Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301 [2008] SGCA 47

Case Number : CA 20/2007

Decision Date : 01 December 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Ernest Yogarajah s/o Balasubramaniam (Arfat Selvam Alliance LLC) for the appellant; Edwin Lee and Looi Ming Ming (Rajah & Tann LLP) for the respondent

Parties : Lee Tat Development Pte Ltd — Management Corporation Strata Title Plan No 301

Land – Easements – Extinguishment – Circumstances under which easement could be extinguished by operation of law – Right of way extinguished by operation of law due to permanent and irreversible change in character and nature of use of dominant tenement and drastic change in circumstances since date of grant

Land – Easements – Rights of way – Whether right of way granted in favour of lot A could be used to access lot B which had been amalgamated with lot A to develop condominium – Effect of acquisition of servient tenement by owner of dominant tenement on its rights vis-a-vis owner of another dominant tenement

Res Judicata – Issue estoppel – Whether issue that had never been decided on the merits could be the subject of an estoppel

Res Judicata – Issue estoppel – Whether res judicata should apply to erroneous decision that an issue had been decided in earlier proceedings when those proceedings had ruled on a different issue

1 December 2008 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by Lee Tat Development Pte Ltd ("Lee Tat") against the decision of the High Court in Originating Summons No 706 of 2004 ("the Present Action"). This appeal is the latest chapter in a long saga of bickering and court proceedings between Lee Tat and the respondent, the Management Corporation of Grange Heights Strata Title No 301 ("the MC"), as well as their respective predecessors in title over a plot of land, namely, Lot 111[illegible]31 of Town Sub-Division 21 ("the Servient Tenement"), which is currently owned by Lee Tat. The parties' dispute ("the Dispute") has dragged on for more than 30 years because, as shall be seen below, previous rounds of litigation have, for one reason or other, left certain fundamental issues relating to the parties' respective rights *vis-à-vis* the Servient Tenement undecided.

Factual background

2 In the Present Action, the MC sought a declaration of its entitlement to repair and/or maintain a right of way that it claims to have over the Servient Tenement. The judge in the court below ("the Judge") granted the declaration sought (see *Management Corporation of Grange Heights Strata Title No 301 v Lee Tat Development Pte Ltd* [2007] 2 SLR 554 ("*Grange Heights (No 3) (HC)*")). Effectively, the MC was permitted to carry out the following repair and/or maintenance works

to its alleged right of way over the Servient Tenement:[note: 1]

1. To lay and compact approximately 95m length x 6m width x 100mm thick hardcore bed (made up of broken bricks/stone/concrete) and to level with quarry dust;

2. To construct 150mm thick concrete slab with 2 layers of A6 BRC over the compacted hardcore and finish with a 50mm thick layer of wearing course (asphalt topping); and

3. To construct concrete road hump (approximately 6m length x 4m width x 200mm thick) and finish with yellow/white paint.

There is a dispute between the parties as to the width of the road proposed to be constructed on the Servient Tenement. However, this dispute is not relevant in view of the conclusions which we have reached in this judgment.

3 The Servient Tenement is a long, narrow and irregular strip of land with an area of around 883.4m^2. It lies adjacent to Lots 111‖30, 111‖32, 111‖33 and 111‖34 of Town Sub-Division 21, which we shall refer to individually as "Lot 111‖30", "Lot 111‖32", "Lot 111‖33" and "Lot 111‖34" respectively, and collectively as "the Dominant Tenements". The Servient Tenement and all the Dominant Tenements were originally owned by a single owner, Mutual Trading Ltd ("Mutual"). In 1919, Mutual (then in liquidation) sold and conveyed the Dominant Tenements to various purchasers, but retained ownership of the Servient Tenement. Each conveyance conveyed the land sold, together with the dwelling house and the buildings described therein, and granted a right of way over the Servient Tenement ("the Right of Way") in favour of each of the Dominant Tenements as follows:

> 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 authorized 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.

We shall refer to the above grant of the Right of Way as "the Grant" in this judgment.

