the 1997 CP was the subdivision plan within the meaning of ss 99(1) and 99(1A) of the LTA, for an implied easement to arise under those provisions, there is a requirement that the easement be "appropriated or set apart" in the subdivision plan, *ie*, it must be *clearly indicated* on the subdivision plan. There was however, no indication on the 1997 CP showing that there was an implied easement of a right of way over the No 23 staircase.

Our decision

Issue

38 The sole issue that we had to decide in this appeal was whether an implied easement of a right of way over the No 23 staircase arose in the Appellants' favour pursuant to s 99(1) read with s 99(1A) of the LTA. But before we turn to consider this issue proper, we will first examine the nature of easements and the applicable legal framework to be used in determining when a right can be enforced as an easement.

Nature of an easement

39 An easement is an interest giving its owner either a positive or a negative right to derive some limited advantage from the land of another. The easement must be annexed – that is, its benefit must be attached – to one parcel of land (the "dominant tenement") and must be exercisable over another parcel of land (the "servient tenement"). The easement entitles the dominant owner to use the servient land in a particular way or, indeed, to prevent the owner of the servient land from using his own land in a particular way (see for example, Kevin Gray & Susan Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) ("*Gray & Gray*") at para 5.1.4; and *Halsbury's Laws of Singapore* vol 14 (LexisNexis, 2014 Reissue) at para 170.0380). In short, an easement has also been described as "either a right to do something or a right to prevent something" done on the servient land (see for example, Jonathan Gaunt QC & Paul Morgan, *Gale on Easements* (Sweet & Maxwell, 19th Ed, 2012) at para 1-78). A common example of a positive easement is an easement of a right of way, giving *A* the right to pass unimpeded over the land of his neighbour, *B*. An example of a negative easement is the easement of light, preventing *B* from blocking the access of light to *A*'s window for instance (see for example, W J M Ricquier, *Land Law* (LexisNexis, 4th Ed, 2010) ("*Ricquier*") at p 263; and Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Tan Sook Yee*") at para 20.1).

Legal framework for determining when a right can be enforced as an easement

Essential characteristics of an easement

40 In determining whether a right can be enforced as an easement, the following framework applies. First, the court must be satisfied that the right concerned must possess the essential characteristics of an easement, such that the asserted right in question *qualifies* as an easement. These essential qualities of an easement were first formulated by Dr Geoffrey C Cheshire in his seminal work, *Modern Law of Real Property* (Butterworth & Co, 1st Ed, 1925) ("*Modern Law of Real Property*") at pp 225–234. The seventh edition of *Modern Law of Real Property*, which provides for these essential qualities at pp 456 *et seq*, were, in turn, adopted by Evershed MR in the leading English Court of Appeal decision of *In re Ellenborough Park, In re Davies, Powell v Maddison* [1956] 1 Ch 131 ("*Re Ellenborough Park*") at 163 and is trite law (as approved by our courts in, for example, the Singapore High Court decisions of *Fragrance Realty Pte Ltd v Rangoon Investment Pte Ltd and others* [2013] 2 SLR 1007 at [30] and *Botanica Pte Ltd v Management Corporation Strata Title Plan No 2040* [2012] 3 SLR 476 at [46(a)]): (a) there must be a dominant and a servient tenement; (b) the easement must accommodate the dominant tenement, *ie*, is connected with its enjoyment and for its benefit; (c) the dominant and servient tenements must be owned or occupied by different persons; and (d) the right claimed must be capable of forming the subject-matter of a grant, *ie*, the grantor and grantee are legally competent persons, and the right must be sufficiently definite (such that the right can be described with a certain degree of precision and scope; this is usually not difficult in respect of positive easements such as a right of way) (for a general discussion of these requirements, see for example, *Gray & Gray* at paras 5.1.22–5.1.55; and Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 8th Ed, 2012) ("*Megarry & Wade*") at paras 27-004–27-025).

41 These essential characteristics apply equally to easements under the LTA. As the LTA itself provides, the interest in question must be one recognised by law as an easement (s 95(1)(*a*)) and it must be expressed to be for the benefit of the dominant tenement, being land owned by a person other than the servient owner (s 95(1)(*b*)). For ease of reference, we set out ss 95(1)(*a*) and 95(1)(*b*) of the LTA, which read as follows:

> **95.**—(1) The Registrar shall not register as an easement any instrument purporting to create an interest —

(*a*) of a kind which has not been recognised by law as an easement; or

(*b*) which is not expressed to be appurtenant to land (whether registered land or otherwise) of a person other than the proprietor or owner of the site of the easement.

