

Lian Kok Hong v Lee Choi Kheong and others
[2010] SGCA 19

Case Number : Civil Appeal No 15 of 2009
Decision Date : 28 April 2010
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : William Ricquier (Pan Asia Law Corporation) and Prabhakaran Nair (Ong Tan & Nair) for the appellant; Letchamanan Devadason (Steven Lee, Dason & Partners) for the respondents.
Parties : Lian Kok Hong — Lee Choi Kheong and others

Land

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 18.]

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Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal by the appellant ("the Appellant"), the owner of the land comprised in Lot 187-157 on which house No 72 Belmont Road is erected, against the decision of the High Court allowing the counterclaim of the respondents ("the Respondents"), the owners of the adjacent land comprised in Lot 185-156 on which house No 70 Belmont Road is erected. The Respondents' counterclaim was that, as the owners of Lot 185-156, they were entitled to a right of way over part of the Appellant's land (for convenience, the land that comprises this right of way will be referred to hereafter as "plot B") as shown in the sketch plan in the Annex hereto ("Sketch Plan"). In these grounds of decision, we shall refer to both lots of land by the street numbers of the houses erected thereon, *ie*, 70 Belmont Road for Lot 185-156 and 72 Belmont Road for Lot 185-157.

2 The Respondents' counterclaim was made in response to an action by the Appellant for an injunction in Suit No 674 of 2007 to restrain the Respondents from building a gate ("the common gate") at the entrance of an access road (for convenience, the land that comprises this right of way will be referred to hereafter as "plot A") where it meets Belmont Road. As shown in the Sketch Plan, plot A leads to, and is part of the land on which is erected 70 Belmont Road.

3 The High Court Judge ("the Judge") dismissed the Appellant's action and allowed the Respondents' counterclaim (see *Lian Kok Hong v Lee Choi Kheong & Others* [2009] SGHC 18 ("the GD")). At the conclusion of oral pleadings before us, we allowed the appeal. We now give our reasons.

Background facts

4 Both 70 and 72 Belmont Road were part and parcel of the same property comprised in Lot 187-

102 until their common owner subdivided the land and sold 70 Belmont Road to the Respondents' predecessor in title in 1949, whilst retaining ownership of 72 Belmont Road. 72 Belmont Road fronts Belmont Road directly whilst 70 Belmont Road is situated behind 72 Belmont Road. Since 1949, both 70 and 72 Belmont Road have changed ownership many times.

5 It can be seen from the Sketch Plan that, after the subdivision of Lot 187-102 in 1949, the owner of 70 Belmont Road would not have been able to gain access to Belmont Road except through plot A, whilst the owner of 72 Belmont Road would have been able to do so through both plot B and plot A. Nevertheless, the common owner of Lot 187-102 decided, upon its subdivision, to grant to the owner of 70 Belmont Road a right of way over plot B and reserved to herself as the owner of 72 Belmont Road a right of way over plot A (which was part of the subdivided lot on which 70 Belmont Road is erected). The transaction was effected by an Indenture 1056 No 101 dated 24 November 1949 [\[note: 1\]](#). The express grant and reservation of the two easements respectively provided for were as follows [\[note: 2\]](#):

[T]he Vendor hereby conveys unto the Purchaser All and Singular the land and hereditaments described in the Schedule hereto together with full and free right and liberty for the Purchaser and its assigns the owner and occupiers for the time being of the said land and hereditaments hereby conveyed and its and their tenants servants and all other persons for the time being authorised by it in common with all other persons having the like right and liberty with or without horses cattle and other animals carts carriages motor cars and other vehicles of every description at all times and for all purposes whatsoever connected with the use and enjoyment of the said land and hereditaments conveyed to pass and repass along over and upon the whole length of the private estates roads leading from Holland Road to the said land and hereditaments hereby conveyed And Together Also with a similar right of way over so much of the access road leading to the house erected on the land hereby conveyed [*ie*, 70 Belmont Road] and forming part of the roadway shown on the plan annexed hereto and thereon coloured brown as is excluded from the conveyance hereby made and forms part of the remaining land belonging to the Vendor [*ie*, plot B] ...Reserving nevertheless to the Vendor and all others the owner or owners for the time being of the remaining property belonging to the Vendor [an easement of] a similar right of way over so much of the roadway coloured brown on the said plan hereto annexed as is included in the Conveyance hereby made [*ie*, plot A – the access road].