4 In 1970, Hong Leong Holdings Ltd ("HL"), the predecessor in title of the MC, became the owner of one of the Dominant Tenements (*viz*, Lot 111‖34) as well as the land adjacent to it (*viz*, Lot 561 of Town Sub-Division 21 ("Lot 561")). Lot 561 has an area of 9,631.6m^2, which is more than three times the size of Lot 111‖34, which has an area of 3,066.1m^2. Lot 561 has no access to Grange Road except via Lot 111‖34 and the Servient Tenement, using the Right of Way. 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). HL amalgamated Lot 111‖34 and Lot 561 into one lot, which became Lot 687 of Town Sub-Division 21 ("Lot 687"), in order to develop a condominium ("Grange Heights") consisting of 120 residential apartments, a car park for 188 cars, a swimming pool, two tennis courts and changing rooms. (For convenience, we shall refer to the amalgamation of Lot 111‖34 and Lot 561, which was effected in 1976, as "the Amalgamation"; these two plots of land will, however, continue to be referred to by their respective lot numbers in this judgment even though they have been merged to form Lot 687.) 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 HL did not own the Servient Tenement. The layout which was eventually approved excluded the Servient Tenement from the development. 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].

5 The residential units in Grange Heights are held by subsidiary proprietors under strata titles. Pursuant to the version of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) which was in force at the time the Present Action was commenced (we shall refer to this particular version as "the Act"), the "common property" (as defined in s 3 of the Act) comprised in a strata title plan is held by subsidiary proprietors as "tenants-in-common proportional to their respective share value[s] and for the same term and tenure as their respective lots are held by them" (see s 13(1) of the Act). Section 33(1) of the Act provides that the subsidiary proprietors of the lots in a strata title plan shall constitute the management corporation of that strata title plan, and s 33(3) provides that the management corporation shall, subject to the Act, have the control, management and administration of the common property. In particular, s 33(2)(*b*) of the Act states that the management corporation may sue and be sued in respect of any matter affecting the common property. The effect of these provisions is that the MC is the *alter ego* of the subsidiary proprietors of the residential units in Grange Heights ("the Residents"), who collectively own the common property in Lot 111[34] and Lot 561. As such, references to the MC in this judgment should be read as incorporating references to the Residents as well, and *vice versa*.

6 In 1973, ownership of two of the Dominant Tenements, namely, Lot 111[32] and Lot 111[33], passed to Collin Development Pte Ltd ("Collin"), which later changed its name to Lee Tat (by a deed of rectification executed in 1986, the conveyance of Lot 111[32] and Lot 111[33] to Collin was reflected as having been a conveyance to "Lee Tat ... formerly known as Collin ..." instead). Lee Tat subsequently acquired 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 in favour of which the Right of Way was granted in 1919. 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 under the Grant.

7 This appeal is the culmination of four sets of court proceedings stretching over a period of more than 30 years between Lee Tat and the MC (as well as their respective predecessors in title) concerning the entitlement of, first, HL and, later, the Residents to use the Right of Way. The first set of proceedings consisted of Suit No 3667 of 1974 and Civil Appeal No 11 of 1976 (collectively, "the First Action"); the second set of proceedings comprised Originating Summons No 404 of 1989 and Civil Appeal No 131 of 1990 (collectively, "the Second Action"); the Present Action, from which this appeal stems, constitutes the third set of proceedings; and the fourth set of proceedings consisted of Originating Summons No 825 of 2004 ("OS 825/2004") and Civil Appeal No 89 of 2004 (collectively, "the Fourth Action"). In this judgment, we shall refer to the High Court and the Court of Appeal in each of these actions as "the HC" and "the CA" respectively; we shall also refer to the First Action, the Second Action and the Fourth Action collectively as "the Previous Actions".

8 After the MC commenced the Present Action, Lee Tat responded by filing OS 825/2004 for, *inter alia*, a declaration that the Right of Way did not extend to Lot 561 and a permanent injunction to prohibit (among others) the Residents from using the Right of Way for access between Grange Road and Grange Heights. As Lee Tat's defence in the Present Action was dependent on its claims in OS 825/2004 being upheld by the court, the HC, with the consent of the parties, heard the latter action first. The HC dismissed Lee Tat's claims in OS 825/2004 (see *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2004] 4 SLR 828 ("*Grange Heights (No 4) (HC)*")). Lee Tat's appeal against that decision was dismissed by a majority of the CA (see *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2005] 3 SLR 157 ("*Grange Heights (No 4) (CA)*")). We shall hereafter refer to the majority of

the CA in the Fourth Action as "the Majority Judges" and to the Majority Judges' decision as "the Majority Judgment".