Acquisition of easement

42 Having established that the right has the essential characteristics of an easement and therefore *qualifies* as an easement, the party seeking to assert the easement must go *further* to determine whether the easement has been *acquired*. There are various ways in which a person may acquire an easement.

43 Almost all land in Singapore is now registered under the LTA, which provides "very clear and straightforward provisions for the acquisition of easements" (see *Ricquier* at p 267). First, easements can only be created or acquired by registration (ss 97 and 101), in which case it is only upon registration that the relevant instrument is effective to pass the interest in the form of an easement in the land (ss 45(1) and 45(2)). The registered easement is also conferred the quality of indefeasibility under s 46(1) of the LTA. Secondly, easements may be implied as provided for in the LTA (ss 98, 99, 101, 102 and 104), which are overriding interests under s 46(1)(ii) of the LTA. Where easements had existed before the land was brought under the LTA, s 46(1)(ii) provides that as *subsisting* easements they will bind the registered title as an overriding interest.

44 We will elaborate more on s 99 of the LTA below as this is the principal piece of legislation that the Appellants relied on in arguing that they had an implied easement of a right of way over the No 23 staircase (see below at [49] *et seq*).

45 The list of easements is further extended by s 21 of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) ("LTSA"), as necessitated by proximate and high-rise living, a common feature in Singapore (see *Tan Sook Yee* at para 20.144). The easements that are implied by the LTSA for lots in a subsidiary title plan include the rights to lateral and subjacent support (s 16), to shelter (s 17), to passage of water, electricity, drainage, sewerage, gas, artificially cooled air and other services (s 18). Ancillary rights and obligations reasonably necessary to make the easements effectively are also implied (s 20).

46 For unregistered land, easements may be created or acquired in a variety of ways. These need not concern us as the land in question in the present case is registered land and is governed by the LTA (for a discussion of the position on unregistered land, see for example, *Gray & Gray* at paras 5.2.1–5.2.86; *Megarry & Wade* at ch 28; *Tan Sook Yee* at paras 20.52–20.108; and *Ricquier* at pp 267–275; see also ss 6, 53 and 60 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed)).

Whether an implied easement of a right of way arose in the Appellants' favour

47 With the above legal framework in mind, we turned to consider whether an implied easement of a right of way arose in the Appellants' favour.

Whether the purported right qualifies as an easement

48 The parties rightly did not contest that a purported right was *capable* of qualifying as an easement. Indeed, we were satisfied that the essential characteristics of an easement as provided for in *Re Ellenborough Park* are satisfied in the present case, such that the *purported* right that the

Appellants said they had over the No 23 staircase qualified as an easement. The dominant tenement in question was No 21 whereas No 23 was the servient tenement. The purported right in question enhanced the enjoyment of No 21 in the sense that it permitted access to the second floor of No 21. It was also clear that No 21 and No 23 were owned by different persons. Moreover, the right claimed was capable of being the subject matter of a grant in that both the grantors (the owners of No 23) and the grantees (the owners of No 21) were legally competent persons, and the right claimed over the No 23 staircase was sufficiently definite. Indeed, as we have already alluded to, a right of way is a *quintessential* example of positive easement (see above at [39]).

Whether the Appellants acquired an easement under s 99(1) read with s 99(1A) of the LTA

Introduction

49 The main contention in this appeal concerned whether the Appellants had acquired an easement of a right of way over the No 23 staircase pursuant to s 99(1) read with s 99(1A) of the LTA. Even though ss 99(1) and 99(1A) were the primary provisions that occupied centre-stage in this appeal, it is important to note the other subsections in s 99 as well.

50 For ease of reference, we set out s 99 in full as follows:

> **Implied easements for right of way and other rights shown in subdivision plan**
>
> **99.**—(1) *Where the competent authority has approved the development and subdivision of any land comprised in an estate* before or after 1st March 1994 and *the subdivision plan has been submitted to the competent authority*, there shall be implied, in respect of each lot of the estate which is used or intended to be used as a separate tenement, in favour of the registered proprietor of the lot and as appurtenant thereto, all the easements referred to in subsection (1A).
>
> (1A) The easements which shall be implied under subsection (1) are all such easements of way and drainage, for party wall purposes and for the supply of water, gas, electricity, sewerage and telephone and other services to the lot on, *over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority relating to the estate, as may be necessary for the reasonable enjoyment of the lot and of any building or part of a building at any time thereon.*
>
> (2) All ancillary rights and obligations reasonably necessary to make the easements referred to in subsection (1A) effective shall be implied.
>
> (3) In respect of all the easements implied by this section, there shall also be implied a covenant binding all registered proprietors enjoying the benefit of such easements to contribute to the cost of maintenance or repair of the subject of the easements as if the easements and the covenant to contribute had been created by an instrument registered under this Act and so long as such easements subsist the covenant to contribute shall bind any successor in title enjoying the benefit of the easements except that in the case of the right to erect and maintain party walls, the implied covenant provided in this subsection shall bind only the registered proprietors of the lots on which party walls have been erected.
>
> (4) Subsection (3) shall not render any person liable to contribute to expenditure incurred at a time before he became, or after he ceased to be, a proprietor of the lot to which the liability is attached.

