Chia Foong Lin and another *v* Chan Yuen Yee Alexia Eve
[2011] SGHC 261

Case Number	: Originating Summons No 350 of 2011
Decision Date	: 12 December 2011
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Deborah Barker SC and Tan Spring (KhattarWong) for the plaintiff; Vinodh S Coomaraswamy SC and Eng Zixuan Edmund (Shook Lin & Bok LLP) for the defendant.
Parties	: Chia Foong Lin and another — Chan Yuen Yee Alexia Eve

Land – Easements – Rights of Way

12 December 2011 Judgment reserved.

Choo Han Teck J:

1 The parties are neighbours staying at Oei Tiong Ham Park. The properties are separated by a private road (the "easement road"), which is part of the defendant's property [23 Oei Tiong Ham Park Singapore 267028 ("No 23")]. The plaintiffs enjoy a right of way over it as owners of the dominant tenement [22 Oei Tiong Ham Park Singapore 267027 ("No 22")]. The easement road is the only means of access between both properties and Oei Tiong Ham Park (the "public road").

2 The parties commenced reconstruction works of their properties in the middle of 2010, which resulted in a number of disputes between them. In reconstructing No 22, the plaintiffs relocated its gate further away from the public road. The plaintiffs' actions prompted the defendant to bring Originating Summons No 46 of 2011/X ("OS 46"), dated 20 January 2011. In OS 46, the defendant prayed for, *inter alia*, a declaration that the relocation of the plaintiffs' gate was in excess of their rights under the easement over part of the defendant's property, and that this constituted an undue interference with the defendant's reasonable enjoyment of her property. She also asked for a declaration that she be permitted to construct an automatic gate between the public road and the easement road ("the easement gate"). As part of the defendant's plans to rebuild No 23, a "porch and angled wall" were to be built at the end of the easement road. This led to the plaintiffs commencing Originating Summons No 85 of 2011/P ("OS 85") on 2 February 2011 which prayed, *inter alia*, for an injunction restraining the defendant from building the proposed porch and angled wall, or any other structure which encroaches on the easement road.

3 I heard OS 46 and OS 85 together on 31 March 2011 and 6 April 2011, and dismissed the parties' respective applications. Following this, the defendant dropped her plans to build the porch and angled wall. In April 2011, she began building a wall on a grass verge which is part of the easement on the side of No 23 ("the kerb wall"). The plaintiffs objected to the construction of the kerb wall. They claimed that they could previously reverse their cars out of No 22, with the car boot protruding over the kerb and onto the grass verge, both of which were on the opposite side of the easement road from No 22. This allowed them enough space to then drive out of the easement road head-first. However, the construction of the kerb wall prevents this manoeuvre. The plaintiffs complained they would now have to reverse all the way along the easement road onto the public road, thereby posing a danger to both life and property. They claimed that the kerb wall constitutes

an interference with their reasonable enjoyment of the easement.

4 As a result, the plaintiffs brought Originating Summons No 350 of 2011/W ("OS 350") on 6 May 2011. This is the current action. Before OS 350 could be heard, the plaintiffs applied for an interim injunction in Summons No 1971 of 2011/D ("SUM 1971") to restrain the defendant from building or continuing to build the kerb wall. I heard the parties on 9–10 May 2011 and visited the properties in the afternoon of 9 May 2011. I then dismissed the plaintiffs' application. They appealed against my decision in Civil Appeal 57 of 2011/Z but the appeal was dismissed. Subsequently, in Originating Summons 371 of 2011/L ("OS 371"), the plaintiffs applied successfully to the Court of Appeal for an extension of time to appeal against my decision in OS 85. The plaintiffs' prayers in these OS 350 proceedings concern their claim that their enjoyment of the easement road is or will be substantially interfered by the following: first, the construction of the kerb wall; second, the easement gate; third, the defendant's intended parking of her cars on the easement road; fourth, the defendant's intention to allow her children to play on the easement road; lastly, the defendant's construction of a meter box at the front of the easement gate. I shall deal with each of them in turn.

