IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 121

Suit No 1087 of 2012

Between

LEE TAT DEVELOPMENT PTE LTD

… *Plaintiff*

And

MANAGEMENT CORPORATION STRATA TITLE PLAN NO 301

… *Defendant*

JUDGMENT

[Tort] — [Abuse of process]
[Tort] — [Malicious falsehood]
[Tort] — [Malicious prosecution]
[Tort] — [Trespass] — [Land]
[*Res judicata*] — [Issue estoppel]

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Lee Tat Development Pte Ltd
v
Management Corporation Strata Title Plan No 301

[2017] SGHC 121

High Court — Suit No 1087 of 2012
Kannan Ramesh JC (as he then was)
12–15, 19, 21, 29 April; 25, 27 May; 3 June; 3 August;
9, 23, 28 September 2016

26 May 2017 Judgment reserved.

Kannan Ramesh J:

Introduction

1 Suit No 1087 of 2012 ("the Suit") is the latest spar in a long-running legal saga between Lee Tat Development Pte Ltd ("Lee Tat") and the management corporation of a condominium development known as Grange Heights ("the MCST"), regarding the use by the subsidiary proprietors of Grange Heights of a narrow strip of land which both the MCST and Lee Tat claimed they were entitled to use. Lee Tat in particular sought to exclude the use of the strip of land by the subsidiary proprietors. The dispute went on for over 30 years, the parties jousting with each other over five sets of proceedings (all of which were appealed to the Court of Appeal), and was eventually decided in Lee Tat's favour by the Court of Appeal in 2008 (and affirmed in 2010). In

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its judgment in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 ("*Grange Heights (No 3) (CA)*"), the Court of Appeal expressed the hope (at [16]) that that would be the final chapter in the fractious and fractured relationship between the parties. Unfortunately, those words were in vain, falling on deaf ears. Lee Tat has now ironically brought the Suit on the back of the Court of Appeal's judgment in the fifth set of proceedings, suing the MCST in four causes of action: abuse of process, malicious prosecution, malicious falsehood and trespass.

2 Lee Tat essentially asserted that the MCST's commencement of the earlier proceedings had been done for an improper or collateral purpose and without reasonable and probable cause. It also alleged that two statements previously made by the MCST's Chairman and its property agent in 1997 and 2007 respectively, to the effect that the MCST enjoyed a right of way over the strip of land in question, constituted malicious falsehoods. Finally Lee Tat alleged that the residents of Grange Heights ("the Grange Heights residents") had committed trespass by regularly traversing the strip of land before the Court of Appeal decided in 2008 that they had no right of way over it.

Background to the dispute

3 To appreciate the legal issues arising in the Suit, it is necessary to set out in some detail both the factual history of the parties' dispute as well as the litigation that preceded the Suit.

4 The dispute concerns a cluster of five lots in Town Sub-Division 21, nestled between Grange Road and St Thomas Walk: Lot 111-30, Lot 111-31, Lot 111-32, Lot 111-33 and Lot 687 (itself an amalgamation of what were previously two lots, *viz*, Lot 111-34 and Lot 561). Lot 111-31, which is at the centre of the dispute, is a long, narrow and irregular strip of land with an area

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of around 883.4m^2. A diagram of these lots is included at Annex 1, from which it will be seen that only Lots 111-30, 111-31 and 111-32 sit along Grange Road. Lot 111-31 snakes away from Grange Road and meets Lot 687, which is bordered on the far side by St Thomas Walk and River Valley Grove.

5 The key changes in the ownership of these lots over time are summarised in a diagram at Annex 2. Lots 111-30, 111-31, 111-32, 111-33 and 111-34 were originally owned by a company, Mutual Trading Ltd. In 1919, Mutual Trading Ltd (which was then in liquidation) sold four of the five lots, Lots 111-30, 111-32, 111-33 and 111-34 ("the Dominant Tenements"), and granted a right of way over Lot 111-31 ("the Servient Tenement") to the purchasers of the four lots on the following terms:

> And together with full and free right and liberty for the Purchaser his executors administrators and assigns being the owner or owners for the time being of the land hereby conveyed or any part thereof and their tenants and servants and all other persons authorised by him or them in common with others having a similar right from time to time and at all times hereafter at his and their will and pleasure to pass and repass with or without animals and vehicles, in along and over the Reserve for Road coloured yellow in the said plan [*ie,* Lot 111–31].

6 Consequently, Lot 111-34 enjoyed a right of way over the Servient Tenement. This allowed the owners of Lot 111-34 access to Grange Road. This is significant for reasons which will later become apparent.

7 In 1970, Hong Leong Holdings Ltd ("HLH"), the predecessor in title of the MCST, became the owner of Lot 111-34 as well as the adjacent Lot 561. HLH amalgamated the two into one lot, which was titled Lot 687, in order to develop a condominium (*ie*, Grange Heights). For ease of discussion, the two plots of land which were amalgamated will continue to be referred to as Lots 111-34 and 561 in this judgment even though they have been merged to form

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Lot 687. As it turned out, the act of amalgamating Lot 111-34 with Lot 561 was a matter of significance to the continued existence of the easement over the Servient Tenement.

8 Grange Heights originally comprised 120 residential apartments, a car park for 188 cars, a swimming pool, two tennis courts and changing rooms. The original proposed layout of Grange Heights included the Servient Tenement as part of the development, but this was rejected by the competent authorities on the ground that HLH did not own the Servient Tenement. The layout which was eventually approved excluded the Servient Tenement from the development altogether. All the residential units in Grange Heights, together with the car park and the swimming pool, are situated on Lot 561 while the tennis courts and the changing rooms are situated on Lot 111-34. Again, the fact that the residential units are situated on Lot 561 turned out to be a matter of significance to the Grange Heights residents' use of the easement. Lot 561 has an area of 9,631.6m^2 while Lot 111-34 has an area of 3,066.1m^2. Lots 561 and 111-34 have no physical access to Grange Road except via the Servient Tenement. However, Lot 561 has access to River Valley Road (via either St Thomas Walk or River Valley Grove) and Killiney Road (via St Thomas Walk).

9 In 1973, ownership of two of the Dominant Tenements, namely Lots 111-32 and 111-33, passed to Collin Development Pte Ltd ("Collin"), which renamed itself as Lee Tat in 1986. Grange Heights was completed in 1976 and the MCST was constituted on 12 August 1976. Lee Tat subsequently purchased the Servient Tenement from the Official Receiver on 27 January 1997. Since that date, Lee Tat has owned the Servient Tenement as well as two of the Dominant Tenements. It is thus both the (successor) grantor (*vis-à-vis* the Servient Tenement) and the (successor) grantee (*vis-à-vis* Lot 111-32 and Lot 111-33) of the right of way over the Servient Tenement.

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Previous proceedings

10 The five sets of proceedings which preceded the Suit will be referred to by chronological order of commencement as the First Action through to the Fifth Action.

The First Action

11 Sometime in 1974, when Grange Heights was still under construction, Collin applied for a declaration that HLH, its directors, officers, servants, workmen and any of its agents, as well as the Grange Heights residents, were not entitled to use the Servient Tenement to access Grange Road. It also sought an injunction restraining such use. HLH counterclaimed for a declaration *inter alia* that it was entitled to use of the right of way and to authorise other persons to do so, as long as such user did not substantially affect Collin's enjoyment of the right of way. The application was determined at first instance by F A Chua J in *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 618 ("*Grange Heights (No 1) (HC)*"). He dismissed Collin's claim because there had been no substantial interference with its enjoyment of the right of way, and dismissed the counterclaim because the declarations sought by HLH could not be granted against Collin, who was not the owner of the Servient Tenement at that time. The Court of Appeal affirmed his decision in *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 806 ("*Grange Heights (No 1) (CA)*").

The Second Action

12 By the time of the Second Action, Lots 111-34 and 561 had been amalgamated to form Lot 687. The MC owned Lot 687 and Lee Tat owned Lots 111-32 and 111-33. *It is important to note, however, that ownership of the*

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Servient Tenement had not yet passed to Lee Tat. On 25 April 1989, Lee Tat erected an iron gate across the end of the Servient Tenement abutting Grange Road and a fence across the other end abutting Grange Heights, thus closing the right of way. On 27 April 1989, the MCST applied for an injunction to restrain Lee Tat from restricting its access to the Servient Tenement, as well as damages for Lee Tat's interference. It is important (for reasons that will later become apparent) to note that Lee Tat, despite not having *locus standi* to raise the issue of the MCST's entitlement to use the right of way, made two distinct contentions:

(a) first, that the amalgamation of Lot 111-34 with Lot 561 had extinguished the MCST's right of way over the Servient Tenement; and

(b) second, that the MCST and the Grange Heights residents were not entitled to use the Servient Tenement to access the Grange Heights apartments, which stood on Lot 561, because the benefit of the right of way did not extend to Lot 561 as it was not a dominant tenement.

I will refer to the former contention as "the Amalgamation Issue" and the latter as "the Extension Issue". I alluded to the significance of these points earlier in this judgment (see [7] and [8] respectively).

13 The Second Action was heard at first instance by Punch Coomaraswamy J, who found that the amalgamation of Lots 111-34 and 561 had not extinguished the right of way enjoyed by the MCST (see *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [1990] 2 SLR(R) 634 ("*Grange Heights (No 2) (HC)*")). He also found that Lee Tat was not entitled to close the right of way, given that it was not the owner of the Servient Tenement and did not complain of excessive use of the Servient Tenement by the Grange Heights residents. Coomaraswamy J thus granted an

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injunction restraining Lee Tat from interfering with or preventing or hindering or otherwise howsoever obstructing the MCST's right of way over the Servient Tenement, and ordered Lee Tat to remove the iron gate and fence. His decision was affirmed by the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [1992] 3 SLR(R) 1 ("*Grange Heights (No 2) (CA)*"). Notably, neither Coomaraswamy J nor the Court of Appeal specifically addressed the Extension Issue despite Lee Tat's submission.

The contempt proceedings

14 After the Second Action was decided and before the Third Action was commenced, the MCST instituted three sets of contempt proceedings against Lee Tat. It is important to note that these proceedings occurred after Lee Tat had acquired ownership of the Servient Tenement.

15 After Lee Tat acquired the Servient Tenement on 27 January 1997, it erected a "No Trespassers" sign on the Servient Tenement and hung a chain across the end of the Servient Tenement abutting Grange Road. In October 1997, the MCST took out committal proceedings against Lee Tat for breach of the injunction that had been granted in the Second Action by Coomaraswamy J. On 17 December 1997, Madam Ching Mun Fong ("Madam Ching"), Lee Tat's director, gave an undertaking to the court in the following terms:

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

16 Notably, the undertaking was given subject to an express reservation that it did not prohibit Lee Tat from commencing any legal action as it might be advised.

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17 Sometime in July 1999, Lee Tat fixed a low chain across the Servient Tenement to stop the Grange Heights residents from accessing it. The MCST took out committal proceedings for the second time, against both Lee Tat and Madam Ching, for contempt of Coomaraswamy J's injunction. Tay Yong Kwang JC (as he then was) held Lee Tat to be guilty of contempt of court and ordered Madam Ching to pay a fine of $3,000 and $10,000 in costs.

18 In or around March 2004, Lee Tat erected two concrete cones along the Servient Tenement in order to block vehicles from accessing it. The MCST took out committal proceedings for the third time against both Lee Tat and Madam Ching for contempt of Coomaraswamy J's injunction. The concrete cones were removed before the committal hearing. Lee Tat and Madam Ching were ordered to pay the MCST $13,000 in indemnity costs.

The Third and Fourth Actions

19 The Third Action was commenced before the Fourth Action, but decided after it by agreement of the parties. It was intended that the result of the Fourth Action would inform the result in the Third Action. On 4 June 2004, the MCST commenced the Third Action seeking a declaration that it was entitled to repair and maintain the right of way over the Servient Tenement, which had allegedly fallen into a state of disrepair. On 26 June 2004, in response to the Third Action, Lee Tat commenced the Fourth Action for various reliefs, including a declaration that the right of way could not be used for access to Lot 687 and a permanent injunction preventing the MCST from using the right of way. *As noted earlier, by this time Lee Tat had acquired ownership of the Servient Tenement.* Parties agreed that the Fourth Action should be decided before the Third Action.

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20 In the Fourth Action, Lee Tat again raised the Extension Issue (see [12(b)] above) and submitted that the right of way over the Servient Tenement could not be used for the benefit of Lot 561 because of the principle in *Harris v Flower and Sons* (1904) 91 LT 816 ("*Harris v Flower*"). This principle, as stated by the Court of Appeal in *Grange Heights (No 3) (CA)* ([1] *supra*) at [19], is that "a right of way which is granted over a servient tenement in favour of a dominant tenement cannot be used for the purposes of a non-dominant tenement as that would exceed the rights of the dominant owner as defined by the terms of the grant". Having become the owner of the Servient Tenement in 1997, Lee Tat now had *locus standi* to challenge the MCST's right to use the right of way, unlike when the same contention had been made in the Second Action. The MCST, however, asserted that Lee Tat was estopped from re-litigating this issue because it already had been decided against Collin and Lee Tat in the First and Second Actions respectively. Woo Bih Li J, who heard the Fourth Action at first instance, agreed with the MCST that the Second Action judgments had determined the question of "whether the residents of Grange Heights could use the right of way to gain access not only to [L]ot 111-34 but also to [L]ot 561" in the MCST's favour (*Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2004] 4 SLR(R) 828 ("*Grange Heights (No 4) (HC)*") at [30]). This gave rise to an issue estoppel, preventing Lee Tat from re-litigating the Extension Issue in the Fourth Action.

21 The Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Grange Heights (No 4) (CA)*") affirmed Woo J's decision by a 2–1 majority (Chao Hick Tin JA dissenting). The majority agreed with Woo J, finding that issue estoppel arose because the "precise issue" in the appeal, *ie*, "whether the residents of Grange Heights [had] a right of way over Lot 111-31 to gain access to and from Grange Road", had been "finally and conclusively determined on the merits by courts

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of competent jurisdiction in the 1989 proceedings" (at [2]). The majority did not accept Lee Tat's argument that it had lacked *locus standi* to raise the Extension Issue at the time of the Second Action (at [13]). It moreover took the view that Lee Tat's acquisition of ownership of the Servient Tenement made "no difference to the rights of the MCST (and hence the residents of Grange Heights) over the [S]ervient [T]enement which were decided in the 1989 proceedings". Specifically, the Second Action had determined that it was lawful for the Grange Heights residents to use the Servient Tenement to pass between Grange Heights and Grange Road (at [16]) and had ruled on both the Amalgamation Issue and the Extension Issue in the MCST's favour (at [17]). The Court of Appeal specifically stated that the correctness of those rulings was irrelevant for the purposes of issue estoppel (at [25]).