(5) The easements implied by this section shall be enforceable without any memorial or notification on the folios, and accordingly section 97(5) and (6) shall not apply thereto.

(6) Unity of seisin of 2 or more lots shall not destroy the easements implied by this section but on the cessation of such unity, they shall continue in full force and effect as if the seisin had never been united.

(7) The easements implied by this section shall not apply to the lots in an estate where subdivision approval was given by the competent authority prior to 1st March 1994 and satisfactory documentary evidence has been produced to the Registrar of the completion of the transfer of any lot in the estate to a purchaser with easements expressly created in an instrument which has been executed and delivered to the purchaser.

(8) In this section —

"estate" means any land which has been subdivided into lots under the Planning Act (Cap. 232), and includes —

(*a*) land intended for use as easements to be made appurtenant to other lots within the same estate as shown in the subdivision plan submitted to the competent authority; and

(*b*) undeveloped lots, if any, which are shown in the first subdivision plan submitted to the competent authority, each of which is capable of being subdivided as shown in one or more subsequent subdivision plans as and when submitted to or issued by the competent authority;

"lot" means a parcel of land forming part of an estate to which the Chief Surveyor has allotted a survey lot number and also described as a "plot" in a subdivision plan submitted to the competent authority.

[emphasis added]

51 By way of background, s 99 was introduced *via* the Land Titles Bill (Bill No 36 of 1992) and provides that certain easements (easements of way and drainage, easements for party wall purposes and easements for the supply of water, gas, electricity, sewerage and telephone and other services) will be implied in "estate", which is defined as land subdivided into lots under the Planning Act (Cap 232, 1998 Rev Ed) ("the Planning Act") including an undeveloped lot which is featured in the first subdivision plan approved by the competent authority (s 99(8) of the LTA). Ancillary rights and obligations reasonably necessary to make the easements effective shall also be implied (s 99(2) of the LTA). Covenants to contribute to the cost of maintenance of the easements are likewise implied (s 99(3) of the LTA).

52 We need not concern ourselves with s 98 of the LTA, even though there is a considerable overlap between that provision and s 99, such that a given situation can fall within the ambit of both provisions (see the decision of this court in *Management Corporation Strata Title Plan No 549 v Chew Eu Hock Construction Co Pte Ltd* [1998] 2 SLR(R) 934 ("*Chew Eu Hock*") at [30]; see also similar comments in the paper prepared by Prof Tan Sook Yee entitled "Comments on the Land Titles Bill No 36 of 1992 submitted to the Select Committee" (22 February 1993) at para 4.1 (appended to *Report of the Select Committee on the Land Titles Bill [Bill No 36/92]* (Parl 3 of 1993, presented to Parliament on 18 August 2013) ("*Report of the Select Committee*") as Paper 1 in Appendix II). This is because, unlike s 99, s 98 does not provide for the implication of an easement of a right of way.

Key requirements that have to be fulfilled

53 Pursuant to ss 99(1) and 99(1A), read with s 99(7), in cases where the subdivision approval was given on or after 1 March 1994, the party seeking to assert that an implied easement arises must: (a) adduce the subdivision plan in evidence; and (b) show that the easement is "appropriated or set apart" on the subdivision plan (see the Singapore High Court decision of *Andrew John Hanam v Lam Vui and another* [2013] 4 SLR 554 ("*Andrew John Hanam*") at [29]).

54 To be clear, the phrase "as may be necessary for the reasonable enjoyment of the lot" in s 99(1A) serves a *limited purpose* of determining how implied easements are to be exercised. It is not a standalone ground to confer additional rights. This is made clear by the court in *Andrew John Hanam*. There, the plaintiff complained of leaks in his semi-detached property (No 4 Thomson Green). The defendants, who owned the adjoining house (No 2 Thomson Green ("No 2")), had refused to permit the plaintiff's contractor access to No 2 in order to inspect the party wall from the side of No 2. The plaintiff then commenced proceedings against the defendants claiming to be entitled to enter No 2 in order to inspect the party wall to determine the source of the leaks and to carry out the necessary repairs. In essence, the plaintiff asserted an implied easement "for party wall purposes" that was "necessary for the reasonable enjoyment" of his property pursuant to s 99(1) read with s 99(1A) of the LTA.