5 In praying for an injunction ordering the defendant to demolish her kerb wall, the plaintiffs are claiming that their right of way over the easement road includes a right to reverse out of their property such that they can drive head-first along the easement road to the public road. The defendant has submitted that the first issue is *res judicata*. Issue estoppel is one of three aspects of the overarching doctrine of *res judicata*, the other two being cause of action estoppel and the defence of abuse of process. As far as issue estoppel is concerned, the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2005] 3 SLR(R) 157 held, the party pleading issue estoppel has to prove the following:

(a) There is a final and conclusive judgment on the merits;

(b) the judgment must be of a court of competent jurisdiction;

(c) there is identity between the parties to the two actions that are being compared; and

(d) there is identity of subject matter in the two proceedings. The previous determination in question must have been central and not merely collateral to the previous decision. The issue must have been raised and argued.

I had made a final and conclusive judgment on the merits after I heard OS 46 and OS 85. The decision in OS 46 and OS 85 was also delivered from a court of competent jurisdiction. Furthermore, the parties in the previous and current set of proceedings are the same. The issue was whether there is identity of subject matter. In *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [34] to [35] and [38] ("*Goh Nellie*"), Sundaresh Menon JC held this issue comprised three separate "conceptual strands". First, the prior decision must traverse the same ground as the subsequent proceeding. The facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change. Second, the previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination. Third, the issue in question should be shown in fact to have been raised and argued. The plaintiffs have raised several arguments as to why this limb is not satisfied. First,

Miss Barker SC submitted on their behalf that when I dismissed the parties' applications in OS 46 and OS 85, I had given them liberty to apply "should fresh work not presently identified arise which might affect the use and enjoyment of land and property of the respective parties" [note: 1]. The plaintiffs asserted that the kerb wall was not before me previously as OS 85 was solely about the porch and angled wall. Therefore, the kerb wall constituted a "fresh work not presently identified" and was consequently a basis for a new application. Contrary to the plaintiffs' submissions, the defendant argued that the scope of OS 85 covered more than the porch and angled wall. The third prayer of the plaintiffs' OS 85 ("Prayer 3") was for the defendant to "redesign and if necessary rebuild the proposed Porch and Angled Wall or any other structure near the Easement so that the Easement will not be encroached upon" [note: 2]. In addition, the plaintiffs made an oral application to me during OS 46 and OS 85 to include an additional prayer for "a declaration that the Defendant is not entitled to build any structure or create any obstruction on the Easement and/or otherwise interfere with the Plaintiffs' reasonable enjoyment of the Easement". I did not grant the application because it was superfluous given that Prayer 3 was wide enough to cover the kerb wall. If Prayer 3 extends to "any other structure near the Easement", it would certainly extend to the kerb wall as well. The parties should be aware that this was my position, given that I had stated the following in SUM 1971 [note: 3]:

> When Ms Barker appeared before me on [SUM 1971] she submitted that the plaintiff only found out very recently that the wall had been built. In this regard, I think that they ought to have expected it because that was the likely consequence of my decision in the previous application.

6 The second argument of the plaintiffs was based on my observation in OS 85 that "the flower trough that runs alongside the wall of 23 Oei Tiong Ham Park would be removed and a 1.8m wall constructed on it" [note: 4]. I also noted that, "[a]s to replacing the flower trough with a wall, there would be no encroachment onto the road. If it would make driving on the road a sense of driving in a tunnel, it was not an experience that can be said to be unreasonably intolerable" [note: 5]. Counsel for the plaintiffs thus argued that no evidence and/or arguments were made as to the kerb wall's impact on their means of entering and exiting No 22. She submitted that I had ruled on the kerb wall only based on the "tunnel effect". I do not think that the argument was valid. First, evidence and submissions about the kerb wall were present before me then. The first plaintiff deposed that [note: 6]:

> … it should be noted that turning into our house with the existing kerb and planters will be much easier than turning with a built-up imposing wall of 1.8 m in height within the Easement narrowing our access. *Even if her new 1.8 m walls are built exactly where the existing kerb and planters are*, it will be difficult and inconvenient for us to turn into our house as we will have to constantly worry about not going too close to and damaging her new walls.
>
> [emphasis added]

In this context, counsel for the plaintiffs submitted that "We want to stop No 22 from building wall (sic) on grass verge. It stops cars from driving close" [note: 7]. I am of the view that the plaintiffs mistook the decision in OS 85 to be solely on the "tunnel effect" of the kerb wall. Indeed, when I gave my decision in SUM 1971, I made it clear to the parties I had dismissed the application on two grounds [note: 8]:

> I declined the plaintiff's application in the previous application because the argument before me was the wall will prevent vehicle from entering and leaving the plaintiff's house; and secondly, that the construction of a wall will create a tunnel effect. *The photographs produced before me*

showed trucks leaving the plaintiff's house and so the first objection failed to persuade me. The tunnel effect was… not a sound reason for an injunction.

[emphasis added]

The plaintiffs have argued that the wall adjudicated upon in OS 85 was the porch and angled wall, not the kerb wall. However, this is undermined by Miss Barker S.C.'s submissions on the "tunnel effect" of the wall, which clearly show that the plaintiffs had envisaged a wall running along the easement road. This suffices for there to be identity of subject matter.

7 Second, issue estoppel can arise only with respect to issues that a court has actually addressed and determined, and only if the issues were essential to the disposition of the cause in question (see above at [5]). It does not mean that arguments not made in respect of those issues can be raised subsequently. I agree with Menon JC who held in *Goh Nellie* at [29] that:

… where a litigant raises a point but either concedes or fails to argue it, issue estoppel may still arise in respect of the point conceded or not argued: *Khan v Golechha International Ltd* [1980] 1WLR 1482; *SCF Finance Co Ltd v Masri (No 3)* [1987] QB 1028; *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508 ("Linprint"); *Setiadi Hendrawan v OCBC Securities Pte Ltd* [2001] 3 SLR(R) 296 ("Hendrawan Setiadi").

I was presented with evidence that showed vehicles could freely enter and exit No 22. The vehicles did so head-first out of No 22. When I heard OS 46 and OS 85, it was not argued then that the kerb wall would prevent cars from reversing out of the property in a way that the cars can then drive head-first along the easement road. Indeed, the evidence suggested the plaintiffs' use of the right of way did not involve them driving their cars out of the property in such a manner. The second plaintiff deposed [note: 9] :

44.4 We have always driven in and out of our compound head-first in the interest of safety in the past, doing a 3-point turn in our compound. We intend to continue with this familiar practice, which has been proven to be a safe practice all these years.

The argument about the kerb wall preventing cars from reversing out of No 22 was only made when I heard SUM 1971, by which time I had already given my decision in OS 46 and OS 85 in which I noted that reversing a car out of No 22 was difficult but could be done. This meant that it would appear to be a substantial inconvenience to the plaintiffs. I visited the site for the purposes of hearing SUM 1971 because issue estoppel was not then raised before me.

8 The plaintiffs' alternative argument, to the issue estoppel argument, was based on the *Arnold* exception articulated in *Arnold and others v National Westminister Bank plc* [1991] 2 AC 93 and accepted by the Court of Appeal in *Management Corporation Strata Title Plan No. 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998:

… where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings, it gave rise to an exception to issue estoppels, whether or not the point had been specifically raised and decided

The plaintiffs could have but did not make their submissions in a manner that allowed me to appreciate the impact of the kerb wall. Therefore, the *Arnold* exception does not, in my view, apply. The Court of Appeal in OS 371 granted the plaintiffs an extension of time to appeal against my

decision in OS 85. The proper forum for the plaintiffs to submit their arguments on the kerb wall is before the Court of Appeal in CA 103, lest there be a conflict between the findings of the two courts in two related, but ultimately separate, actions. As such, I decline to address the issue of the kerb wall on the grounds of issue estoppel.