22 Chao JA's dissent was principally on two bases. First, issue estoppel did not apply. The First and Second Actions had been decided purely on the basis that HLH's and the Grange Heights residents' use of the Servient Tenement did not amount to interference with Lee Tat's enjoyment of the right of way (*Grange Heights (No 4) (CA)* at [68], [69] and [74]). Lee Tat did not have *locus standi* at the time to raise the Extension Issue, and though it had tried to do so in the Second Action, the Second Action had not been decided on that basis (*Grange Heights (No 4) (CA)* at [69] and [74]). Since the Extension Issue had not been ruled upon, Lee Tat was not estopped from re-litigating it. Second, the well-entrenched principle in *Harris v Flower* pointed to the clear conclusion that the MCST could not extend the right of way beyond the terms of the original grant to benefit Lot 561 (*Grange Heights (No 4) (CA)* at [61]). Chao JA's dissent was of significance for reasons that will become apparent later.

23 The tide turned in the Third Action. Woo J, who again heard the application at first instance, ruled in *Management Corporation Strata Title Plan*

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No 301 v Lee Tat Development Pte Ltd [2007] 2 SLR(R) 554 ("*Grange Heights (No 3) (HC)*") that the MCST was entitled to repair and maintain the Servient Tenement. The Court of Appeal unanimously set aside his decision and ruled in favour of Lee Tat in *Grange Heights (No 3) (CA)* ([1] *supra*). It held that the Court of Appeal in the Fourth Action had been incorrect to find issue estoppel and aligned itself with the dissenting judgment of Chao JA. The Court of Appeal found that the Extension Issue had *not* in fact been decided in the Second Action. It had not arisen for decision then as Lee Tat had lacked *locus standi* to contest the MCST's right of way. The Court of Appeal also found (at [81]) that the parties were not bound by the Fourth Action judgment, which contained an "egregious error" resulting in "grave injustice to Lee Tat", because it came within an exception to the principle of *res judicata* recognised in *Arnold and others v National Westminster Bank Plc* [1991] 2 AC 93 ("*Arnold (HL)*"), which I shall henceforth refer to as the *Arnold* exception. Considering the Extension Issue afresh, the Court of Appeal found that the Grange Heights residents were not entitled to use the right of way to access their apartments because of the *Harris v Flower* principle. Turning to the Amalgamation Issue, the Court of Appeal also found that the right of way *vis-à-vis* Lot 111-34 had been extinguished by operation of law as a result of the amalgamation of Lots 111-34 and 561.

The Fifth Action

24 On 29 June 2009, the MCST filed an application by summons to the Court of Appeal praying for an order to reconstitute the Court of Appeal to set aside its judgment in *Grange Heights (No 3) (CA)*, on the ground that there had been a breach of natural justice as the MCST had not been heard on the *Arnold* exception in the Third Action. On the direction of the Registrar of the Supreme Court, the MCST then filed an application to the High Court on 3 August 2009

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to first determine the preliminary question of whether the Court of Appeal *could* be reconstituted to hear an application to set aside its own judgment. Choo Han Teck J, who heard this application, determined in *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] 1 SLR 645 ("*Grange Heights (No 5) (HC)*") that the Court of Appeal should not be reconstituted. He took the view that for the purposes of *res judicata*, the public interest in finality outweighed the public interest in achieving justice between the parties (at [4]) and that there should be no exceptions to *res judicata* except in the case of a judgment tainted by apparent bias (at [9]). Even if it was true that the MCST had been deprived of an opportunity to be heard on the *Arnold* exception, that was not so grave a procedural wrong as to warrant reopening the case (at [11]).

25 The Court of Appeal in *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 ("*Grange Heights (No 5) (CA)*") affirmed Choo J's decision to dismiss the application. The Court of Appeal held that it did have inherent jurisdiction to reopen and set aside a decision which it had made in breach of natural justice and rehear the matters dealt with in that decision (at [55]). However, it would not be unreasonable for an observer to conclude that the MCST in fact had the opportunity to address the Court of Appeal in the Third Action on the *Arnold* exception (at [85]). In any event, it was pointless to set aside *Grange Heights (No 3) (CA)* and grant the MCST a hearing on the *Arnold* exception because that would not have affected the outcome of the Third Action (at [67]).

26 Having set out the background facts and the course of the previous proceedings, I will now consider the merits of each of Lee Tat's causes of action in turn.

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(1) Abuse of process

27 The thrust of Lee Tat's case for abuse of process was that the MCST had participated in each of the Second, Third, Fourth and Fifth Actions for the collateral purpose of enhancing the value of its own land by retaining the Grange Heights address and name. This was allegedly achieved by retaining access to Grange Road through the right of way. Lee Tat cited *Grange Heights (No 5) (CA)* at [8], in which the Court of Appeal noted that the MCST's motivation in the Fifth Action was not so much to enable the Grange Heights residents to use the right of way to access Grange Heights, as it was to maintain the current address and/or name of Grange Heights to avoid depreciation in the market value of the Grange Heights residential units. Lee Tat submitted that since the address, name and value of Grange Heights were "not the relevant legal rights in dispute in the said Actions", the MCST's stance in the Second to Fifth Actions was motivated by extra-legal and irrelevant considerations and therefore constituted an abuse of process. Lee Tat also submitted that the MCST had initiated the committal proceedings against it to "coerce Lee Tat and Madam Ching (as owners of the *[S]ervient* [T]enement) to provide certain undertakings".

Analysis

28 First, it is not clear whether abuse of process is a recognised tort in Singapore. In *Lim Kok Lian (executor and trustee of the estate of Lee Biau Luan, deceased) v Lee Patricia (executor and trustee of the estate of Lee Biau Luan, deceased) and another* [2015] 1 SLR 1184 ("*Lim Kok Lian*"), Edmund Leow JC observed (at [13]) that it was "not entirely clear whether the tort of abuse of process is a recognised cause of action in Singapore", but refused to strike the claim out simply on that basis. The Court of Appeal similarly observed in *Yan Jun v Attorney-General* [2015] 1 SLR 752 at [101] that "it is unclear whether

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[abuse of process] is a recognised free standing cause of action at law and further, whether this is a cause of action capable of giving rise to a claim *for damages*" [emphasis in original]. I share the same reservations.

29 In any event, it is not necessary for me to decide whether Singapore should recognise abuse of process as a cause of action, as the UK has done. It is clear that the facts of this case do not even fall within the scope of the English tort of abuse of process, assuming that were to be accepted as good law in Singapore.

30 It is important to first identify the wrongdoing that the English tort of abuse of process seeks to remedy. There have been many formulations of the essence of the tort. For example, Lord Sumption JSC (dissenting, although not in this respect) stated in the Judicial Committee of the Privy Council decision of *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 ("*Crawford Adjusters*") at [149]:

> Abuse of process … differs from [the tort of malicious prosecution] in significant respects. It applies to the initiation or conduct of civil proceedings. It is not necessary to prove malice. It is not necessary to show that the proceedings have gone to judgment. It is not even necessary to show that they were baseless, although in practice they often will be. *The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought.* The paradigm case is the use of the processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do.
>
> [emphasis added]

31 The Australian case of *Williams v Spautz* (1992) 174 CLR 509 was referred to by Lord Wilson JSC (at [63]) and cited with approval by Lord

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Sumption JSC (at [155]). In that case, Dr Spautz, who had been dismissed from his lectureship at the University of Newcastle, instituted 32 actions against the university and various of its members. The trial judge found that Dr Spautz's predominant purpose was to put pressure on the university to reinstate him or to settle his claims on favourable terms. Brennan J helpfully stated at 537 that:

> [A]n abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is *not reasonably related to a verdict that might be returned or an order that might be made in the proceeding.*
>
> [emphasis added]

32 The emphasis on an advantage or benefit "*not reasonably related*" to the legal remedy makes it clear that the tort does not lie in the litigant harbouring some underlying motivation or object contingent upon the vindication of his legal right. As Lord Sumption JSC noted in *Crawford Adjusters*, a claim in abuse of process does not require the court to scrutinise the reasons for which each litigant seeks the legal remedy. These are varied and the court is not tasked with policing them. Rather, the *raison d'être* for the tort lies in the litigant not in fact seeking the legal remedy *at all*, but something wholly extraneous to the reliefs that might be ordered in the proceedings. This was eloquently articulated by Lord Wilson JSC in *Crawford Adjusters* at [63]:

> What is an improper purpose? A helpful metaphor suggested by Isaacs J in the High Court of Australia in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35, 91, is that of a stalking-horse:
>
> > "If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim on which the court is asked to adjudicate they are regarded as an abuse of process for this purpose …"
>
> The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of victory in the action will be the defendant's

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> downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall—or some other disadvantage to the defendant or advantage to himself—by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper.

33 *Winfield & Jolowicz on Tort* (Edwin Peel & James Goudkamp, eds) (Sweet & Maxwell, 19th Ed, 2014) ("*Winfield & Jolowicz on Tort*") makes the same point in different words at para 20–023:

> If a person presents a claim for damages in the knowledge that it is completely unfounded … he does not commit the tort of abuse of process because he is using the law, albeit corruptly, for its assigned purpose, namely to recover damages against the defendant in that suit. The position is the same even if the defendant has some further purpose which will be achieved or assisted by success in the suit, for his object is still to succeed in the litigation.

34 In other words, the tort will be made out when it is the *proceedings themselves*, rather than the legal outcome thereof, which the litigant regards as instrumental to his true purpose. This will be the case, for example, where the litigant seeks to extort money from his opponent or bankrupt him by instituting or prolonging proceedings. *The proceedings are the means to some end unrelated to victory in the suit.* It is important to emphasise that the tort of abuse of process must not be expanded beyond these narrow confines, lest "honest litigants" be "deterred from pursing honest claims or defences" (*Crawford Adjusters* at [157], citing *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 470F). In England, there have only been two reported cases in which the action has succeeded despite a moderately substantial body of case law, and both instances occurred before 1860 (*Crawford Adjusters* at [149]).

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35 Once the tort of abuse of process is properly understood, it becomes plain that it would have no application to the facts of this case *even if* it were to be recognised in Singapore. Lee Tat was not able to identify any purpose of the MCST's which was *not* reasonably related to victory or a favourable result in the various proceedings. Even if it was true that the MCST's primary purpose was retention of the Grange Heights name and address, that outcome was wholly contingent on the existence of the MCST's purported right of way over the Servient Tenement, which was the subject matter in the Second to Fifth Actions. It was the judicial decisions in the Second and Fourth Actions (rather than the proceedings themselves) that enabled the MCST temporarily to obtain this benefit, while the rulings in the Third and Fifth Actions ultimately deprived the MCST of it. Since the MCST's desired outcome stood or fell on its claim in law to the right of way, the MCST could not be said to have abused the process of the court in the Second to Fifth Actions for an improper or collateral purpose. As *Winfield & Jolowicz on Tort* notes (see [33] above), just because a claimant has knowingly brought an unmeritorious claim, that does not mean that there was abuse of process so long as the object of the litigation was to secure a positive result. That was the MCST's object.

36 Lee Tat was also unable to identify any collateral or improper purpose *vis-à-vis* the three contempt proceedings instituted by the MCST. In its closing submissions it asserted that the MCST had hoped thereby to coerce Lee Tat and Madam Ching into providing "certain undertakings". In my view, the contempt proceedings were ultimately about compelling Lee Tat to comply with the injunction that was ordered by Coomaraswamy J. Further, it was not clear from Lee Tat's closing submissions what "undertakings" it meant. The MCST did in fact obtain an undertaking from Madam Ching at the conclusion of the first of the contempt proceedings (see [15] above). But this only weakens Lee Tat's case in two ways.

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37 First, if the MCST's sole purpose in the Second to Fifth Actions was to retain the Grange Heights name and address for financial gain, committal proceedings would have been unnecessary. The Second Action had already concluded the issue in the MCST's favour. The fact that the MCST took out committal proceedings to enforce the injunction suggested that the MCST was genuinely interested in securing physical access to the Servient Tenement for the benefit of the Grange Heights residents. In other words, the MCST's interest in the Second to Fifth Actions was not confined to the financial benefits arising from retention of the Grange Heights name and address, but included a *bona fide* interest in actually using the right of way. This is not difficult to believe as Mr Ivan Steinbock ("Mr Steinbock"), a resident of Grange Heights, testified during cross-examination that the Grange Heights residents had in fact made regular use of the Servient Tenement to pass between Grange Road and Grange Heights:

> Q: … [T]here is an affidavit by you filed on 29 June 2009 and … you say as follows: "For more than 30 years, we residents have used the right of way to drive to and from Orchard Road via Grange Road. … Since moving into our apartment units, the residents have also been using the right of way as a convenient shortcut for walking to Orchard Road: this includes school children, sometimes accompanied by their grandparent and/or maids, using the right of way as a footpath to Grange Road for access to the bus services through Grange Road." … So is it your evidence that the right of way that [Lot 111-31] was being continuously used by the residents in Grange Heights both on foot and by motor vehicles to access Orchard Road via Grange Road ever since the time you were a resident and even from earlier to that? Is that the effect of what you are trying to say?
>
> …
>
> A. Not me, the residents were using, not me.
>
> Q. Yes, yes, but this is what you are saying from your belief?
>
> A. Yes.

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> Q. From what you understand both from your own knowledge and what the residents have been telling you?
>
> A. Correct.
>
> Q. From your understanding of the position, the right of way was used both for most vehicles as well as for pedestrian traffic?
>
> A. Yes, sir.
>
> Q. And it was quite regularly used by the various residents of Grange Heights?
>
> A. I think so.

38 Indeed, Lee Tat did not dispute that the right of way was regularly used by the Grange Heights residents. Moreover, at the 27th Annual General Meeting of the MCST on 27 March 2004, the MCST resolved by special resolution to improve the right of way to make it safe for pedestrian access as well as to enable vehicular access. It would obviously have been pointless for the MCST to expend funds on the improvement of the Servient Tenement if the right of way was only nominal.