6 As regards 72 Belmont Road, the Appellant purchased it on 25 July 1994 from Peter Leo Chin Fang ("Peter") who had purchased the property from Koh Ah Kim ("Koh") on 18 February 1987. Koh in turn purchased the property from Muriel Anna Hutchinson on 6 August 1971. Following this transaction, 72 Belmont Road was brought under the Land Titles Act (now Cap 157, 2004 Rev Ed) ("the LTA") on 15 December 1971, with a qualified title. The caution endorsed on the Certificate of Title lapsed on 5 March 1987 and the title became unqualified.

7 As for 70 Belmont Road, the Respondents purchased their property on 20 September 2007 from Gan Boon Hwee ("Gan") who had purchased it from Tsang Shou Meng ("Tsang") on 4 October 1986. Tsang purchased the property on 10 February 1977 from Singapore Oxygen Air Liquide Pte Ltd ("Singapore Oxygen") which had bought the property on 1 December 1971 from Far East Oxygen & Acetylene Company Ltd ("FEOAC"). Following the purchase of the property on 10 February 1977, 70 Belmont Road was brought under the LTA on 22 December 1977, with a qualified title. The caution endorsed on the Certificate of Title lapsed on 4 October 1986 and the title became unqualified.

8 What happened next after Koh purchased 72 Belmont Road in 1971 which is material to the dispute in this case was that she constructed a chain-linked fence along the common boundary of the two houses and fenced off plot A. The fence effectively became a party wall separating the two

properties and deprived FEOAC, the then owner of 70 Belmont Road, of its right of way over plot B (which was adjacent to plot A) to gain access to Belmont Road. The Respondents' case is that the fence was constructed around 1980 (according to the evidence of their surveyor). In our view, however, the fence was most likely constructed on or before August 1973 when the renovation plans of 70 Belmont Road showing the existence of the fence were approved by the Building Control Division. However, what is more material to the dispute in this case, and which was not, and could not be, denied, is that there is no evidence that FEOAC had ever objected to plot B being fenced off and thereby preventing FEOAC from using plot B as a right of way.

9 Since then, plot B had been fenced off, unavailable for use as a right of way to all successive owners of 70 Belmont Road until the issue as to its existence was raised by the Respondents in their counterclaim. It seems clear that they would not have made the counterclaim to the right of way over plot B, but for the action commenced by the Appellant which has led to this appeal. The Appellant's reply to the counterclaim was that the right of way had been extinguished by express or implied consent of the previous owners of 70 Belmont Road or by surrender of the usage of the easement by the previous owners.

10 The Judge held that the easement continued to subsist for the reasons set out at [2] of the GD as follows:

The evidence showed that when 70 and 72 Belmont Road were created in 1949 under Indenture 1056 NO 101 (by sub-dividing 70 Belmont Road from the parent lot), the then owner also created mutual easements over both properties. The owner of 72 Belmont Road was entitled to an easement through the access road which was part of the property of 70 Belmont Road and the owners of 70 Belmont Road had a right of easement over a part of the property belonging to 72 Belmont Road. This part of the mutual easement had been walled off since it was part of the [Appellant's] land. It was not known to the parties that the [Respondents'] easement had been blocked in this way because what was shown on the sketch plans was not obvious on site. The easements were created to be mutually co-existing and one could not be abandoned without the abandonment of the other. The mere encroachment by walling off the easement by the previous owner was not by itself sufficient proof of abandonment. I find that there was no abandonment of the easement as alleged by the [Appellant].

Issues on appeal

11 Counsel for the Appellant contended that the Judge's decision was wrong on three grounds:

- (a) that one "mutual" easement could not be abandoned without the abandonment of the other;
- (b) that there was no abandonment of the easement; and
- (c) that, in any case, the right of way over plot B was extinguished.

We will deal with these three grounds in turn.