9 In relation to the easement gate, I held in OS 46 that:

> … in my view, the construction of a gate was within any owner's right. It becomes unreasonable only if the dominant tenement was thereby unreasonably preclude from the easement or has his use rendered unreasonably inconvenient. In the present case, the gate will be operated by a remote control key which is being offered to Mr and Mrs Wee. In the circumstances, I do not think that a declaration was necessary. I therefore make no order as to this application for the time being.

10 Unlike the other prayers in OS 46 and OS 85, which I dismissed, I preferred not to make an order here. My reason was that the easement gate had not been built so it was premature then for me to rule on the issue. As I had not granted an order, it was within the defendant's right to build on her property so long as she did not substantially interfere with the plaintiffs' reasonable enjoyment of the easement road. It is well-established that trivial or temporary infringements will not justify an injunction per *Cowper v Laidler* [1903] 2 Ch 341. There must be some substantial interference with the enjoyment of the easement, and not merely injury to the servient land. The test of actionable interference in the context of gates is whether the right of way is "locked against enjoyment" per *Sunset Properties Pty Ltd v Johnston* (1975) 3 BPR 9185, 9195. The right is not infringed if the dominant owner is provided with a key. In *Lian Kok Hong v Lee Choi Kheong and Others* [2009] SGHC 18, I ruled that the erection of a common gate at an access road does not amount to an actionable interference with a right of way if the owner of the dominant tenement is permitted to pass freely. This ruling still stands despite the Court of Appeal's reversal of part of my decision in *Lian Kok Hong v Lee Choi Kheong and others* [2010] 3 SLR 378 as the gate was not a subject of the appeal.

11 In support of their case that the "locking of a gate/barrier could readily constitute an actionable nuisance even if the keys were made available" [note: 10], the plaintiffs have cited two English cases: *Guest's Estates Ltd v Milner's Safes Ltd* [1911] 28 TLR 59 ("*Guest's Estates*") and *Rafique and others v The Trustees of The Walton Estate* [1992] 65 P & CR 356 ("*Rafique*"). Neither case persuaded me. *Rafique* was an application for an interim injunction from the dominant tenement to restrain the servient tenement from building on a right of way. Therefore, the court was applying the test for interim injunctions articulated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, not the "substantial interference" test. The case can thus be distinguished from the present dispute. In *Guest's Estate*, Swinfen Eady J found that where a person was entitled to a free right of way, it was an obstruction to keep the gate locked. He was also of the view that it was no answer to say that keys would be supplied. I agree that it is inconvenient to have to carry a key as opposed to not carrying one, but I do not think that it is such a great inconvenience that it should prevent the owner of a property from erecting a gate across a right of way. Furthermore, the defendant offered to provide the plaintiffs with their own set of keys. She also offered to install an intercom for visitors to communicate with No 22. Second, the easement gate will only be closed at certain times, for example, when the defendant's children wish to play on the easement road. Third, there is a side-gate which allows pedestrians access to the properties. This will be accessible at all times to visitors on foot to No 22. The plaintiffs have expressed concerned they will be locked out or locked in if the gate mechanism breaks down. This is mitigated by the fact that there is a manual override system. The plaintiffs argue that this would still be inconvenient but the fear of breakdown and the inconvenience of using a manual override system have not stopped the plaintiffs from building their

own automatic gate for No 22. I am therefore of the view that the defendant is entitled to construct the easement gate.