39 Second, if the MCST's objective was to obtain an undertaking from Lee Tat, why did it not cease proceedings after Madam Ching's undertaking in the first contempt proceedings in 1997? Instead, the MCST firmly resisted Lee Tat's subsequent attempts to deny access to the Grange Heights residents by taking out contempt proceedings twice more in 1999 and 2004. This also suggested to me that the MCST's intention was to retain physical access to the Servient Tenement. These factors made it clear that the English tort of abuse of process could have no application here.

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(2) Malicious prosecution

40 The tort of malicious prosecution has conventionally been applied to *criminal* prosecution, and Lee Tat devoted substantial submissions to persuading me to extend the tort to civil proceedings. This is a matter of ongoing debate and development in other jurisdictions. The UK (at least since *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674) originally confined the tort to criminal prosecution, but it was extended to civil proceedings by the Judicial Committee of the Privy Council in *Crawford Adjusters* on an appeal from the Court of Appeal of the Cayman Islands and that extension was subsequently accepted by the UK Supreme Court in *Willers v Joyce and another (No 1)* [2016] UKSC 43 ("*Willers v Joyce (No 1)*"). The tort has also been expanded beyond criminal prosecution to varying extents in Australia, New Zealand and the US (see *Crawford Adjusters* at [69]–[71] and [165]–[196]).

41 In Singapore, this point does not appear to have received consideration by the Court of Appeal. Two High Court Judges have taken the position that malicious prosecution does not apply to civil proceedings: *Strategic Worldwide Assets Ltd v Sandz Solutions (Singapore) Pte Ltd and others (Tan Choon Wee and another, third parties)* [2013] 4 SLR 662 at [93] and *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 at [158]. On the other hand, in *Lim Kok Lian* at [13]–[15] the Judicial Commissioner stated that it was "not entirely clear" whether the tort of malicious civil proceedings was recognised in Singapore, as the High Court case of *Bhagwan Singh v Chand Singh* [1968–1970] SLR(R) 50 "seem[ed] to have recognised the tort … although it ultimately held that the claim was not made out on the facts".

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42 In this case, despite the intellectual interest that the debate stirs, it is neither necessary nor appropriate for me to decide whether Singapore should recognise the tort of malicious civil proceedings. That is because, even assuming that such a tort exists, its requirements would not be satisfied on the facts of this case. I will therefore say no more about whether the tort of malicious prosecution should extend to civil proceedings but focus solely on why the facts would not support such a cause of action assuming *arguendo* that the tort does extend to civil proceedings.

43 The elements of the tort, as stated in *Martin v Watson* [1995] 3 All ER 559 at 562 and cited with approval in *Zainal bin Kuning and others v Chan Sin Mian Michael and another* [1996] 2 SLR(R) 858 ("*Zainal bin Kuning*") at [54], are as follows:

(a) the plaintiff must show that he was prosecuted by the defendant;

(b) the prosecution must have been determined in the plaintiff's favour;

(c) the prosecution must have been without reasonable and probable cause; and

(d) the prosecution must have been malicious.

44 Lee Tat asserted that the MCST had committed the tort in commencing the Third and Fifth Actions. The MCST did not dispute that the first two requirements above were satisfied in respect of both those Actions. However, the third and fourth elements posed an obstacle to Lee Tat. I will first set out the facts relied upon by Lee Tat to support its claim of malicious prosecution before examining the third and fourth elements in greater detail.

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Facts relied on by Lee Tat

45 The thrust of Lee Tat's claim was that the MCST had instituted the Third and Fifth Actions despite not genuinely believing that the Grange Heights residents were entitled to use the right of way. There were three planks to this claim:

(a) it was so obvious that the Grange Heights residents were not entitled to use the right of way that the MCST could not have truly believed otherwise;

(b) the MCST took a position in the Fourth Action which was at odds with its position in the Second Action, suggesting a lack of genuine belief in the merits of its claim; and

(c) members of the MCST and the council of the MCST ("the management council") had expressed concerns as to whether the Grange Heights residents were in fact entitled to use the right of way.

46 First, Lee Tat asserted that in light of *Harris v Flower*, it was so obvious that the Grange Heights residents and the MCST were not entitled to access the Servient Tenement that the MCST could not honestly have believed otherwise. In support, Lee Tat referred to the following *dicta* (Lee Tat's emphases in italics):

(a) *Grange Heights (No 5) (CA)* at [67]: "if Lee Tat had been permitted to raise the *Harris v Flower* issue in the [Fourth Action] … the Majority Judges … would *undoubtedly* have decided … that the *Harris v Flower* principle … prevented the Residents from using the Right of Way for access between Grange Road and Lot 561."

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(b) *Grange Heights (No 5) (CA)* at [101]: "The scope of the 1919 Grant … was not in dispute; neither was the *Harris v Flower* principle … These factors should have produced a *straightforward and clear-cut judgment* on the rights of the parties (and their respective predecessors in title) *vis-à-vis* the Right of Way at the various stages of ownership of the Servient Land."

47 Second, Lee Tat submitted that the MCST's conduct of the Fourth Action betrayed a lack of genuine belief in its asserted right to use the right of way. It was alleged that the MCST deliberately took inconsistent positions in the Second and Fourth Actions. In the Fourth Action the MCST submitted that the Extension Issue was *res judicata* since the Second Action, whereas in the Second Action it had submitted that Lee Tat lacked *locus standi* to raise the Extension Issue. Lee Tat referred to the following *dicta* from *Grange Heights (No 5) (CA)* at [98]–[99]:

> … A material factor … which the [Third Action] CA took into account was the fact that in the [Fourth Action] appeal, the [MCST] advanced a legal argument on the *Harris v Flower* issue which it knew (or, at least, ought to have known) was unmeritorious – namely, the argument that the *Harris v Flower* issue … was *res judicata* as it had already been decided against Lee Tat by the [Second Action] CA. … [T]his argument was in direct opposition to the [MCST's] argument on the *Harris v Flower* issue in the [Second Action] appeal, where the [MCST] had contended – successfully – that Lee Tat, not being the Servient Owner at that time, could not raise the *Harris v Flower* issue. In the [Fourth Action] appeal, the [MCST] managed to persuade the Majority Judges to accept its submission that the *Harris v Flower* issue was *res judicata* – a decision which the [MCST] now concedes was wrong …
>
> *In this connection, it is also pertinent to note that during the hearing of this appeal, evidence emerged that in the [Fourth Action] appeal, the [MCST] appeared to have deliberately suppressed (by omission) the fact that its submissions on the* Harris v Flower *issue in that appeal … were contradictory to its submissions on that same issue in the [Second Action] appeal. …* In our view, this evidence may be said to exacerbate the

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> [MCST's] conduct in advancing to the [Fourth Action] CA a contradictory argument on the *Harris v Flower* issue (as compared to its argument on that issue in the [Second Action] appeal) … the [MCST's] conduct in the [Fourth Action] appeal led the Majority Judges to hold – wrongly (as the [MCST] has now conceded) – that the *Harris v Flower* issue was *res judicata*.
>
> [emphasis added]

48 In other words, there was deliberate inconsistency between the MCST's positions in the Second and Fourth Actions. In the Second Action, the MCST had submitted that Lee Tat could not argue the Extension Issue because Lee Tat was not the owner of the Servient Tenement, and therefore lacked *locus standi* to challenge the MCST's entitlement to the right of way. In the Fourth Action, however, the MCST persuaded the Court of Appeal that the Extension Issue had already been determined in its favour in the Second Action and was *res judicata*, suppressing in the process the fact that it had run the contrary argument in the Second Action. According to Lee Tat, the reason for this was that the MCST did not genuinely believe that the Extension Issue was *res judicata* but only said so because it knew it would lose on the merits in light of *Harris v Flower*.

49 Third, Lee Tat submitted that other evidence showed that the MCST "could not objectively have believed that Grange Heights [residents] had the [r]ight of [w]ay", and that some members of the MCST doubted that they had a right of way. In this regard, Lee Tat referred to minutes from two meetings:

(a) On 22 March 2003, during the 26th Annual General Meeting ("AGM") of the MCST, Mr Steinbock enquired if there was "follow up to the Grange Road access for the 'right of way'". The then Chairman, Mr Rustom M Ghadiali ("Mr Ghadiali"), explained that it was "difficult", would be "an expensive legal matter" and that the management council would be "looking into it".

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(b) During the same AGM, another subsidiary proprietor asked if "the track" (which the MCST understood to mean the Servient Tenement) could be improved. In response, the Chairman said that the road was not the MCST's property and it was not feasible to expend money on its maintenance. The Chairman also "encouraged the residents to make full use of the access" to "maintain the 'right of way'".

(c) On 6 February 2004, during a meeting of the management council of Grange Heights, a council member by the name of Mr Philip Chee expressed concern regarding whether the Grange Heights residents were entitled to use the Servient Tenement and whether the MCST's lawyer had thoroughly researched the history of the case. Mr Chee also apparently "suggested that the lawyer review and study the facts from the beginning". In response, he was told by the council secretary that the MCST was indeed entitled to the right of way and that the MCST's lawyer had done the necessary to reach that conclusion.

Reasonable and probable cause

50 Regarding "reasonable and probable cause", Lee Tat cited the test by Hawkins J in the English case of *Hicks v Faulkner* (1878) 8 QBD 167 at 171, also adopted by Lord Atkin in *Herniman v Smith* [1938] AC 305 at 316:

> [A]n honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

51 However, our Court of Appeal in *Zainal bin Kuning* noted that the majority of the Law Lords in *Glinski v McIver* [1962] AC 726 ("*Glinski*") had

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"somewhat moderated" Hawkins J's test, such that "[t]he degree of guilt believed by the prosecutor need not extend to a belief that the accused would be convicted but whether there is a case fit to be tried" (*Zainal bin Kuning* at [56]). In *Glinski*, Lord Denning described the requirement of "reasonable and probable cause" at 758 as follows (approved in *Willers v Joyce (No 1)* at [54] *per* Lord Toulson):

> … [I]n truth [the defendant] has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause "to bring the [accused] to a fair and impartial trial": see *Johnstone v Sutton* [1 Term Rep 493, 547].

Lord Devlin expressed a similar view at 766–767:

> … [Reasonable and probable cause] means that there must be cause (that is, sufficient grounds …) for thinking that the plaintiff was probably guilty of the crime imputed: *Hicks v Faulkner* [8 QBD 167, 173]. This does not mean that the prosecutor has to believe in the probability of conviction: *Dawson v Vandasseau* [(1863) 11 WR 516, 518]. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether *there is a case fit to be tried*.
>
> [emphasis added]

52 Thus in *Zainal bin Kuning*, the test the court adopted was "whether the first respondent believed that there was a case against the appellants fit to be tried" (at [57]).

53 As to the degree of care that a person should take to be satisfied that there is cause, *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) ("*Clerk & Lindsell on Torts*") states at para 16–39:

> A person is not bound before instituting proceedings to see that he has such evidence as will be legally sufficient to secure a conviction. … Neither is it necessary that the defendant should act only on legal evidence and inquire into everything at first hand. *It is sufficient if he proceeds on such information as a*

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> *prudent and cautious person may reasonably accept in the ordinary affairs of life …*
>
> [emphasis added]

54 Having considered the evidence and the course of the First to Fifth Actions, I am compelled to conclude that the MCST did indeed have reasonable and probable cause. I will deal with each of Lee Tat's arguments at [45] above in turn.

Not obvious that the Grange Heights residents could not use the right of way

55 First, I do not agree that it was so obvious that the Grange Heights residents were not entitled to use the right of way that the MCST could not have truly believed otherwise.

56 The strongest support for Lee Tat's contention was that Chua J had in *Grange Heights (No 1) (HC)* denied the MCST's counterclaim on the basis of its lack of standing (see [11] above). He thus clearly recognised the relevance of *locus standi*. However, by the time the MCST instituted the Third Action, Chua J's observation had been overtaken by the pronouncements of the High Court and Court of Appeal in the Second Action.

57 The judgments in the Second Action did not make it obvious that the Extension Issue had been left undecided. Indeed, the Amalgamation Issue was specifically considered. The fact that Lee Tat had expressly argued the Extension Issue before the High Court Judge in the Second Action was noted by the Court of Appeal in *Grange Heights (No 2) (CA)* at [13]:

> The main contentions of the defendants [*ie*, Lee Tat] before the learned trial judge were:
>
> (a) …

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

58 Both the High Court Judge and the Court of Appeal in the Second Action ruled in the MCST's favour. It has since been explained in *Grange Heights (No 3) (CA)* at [32(g)] that the MCST's success in the Second Action was due to the fact that its use of the Servient Tenement did not substantially interfere with Lee Tat's enjoyment of the right of way. Its success did not extend to the Extension Issue, which Lee Tat had lacked *locus standi* to argue and which had therefore not been decided in the Second Action. While that account must on reflection be correct, I do not think that this was obvious from the Second Action judgments themselves. The High Court Judge's brief grounds of decision in *Grange Heights (No 2) (HC)* did not expressly rule on the Extension Issue, but neither did he expressly reserve the Extension Issue. He ruled only on the Amalgamation Issue, at [8]:

> Plainly, the [MCST's] right of way is derived from or based on the right of way given to [it] as [the owner] of Lot 111-34. The number 111-34 is no longer the lot number for that parcel of land; that number has been extinguished and the parcel of land has become and is a part of [a] larger parcel of land known as Lot 687. However, the land is still there and the right of way which runs with the land remains intact. The amalgamation of Lots 111-34 and 561 into one lot known as Lot 687 is only for the purposes of survey and issue of documents of title. It does not destroy or extinguish the right of way which runs with the land and enure to the benefit of the owners for the time being of the land. Accordingly, in my judgment, the [MCST] as [the owner] of the land, formerly known as Lot 111-34 but now a part of Lot 687, still [has] the right of way over the [S]ervient [T]enement, and [Lee Tat] in erecting the gate and the fence ha[s] interfered with the [MCST's] right of way.