Mutuality

12 We agree that the Judge was wrong to hold that on the facts of this case the easements over plots A and B were created to be mutually co-existing and that, therefore, one could not be abandoned without abandoning the other. There was no evidence of such intention on the part of the creator of the easements. On the facts, this conclusion was clearly wrong as the right of way over plot B could be abandoned without affecting the right of way of both owners over plot A. It might be that if the mutual easements together constituted a right of way of necessity for both owners, neither easement could be abandoned without one house becoming landlocked. Except on this ground, there is, in principle, no reason why one dominant owner may not abandon his right of way over the relevant servient tenement, if he is still able to access the main road without the use of the right of way over the servient tenement.

13 To put the materiality of the Respondents' counterclaim in perspective, the width of plot A is sufficiently wide for vehicles to pass and repass to and from 70 Belmont Road to Belmont Road. The fencing off of plot B did not appear to have caused any inconvenience to any of the successive owners of 70 Belmont Road, including the Respondents, from accessing Belmont Road. The counterclaim for the restoration of the right of way over plot B appeared to have been the Respondents' tit-for-tat response to the Appellant's unwise and wrongful action in trying to prevent the Respondents from building the common gate.

Subsistence of right of way under s 46(1) of the LTA

14 The right of way over plot B, as is the right of way over plot A, is subject to the common law as both easements were created before the relevant lands were brought under the LTA. 72 Belmont Road was brought under the LTA on 15 December 1971 and 70 Belmont Road was brought under the LTA on 22 December 1977. Section 46 of the LTA confers an indefeasible title on the registered proprietor in the circumstances. However, s 46(1)(c)(ii) subjects such indefeasibility to any "subsisting easement ... which was in existence at the date on which the land was brought under the provisions of [the LTA]".

15 In the case of 72 Belmont Road, the land was brought under the LTA on 15 December 1971. On that day, the owner of 70 Belmont Road undoubtedly had a subsisting right of way over plot B. It was only after Koh had become the proprietor of 72 Belmont Road that, as part of the renovations to the house, she fenced off the right of way. The Judge held (at [2] of the GD) that the mere encroachment by walling off the easement by Koh was not in itself sufficient proof of abandonment. Counsel for the Appellant accepted this statement of principle but contended that there was sufficient evidence of acts of abandonment or acquiescence by the successive owners of 70 Belmont Road to justify the court making a finding of abandonment under the law. What the facts show is that the action of Koh in fencing off plot B would have been done openly, and the owners (through the actual occupiers) of 72 Belmont Road would have seen it happening or would have known about it shortly after plot B had been fenced off. Evidently, they did not object to plot B being fenced off or consider Koh's action worth protesting against. The facts also show that all successive owners of 70 and 72 Belmont Road (up to September 2007 when the Respondents purchased 70 Belmont Road) conducted themselves as if either the right of way had never existed or that they had no use for it, since they knew or ought to have known of the prior existence of the easement as any competent conveyancer would have ascertained this with reasonable diligence.

16 In our view, if the proprietor of 70 Belmont Road had, in 1971 or shortly thereafter, taken action to recover the right of way over plot B, he would have been entitled to do so and that action alone would have confirmed that the right of way had not been abandoned. The next entry in the Register of Titles regarding 72 Belmont Road is on 5 March 1987 when Peter became the registered proprietor. On the same day, the caution which had been notified on the title lapsed, and the title became

unqualified.

17 When Peter contracted to purchase 72 Belmont Road in December 1986, the title to the land was still qualified title and therefore he was obliged to investigate the title for subsisting encumbrances. If he and/or his solicitors had checked the Indenture of Conveyance dated 5 December 1947 [\[note: 3\]](#) or the Indenture dated 11 May 1951 [\[note: 4\]](#), the right of way over plot B would have been discovered. But if they had checked the Indenture of Conveyance dated 8 October 1954 [\[note: 5\]](#), they would not have found a right of way mentioned in that conveyance. How far they went to investigate title, we do not know. But, they would not have seen plot B except as part of the land on which 72 Belmont Road was erected. Indeed, Peter might have purchased the land on the basis of "as is, where is", ie, there was no visible right of way over any part of the land on which 72 Belmont was erected. Thus, if the right of way over plot B had been abandoned or extinguished, he would have obtained an indefeasible title by virtue of s 46(1) of the LTA.