9 As we mentioned at [1] above, the long saga of bickering and court proceedings between the parties has not brought the Dispute closer to a final resolution. Many legal issues between them remain unresolved. For example, in the Present Action, the Judge left unanswered the question of whether the Residents may use the Right of Way for vehicular traffic as a result of the decisions in the Previous Actions. Lee Tat claimed that the Residents had abandoned their entitlement to use the Right of Way in this particular manner, but the MC denied this. Another issue that was left undecided was what would constitute excessive use of the Right of Way, given that the Residents own Lot 111[illegible]34, to which the Right of Way is appurtenant. Indeed, as will be seen, there are many more fundamental legal issues between the parties which remain open, and there will be no end to this series of litigation so long as any of these issues are not resolved.

10 The Dispute is concerned primarily with the MC's claim that the Residents are entitled to use the Right of Way for the purposes of gaining access to Lot 561 from Grange Road and *vice versa*. Lee Tat denies that the Residents have any such right. The Dispute raises issues of fact and law which could have been decided within a short period of time if the parties had agreed on the precise issues which required adjudication and had put those issues clearly and comprehensively to the courts in the Previous Actions. The fact that many legal issues currently remain undecided suggests that something went wrong somewhere in the Previous Actions. Whatever may be the reasons for or the causes of this situation, it is time for this court to bring finality to the Dispute in so far as it is within our judicial power to do so. Indeed, after we reserved judgment to consider the arguments of counsel for the parties, we suggested to them that this would be a proper case for their clients to negotiate a mutually acceptable settlement, whether in monetary terms or otherwise. However, this came to naught. As such, it now falls on this court to decide not only the question of whether the Residents may use the Servient Tenement as a means of access between Lot 561 and Grange Road, but also the outstanding legal issues connected with the parties' respective rights over the Right of Way. Before we deal with these issues, however, we have to consider a more immediate question relating to issue estoppel ("the Estoppel Question").

The Estoppel Question: Issue estoppel and its impact on the present appeal

The relevance of issue estoppel in this appeal

11 This appeal is, on the face of it, concerned with whether or not the Judge's decision in the Present Action is correct in law. The Judge granted the MC's application on the basis that, pursuant to the decision made in the Fourth Action, the MC was entitled to enjoy the Right of Way to the extent decided in the Second Action (see *Grange Heights (No 3) (HC)* ([2] *supra*) at [30]–[32]). He rejected Lee Tat's contention to the contrary on the ground that Lee Tat was estopped from re-litigating this particular issue – *viz*, whether the Residents could use the Right of Way to access Lot 561 from Grange Road by crossing from Grange Road to Lot 111[illegible]34 and then to Lot 561, and *vice versa* ("the Main Issue") – because, as was held by the HC and the Majority Judges in the Fourth Action, that issue had already been decided against Lee Tat in the Second Action.

12 At one level, this appeal is concerned with the law relating to rights of way and conflicting claims to use a right of way over a servient tenement. (To facilitate our discussion of this area of the law, we shall hereafter refer to the owner of a dominant tenement in favour of which an easement has been granted as a "dominant owner" and the owner of a servient tenement over which an easement exists as a "servient owner".) These are no doubt important issues to the parties in this action, and also to other dominant owners in similar situations in Singapore.

13 At another level, this appeal raises a more important question – *ie*, the Estoppel Question – as to the application of the principle of estoppel *per rem judicatam*, more commonly referred to as "*res judicata*" for short. (We should add that what we are concerned with in this regard is the doctrine of *res judicata* in its *conventional* form, as opposed to its *extended* form, which is discussed at [58]–[61] below.) *Res judicata* is based on the important principle of public policy that a cause of action, or an issue necessary to the resolution of a cause of action, which has been finally and conclusively adjudicated on the merits by a court of competent jurisdiction may not be re-litigated by the same parties. *Res judicata* applies to all litigation before the courts. For this reason, our decision on the applicability or otherwise of issue estoppel (which is the particular form of estoppel *per rem judicatam* involved in the present appeal) will have a larger and more lasting impact on the legal rights of litigants generally than our decision on the specific rights of Lee Tat and the MC in relation to the Right of Way.