59 These remarks were cited in *Grange Heights (No 2) (CA)* at [16]. Together the two decisions could plausibly have been misconstrued as an

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implicit or even explicit rejection of the Extension Issue. Even if the Extension Issue had not been specifically decided by the judgments in the Second Action, the Court of Appeal noted that it had been raised in argument (*Grange Heights (No 2) (CA)* at [13]). The fact that it had been argued, and that the courts ultimately ruled for the MCST, would have led a reader to the fair conclusion that the Extension Issue had been considered and implicitly rejected on its merits rather than on the basis of *locus standi*. The Amalgamation Issue, like the Extension Issue, required Lee Tat to have *locus standi* to advance it. Yet the court considered the Amalgamation Issue notwithstanding Lee Tat's lack of *locus standi*, suggesting that it could well have done the same *vis-à-vis* the Extension Issue. In fact, this was a key point on which Chao JA dissented from the majority in *Grange Heights (No 4) (CA)*. Chao JA interpreted the Second Action judgments as having left the Extension Issue undecided, such that they could not have given rise to an issue estoppel (see *Grange Heights (No 4) (CA)* at [48] and [69]). On the other hand, the High Court Judge and the majority of the Court of Appeal firmly took the view that the Extension Issue formed part of the *ratio* of the Second Action judgments and Lee Tat was therefore estopped from re-litigating it in the Fourth Action (see *Grange Heights (No 4) (HC)* at [30] and *Grange Heights (No 4) (CA)* at [16] and [24]). The majority considered but rejected the argument that Lee Tat had lacked *locus standi* at the time of the Second Action to challenge the MCST's right of way. In the majority's view, none of Lee Tat's authorities "stood for the proposition that a dominant tenement owner could never question the inappropriate scope of use of the right of way by a fellow dominant tenement owner": *Grange Heights (No 4) (CA)* at [13]. The majority thus rejected the notion that the courts in the First and Second Actions had refrained from determining the Extension Issue for Lee Tat's want of standing. It was not until the Third Action that the record was set straight. If the High Court Judge and the majority in the Court of Appeal in the Fourth

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Action could have read the *ratio* of the Second Action judgments as having decided the Extension Issue, even after hearing full submissions from Lee Tat, which was represented by Senior Counsel at the time, it was certainly conceivable and understandable for the MCST – and the lawyers who advised them – to have believed that the MCST might have a right of way.

60 This misapprehension was all the more understandable because the Amalgamation Issue and the Extension Issue are conceptually similar, although distinct. The principle in *Harris v Flower* applies to the latter. They both arose from the fact that Lots 111-34 and 561 were amalgamated. The Amalgamation Issue dealt with whether the amalgamation extinguished the right of way appurtenant to Lot 111-34 as a matter of law, while the Extension Issue dealt with whether the right of way could be used for the purpose of accessing the newly added plot. An adverse ruling on either issue would have sufficed to dispose of the MCST's entitlement to use the right of way. Thus it may not have been immediately apparent to the MCST that the courts' remarks in *Grange Heights (No 2) (HC)* and *Grange Heights (No 2) (CA)*, directed to the effect of the amalgamation upon the MCST's entitlement to the right of way, were solely confined to the *existence* of the right of way as opposed to its *use for the benefit of Lot 561*. Neither the High Court nor the Court of Appeal in the Second Action explicitly stated that Lee Tat lacked *locus standi* to argue the Extension Issue. Neither court clarified that it ruled only on the Amalgamation Issue. And neither court said anything to qualify such statements as that "[the MCST] as the [owner] of Lot 111-34 … [has] a right of way over the [S]ervient [T]enement"; that despite the amalgamation "the right of way which runs with the land remains intact"; and that "[the MCST] as [the owner] of the land … still [has] the right of way over the [S]ervient [T]enement" (*Grange Heights (No 2) (HC)* at [7]–[8], cited with approval in *Grange Heights (No 2) (CA)* at [16]).

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61 The MCST's belief in its right of way would have been further fortified by Lee Tat's behaviour following its acquisition of the Servient Tenement in 1997, particularly in the context of the contempt proceedings. Shortly after acquiring ownership of the Servient Tenement, Lee Tat erected a "No Trespassers" sign there and hung a chain across one end of it. The MCST instructed its solicitors to write to Lee Tat on 19 September 1997 to request the removal of those items. Lee Tat personally replied on 23 September 1997, putting the MCST on notice that Lee Tat was now the owner of the Servient Tenement, denying the MCST's right of way and purportedly prohibiting the MCST from using the Servient Tenement. The letter ended with: "If your clients [*ie*, the MCST] or any of the subsidiary proprietors fail to comply with our notice [prohibiting them from passing and re-passing over the Servient Tenement], we will seek the necessary legal remedies." Interestingly, a letter from Lee Tat's solicitors on 15 October 1997 again referred to legal recourse but adopted a somewhat different tone:

> Our clients, Lee Tat Development Pte Ltd, are desirous of seeking *a court declaration to determine whether the subsidiary proprietors of [Grange Heights] are entitled to use [the Servient Tenement] as a right of way* to and from their apartments …
>
> Lot 111-31 is not a servient tenement of Lot 561 which has its own access via St Thomas Walk and River Valley Road. We are instructed that the subsidiary proprietors of Grange Heights Estate and their agents, servants and/or invitees are using Lot 111-31 as an additional access road to and from Lot 561.
>
> Our clients [*ie*, Lee Tat] are the owner of Lot 111-31 and they are of the view that the subsidiary proprietors of Grange Heights Estates [*sic*] cannot use Lot 111-31 as an access to and from Lot 561. Your clients, by relying on the Order of Court dated 5th December 1990 to commence the committal proceedings fixed for hearing this Friday, are asserting that they can.
>
> In the circumstances, *unless your clients withdraw their assertion, our clients will refer the matter for determination by the court*, in which event, will you please let us know whether you are authorised to accept service of process on behalf of your clients.

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[emphasis added]

62 Unlike Lee Tat's own letter on 23 September 1997, which had unambiguously threatened legal action against the MCST for use of the Servient Tenement, the letter from Lee Tat's solicitors was more tentative. Although the third paragraph implicitly referred to the *Harris v Flower* principle, this was described as Lee Tat's "view". The legal recourse sought was a determination as to *whether* the MCST was entitled to use the right of way – this was apparently an open question, not a foregone conclusion. There was no suggestion of any tortious liability, only declaratory relief. This moderation in tone suggests that the case was not as clear-cut as Lee Tat suggested. The guarded tone of the letter must be contrasted with Lee Tat's emphatic position in the Suit that the position on the right of way was crystal clear given the *Harris v Flower* principle.

63 Despite the Grange Heights residents' continued use of the Servient Tenement, Lee Tat did not take the legal action it had threatened in its letter of 23 September or its solicitors' letter of 15 October. Instead, it was the MCST that took out committal proceedings for Lee Tat's breach of Coomaraswamy J's injunction in the Second Action. The contempt proceedings would have presented the perfect opportunity for Lee Tat to raise the Extension Issue in its new capacity as owner of the Servient Tenement. However, instead of contesting the contempt proceedings, Madam Ching simply warded them off by giving an undertaking to the court that the MCST was at liberty to inform the Grange Heights residents that they had a right of way over the Servient Tenement and that the "No Trespassers" sign did not apply to them (see [15] above). If Lee Tat was so confident of its position on the Extension Issue or if the position was as crystal clear as Lee Tat contended in the Suit, it is difficult to understand why it shied away from asserting this at the critical moment when

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it acquired standing to do so. Instead it capitulated and meekly legitimised the Grange Heights residents' use of the Servient Tenement. Lee Tat maintained this passive approach in subsequent committal proceedings. The second committal proceedings resulted in a fine being imposed on Madam Ching, while the third contempt was purged before the date of the hearing. In this regard, the Court of Appeal in the Fourth Action noted that Madam Ching's undertaking reinforced the "incontrovertible effect" of the Second Action, conveying "the clear message that residents of Grange Heights using the [S]ervient [T]enement would not be trespassing" (*Grange Heights (No 4) (CA)* at [18]). The MCST thus submitted that Lee Tat's conduct in this regard gave the MCST the impression that "Lee Tat clearly recognised that under the law as it stood then, the MCST was entitled to use the Right of Way".

64 Although Madam Ching's undertaking had reserved Lee Tat's right to commence any legal action as it might be advised, no legal action was subsequently undertaken. Lee Tat's failure to contest the MCST's right of way despite its position as owner of the Servient Tenement was conspicuous, as noted in *Grange Heights (No 4) (HC)* at [46]–[49] and *Grange Heights (No 4) (CA)* at [19]. Lee Tat took no steps to raise the Extension Issue until it commenced the Fourth Action in 2004, and even that was in response to the MCST's application in the Third Action. Had the MCST not brought the Third Action to repair and maintain the right of way, the Fourth Action may never have been brought. Until 2004, it would not have been readily apparent that Lee Tat regarded its acquisition of the Servient Tenement as legally significant or as a threat to the MCST's continued use of the right of way. On the contrary, Lee Tat's submissiveness in the contempt proceedings and delay in contesting the MCST's right of way, despite having acquired ownership of the Servient Tenement, would have further reinforced the MCST's belief that it was indeed entitled to a right of way. Lee Tat's delay in action was all the stranger given

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that Lee Tat allegedly wanted to redevelop the Servient Tenement, and it would have been in Lee Tat's financial interests to do so as soon as possible. The fact that Lee Tat refrained from doing so for such a long period of time suggests some recognition or suspicion that the MCST really did have a right of way over the Servient Tenement.

65 It is also telling that the MCST made no attempt to purchase the Servient Tenement when it was put up for sale by the Official Receiver in 1996. Both the MCST and Lee Tat were invited to submit bids for the Servient Tenement but only Lee Tat did so. Mr Steinbock, who was a member of the management council from 1991 to 1996, explained during cross-examination that the MCST was under some time pressure. However, he also explained that the MCST declined to submit a bid because it did not think that the sale of the Servient Tenement would affect its right of way one way or another:

> It was given 15 days to reply to the offer and we are -- MCST, Management Corporation, and we need 21 days to call on an EOGM. So we had no chance to make an offer. In the MCST, we reasoned also -- we don't protest it, and *we reasoned that the right of way was decided already, and also it was sold with the right of way, plot unit 31.* So probably we thought Lee Tat was interested over plot ratio. We don't understand why they paid $3 million for the road when they could buy it for $10,000, and *we both should be able to use the road.*
>
> [emphasis added]

66 Lee Tat alleged that the MCST must have been advised that there was no right of way over the Servient Tenement, but sought to retain access to Grange Road for financial reasons. However, if this were true, the easiest thing for the MCST to do would have been to buy the Servient Tenement. In light of Lee Tat's antagonistic position towards the MCST's use of the Servient Tenement and the financial consequences of losing access to Grange Road, the MCST would hardly have allowed the insufficiency of time to pose a barrier to

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its acquisition of the Servient Tenement. Indeed, it is hard to fathom the management council being so lackadaisical in protecting Grange Heights' financial interests. The management council members owe fiduciary duties analogous to those of a company director (*Fu Loong Lithographer Pte Ltd and others v Mok Wai Hoe and another and another matter* [2014] 3 SLR 456 ("*Fu Loong Lithographer*") at [27]) and their inaction in such circumstances would have potentially exposed them to allegations of breach of such duties. The fact that the MCST took no steps to bid for the Servient Tenement or seek an extension of time gives credence to its assertion that it genuinely believed, as a result of the Second Action, that it had a right of way over the Servient Tenement. It was thus apparently content for Lee Tat to acquire the Servient Tenement, confident that its right of way (and by extension its financial interests) would be unaffected.

MCST's position in the Fourth Action

67 Lee Tat's second point was that the MCST had argued in the Second Action that Lee Tat lacked *locus standi* to argue the Extension Issue, but subsequently argued in the Fourth Action that the Extension Issue was *res judicata* (see [47] above).

68 I accept that these positions were inconsistent in the sense that if the courts had accepted the MCST's argument in the Second Action and refused to decide the Extension Issue, then the MCST's argument in the Fourth Action could not have been correct (*ie*, the Extension Issue could not have been *res judicata*). However, for the reasons I have already given (at [56]–[66] above), I do not think it was so clear that the courts in the Second Action had indeed refused to decide the Extension Issue. It may well have appeared to the MCST that the courts in the Second Action, notwithstanding the MCST's argument on

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locus standi, had taken it upon themselves to decide the Extension Issue and had ruled on it in the MCST's favour. Certainly it was arguable. The question, in my view, is not whether the MCST's assertion that the Extension Issue was *res judicata* was at odds with its argument in a previous set of proceedings, but whether the MCST could honestly have believed that this assertion was correct. For the foregoing reasons I think that it could have.

69 Moreover, even if it were true that the MCST had suppressed the fact that it had raised the *locus standi* argument in the Second Action, this clearly had no bearing on the outcome in the Fourth Action. Counsel for Lee Tat made the *locus standi* argument anew in the Fourth Action. The majority expressly noted Lee Tat's submission that "the only party with *locus standi* to advance the *Harris v Flower* principle is the owner of the [S]ervient [T]enement" and that "the silence of the High Court and the Court of Appeal in the [Second Action] might indicate that the court made no decision on the [Extension Issue] at all" (*Grange Heights (No 4) (CA)* at [13]). Chao JA penned a strong dissent on that basis, concluding that the Extension Issue had been left undecided in the Second Action as a result of Lee Tat's lack of standing to raise it. Chao JA's dissent is significant, as I mentioned earlier, because it shows that the *locus standi* argument was fully aired before and appreciated by the Court of Appeal in the Fourth Action. The majority also considered this argument, but expressly rejected it after hearing Lee Tat's submissions on that point (*Grange Heights (No 4) (CA)* at [13], quoted at [59] above). This shows that the MCST's omission to mention its stance in the Second Action did not have the effect of removing the *locus standi* argument from the Court of Appeal's consideration altogether. Instead, the members of the Court carefully considered the argument and ultimately took different positions on it. The alleged suppression did not impact the deliberations and conclusions of the Court of Appeal in the Fourth Action. Accordingly, there was no reason for the MCST to doubt the correctness

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of the majority's ruling that it enjoyed a right of way over the Servient Tenement notwithstanding its position in the Second Action.

MCST members' concerns regarding the MCST's entitlement to use the right of way

70 Third, Lee Tat pointed out that members of the MCST and the management council had expressed concerns as to whether the Grange Heights residents were legally entitled to use the right of way (see [49] above). In my view, this did not at all suggest that the MCST lacked reasonable and probable cause in the Third and Fifth Actions.