18 The next purchaser of 72 Belmont Road is the Appellant who became the registered proprietor of the property on 25 July 1994. That would be about seven years after the title to 72 Belmont Road became unqualified and about 21 years after Koh had fenced off plot B. There would have been no reason for the Appellant to know of the previous existence of plot B or the right of way over it, unless his solicitor had investigated title going back more than 30 years. We have no evidence on this point.

19 Let us now look at the chronology of transactions concerning 70 Belmont Road, the dominant tenement *vis-à-vis* the right of way over plot B. The Respondents became the proprietors on 20 September 2007, having purchased the property from Gan who became the proprietor on 4 October 1986. Gan had purchased the property on or about 8 July 1986 from Tsang who became the owner on 10 February 1977. Now, after Tsang became the owner, 70 Belmont Road was brought under the LTA on 22 December 1977 and a qualified Certificate of Title Vol 198 Fol 61 was issued to Tsang. Attached to the Certificate of Title was a plan of the land (Lot 187-156) showing plot A as the only right of way in existence. This plan also shows broken lines demarcating what was plot B on Lot 187-157 (on which 72 Belmont Road is erected).

20 These facts show two things: first, the Respondents purchased 70 Belmont Road with no expectation of having such a right of way over plot B since a visual examination of the site would not have shown plot B as part of the access road to either 70 Belmont Road or 72 Belmont Road. In other words, they did not pay a purchase price which had factored in the benefit of a visible right of way. Neither had Gan nor Tsang when they respectively acquired title to the property. But if they did, they did not take any steps to recover the right of way. By the time the Respondents purchased 70 Belmont Road in September 2007, the total period of acquiescence was more than 30 years.

21 The question is whether these circumstances were sufficient for us to infer that the right of way over plot B was no longer a subsisting easement under s 46(1)(c)(ii) of the LTA when the Respondents became proprietors on 20 September 2007 for the reason that it had been abandoned or that it had been extinguished by operation of law prior to that date.

Abandonment and Extinguishment of Easements

22 The word "subsisting" is not defined in s 46(1)(c)(ii) of the LTA but, in our view, it must mean an easement which the dominant owner is entitled to enjoy. The word "subsisting" does not mean visible, physically existing, or legally extant. The easement would, however, not be subsisting if it has been abandoned or extinguished in law.

23 Counsel for the Appellant relied on both abandonment and extinguishment in this case. He

contended that there was abandonment in law and, alternatively, the right of way over plot B was extinguished by operation of law. We shall deal with the issue of abandonment first.

Was the right of way abandoned by 1994 or 2007?

24 At common law, rights under an easement are perpetual and, therefore, the court will not lightly infer that the dominant owner would give it up for no consideration. Hence, mere non-user (*by itself*), without more, *however long*, cannot amount to abandonment (*Gale on Easements* (Jonathan Gaunt & Paul Morgan eds) (Sweet & Maxwell, 18th Ed, 2008) ("*Gale*") at para 12-66). However, *Gale* also states at para 12-66 that a *presumption* of abandonment will arise in at least two situations:

- (a) where there are circumstances adverse to the user and sufficient to explain the non-user, combined with a substantial length of time during which the dominant owner has *acquiesced* in that state of affairs; or
- (b) where the dominant owner does some act *clearly indicating the firm intention* that neither he nor any successor in title of his should thereafter make use of the easement.

25 In a recent English High Court case, *viz, Odey and others v Barber* [2007] 3 All ER 543 ("*Odey*"), Silber J restated the principles as follows (at [103], see further, *Gale* at para 12-99):

[103] The approach of the courts to a claim that an easement such as a right of way has been abandoned can be summarised by the following principles set out in *Gale on Easements* as follows.