14 Issue estoppel is relevant in this appeal because the outcome of the Present Action was – according to the Judge's analysis – already predetermined by the decision in the Fourth Action that Lee Tat was estopped from re-litigating "the issue [of] whether the [R]ight of [W]ay ... could be used by the [R]esidents ... to reach ... [L]ot 111**I**34 and then to cross over to ... [L]ot 561" (see *Grange Heights (No 3) (HC)* ([2] *supra*) at [29]). We would highlight at this juncture that this issue, which we shall term "the issue raised in the Fourth Action", is the same as the Main Issue which we defined earlier at [11] above. Significantly, the HC in the Fourth Action did not dismiss OS 825/2004 by direct reference to the facts and the legal issues raised by Lee Tat as the owner of the Servient Tenement. Instead, the HC dismissed it on the basis that the CA in the Second Action had already ruled against Lee Tat on the issue raised in the Fourth Action (which, as we have just mentioned, is also the Main Issue in the Present Action) (see *Grange Heights (No 4) (HC)* ([8] *supra*) at [32]–[37]). In other words, the HC in the Fourth Action dismissed OS 825/2004 on the ground that Lee Tat, in advancing the issue raised in the Fourth Action, was effectively seeking to re-litigate a point that had already been decided by the CA in the Second Action. On appeal by Lee Tat in the Fourth Action, the Majority Judges affirmed the decision of the HC on substantially the same grounds (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [16]–[18]). How the Majority Judges arrived at this conclusion and whether their conclusion was wrong in law are relevant issues before us. As will be seen, what we are faced with in this case is a situation in which neither the Judge in the Present Action nor the HC and the Majority Judges in the Fourth Action have actually addressed directly the rights of Lee Tat, *as a servient owner*, *vis-à-vis* the MC with respect to the use of the Right of Way for the benefit of Lot 561.

15 Ordinarily, issue estoppel should not cause serious difficulties for the court dealing with the same issue(s) in future litigation between the same parties. The present appeal is, however, an exception because of the interaction between the substantive law on rights of way and the law on issue estoppel. As we see it, the following problems have arisen in this case. The first relates to the existence or otherwise of legal rights, namely, whether the Residents are entitled to use the Right of Way to pass between Lot 561 and Grange Road, given that they do not reside on Lot 111**I**34, the dominant tenement. One difficulty that arises in this regard is that a right of way, whether acquired by prescription or (as in the present case) by a grant, is not an immutable or irrevocable legal right that, once acquired, lasts forever. It can be lost in a number of ways under the law, such as by abandonment, by extinguishment due to the operation of law (*eg*, if something is done to destroy the easement or the character of the dominant tenement) or even by excessive use. With respect to Lot 111**I**34 specifically, a question of law arises as to whether the Right of Way might have ceased to exist by 1976 as against the owner of the Servient Tenement because of the Amalgamation. Alternatively, questions of law arise as to whether the Right of Way might no longer have existed to its full extent as set out in the Grant by the time the appeal in the Second Action was heard in 1992 (because the Residents had not used it for vehicular traffic in any meaningful way since 1976) and

whether the Right of Way had been extinguished by the time the appeal in the Fourth Action was heard in 2005 (because of events which had occurred in the course of and after the construction of Grange Heights).