71 For one, none of what was said by the members of the MCST conveyed a belief that the MCST or the Grange Heights Residents were *not* entitled to use the right of way. It was natural for some members to express concern about the entitlement, and to want to be reassured of it, but that is a far cry from saying that the MCST knew that it was not entitled to the right of way. Even if some members doubted that the MCST was legally entitled to the right of way – which may perhaps be inferred from Mr Chee's comments at [49(c)] above, but even that is speculative – those doubts cannot be imputed to the entire management council as a whole or be regarded as representing the views of the MCST. In fact, nobody except Mr Chee appears to have expressed such doubts. In any event, the council secretary sought to reassure Mr Chee that the MCST's lawyers had looked into the matter and concluded that the MCST was entitled to the right of way.

72 Moreover, doubts about one's case do not amount to an absence of reasonable and probable cause. Doubts are to be expected save in the most clear-cut of cases. As I have already noted (at [51] and [52] above), reasonable and probable cause does not require the MCST to have believed in the probability

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of success in the Third and Fifth Actions. It only requires the MCST to have believed that there was a "proper case to lay before the court" and that there was a case "fit to be tried". None of the discussion which Lee Tat cited suggested that the MCST did not believe that there was a case fit to be tried.

Legal advice

73 Lee Tat strongly criticised what it saw as the MCST's attempt to rely on the purported contents of the legal advice that it had received. In Summons No 1622 of 2015, which was Lee Tat's application for specific discovery of the legal advice that the MCST had received, the MCST represented that it would rely at trial only on the *fact* that it had received legal advice, and not the *contents* of the legal advice. Lee Tat's application was eventually dismissed on the basis that the MCST had not waived its privilege. During trial, Mr Ghadiali testified that the MCST had honestly believed in its entitlement to the right of way and had commenced the various proceedings (including the Third and Fifth Actions) on the advice of its solicitors. Lee Tat submitted that, the MCST having previously represented that it would not be relying on the contents of the legal advice, the testimony of its witnesses on the content of that advice should not be accepted.

74 The legal advice that the MCST received is protected by both legal professional privilege and, in so far as it relates to the proceedings between the MCST and Lee Tat, litigation privilege. I am not willing to draw an adverse inference against the MCST for its decision not to waive that privilege. There are many possible reasons that a party might not want to waive legal professional privilege, and I do not think the inference can safely be made that the MCST's reason for its decision was that such advice would if produced be unfavourable to it.

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75 In the absence of any documents evidencing the contents of the MCST's legal advice, I will not speculate on its contents. All that I can accept, which Lee Tat does not dispute, is the fact that the MCST was represented (by Drew & Napier in the Second Action, and by Rajah & Tann LLP in the Third, Fourth and Fifth Actions). Notwithstanding the lack of evidence as to how the MCST was advised, the burden remains on Lee Tat to prove on a balance of probabilities that the MCST lacked reasonable and probable cause. If Lee Tat were able to show that the MCST had instituted the Third and Fifth Actions contrary to legal advice, that would certainly suggest a lack of reasonable and probable cause. But Lee Tat has not been able to prove that on a balance of probabilities.

76 First, there is insufficient evidence that the MCST's lawyers had advised it that it was not entitled to the right of way, or advised it against instituting the Third and Fifth Actions. For the reasons stated at [55]–[60] above, I cannot accept Lee Tat's submission that "no reasonable lawyer, after studying [*Grange Heights (No 1) (HC)*], would have advised the MCST that the court had recognised the Right of Way". In fact, that was exactly what the court had done in the Second Action: see *Grange Heights (No 2) (HC)* at [7]–[8] (quoted at [60] above). The majority of the Court of Appeal in the Fourth Action also took this view of the Second Action, stating that it had been "decided in the 1989 proceedings that it was lawful for the residents of Grange Heights to use the [S]ervient [T]enement as a foot path to access Grange Road and *vice versa*" (*Grange Heights (No 4) (CA)* at [16]).

77 Lee Tat pointed to correspondence which had passed between the MCST's solicitors, Drew & Napier ("D&N"), and Lee Tat's solicitors, Donaldson & Burkinshaw ("D&B"), to argue that it was "unlikely that [D&N], as of 15 October 1997, would have advised the MCST that the Court of Appeal

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in the Second Action had decided that the MCST could use the Right of Way to access Grange Heights from Grange Road".

78 I have already referred to D&B's letter to D&N on 15 October 1997 at [61] above. D&N replied on the same day (15 October 1997). The relevant paragraphs are as follows:

> Our clients reject your clients' suggestion that they are not entitled to the said Right of Way over the abovecaptioned property.
>
> The issue of the access to our clients' property via St Thomas Walk and River Valley Road had been canvassed before the Court of Appeal and did not succeed. The issue is *res judicata*.

79 According to Lee Tat, D&N's reference to St Thomas Walk and River Valley Road was highly significant. Lee Tat alleged that D&N had *deliberately* refrained from phrasing this portion of its letter in terms of the Extension Issue. It asserted that D&N did not go so far as to say that the Extension Issue had been decided in the Second Action because it knew this to be untrue. Hence the letter only stated that the "issue of the access to [Grange Heights] via St Thomas Walk and River Valley Road" was *res judicata*. This allegedly "show[ed] that Drew & Napier did not take the view that the issue of access from Grange Road had been decided in the Second Action".

80 I cannot accept this argument, which is based on Lee Tat's utterly speculative interpretation of very brief legal correspondence which it had received from the MCST's solicitors. Moreover, it was D&B's own letter that had first referred to "St Thomas Walk and River Valley Road" (see [61] above), with no reference whatsoever to *Harris v Flower*. D&N's letter could be interpreted as having merely adopted the same phrase for convenience. This correspondence was hence inconclusive and certainly said nothing about what D&N advised the MCST regarding the Extension Issue.

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81 Moreover, I have difficulty understanding why the MCST would deliberately disregard the advice of its lawyers. The MCST was represented at all times by eminent counsel whose advice it would have disregarded at its peril. Nor did I get the impression that the MCST was firmly set on suing Lee Tat without cause or on insisting on the right of way come what may. It is important to remember that the membership of the management council is constantly in flux, with new members being elected at every annual general meeting. What incentive would the council members have to agree to institute frivolous proceedings against Lee Tat contrary to legal advice? It was also hard to believe that they would have the impetus and ability to coordinate and pursue such a plan over a protracted period of time. As I have noted, the management council members owe fiduciary duties analogous to those of a company director (*Fu Loong Lithographer* at [27]) and would have exposed themselves to personal liability, say under s 61 of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"), should they have countenanced such reckless conduct.

82 As such, I am not convinced on a balance of probabilities that the MCST instituted the Third and Fifth Actions against the advice of its lawyers and therefore without belief that it had a proper case to lay before the court.

Malice

83 My conclusion that there was reasonable and probable cause renders the question of malice irrelevant: "[e]ven though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution" (*Tempest v Snowden* [1952] 1 KB 130 at 140, cited in *Clerk & Lindsell on Torts* at para 16–53). Even if that were not the case, I would not find that the MCST was malicious.

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84 In *Zainal bin Kuning*, the Court of Appeal stated at [84] that malice means "being motivated by improper and indirect considerations", and requires proof that "the prosecution was motivated not by a desire to achieve justice, but for some other reason". In *Crawford Adjusters*, Lord Kerr of Tonaghmore JSC adopted (at [109]) the following "working definition" of malice in *A v New South Wales* (2007) 230 CLR 500 at [91], which he said (at [110]) should be "no less stringent" in the civil context:

> … [T]o constitute malice, the dominant purpose of the prosecutor must be a purpose *other* than the proper invocation of the criminal law—an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.
>
> [emphasis in original]

85 In *Willers v Joyce (No 1)*, Lord Toulson (with whom Lady Hale, Lord Kerr and Lord Wilson agreed) helpfully expounded (at [55]) on the meaning of malice:

> … As applied to malicious prosecution, [malice] requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation (as in Hobart CJ's formulation [in *Waterer v Freeman* (1618) Hob 266]). But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. *The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process*. In [*Crawford Adjusters*] Mr Delessio knew that there was no proper basis for making allegations of fraud against Mr Paterson, but he did so in order to destroy Mr Paterson's business and reputation.
>
> [emphasis added]

86 Lee Tat's submissions on this point were brief. First, it reasoned that since the MCST had lacked reasonable and probable cause, it had therefore

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acted maliciously. Second, Lee Tat submitted that the MCST had from the Second to the Fifth Actions "conducted the proceedings in pursuit of an improper collateral purpose". This improper collateral purpose was to retain the land's enhanced value by virtue of the Grange Heights address and name.

87 I have already found that the MCST did not lack reasonable and probable cause. In my view, the MCST brought the Second to Fifth Actions for the *bona fide* purpose of trying the issue and was not "indifferent whether the allegation is supportable". Even if the MCST had been primarily motivated by a desire to retain the Grange Heights name and address, I do not think that would constitute an improper motive for the purposes of the tort of malicious prosecution. Retention of the Grange Heights name and address was one of the advantages flowing from the relief sought; *there was nothing spiteful or vindictive about it*. There is no evidence that the MCST had a personal agenda against Lee Tat. In this regard it must be remembered that civil proceedings, unlike criminal proceedings, are instituted for personal and private ends. Not all personal ends are improper. *Crawford Adjusters* provides a good example of the kind of objective that would qualify as malice in the context of civil proceedings.

88 In *Crawford Adjusters*, the Judicial Committee of the Privy Council found the defendant, Sagicor General Insurance (Cayman) Ltd ("Sagicor"), liable for the tort of malicious prosecution against Mr Alastair Paterson. To understand why, the factual background is important. In September 2004, Sagicor appointed Mr Paterson, a chartered surveyor, to act as its loss adjuster in relation to an insurance claim arising from damage caused by a hurricane to a development in Grand Cayman known as Windsor Village. Mr Paterson supervised and approved the payment arrangements between Sagicor and the building company which it engaged to undertake the restoration works. In June

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2005, while the restoration works were underway, Mr Frank Delessio joined Sagicor as Senior Vice President. He and Mr Paterson knew and disliked each other, and Mr Delessio expressed dissatisfaction with the manner in which Mr Paterson had carried out his duties. In July 2005, Mr Delessio stated that he intended to drive Mr Paterson out of business and destroy him professionally. He arranged for private investigators to place Mr Paterson under surveillance and invited the head of the Financial Crimes Unit of the Islands Police Service to attend a meeting between him and Sagicor's attorneys in case it should be concluded that Mr Paterson had committed a criminal offence.

89 In August 2005, Mr Delessio instructed another chartered surveyor, Mr Purbrick, to assess the value of the restoration works performed, but prohibited Mr Purbrick from speaking to Mr Paterson or the building company which had performed the works. On the basis of Mr Purbrick's reports, Mr Delessio caused Sagicor to instruct attorneys to issue proceedings against Mr Paterson on its behalf. In February 2006, Sagicor and the proprietors of Windsor Village issued a writ against Mr Paterson and the building company, alleging *inter alia* that Mr Paterson had fraudulently misrepresented the value of the restoration works undertaken by the building company. Sagicor claimed damages against Mr Paterson for deceit and conspiracy. Mr Delessio informed an officer of the Windsor Village proprietors that he intended to plant an article in the press about the allegations against Mr Paterson and the building company. He subsequently caused an article to be published in the *Caymanian Compass* in March 2006 reporting Sagicor's allegations that Mr Paterson had made misrepresentations which he knew to be false or which he had made recklessly. The currency thereby given to the allegations massively damaged Mr Paterson's reputation and employability. Three months before the dates fixed for trial, the building company disclosed invoices and other documentation which appeared to undermine Mr Purbrick's reports. Days before trial, the action was discontinued

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and judgment was entered for Mr Paterson and the building company. Mr Paterson subsequently sued Sagicor in malicious prosecution.

90 The Judicial Committee of the Privy Council found that malice lay in Mr Delessio's initiation of proceedings for the predominant purpose of ruining Mr Paterson's professional reputation. As Lord Wilson JSC remarked at [80], "the fact that [Mr Delessio] believed that Mr Paterson had defrauded Sagicor count[ed] for nothing because of the absence of reasonable cause for any such belief". The facts of the present case are totally different. Unlike Mr Delessio, the MCST acted with reasonable and probable cause and there is no evidence that it initiated the Third and Fifth Actions out of ill will towards Lee Tat. The MCST genuinely sought to have its alleged right of way over the Servient Tenement adjudicated; that its interest in doing so was primarily financial did not make the proceedings malicious any more than it rendered them an abuse of process (see [35]–[39] above). Lee Tat conflated the two issues. Lee Tat might have lost an opportunity to redevelop the land while the litigation was pending but, given that the litigation was a *bona fide* use of the court's process, it cannot be said that Lee Tat "undoubtedly suffered an injustice" at the hands of the MCST (*Crawford Adjusters* at [95] *per* Lord Kerr JSC).

91 Since the MCST neither acted maliciously nor without reasonable and probable cause in instituting the Third and Fifth Actions, Lee Tat's claim in malicious prosecution would clearly fail *even if* the tort were to be extended to civil proceedings in Singapore.

(3) Malicious falsehood

92 Lee Tat sued the MCST for malicious falsehood in respect of two statements that were published:

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(a) On 12 October 1997, the Straits Times ran an article titled "Condo's MC takes developer to court again". Mr Ghadiali (who was then the Chairman of the MCST) was reported in the article as having said that "the estate's owners had the right to use the road forever – for walking as well as for driving", and that "the residents could not give up the right to access because it was a valuable piece of land". I will refer to this as "the 1997 Statement".

(b) On 14 November 2007, the MCST's property agents, Jones Lang LaSalle, placed an advertisement in the Straits Times regarding the sale of Grange Heights by tender. The advertisement stated that there was "[c]onvenient access from Grange Road". I will refer to this as "the 2007 Statement".

93 The elements of the tort of malicious falsehood are as follows (*Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another* [2015] 2 SLR 751 ("*Golden Season*") at [159]; *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd and others* [2008] 4 SLR(R) 727 ("*WBG Network*") at [68]):

(a) that the defendant published to third parties words which are false;

(b) that they refer to the claimant or his property or his business;

(c) that they were published maliciously; and

(d) that special damage followed as a direct and natural result of their publication.

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Lee Tat submitted that the fourth requirement of special damage need not be proved as a result of s 6(1) of the Defamation Act (Cap 75, 2014 Rev Ed) ("the DA").