- (a) Whether a person intends an abandonment is not a subjective question—'it is always a question of fact to be ascertained by a jury, or by the Court, from the surrounding circumstances, whether the act amounts to an abandonment, or was intended as such' (see *Cook v Bath Corp* (1868) LR 6 Eq 177 at 179 per Malins V-C).
- (b) Abandonment depends on the intention of the person alleged to be abandoning the right of way as perceived by the reasonable owner of the servient tenement—'[t]o establish abandonment of an easement the conduct of the dominant owner must, in our judgment, have been such as to make it *clear* that he had at the relevant time a *firm intention* that neither he nor any successor in title of his should thereafter make use of the easement.' (See *Gotobed v Pridmore* (1971) 217 EG 759 at 760 per Buckley LJ quoted with approval by Cumming-Bruce LJ in *Williams v Usherwood* (1983) 45 P & CR 235 at 256 ...)
- (c) It is a question of fact whether an act is intended as abandonment.
- (d) 'Abandonment is not to be *lightly inferred*. Owners of property did not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it.' (See *Gotobed v Pridmore* (1971) 217 EG 759 at 760 per Buckley LJ quoted with approval by Cumming-Bruce LJ in *Williams v Usherwood* (1983) 45 P & CR 235 at 256 ...)
- (e) 'Non-user is not by itself conclusive evidence that a private right of easement is abandoned. The non-user must be considered with, and may be explained by, the surrounding circumstances' (See *Swan v Sinclair* [1924] 1 Ch 254 at 266 per Pollock MR quoted by Buckley LJ in *Gotobed v Pridmore* (1971) 217 EG 759 at 760 and quoted with approval by Cumming-Bruce LJ in *Williams v Usherwood* (1983) 45 P & CR 235 at 256).

[emphasis in original]

26 Counsel for the Appellant relied on the above passage from *Gale* and submitted that his case was not a case of “mere non-user” but something more. The construction of the fence in 1971 was an adverse circumstance to the user, coupled with the substantial length of time during which three successive owners of 70 Belmont Road had acquiesced in that state of affairs, constituted grounds for finding that abandonment had taken place. When the fence was constructed between 1971 and 1973, the then owner of 70 Belmont Road, Singapore Oxygen did not protest; at least there is no evidence of any protest.

27 Singapore Oxygen conveyed 70 Belmont Road to Tsang and in that conveyance (Indenture of Conveyance dated 10 February 1977 [\[note: 61\]](#)), the right of way over plot B was described as “the roadway shown on the plan annexed to an Indenture of Conveyance dated 24th November 1949 (Registered in Volume 1056 No. 101) and made between Elizabeth Gilmour Buchan of the one part and Group Estates Limited of the other and thereon coloured Brown”. Accordingly, it is clear from this Indenture that the right of way over plot B was conveyed to Tsang, and he should have known about plot B. On taking possession of 70 Belmont Road, he should have known that plot B had been fenced off, but he did nothing about it. We can only conclude that he was satisfied with using plot A for the purpose of accessing Belmont Road. Neither was there any protest forthcoming from the successors in title, *viz*, Gan from October 1986 to September 2007 when the Respondents became the owners.

28 By the time the Appellant purchased 72 Belmont Road in February 1994, plot B had been fenced off for more than 20 years without any protest by the successive owners of 70 Belmont Road. If the doctrine of adverse possession were applicable to the easement, the Appellant’s immediate predecessor in title would have obtained a good title against the easement on plot B. This situation subsisted for another 13 years, until 2007 when the Respondents raised the issue for the first time in these proceedings to reclaim the right of way over plot B.

29 In our view, these facts were sufficient for us to conclude that the owners of 70 Belmont Road, the dominant tenement, had abandoned the right of way. It was not so much the actual non-user that is crucial in this case, but the long acquiescence by the successive owners of 70 Belmont Road to the right of way over plot B being fenced off. Such conduct amounted to acquiescence to the right of way being rendered unusable and would amount to a conscious act of abandonment. The acquiescence started with Singapore Oxygen which was the owner of 70 Belmont Road from 1 December 1971 to 10 February 1977 and, at some point of time thereafter, the owner of 72 Belmont Road would have inferred that the dominant owner had decided to abandon the easement. As we have mentioned earlier, the owner of 70 Belmont Road from 1977, *viz*, Tsang, was holding a conveyance which had conveyed the right of way over plot B to him, but he also chose to do nothing about it.