16 The second problem relates to the application of a legal principle, *viz*, the doctrine of *res judicata*. In the Fourth Action, the HC and the Majority Judges effectively held that Lee Tat was estopped from re-litigating the Main Issue (the issue raised in the Fourth Action being, as we pointed out at [14] above, the same as the Main Issue) because that issue had already been decided against Lee Tat in the Second Action. In the course of perusing the judgments in the Previous Actions and after hearing counsel, however, we formed the provisional view that the Main Issue was *not* the same as the issue decided by the courts in the Second Action ("the issue decided in the Second Action"). Furthermore, in the Fourth Action, the Main Issue (as framed in the form of the issue raised in the Fourth Action) also did not arise between the same parties as those involved in the issue decided in the Second Action. In the Second Action, Lee Tat was sued in its capacity as a *dominant* owner, whereas, in the Fourth Action, it sued as a *servient* owner. Accordingly, we were somewhat puzzled by the Majority Judges' decision in the Fourth Action that Lee Tat was estopped from raising the Main Issue in that action. As the Dispute has gone on for more than 30 years without a final resolution, freezing in the meantime the development of what are acknowledged to be very valuable pieces of land in Singapore, we are of the view that it is necessary that we resolve this dispute definitively once and for all so as to terminate the cycle of litigation between the parties. To this end, we propose to re-examine all the judgments in the Previous Actions in order to identify the issue or issues of fact and/or law that were determined in those actions, and, in turn, ascertain what issue or issues Lee Tat is now barred from raising in the Present Action by virtue of issue estoppel.

17 If the Majority Judges in the Fourth Action were correct in finding that the issue decided in the Second Action was the same as the issue raised in the Fourth Action (which is the same as the Main Issue (see [14] above)), it would mean that the Majority Judges were also correct to hold that Lee Tat was estopped from bringing up the Main Issue (as framed in the form of the issue raised in the Fourth Action) in that action (*ie*, the Fourth Action). This would in turn mean that, in the Present Action, the Judge was correct to rule that, pursuant to the Majority Judgment in the Fourth Action, issue estoppel prevented Lee Tat from raising the Main Issue in the Present Action. We would, in that case, have to dismiss this appeal. But, if we should find that the Majority Judges were wrong in regarding the issue raised in the Fourth Action as being the same as the issue decided in the Second Action and therefore erred in holding that Lee Tat was estopped from bringing up the Main Issue (as framed in the form of the issue raised in the Fourth Action) in the Fourth Action (and see, in this regard, our provisional view at [16] above), then we would be placed in the unenviable position of having to decide whether, in spite of the Majority Judgment being wrong in law on the point of issue estoppel, we should nonetheless hold that Lee Tat is estopped from re-litigating the Main Issue because that was what the Majority Judges decided. In this regard, if we were to decide that Lee Tat is not bound by the Majority Judgment, then it is open to this court to consider and resolve the Main Issue as well as all the other outstanding legal issues in dispute once and for all. With this prospect open to us, we directed the parties, after we had reserved judgment, to file further submissions on *res judicata* and abuse of process and also on the extinguishment of a right of way. This process, together with the need for this court to re-examine the issues raised, the arguments made and the decisions rendered in the Previous Actions, has contributed to the delay in finalising this judgment.

The decisions in the Previous Actions

18 We will now retrace our steps to 1974 (when the First Action was commenced) to ascertain the issue or issues which were decided between the parties and their respective predecessors in title in the Previous Actions *vis-à-vis* the Right of Way. For this purpose, and to facilitate the

understanding of the issues arising from the development of Grange Heights, we have appended to this judgment, as Appendix 1, a site plan (not drawn to scale) showing the location of the Dominant Tenements (*ie*, Lot 111‌30, Lot 111‌32, Lot 111‌33 and Lot 111‌34) in relation to the Servient Tenement (*ie*, Lot 111‌31 of Town Sub-Division 21) and Lot 561 (which has been amalgamated with Lot 111‌34 to form Lot 687). (It should be noted that the attached site plan does not take into account changes in the configurations and/or the lots numbers of any of the Dominant Tenements other than Lot 111‌34, since nothing in this judgment turns on such developments, if any.) It can be seen from the site plan that, as mentioned earlier (at [4] above), there is no access from Lot 561 to Grange Road and *vice versa* except through Lot 111‌34 and the Servient Tenement (via the Right of Way). Hence, as all the residential apartments in Grange Heights are sited on Lot 561, the Residents also have no access to Grange Road except through Lot 111‌34 and the Right of Way over the Servient Tenement. The site plan also shows that, although Lot 561 has no access to Grange Road, it has access to River Valley Road (via either St Thomas Walk or River Valley Grove) and Killiney Road (via St Thomas Walk). The Residents have been using St Thomas Walk, a public road, for access to Grange Heights since 1976. River Valley Grove is another public road which may be used for access between Grange Heights and River Valley Road. However, there is no evidence as to whether the Residents have been using River Valley Grove for this specific purpose in the past and, if not, why they have not been doing so.