94 The MCST's defence was fourfold:

(a) first, the statements were true at the time that they were made;

(b) second, even if they were untrue at the time, the two statements were not published maliciously as they were made under a settled view of the law after the Second and Fourth Actions respectively;

(c) third, the statements were not "calculated to cause pecuniary damage to the plaintiff" so s 6(1) of the DA did not apply; and

(d) fourth, any cause of action in malicious falsehood arising from the 1997 Statement was time-barred by the Limitation Act (Cap 163, 1996 Rev Ed) ("the Limitation Act") as more than six years had elapsed since that statement was made.

95 I accept that the statements at [92] above amounted to assertions (whether express or implied) that the Grange Heights residents enjoyed the benefit of a right of way over the Servient Tenement. The MCST did not deny that these statements were made, although it disputed that the second statement by Jones Lang LaSalle could be attributed to the MCST. I accept that the statement, although published by Jones Lang LaSalle, is attributable to the MCST. However, I do not agree that the 1997 and 2007 Statements amounted to malicious falsehoods.

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Attribution of the 2007 Statement to the MCST

96 I will briefly explain why I rejected the MCST's argument that the 2007 Statement could not be attributed to it. Lee Tat rightly observed that when a property agent is engaged to sell or buy real property, he is the agent of the person who engaged him: *Yuen Chow Hin and another v ERA Realty Network Pte Ltd* [2009] 2 SLR(R) 786 at [13]. Jones Lang LaSalle was therefore the MCST's agent at the time that it made the 2007 Statement. Indeed, the MCST did not dispute that Jones Lang LaSalle was its agent or that it had placed the advertisement of Grange Heights in the Straits Times in its capacity as the MCST's agent. What the MCST disputed was whether Jones Lang LaSalle had the authority to make the *particular* statement that Grange Heights enjoyed "[c]onvenient access from Grange Road". The MCST submitted that it did not have such authority for two reasons:

(a) In so far as the 2007 Statement was untrue, Jones Lang LaSalle lacked implied authority to make it because an agent has no authority from his principal to state any falsehood (*Mullens v Miller* (1882) 22 Ch D 194 ("*Mullens v Miller*") at 199).

(b) Nor could it be said that the 2007 Statement, although unauthorised, was subsequently ratified by acquiescence by the MCST. The MCST's inaction did not "amount to clear evidence that [it] adopt[ed] or recognise[d]" the statement (*Eng Gee Seng v Quek Choon Teck and others* [2010] 1 SLR 241 at [35]), nor did it "*unequivocally*" signify assent [emphasis in original] (*Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [31]).

97 It should be noted that the MCST did not dispute the attribution of the 2007 Statement in its pleadings. This argument only appeared in its written

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closing submissions and reply submissions. In any event, I am of the view that the 2007 Statement is attributable to the MCST.

98 As the MCST's property agent, Jones Lang LaSalle had implied actual authority to place the advertisement for Grange Heights in the Straits Times. As stated in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [42] (citing *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at para 3–024):

> An agent who is authorised to conduct a particular trade or business or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such trade or business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties; but not to do anything that is outside the ordinary scope of his employment and duties.

99 Applying that principle, a property agent has authority to truthfully describe the property which is to be disposed of as well as "any fact or circumstance which may relate to the value of the property" (*Mullens v Miller* at 199, cited with approval in *Ng Kong Teck v Sia Kiok Kok and another* [1996] 2 SLR(R) 720 at [13]). Jones Lang LaSalle would indeed have exceeded its authority had it made *false* representations about Grange Heights, but it did not do so. My view (as will be seen) is that the 1997 and 2007 Statements were true at the time they were made, and Lee Tat's claim in malicious falsehood fails precisely for this reason. In so far as agency is concerned, the 2007 Statement fell within the scope of Jones Lang LaSalle's implied authority and was authorised by the MCST. There is hence no need to consider whether it was ratified by acquiescence.

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Statements were not false

100 I do not agree with Lee Tat's submission that the 1997 and 2007 Statements were "clearly false at the material time".

The 1997 Statement

101 The 1997 Statement was made after the Second Action had concluded, and in between the first and second set of committal proceedings. In the Second Action, although the Extension Issue was not expressly ruled upon, both courts had said quite clearly that the MCST was entitled to use the right of way:

(a) Coomaraswamy J observed that it was "common ground that the [MCST] as the [owner] of Lot 111-34 and [Lee Tat] as [the owner] of Lots 111-33 and 111-32 ha[d] a right of way over the [S]ervient [T]enement" (*Grange Heights (No 2) (HC)* at [7]).

(b) He also observed that "the [MCST's] right of way [was] derived from or based on the right of way given to [it] as [the owner] of Lot 111-34", that "the [MCST] as [the owner] of … Lot 111-34 … still ha[d] the right of way over the [S]ervient [T]enement", and that by erecting the gate and fence, Lee Tat had "interfered with the [MCST's] right of way" (*Grange Heights (No 2) (HC)* at [8]).

(c) Finally, he stated that Lee Tat was "not entitled to erect the gate and fence as [it] did and close the right of way, which [it had] *in common with others*" [emphasis added] (*Grange Heights (No 2) (HC)* at [10]).

102 The Court of Appeal affirmed Coomaraswamy J's decision and cited the above *dicta* in *Grange Heights (No 2) (CA)* at [16]. The Court of Appeal also referred to the First Action and noted at [20(a)] that Collin had argued the

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Extension Issue, *ie*, that "that [HLH] as the owners of Lot 561 were not entitled to use nor permit any purchasers of Grange Heights to use Lot 111-31 for the purpose of either passing to or from Grange Road", but that this had been dismissed, although the portions cited from *Grange Heights (No 2) (HC)* did not go so far as to say that the MCST had a right of way over the Servient Tenement.

103 Both courts in the Second Action thus concluded that Lee Tat was wrong to have prevented the Grange Heights residents from traversing the Servient Tenement, and granted the MCST an injunction to stop Lee Tat from doing so. Needless to say, such relief would have been pointless if the MCST was not entitled to use the Servient Tenement in the first place. The award of such relief was thus clearly grounded on the premise that the MCST and Grange Heights residents were legally entitled to the right of way. I therefore take the view that at the time that the 1997 Statement was made, the law (as a result of the Second Action judgments) was that the MCST, as the owner of Lot 111-34, was entitled to use the right of way.

The 2007 Statement

104 The 2007 Statement was made after arguments were heard in the Third Action appeal but before the Court of Appeal released its judgment. The last judicial pronouncement on the subject would have been in *Grange Heights (No 3) (HC)*, and before that, *Grange Heights (No 4) (CA)*. Both these decisions, like the judgments in the Second Action referred to above, were clearly made on the basis that the MCST had a right of way over the Servient Tenement:

(a) In *Grange Heights (No 3) (HC)*, Woo J referred to F A Chua J's decision in the First Action that there was no substantial interference with Lee Tat's enjoyment of its right of way and his dismissal of Lee

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Tat's claim. Woo J construed his decision as having been made on the basis that HLH was entitled to the right of way (*Grange Heights (No 3) (HC)* at [21] and [32(a)]).

(b) Woo J also referred to Coomaraswamy J's and the Court of Appeal's decisions in the Second Action, which he interpreted as having been made "on the basis that the MC[ST] was still entitled to enjoy the right of way over [L]ot 111-31" (*Grange Heights (No 3) (HC)* at [32(b)]).

(c) Woo J recounted, at [29], his own prior decision in *Grange Heights (No 4) (HC)*, in which he had dismissed Lee Tat's claim on the basis that the Extension Issue had already been determined in the MCST's favour in the Second Action. Woo J reiterated his view that this determination bound Lee Tat, even though by the time of the Fourth Action Lee Tat had acquired ownership of the Servient Tenement (*Grange Heights (No 3) (HC)* at [30]).

(d) For that reason, in the Third Action, Woo J "intimated to Lee Tat's counsel that in the light of the various court decisions, the parties had to proceed on the basis that *the MC[ST] still had a right of way over [L]ot 111-31*" [emphasis added] (*Grange Heights (No 3) (HC)* at [32]). Nevertheless Lee Tat continued to attempt to litigate the existence of the right of way, which Woo J found it "was not entitled to do" (*Grange Heights (No 3) (HC)* at [32]).

(e) Woo J further noted that Lee Tat's response to the committal proceedings and the court's rulings thereon "were also on the basis that the MC[ST] was entitled to enjoy the right of way" (*Grange Heights (No 3) (HC)* at [33]).

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105 The majority of the Court of Appeal in the Fourth Action had earlier articulated the same view:

> (a) In *Grange Heights (No 4) (CA)*, the majority stated at [2] that "the precise issue in this appeal, which is whether the residents of Grange Heights have a right of way over Lot 111-31 to gain access to and from Grange Road, has been finally and conclusively determined on the merits by courts of competent jurisdiction in the 1989 proceedings".
>
> (b) In the majority's view, it had been decided in the Second Action that it was "lawful for the residents of Grange Heights to use the [S]ervient [T]enement as a foot path to access Grange Road and *vice versa*" (*Grange Heights (No 4) (CA)* at [16]). The majority understood Coomaraswamy J as having "roundly rejected" Lee Tat's argument on *both* the Extension Issue and the Amalgamation Issue (*Grange Heights (No 4) (CA)* at [17]).
>
> (c) By Coomaraswamy J's restraining order of 5 December 1990, "the residents of Grange Heights, through the MCST, were entitled to an unobstructed use of the right of way to get from Lot 111-34 to Lot 561 and *vice versa*" (*Grange Heights (No 4) (CA)* at [18]). The order prevented Lee Tat from "interfering with the exercise of the right of way of the MCST over the [S]ervient [T]enement" (*Grange Heights (No 4) (CA)* at [20]).

106 Thus at the time that the 2007 Statement was made, it had been made amply clear both by the High Court in *Grange Heights (No 3) (HC)* as well as by the Court of Appeal in *Grange Heights (No 4) (CA)* that the Grange Heights

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residents *were entitled* to use the Servient Tenement to pass between Grange Road and Grange Heights.

107 Lee Tat's counter-argument in the Suit was that the MCST could not rely on *Grange Heights (No 4) (CA)* when the MCST had allegedly misled the Court on the *Harris v Flower* principle. On the contrary, I think the MCST was fully entitled to rely on the correctness of the Court of Appeal's decision. As I have stated at [69] above, I do not think that the MCST's omission to mention its stance in the Second Action had any bearing on the Court of Appeal's decision in the Fourth Action. The decision was made on Lee Tat's appeal and the Court had the benefit of hearing full submissions from both Lee Tat and the MCST. In fact, the strong dissenting opinion from Chao JA as well as the majority's rejection of the *locus standi* argument show that Lee Tat's perspective had been articulated and fully considered, and there was no reason for the MCST to doubt the force or correctness of *Grange Heights (No 4) (CA)*.

Statements were not made maliciously

108 Lee Tat submitted that malice in the context of the tort of malicious falsehood was "generally the same" as malice in the context of malicious prosecution, and simply reiterated its submissions *vis-à-vis* malicious prosecution.

109 Malice is proved by showing knowledge of falsity or lack of belief in the truth of the words complained of: *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 ("*Low Tuck Kwong*") at [82] (see also *The Law of Tort* (Ken Oliphant gen ed) (LexisNexis, 2nd Ed, 2007) ("Oliphant, *The Law of Tort*") at para 27.10). Lack of belief has also been described as a "reckless disregard of the true facts", which exists where the defendant is shown "to have not cared or

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considered if the statement was true" (*WBG Network* at [72], citing *Maidstone Pte Ltd v Takenaka Corp* [1992] 1 SLR(R) 752 at [50]). So malicious falsehood will not be made out where a false statement was made "in the belief, even a careless belief, that it was true" (*Golden Season* at [163], citing *Gatley on Libel and Slander* (Patrick Milmo & W V H Rogers eds) (Sweet & Maxwell, 11th Ed, 2008) at para 21.7), unless it was published with the *dominant intention* of injuring the plaintiff (*Golden Season* at [92]; see also Oliphant, *The Law of Tort* at para 27.11).

110 I have found that malice was not made out in the context of malicious prosecution (see [83]–[91] above). Nor is it made out here. The weight of judicial authority at the time of the 1997 Statement and 2007 Statement was firmly in favour of the MCST enjoying a right of way over the Servient Tenement. There was hence no evidence that the statements were made either with knowledge of falsity, recklessness as to truth or a predominant intention of injuring Lee Tat.

Section 6(1) of the DA does not apply

111 Even assuming *arguendo* that the two statements were both false and malicious, s 6(1) of the DA does not apply. Section 6(1) states:

> **Slander of title, etc.**
>
> **6.**—(1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage —
>
> > (*a*) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
> >
> > (*b*) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

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112 The words "calculated to" have been interpreted to mean "likely to produce the result" (*DHKW Marketing and another v Nature's Farm Pte Ltd* [1998] 3 SLR(R) 774 at [39], cited with approval in *Low Tuck Kwong* at [112] and *Golden Season* at [162]). If the provision applies, a plaintiff does not need to prove specific pecuniary loss but instead the court will infer the existence of such loss, with the result that the damages will be "at large": *Low Tuck Kwong* at [113]. Lee Tat's brief submission in this regard was that:

> The MCST was aware at all material times that Lee Tat was a property developer. The MCST would also be aware that any right of way on Lot 111-31 would affect Lee Tat's ability to develop the land. It is therefore submitted that when the statements were published, it was more likely than not that pecuniary damage would be caused to Lee Tat.

113 The third sentence does not follow from the first two. If the MCST had a right of way over the Servient Tenement, that would indeed restrict Lee Tat's ability to develop the Servient Tenement. But the two statements made by Mr Ghadiali and Jones Lang LaSalle could have had no effect on whether the right of way existed or not. That was strictly a question of law. It was the courts' rulings in the Second and Fourth Actions which had found that the MCST did enjoy a right of way over the Servient Tenement. It was this finding that prevented Lee Tat from trying to develop the Servient Tenement. The 1997 and 2007 Statements simply communicated the effect of those decisions to the media and the public; the making of the statements themselves could have had no effect on Lee Tat's ability to develop the land. It is not as though, had the statements not been made, Lee Tat would have had *more* of an ability to develop the land. I therefore disagree that the statements were likely to cause pecuniary damage to Lee Tat. Hence s 6(1) of the DA was inapplicable and Lee Tat had to prove special damage as the fourth requirement of the tort (see [93] above).