55 Belinda Ang Saw Ean J, in dismissing the plaintiff's application, found that the party wall easements created by an execution of the relevant transfer instruments that were later registered were only concerned with cross easements of support (at [20]). It did not also confer a right to enter No 2 to inspect the party wall on the side of No 2 or to carry out repairs from No 2 without the consent of the defendants. She also held that the phrase "as may be necessary for the reasonable enjoyment of the lot" in s 99(1A) also did not extend the scope of the party wall rights to include the right to enter the neighbour's property to inspect the party wall (at [33]). Citing the Court of Appeal of Victoria's decision in *Boglari and another v Steiner School and Kindergarten* [2007] VSCA 58, which dealt with a phrase in s 98 of the Transfer of Land Act 1958 (No 6399 of 1958) (Vic) (which is almost identical to s 99 of the LTA), she was of the view that the phrase serves a rather limited purpose of determining how the implied easements were to be exercised in the light of the circumstances (at [34]).

56 The wording of s 99(1) may suggest that it is *also* a requirement that the competent authority must have approved *both* the development and subdivision of land over which the easement was claimed. Indeed, this was so held by the Judge, who had observed as follows (see the GD at [24]):

> It is evident from the language of s 99(1) and s 99(1A) that these statutory provisions have no application unless the competent authority has approved *both* the development and subdivision of the land over which the easement is claimed. … [emphasis in original]

57 But there may well also be instances where there is no development approval, such as the situation where land is sold and subdivided as open lots for purchasers to develop. In such cases, the lack of development approval would not be fatal in a claim of an implied easement under s 99(1) read with s 99(1A). As this court in *Oei Hong Leong* noted at [47]:

> … [W]e have a comment on the requirement in s 99(1) for subdivision approval *and* development approval. There does not appear to us to be a need to link subdivision approval with development approval. As s 99(1A) states, upon the subdivision of land, easements of way necessary for the reasonable enjoyment of the land may be implied. Land may be subdivided and sold as open plots for the purchasers to develop. Easements of way necessary for the reasonable enjoyment of

such plots should in proper cases be implied, whether there is development approval or not. [emphasis in original]

58 If development approval is given, this court in *Chew Eu Hock* clarified at [31] that there is no need for both the development and subdivision approvals to be given at the same time. It held that s 99 applied in that case even though the development approval had been granted almost 10 years before the subdivision approval.

59 In the present appeal, we were prepared (taking the Appellants' case at its highest) to proceed on the basis, without making a definite finding on the merits, that:

(a) First, the approvals the Third Respondent received from the BCA and the URA for the works fell within the meaning of "development approval" under s 99(1); and

(b) Second, the 1997 CP was the "subdivision plan" contemplated within the meaning of ss 99(1) and 99(1A) of the LTA.

60 There was nonetheless an insurmountable obstacle that stood in the way of the appeal and that is the requirement in s 99(1A) of the LTA that the easement be "appropriated or set apart" on the subdivision plan, which essentially means that the easement must be *indicated* on the subdivision plan. The purported easement in the present appeal was, in our view, *not* indicated on the 1997 CP.

61 The need for an easement under ss 99(1) and 99(1A) to be indicated on the subdivision plan for it to arise is made clear by the relevant parliamentary material. First, the *Report of the Select Committee* states at [23]–[25]:

23. Clause 99 seeks to imply certain easements in respect of parts of an estate where the approved subdivision plan for the estate contains *a legend indicating those easements and the dominant and servient tenements*. Examples of such easements are right of way, a right to make connections to electrical sub-stations and party wall rights. By this approach, there is no need to describe the easements in clause 99 as they would be described in the legend.

24. A representor [Assoc Prof Tan Sook Yee (see Minutes of Evidence dated 7 May 1993 at p B 5 in Appendix III to Select Committee Report] expressed some concern over the lack of description of the type of easements that are to be implied under clause 99 as well as the lack of description of the servient lots. Another representor [the Singapore Institute of Surveyors and Valuers (see Paper 3 in Appendix II at para 2(b); see also Minutes of Evidence dated 7 May 1993 at p B 7 in Appendix III to Select Committee Report] suggested that the easements to be implied should be set out within clause 99 instead of being set out in a legend endorsed on the approved plan for subdivision. They recommended an approach similar to that in the Land Titles (Strata) Act (Cap. 158). As the majority of easements are in respect of roads, electrical substations, septic tanks, drainage reserves and party walls, the approval of any lot as a road, electrical subdivision, etc in an approved subdivision plan should imply the easements for corresponding rights of use. Similarly, the approval of any terrace or semi-detached house should imply the right of support for party walls.