The First Action

(1) The decision of the HC

19 The First Action was commenced by Collin in 1974 against HL on the ground that the latter, which was then in the course of developing Grange Heights on Lot 111‌34 and Lot 561, and its contractors were, *inter alia*, using the Right of Way for lorries to bring workers and construction materials to Lot 561 from Grange Road. Collin, in its capacity as a dominant owner, sought the following reliefs against HL, which was likewise a dominant owner (see *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1975-1977] SLR 457 ("*Grange Heights (No 1) (HC)*") at 458, [7]):

> (1) A declaration that the defendants Hong Leong Holdings Ltd [*ie*, HL] as the owners of Lot 561 … by their directors, officers, servants, workmen or agents or any of them or otherwise howsoever are not entitled to use, nor as such owners to permit or invite any persons or purchasers of apartments in ... Grange Heights to use [the Servient Tenement] or any part thereof for the purpose of passing either to or from Grange Road, Singapore aforesaid.
>
> (2) An injunction to give effect to the said declaration restraining the defendants as the owners of Lot 561 … by their directors, officers, servants, workmen or agents or any of them or otherwise howsoever from so using and inviting [the] purchasers [of apartments in Grange Heights] and other persons so to use the said passage.
>
> (3) Damages.

It should be noted that the declaration sought by Collin was in substance a restatement of the principle in *Harris v Flower* (1904) 74 LJ Ch 127 ("the *Harris v Flower* principle"). This principle states 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. In the context of the present case, the *Harris v Flower* principle entails that, since Mutual (the servient owner at the time of the Grant) granted the Right of Way over the Servient Tenement for the benefit of the Dominant Tenements (which include Lot 111‌34 *but not* Lot 561), the MC could not use the Right of Way for the benefit of Lot 561. *Harris*

v Flower was cited in argument by Collin. Although F A Chua J did not expressly refer to that case in his judgment, he did in essence decide that Collin's argument was not an answer to HL's contention that HL's activities did not substantially interfere with Collin's enjoyment of the Right of Way and, therefore, Collin was not entitled to prevent HL from using the Right of Way (see further [20] below).

20 In its defence, HL contended that, in law, Collin had no cause of action unless it could prove that HL's actions had caused substantial interference with its (Collin's) enjoyment of the Right of Way. Chua J agreed with this legal submission (see *Grange Heights (No 1) (HC)* ([19] *supra*) at 459, [10]), citing *Hutton v Hamboro* (1860) 2 F & F 218; 175 ER 1031 and *Pettey v Parsons* [1914] 2 Ch 653. Reference was also made to pp 580–581 of *Halsbury's Laws of England* vol 12 (Butterworths & Co (Publishers) Ltd, 3rd Ed, 1955). On the facts, HL denied that it had substantially interfered with Collin's enjoyment of the Right of Way as alleged or at all, or that it had evinced any clear intention to continue any interference or disturbance as alleged or at all.

21 HL contended that it was entitled to "an identical or [a] similar right of way over [the Servient Tenement]" (see *Grange Heights (No 1) (HC)* ([19] *supra*) at 458, [8]), and could pass and repass over the Right of Way as well as authorise other persons to do so. HL also counterclaimed for the following declarations (*ibid*):

> 1. For a declaration that the defendants [*ie*, HL] are entitled to pass and repass [the Servient Tenement] as a right of way [for] access to their property Lot [111**I**34] ...
>
> 2. For a declaration that the defendants are entitled to authorise other persons to pass and repass the said right of way for access to Lot [111**I**34] or elsewhere.
>
> 3. For a declaration that the defendants are entitled to carry out improvement of the said right of way over [the Servient Tenement].
>
> 4. For a declaration that the defendants are entitled to authorise other persons to pass and repass [the Servient Tenement] for access to Lot 561 so long as such user does not substantially affect the plaintiffs' [*ie*, Collin's] enjoyment of the [R]ight of [W]ay.