12 In my view, defendant's intention to park her cars on the easement road also would not constitute a substantial interference with the plaintiffs' right of way. Photographs showed that cars could still enter and exit the properties so long as cars were not parked directly opposite the gates of the properties. The plaintiffs submit the parking of cars would be akin to building a wall on the easement road, but a wall is an immovable object whereas a car is movable. Should the plaintiffs ever need to use the entire width of the easement road on occasion, they can reasonably expect the defendant and family to temporarily move their cars away. Accordingly, I do not think that the defendant should be ordered not to park her cars on the easement road.

13 As the defendant and her family have not moved into No 22, and so her children have not begun playing on the easement road, the plaintiffs are essentially asking for a *quia timet* injunction to stop the defendant's children from ever playing on the easement road. In *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 at [26], the Court of Appeal cited its earlier decision in *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 806:

> … It is conceded that for the owner of a dominant tenement to succeed in an application for a *quia timet* injunction, *he has to show there is likely to be a substantial interference with his enjoyment of the right of way granted to him over the servient tenement.* The answer to that question depends upon the nature of the right of way, of the *locus in quo*, and upon the general circumstances of the case.
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> [emphasis added]

I do not think that the defendant's children playing in their own land on the easement road would be a substantial interference with the plaintiffs' enjoyment of the right of way. The courts do not regulate in advance the responsibility of parents over their children nor the responsibility of drivers in private property. Consequently, I decline to grant an injunction restraining the defendant's children from playing on the easement road. Finally, I do not think that the construction of the meter box at the easement gate amounts to a substantial interference with the right of way. The first plaintiff deposed [note: 11] :

> 12 The Defendant has now built a meter box on the Easement where there were once plants…
>
> 13 The Defendant's old meters like those of ours were formerly within her own house compounds. Her meter box should relocate to her new gate pillar within her own house compound. She should not then close the gate so her meter-reading personnel can walk up to her meter like for our house too. I standby the fact that we did not and still do not have precise plans from her. The meter box plan was again not openly shared …

She also deposed in a further affidavit [note: 12] :

> The meter box should be at [the defendant's] boundary, not at least 20m down the Easement, on Easement land. These new works should not be allowed, they take away our right to enjoy the 8m by 31m Easement.

In the written submissions of the plaintiffs' counsel, the only reference to the meter box was that –

> [t]he Defendant has already proceeded to build her new meter box on the Easement where the flower trough used to be … it appears that the Defendant intends to build a pedestrian gate adjacent to this meter box [note: 13] .

The plaintiffs have asserted that the meter box encroaches onto the easement road but they have not explained how the meter box constitutes a substantial interference with their right of way. Looking at the evidence, I do not think that it would be an interference at all. Further, by the first plaintiff's own admission, there were concrete planter boxes where the meter box will be. This meant that that part of the right of way had already been inaccessible to pedestrians and vehicles. I therefore decline to grant the plaintiffs' application for an injunction in relation to the meter wall.

14 I dismiss the plaintiffs' claim with costs to the defendant, to be taxed if not agreed.

[note: 1] Notes of Argument dated 6 April 2011 p 4 at [12]

[note: 2] Originating Summons 86 of 2011/P p2 at [3]

[note: 3] Notes of Argument dated 10 May 2011 pp 1 – 2 at [3]

[note: 4] Notes of Argument p 7 at [3]

[note: 5] Notes of Argument dated 31 March 2011 p 9 at [9]

[note: 6] Affidavit of Dr Chia Foong Lin dated 30 March 2011

[note: 7] Notes of Argument dated 31 March 2011 p 5

[note: 8] Notes of Argument dated 10 May 2011 p 1 at [2]

[note: 9] Affidavit of Dr Wee Siew Bock dated 8 February 2011

[note: 10] Plaintiffs' Written Submission, on 4 November 2011, at [25]

[note: 11] Affidavit of Dr Chia Foong Lin dated 5 September 2011 at [12] to [13]

[note: 12] Affidavit of Dr Chia Foong Lin dated 17 October 2011 at [8]

[note: 13] Written Submissions of Plaintiff dated 22 September 2011 at [58]