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Special damage

114 Special damage is described in Oliphant, *The Law of Tort* at para 27.12 as "some actual, temporal loss that is pecuniary or capable of being estimated in money". It was described extensively in *Low Tuck Kwong* at [94]–[95] in the context of the tort of defamation:

> [T]he availability of [an award for special damage] is not as wide as the Appellant's pleadings allege it to be, *ie*, all consequential pecuniary loss. … It is true that to constitute special damage the loss must be pecuniary, *ie*, it must be loss capable of estimation in money's worth, but the converse is not true: not all manner of pecuniary losses fall within the scope of special damage. …
>
> In *Ratcliffe v Evans* [[1892] 2 QB 524], Bowen LJ explained that in actions such as the present, where the wrong is actionable *per se*, special damage is used to denote the particular damage which a claimant suffers beyond general damage (at 528):
>
> > At times (both in the law of tort and of contract) it is employed to denote ***that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right***: see *Ashby v. White*. In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. ***Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case***, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.
> >
> > [emphasis in original in italics; emphasis added in bold italics and underline]
>
> [emphasis in original]

115 Lee Tat adduced no evidence to show that its inability to develop the land was in any way attributable to the making of the statements. In its Statement of Claim it stated:

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> [T]he [statements] were of a nature that was intrinsically injurious to the Plaintiff … A published claim by someone other than the owner of land to have an easement over that land is intrinsically injurious to the owner's interests in the land. It indicates that he is inhibited from dealing with that land in a manner that would interfere with the alleged easement. Such a claim is bound to have an adverse effect on the ability of the Plaintiff (or a third party) to develop the land and obtain planning permission, because any proposed development would have to take into account the Defendant's claimed "rights".

116 It seemed that Lee Tat was trying to blame the MCST for making the statements when it was Lee Tat's own considered decision not to redevelop the land. Clearly, Lee Tat must accept either that the statements were accurate reflections of the law at the time (in which case Lee Tat would have been unable to develop the Servient Tenement regardless of the statements), or that they were inaccurate and the MCST in fact had no right of way (in which case it was Lee Tat's decision to neither redevelop the land nor contest the statements, and not the statements themselves, which was the cause of the non-development). Lee Tat clearly took the former position, stating in its rebuttal submissions that "[t]he Right of Way and the road reserve over Lot 111-31 substantially obstructed Lee Tat's efforts to develop its land" and that it was "not in dispute that Lee Tat would have developed its land, at least sometime in 1981 or 1993 – 1996, 'but for' the Right of Way and/or the Road Reserve". In other words, Lee Tat refrained from developing its land because it accepted that the MCST enjoyed a right of way over the Servient Tenement. The 1997 and 2007 Statements merely mirrored Lee Tat's own understanding of the law prior to 1 December 2008, the date of release of *Grange Heights (No 3) (CA)*. It should also be remembered that Lee Tat had the benefit of legal advice throughout. Having made an informed decision not to redevelop the Servient Tenement, Lee Tat cannot now seek from the MCST the profits that it chose to forego.

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117 In light of my findings that the statements were not false at the time, were not made maliciously and did not give rise to special damage, I find that malicious falsehood is not made out. It is not necessary for me to consider the limitation defence in light of this conclusion.

(4) Trespass

118 Lee Tat sued the MCST for trespass in both the MCST's own capacity under s 24(2) of the BMSMA as well as its capacity as the *alter ego* of the Grange Heights residents under s 85 of the BMSMA. The thrust of its complaint was that the Grange Heights residents had used the Servient Tenement to access Lot 561 continually until 1 December 2008, the date of release of *Grange Heights (No 3) (CA)*. They were not entitled to do so because of the *Harris v Flower* principle and because the right of way had been extinguished due to the amalgamation of Lots 111-34 and 561.

119 Section 6(1)(*a*) of the Limitation Act provides that actions founded on contract or tort shall be brought within six years of the date on which the cause of action accrued. As Lee Tat commenced the Suit on 24 December 2012, its cause of action must have accrued on or after 24 December 2006. Hence any acts of trespass before 24 December 2006 must be disregarded for the purposes of the Suit.

120 As regards the acts of trespass between 24 December 2006 and 1 December 2008, the MCST's defence was that:

> (a) use of the Servient Tenement was not unlawful because the courts had upheld the MCST's right of way over the Servient Tenement in the First, Second and Fourth Actions and at first instance in the Third Action;

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(b) the Court of Appeal's decision in the Third Action that the MCST was not entitled to use the right of way should not be applied retroactively; and

(c) the MCST could not be held liable for the acts of trespass committed by the Grange Heights residents under s 85 of the BMSMA because the trespass did not relate to the common property of Grange Heights.

Whether Lee Tat was able to sue in trespass

121 The doctrine of *res judicata* is firmly grounded on "the public interest in the finality of litigation" and the "policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question, *even though the decision may be wrong*" [emphasis in original] (*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporation Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [71], citing *Mulkerrins v PricewaterhouseCoopers (a firm)* [2003] 1 WLR 1937 at [10]). The whole point of the doctrine is that even erroneous decisions must be given effect to. The *Arnold* exception operates as "a *very narrow*" exception to this doctrine [emphasis in original] (*TT International* at [150]), and it must be very carefully construed. Importantly, the *Arnold* exception was not intended for parties to unwind or claw back benefits that had accrued as a result of the old law. This was most recently observed in *TT International* at [188]:

> We turn now to the question of what the limits of the *Arnold* exception … should be. … The real difficulty in *Arnold* was that there was a patently wrong decision by Walton J which threatened to continue to guide future decisions affecting the parties concerned – in that case, future decisions as to the rent payable upon future rent reviews. In effect, the future rights of the parties were going to be determined based on a past

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> pronouncement of the law that was wrong. That is what marks *Arnold* as exceptional. It is antithetical to the rule of law that the future rights of the parties (for instance, under a contract), which are meant to be worked out against the backdrop or in the shadow of the law, should take place against a backdrop or shadow that everybody by that stage knows to be wrong. *In this sense, the* Arnold *exception is forward-looking – it does not look into the past to undo rights that have accrued pursuant to the erroneous decision, just as in* Arnold *itself, the tenants did not seek to claw back the excess rent they had paid pursuant to Walton J's erroneous construction of the rent review clause.*
>
> [emphasis added]

122 The Court of Appeal included this as one of the requirements for the *Arnold* exception to be met: "there can be no attempt to claw back rights that have accrued pursuant to the erroneous decision or to otherwise undo the effects of that decision" (at [190(d)]).

123 This principle was present at the very conception of the *Arnold* exception. To summarise briefly, *Arnold* concerned a 32-year lease with an initial yearly rent of £800,000. The rent was subject to review every five years. When the time came for the first rent review in 1983, a dispute arose between the landlords and the tenants on an issue of construction. Walton J decided the dispute in the landlords' favour and declined to grant the tenants a certificate which they required in order to appeal his decision. Subsequently, a number of cases arose concerning the same issue of construction, and the English Court of Appeal in those cases decided the issue contrary to Walton J's approach. On the strength of those cases, the tenants subsequently sought to reopen Walton J's decision at the time of the second rent review in 1988. The landlords applied to strike out the action on the ground that the tenants were barred by issue estoppel from bringing the action. The Court of Appeal in *Arnold and others v National Westminster Bank Plc* [1990] Ch 573 ("*Arnold (CA)*") held that the facts fell within special circumstances constituting an exception to issue estoppel and the House of Lords in *Arnold (HL)* ([23] *supra*) agreed.

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124 It is important to note that the injustice which motivated their Lordships to reconsider Walton J's decision notwithstanding issue estoppel was the fact that the parties had an *ongoing* legal relationship. Lord Keith of Kinkel stated in *Arnold (HL)* at 110E that it was "most unjust that a tenant should be faced with a succession of rent reviews over a period of over 20 years, all proceeding upon a construction of his lease which is highly unfavourable to him and is generally regarded as erroneous". Lord Keith also added (at 110F) that if the issue could not be re-opened, the landlord "would most unfairly be receiving a very much higher rent than he would be entitled to on a proper construction of the lease". The original (erroneous) decision would therefore have impacted the parties far beyond the first rent review if issue estoppel operated. The same concern had also weighed on Staughton LJ in the court below. He observed in *Arnold (CA)* at 599A that the change in the law, together with the fact of the parties' "continuing contractual relationship", justified the decision to allow the tenants to re-argue the construction of the lease. This explains the requirement in *TT International* (at [190(a)]) that "the decision said to give rise to issue estoppel must directly affect the *future* determination of the rights of the litigants" [emphasis in original]. After all, the doctrine of *res judicata* applies even to erroneous decisions. What sets cases under the *Arnold* exception apart is that the erroneous decision will, if not re-opened, *continue* affecting parties' rights.

125 The re-opening of Walton J's original decision was therefore only meant to affect *future* relief. That is very clear. Staughton LJ and Mann LJ in *Arnold (CA)* were expressly anxious that the first rent review, which was the subject of Walton J's decision in 1983, should *not* be disturbed. Mann LJ stated at 600F–G:

> I was at one time during the course of argument troubled by *In re Waring (No. 2)* [1948] Ch 221. However, that case is

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> distinguishable in my view, because it was a decision of the court which it was sought to re-open. Here there is no attempt to re-open the rent review for 1983 to 1988. The present question is as to a totally independent rent review and the respondents to this appeal have expressly disclaimed any intent to upset the previous determination. Therefore *In re Waring (No. 2)* no longer troubles me.

126 Staughton LJ likewise stated at 596G–H:

> I have considered the reasons given by Walton J. for reaching a different conclusion in *National Westminster Bank Plc. v. Arthur Young McClelland Moores & Co.* [1985] 1 E.G.L.R. 61, but I am afraid that I cannot agree with them. Nevertheless that decision remains binding between the parties so far as concerns the rent payable between June 1983 and June 1988. The question is whether it is still binding from 1988 onwards.

127 The decision not to rectify or undo the outcome of the original ruling was in accordance with the prior decision of the Court of Appeal in *Property and Reversionary Investment Corporation Ltd v Templar and another* [1977] 1 WLR 1223 ("*Templar*"), which was cited with approval by Lord Keith in *Arnold (HL)* (at 109G) as well as by Dillon LJ (at 588G and 595H) and Staughton LJ (at 598G) in *Arnold (CA)*. In *Templar*, a landlord's claim for increased rent under a rent review clause had been dismissed upon the ground of non-compliance with the time limit for initiating the review. Two and a half years later, the House of Lords reversed two decisions of the Court of Appeal which had proceeded upon the same basis. The Court of Appeal granted the landlord leave to appeal out of time against the judgment dismissing his claim. Roskill LJ stated at 1225D–F:

> The real point here, as [counsel for the landlords] ultimately accepted, is whether it is right that these parties should have these [*sic*] *continuing contractual relationship* governed by a lease the terms of which have assumedly been erroneously construed in the court below. … [Counsel for the landlords], very properly in the light of [*In re Berkeley* [1945] Ch 1], accepted that he *could not claim any new rent retrospectively*, even if the appeal out of time ultimately succeeded. That is clearly right, and upon his undertaking not to claim any

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> increased rent, if the appeal succeeds, before any date before Midsummer Day next, I take the view that leave to appeal out of time should be given …
>
> [emphasis added]

128 Cumming-Bruce LJ said at 1225H–1226A (cited by Lord Keith in *Arnold (HL)* at 110C):

> Now that the House of Lords has decided that the proper construction of the contract is other than that decided by the judge, I agree that there are special circumstances here because *it does not seem just that future obligations between the parties* to the lease should depend upon the construction now shown to be wrong.
>
> [emphasis added]

129 The facts of *In re Berkeley* [1945] Ch 1 ("*In re Berkeley*"), which was referred to by Roskill LJ, were similar to those in *Templar*. A tenant for life in remainder applied for leave to appeal out of time against an order made by Cohen J in the administration of the estate. The question before Cohen J was whether s 25 of the Finance Act 1941 (c 30) (UK) ("the UK Finance Act 1941") applied to an annuity which had been bequeathed by a codicil before that provision came into force and confirmed by another codicil after the provision came into force. If the provision applied, it would have the effect of scaling down the annuity. If not, the annuitant would receive her tax-free annuity in full, which would seriously deplete the capital of the estate over time. Cohen J ruled that s 25 of the UK Finance Act 1941 did not apply on the strength of an earlier authority, *In re Tredgold* [1943] Ch 69 ("*In re Tredgold*"). After the Court of Appeal subsequently overruled *In re Tredgold* in *In re Sebag-Montefiore* [1944] Ch 331, the tenant for life in remainder sought leave to appeal out of time in light of the change in the law. The Court of Appeal unanimously granted leave to appeal. Crucially, the applicant only sought to affect future annual payments. This is evident from the All England Law Reports version of the judgment

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reported at *Re Berkeley* [1944] 2 All ER 395, in which Lord Greene MR stated at 397, "Counsel for the applicant does not seek and, indeed, could not properly seek, to disturb any payments which have been made, and the order giving leave will recite that he does not seek to disturb those matters."

130 Evidently, the injustice which the Court of Appeal in *In re Berkeley* sought to remedy by granting leave to appeal out of time was that the parties' *future* relationship would otherwise be governed by a decision which had been found to be wrong. The relief did not extend to unsettling or unwinding past benefits which had accrued as a result of that first decision before it was corrected. The Court of Appeal in *Templar* followed this approach. The same approach came to be adopted in *Arnold (CA)* and *Arnold (HL)* and, in Singapore, in *TT International*.

131 By suing the MCST in trespass, Lee Tat sought to undo the effect of *Grange Heights (No 4) (CA)*. The *Arnold* exception does not entitle it to do so. This is clearly correct as a matter of principle. It is well-established that the public interest requires finality of litigation, which is only outweighed where there is a "sufficient degree of injustice", for example where "the litigant would have to live with the consequences of an erroneous decision *for a prolonged period of time* if an exception to issue estoppel were not made" [emphasis added] (*TT International* at [150]). It would moreover be exceptionally unfair to the MCST, as well as antithetical to the guiding purpose of the law, to order the MCST to pay Lee Tat damages for using the Servient Tenement, when its decision to do so was made in reliance on prevailing *res judicata*. Litigants "can – indeed *must* – order their affairs on the strength of judicial decisions relating to the matters which they are disputing" [emphasis in original] (*TT International* at [192]).