Extinguishment of easement by operation of law

30 We next deal with the arguments of counsel for the Appellant on the extinguishment of the right of way over plot B. He referred to the judgment of this court in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875. Counsel argued that there were good policy reasons for deciding that the right of way had been extinguished by operation of law as the fact that it had not been used at all for more than 35 years, without any protest or action of any sort by the dominant owner, must raise a question mark as to whether the easement continued to accommodate the dominant tenement in the manner as originally intended (see *Re Ellenborough Park* [1956] Ch 131).

31 In our view, it is not necessary for us to justify our decision on this ground. We were satisfied that the easement had been abandoned by the time the Appellant purchased 72 Belmont Road in 1994 and certainly by the time the Respondents purchased 70 Belmont Road in 2007.

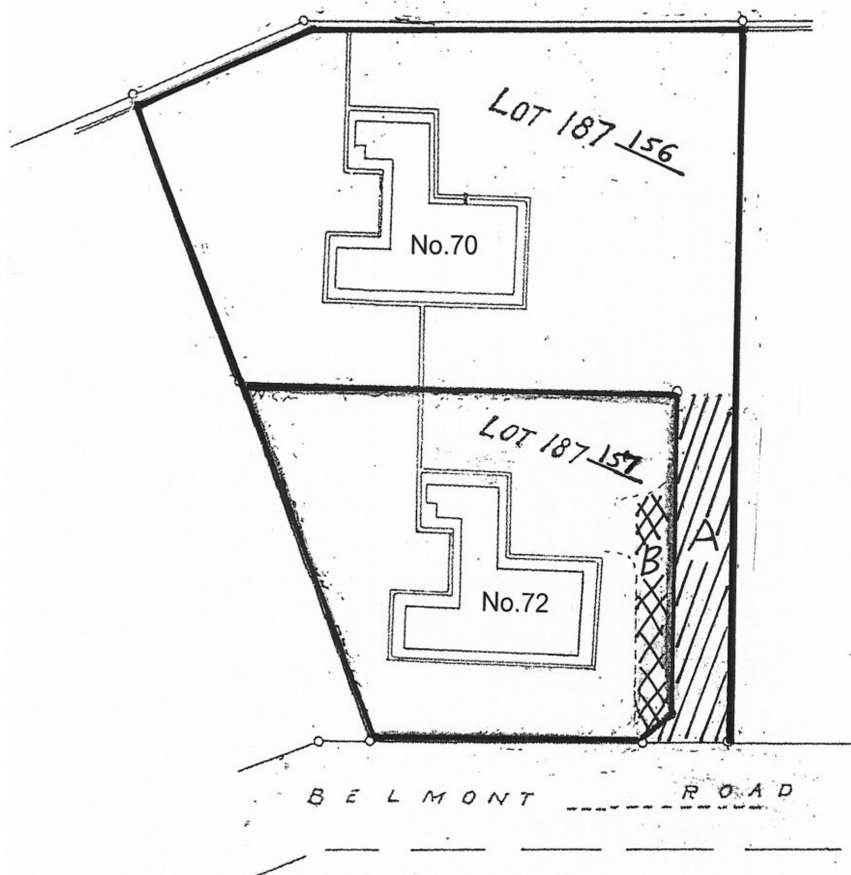
32 Although not relevant to our determination, we would add that from the point of view of equity and fairness, the Respondents should have no complaints. They purchased 70 Belmont Road for a consideration which, on the face of it, did not include any right of enjoyment over plot B as a right of way to gain access to Belmont Road. On the other hand, the Appellant purchased 72 Belmont Road for a consideration that, on the face of it, included plot B without any visible right of way over it. It could be said for both parties that, in terms of commercial value, each of them got what they had paid for.

Conclusion

33 For the reasons given above, we allowed the appeal, with each party bearing his/their costs both here and below.

ANNEX

Sketch Plan



[\[note: 1\]](#) Bundle of Conveyancing Documents ("BOCD") Pertaining to No 70 and 72 Belmont Road, Singapore, at pp 10-16.

[\[note: 2\]](#) Appellant's Core Bundle at p 85.

[\[note: 3\]](#) BOCD at pp 1–9.

[\[note: 4\]](#) BOCD at pp 17–22.

[\[note: 5\]](#) BOCD at pp 23–27.

[\[note: 6\]](#) BOCD at pp 42–48.

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