25. The Committee sees some merit in the latter approach. It is, however, not feasible to imply a common set of easements for all developments. The Committee therefore recommends that clause 99 describe the common easements and these *will be implied where indicated in the approved subdivision plans*.

[emphasis added]

62 Prof S Jayakumar, who was then the Minister for Law and Minister for Home Affairs, also stated the following during a meeting of the Select Committee for a clause by clause consideration of the Bill on 12 August 1993 (see Official Report, Consideration of Bill (clause by clause) (12 August 1993), appended to the *Report of the Select Committee* in Appendix V at p D16):

> The Singapore Institute of Surveyors and Valuers (SISV), you will recall, Sir, suggested that the common types of easements be specified rather than leave it to a legend endorsed on an approved subdivision plan. The amendment that we propose describes these common easements and *these easements will be implied to the extent indicated in the approved subdivision plan relating to the estate.* [emphasis added]

Whether *Oei Hong Leong* permitted us to have regard to the development plan

63 The reasons we have set out above were, in and of themselves, sufficient to dispose of the present appeal. Nonetheless, for completeness, we shall address Mr Pereira's argument that *Oei Hong Leong* permitted us to have regard to the other documents besides the subdivision plan, and that indeed we should have regard to the development plan, which showed that the only way to gain access to the second floor of No 21 was through the No 23 staircase.

64 In our view, Mr Pereira's argument was untenable if one has proper regard to the facts in *Oei Hong Leong*.

65 In *Oei Hong Leong*, two bungalows were developed on an undivided lot of land. When they were developed, access to the public road for one of the bungalows ("No 48") could only be attained *via* a short driveway over the land of the other bungalow ("No 48A"). The lot of land on which the bungalows stood was later subdivided and each bungalow then stood on a separate lot of land. When the certificates of title in respect of the subdivided plots were issued, no express easement of way was created. The appellant entered into an agreement to buy No 48. The respondent owned No 48A. The agreement was subject to a condition that a declaration be obtained that No 48 enjoyed an implied easement of a right of way through No 48A pursuant to s 99(1) read with s 99(1A) of the LTA.

66 A dispute arose as to whether there was an implied easement of a right of way whereupon the appellant then filed an originating summons for the declaration, contending that an implied easement of a right of way arose in her favour over the driveway in No 48A under ss 99(1) and 99(1A) of the LTA. The appellant tendered a subdivision plan. While that subdivision plan had the word "Access" notated on the part of the land where No 48 abutted No 48A, that plan did not mark out the land over which the access was to run. This was a key impediment to the appellant's case.

67 Nonetheless, this court eventually held in the appellant's favour because it had regard to other plans annexed to the certificates of title for No 48 and No 48A, which were not in themselves subdivision plans, that showed the path over which the easement of way was to run, and read these *together* with the subdivision plan in holding that an implied right of way under ss 99(1) and 99(1A) arose in the appellant's favour. This court was of the view that it was entitled to read the annexed plans *together* with the subdivision plan because it was the word "Access" on the subdivision plan which suggested that there was an access route in favour of the owners of No 48 over the land on which No 48A was situated (see *Oei Hong Leong* at [30]–[33]).

68 It is clear that the present appeal dealt with wholly different circumstances from that in *Oei Hong Leong*. There, the court was entitled to have regard to documents other than the subdivision

plan because there was already an indication in the subdivision plan itself that there was an easement arising in the appellant's favour because of the word "Access". This court in *Oei Hong Leong* had regard to annexed plans merely to determine the path over which the easement of way was to run, and read these together with the subdivision plan in finding that an easement arose in that case. In the present appeal however, there was no indication in the 1997 CP, assuming it was the subdivision plan to begin with, to suggest that there was an easement that had arisen in the Appellants' favour.

69 Further, *even if* we did read the development plan together with the 1997 CP, this did not take the Appellants' case much further. The development plan itself merely has a drawing of the No 23 staircase, but does not go on to indicate that an easement arose in the Appellants' favour.

Conclusion

70 For the above reasons, we held that the Appellants' argument that they had an implied easement of a right of way under s 99(1) read with s 99(1A) of the LTA was one without merit. We therefore dismissed with appeal with the costs fixed at $25,000 plus reasonable disbursements to be paid to the First and Second Respondents, and the Third Respondent respectively. We would, however, also like to take this opportunity to note that, whilst setting forth the strongest case he could on behalf of his clients, Mr Pereira did not (commendably, in our view) overstate his case and dealt with it most fairly.

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