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132 Accordingly, the question of prospective *versus* retroactive overruling – which counsel for both parties focused their submissions on – was in my view a red herring. *Grange Heights (No 3) (CA)* is still retroactive in that the MCST's right of way must be taken to have been extinguished at the point in time when Lots 111-34 and 561 were amalgamated. However, the benefits that accrued as a result of the First, Second and Fourth Actions are not liable to be disgorged as damages for trespass as a result of the application of the *Arnold* exception.

133 I therefore take the view that Lee Tat's claim in trespass should be dismissed.

Whether the MCST had capacity to be sued for trespass

134 For thoroughness, I will address whether the MCST could be liable for the trespass of the Grange Heights residents. Lee Tat sued the MCST for trespass in both the MCST's own capacity under s 24(2)(*b*) of the BMSMA as well as its capacity as the *alter ego* of the Grange Heights residents under s 85 of the BMSMA. Section 85(1)(*a*) states:

> **Management corporation, etc., may represent subsidiary proprietors in proceedings**
>
> **85.**—(1) Where all or some of the subsidiary proprietors of the lots in a parcel comprised in a strata title plan are jointly entitled to take—
>
> > (*a*) proceedings for or with respect to the common property in that parcel against any person or are liable to have such proceedings taken against them jointly;
> >
> > …
>
> the proceedings may be taken by or against the management corporation in the case of paragraph (*a*), … as if it were the subsidiary proprietors of the lots concerned.

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135 Section 24(2)(*b*) of the BMSMA states that "[a] management corporation for a strata title plan may … sue and be sued in respect of any matter affecting the common property".

136 The MCST disputed that it could be held liable for the tort of trespass committed by the Grange Heights residents because s 24(1)(*b*) of the BMSMA, which states that the management corporation in respect of a strata title plan shall "be a body corporate capable of suing and being sued and having perpetual succession and a common seal", makes it abundantly clear that the MCST is a "separate legal entity" from the subsidiary proprietors: *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998 at [26]. It further submitted that s 85 of the BMSMA did not apply because the right of way over the Servient Tenement did not form part of the "common property" of Grange Heights. The MCST did not address s 24(2) of the BMSMA.

137 The difference between ss 24 and 85 of the BMSMA was discussed by the Court of Appeal in *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 4 SLR 351. In proceedings under s 24(2) of the BMSMA, the management corporation is "the bearer of rights and obligations, and sues and or is sued as a legal person in its own right" (at [22]). It sues to protect *its own* interests, rather than the interests of the subsidiary proprietors. Section 85 of the BMSMA, on the other hand, is a "procedural provision to facilitate action by a large number of subsidiary proprietors" (at [19], citing *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 at [18]) and creates "a legal fiction (that the management corporation is the subsidiary proprietors in question) for the limited procedural purpose of enabling proceedings involving a large number of subsidiary proprietors to be taken by or against the management corporation" (at [20]). Under s 85, it is the *subsidiary proprietors* who are liable to have

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proceedings taken against them, whereas under s 24(2) it is the management corporation *itself* which is party to the proceedings in both substance and form (at [21]–[22]).

138 I am of the view that the MCST had capacity to be sued in trespass as the representative of the subsidiary proprietors of Grange Heights under s 85 of the BMSMA. From the Second Action in 1990 to the Fifth Action in 2010, the MCST asserted and defended the existence of a right of way over the Servient Tenement for and on behalf of the subsidiary proprietors. Its capacity to do so arose because the right of way, assuming it existed, would have formed part of the common property of Grange Heights: *Frontfield Investment Holding (Pte) Ltd v Management Corporation Strata Title Plan No 938 and others* [2001] 2 SLR(R) 410 ("*Frontfield Investment*") at [26], approved in *Choo Kok Lin and another v Management Corporation Strata Title Plan No 2405* [2005] 4 SLR(R) 175 at [44]. In *Frontfield Investment*, for example, the owner of the servient tenement sued the management corporation of the dominant tenement for a declaration that the right of way over the servient tenement had been extinguished, under ss 33(2) or 116(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) (*in pari materia* with ss 24(2) and 85(1) of the BMSMA respectively).

139 Having all along represented the subsidiary proprietors in defending the purported right of way, the MCST must now likewise be liable in principle for their alleged acts of trespass. The subsidiary proprietors had made use of the Servient Tenement in the belief that they enjoyed a right of way over it. Their right to use the Servient Tenement (in the event that there was a right of way) and their liability for doing so (in the event there was not) are two sides of the same coin, one being the converse of the other. The MCST's capacity to

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represent the subsidiary proprietors cannot apply to one situation and not the other.

140 Moreover, Lee Tat has always dealt with the MCST on the understanding that the MCST possessed capacity to represent the Grange Heights residents. It would be unrealistic to expect Lee Tat now to painstakingly identify each of the subsidiary proprietors who made use of the purported right of way from 24 December 2006 to 1 December 2008. If that were required, it would be almost impossible for Lee Tat to identify which subsidiary proprietors to sue in trespass.

141 However, given the reasons I have stated above, I am of the view that Lee Tat would in any event be unable to sue for trespass. It follows that it is unnecessary for me to consider the question of damages.

142 I should add that in the course of the Suit, the parties devoted much attention to the matter of a road reserve over the Servient Tenement. At the time of the Suit the Servient Tenement was subject to a road reserve, which also appeared to extend some way over Lot 111-33. Lee Tat asserted that the road reserve had been created in around November 1970 as a result of HLH's application for the development of Grange Heights (see [8] above) and remained in force thereafter due to the various legal proceedings regarding the MCST's purported right of way. It appears that Lee Tat was prevented from redeveloping the land subject to the road reserve at least until February 2008. Lee Tat submitted that the MCST was therefore responsible for its inability to redevelop the land in question before then. The MCST, on the other hand, argued that the road reserve had already existed by 1919 and had nothing to do with the MCST's purported right of way. The MCST claimed it was not responsible for the road reserve and, consequently, not liable for any loss allegedly suffered by

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Lee Tat in having its redevelopment plans delayed as a result of the road reserve. In any event, in light of my conclusion that Lee Tat has not established any of the four causes of action, it is unnecessary for me to consider damages. It follows that there is no need to rule on the questions of what (if any) loss the road reserve occasioned to Lee Tat, and the extent to which the presence of the road reserve was attributable to the MCST (if at all).

Conclusion

143 For all the reasons above, I dismiss the Suit with costs to the MCST.

144 The parties' long and troubled legal history make the remarks of the Court of Appeal in *TT International* at [185] especially apt:

> [I]n the final analysis, it is not merely in the court's interest to relieve the strain on its limited resources; it is also in the public interest, as more resources can then be devoted to litigants with *bona fide* and non-vexatious claims. *Moreover, the parties to a litigation themselves have an interest in the finality of the proceedings between them as that is what enables them to put the litigation behind them as a chapter concluded and carry on with their lives.* This is so even for the litigant who is unhappy with a decision and seeks to reopen it; in this regard, we draw attention to the comments made by Lee Seiu Kin J, albeit in a different context (namely, in the context of an application to block a vexatious litigant from instituting proceedings without the court's leave), where he said (see *AG v Mah Kiat Seng* [2013] 4 SLR 788 at [24]) that it was "detrimental, objectively speaking", for a litigant to apply over and over again to reopen a decision because "maintaining the proceedings similarly diverts [the litigant's] own time and resources from more productive endeavours".
>
> [emphasis added]

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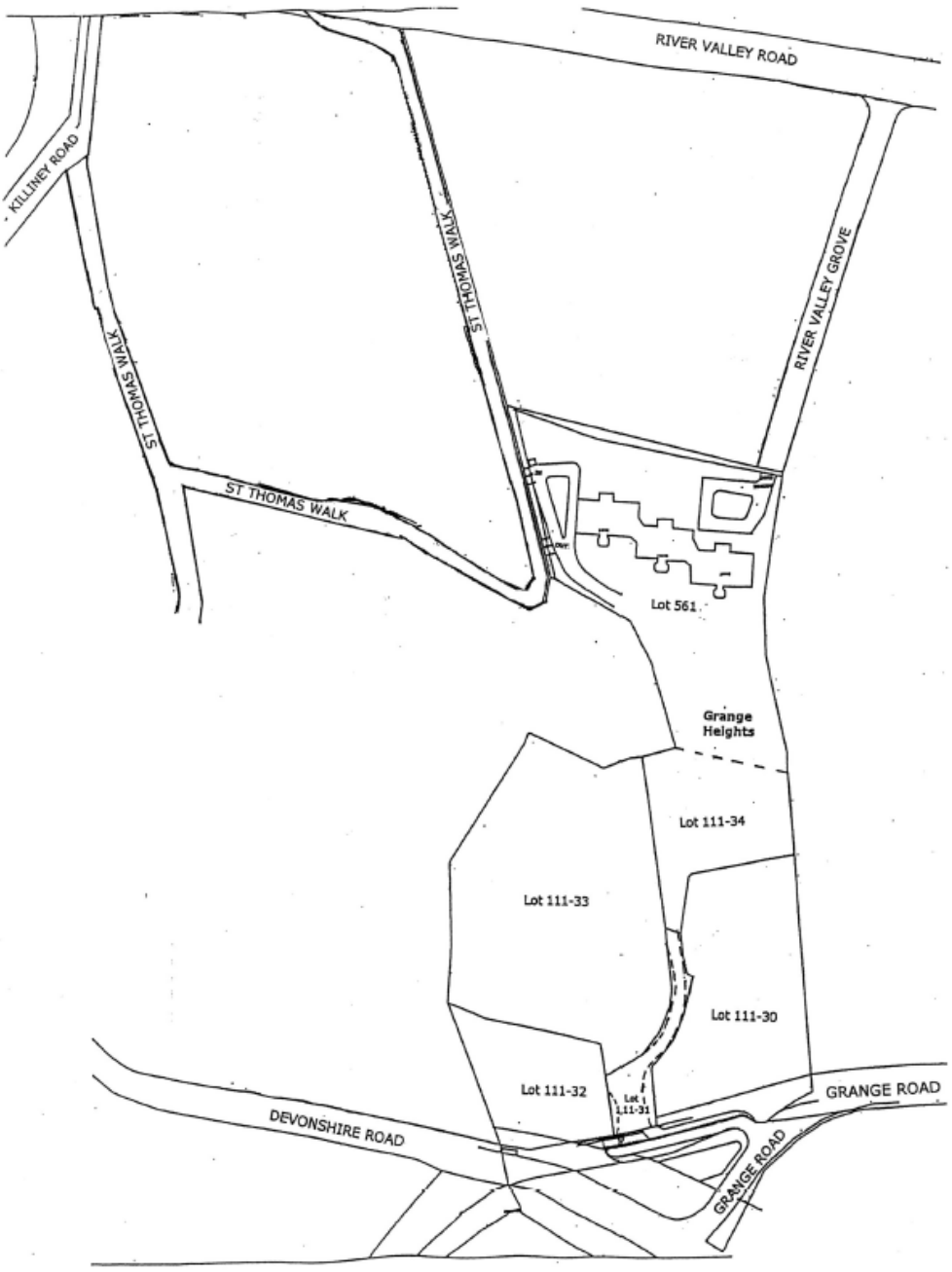
145 The dispute over the MCST's entitlement to use the Servient Tenement was conclusively resolved in 2008. It would be desirable that, with the dismissal of the Suit, the parties close this protracted and convoluted chapter and move on to other productive endeavours.

Kannan Ramesh
Judge

Chelva R Rajah SC, Tham Lijing and Stephanie Tan (instructed counsel) (Tan Rajah & Cheah) and Balasubramaniam Ernest Yogarajah (Unilegal LLC) for the plaintiff;
Tan Chee Meng SC, Sngeeta Rai and Ngiam Heng Hui Jocelyn (WongPartnership LLP) for the defendant.

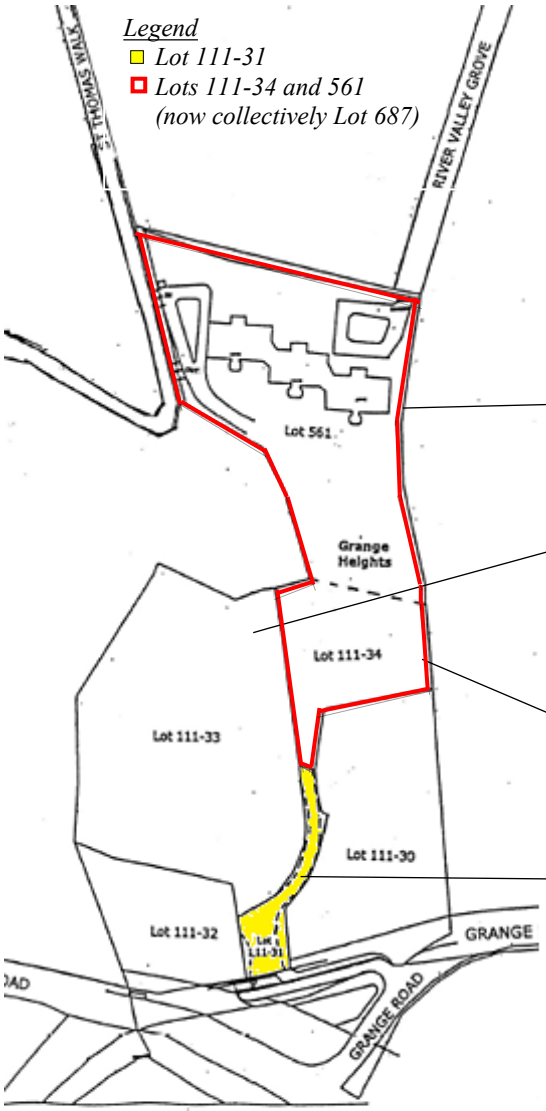
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Annex 1



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Annex 2



1919	Lots 111-30, 111-32, 111-33 and 111-34 were sold by Mutual Trading Ltd subject to a right of way over Lot 111-31. Mutual Trading Ltd retained ownership of Lot 111-31 but subsequently went into liquidation.
1970	HLH (the MCST's predecessor in title) acquired Lots 111-34 and 561.
1973	Lee Tat (then Collin) acquired Lots 111-32 and 111-33.
1976	Lots 111-34 and 561 were amalgamated to form Lot 687 and the MCST of Grange Heights was constituted.
1997	Lee Tat acquired Lot 111-31 (the Servient Tenement) from the Official Receiver.

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