22 Collin obtained an interim injunction against HL, which was continued until the trial of the action. By the time the trial was heard in 1976, the development of Grange Heights was substantially completed. As we noted at [20] above, at the trial, Chua J accepted HL's submission on the law. He found that, on the facts, there was no evidence that HL had caused substantial interference with Collin's enjoyment of the Right of Way. Accordingly, he dismissed Collin's action on the following grounds (see *Grange Heights (No 1) (HC)* ([19] *supra*) at 460–461, [16]–[22]):

> [Collin] says that Grange Heights consists of 120 units of luxury apartments; that there would be a car park for 188 cars; that if [HL] permits the [R]esidents ... to use the [R]ight of [W]ay as a link road to Grange Road the vehicular traffic on the [R]ight of [W]ay would be substantially increased and would thereby seriously and adversely affect [Collin's] enjoyment of the [R]ight of [W]ay.
>
> The evidence adduced by [Collins] only shows that there were activities carried [out] on [the Servient Tenement] ... in 1975 and that persons were walking along the [R]ight of [W]ay from Grange Road to Grange Heights and from Grange Heights to Grange Road. The digging of the trench along the [R]ight of [W]ay was not carried out by [HL] but by the Public Utilities Board. There is no evidence that [Collin] has been substantially obstructed by these activities.

...

I inspected the [R]ight of [W]ay on 21 October 1975 during the course of the hearing and I found that the road on [the Servient Tenement] was in fairly good condition and there was no difficulty for [Collin] to get to the houses on [Lot 111 32] and [Lot 111 33].

Access to Grange Heights is now at two points, River Valley Road and St Thomas Walk. As from March 1975 [the Servient Tenement] as an access road is excluded from [HL's] development. Even if [the Servient Tenement] is used as an access road it is highly improbable that vehicular traffic from Grange Heights along the [R]ight of [W]ay would be so heavy as to substantially interfere with [Collin's] enjoyment of the [R]ight of [W]ay.

I find that there has been no substantial interference of [Collin's] enjoyment of the [R]ight of [W]ay and consequently [Collin] has no cause of action against [HL].

23 Chua J also dismissed HL's counterclaim on the ground that HL could not seek declaratory rights in relation to the Right of Way against Collin, which did not own the Servient Tenement (*id* at 461, [24]). In other words, whether HL was entitled to use the Right of Way to access Lot 561 from Grange Road and *vice versa* was an issue to be decided between HL and the then owner of the Servient Tenement, and not between HL and Collin, both of which were dominant owners having the same entitlement to use the Right of Way.

(2) The decision of the CA

24 Collin appealed against the dismissal of its claim, but HL did not appeal against the dismissal of its counterclaim. The CA dismissed Collin's appeal (see *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1975-1977] SLR 202 ("*Grange Heights (No 1) (CA)*")). Wee Chong Jin CJ, delivering the judgment of the CA, said (at 203–204, [7]–[11]):

... 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 that 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.

...

It is contended on behalf of [Collin] … that the volume of vehicular traffic passing through the [S]ervient [T]enement from Grange Road to the 120 flats on Lot 561 when they are completed and occupied must be such as to amount to a substantial interference with [Collin's] right to use the [S]ervient [T]enement for ingress to and egress from the dominant tenement[s] [owned by Collin]. It is submitted, having regard to [HL's] evidence that the intention is for the occupiers of the 120 flats to use the metalled road [on Lot 111 34] which would run through the [S]ervient [T]enement as a one way [*sic*] road for ingress to the flats from Grange Road, that such use would create a danger to [Collin] in [its] enjoyment of [its] right to use the [S]ervient [T]enement as a means of egress from [its] properties to Grange Road.

As we have said, the question turns on the facts and circumstances of the particular case. The way in question is about 280 ft long and the metalled portion will be 18 ft wide. It will be used as a one way [*sic*] road by the occupiers, and their invitees, of 120 flats to their flats from Grange Road but they will have other means of access to these flats. It is reasonable to assume that all

the occupiers of these flats own cars. It is also reasonable to infer that not more than half of the occupiers would be passing along this metalled road when they return to their flats from work, shops, markets, etc nor would they be passing along it at the same time. [Collin] presently rarely uses it and is unlikely to do so in the future. The trial judge was of the opinion on the facts before him that it would be highly improbable that vehicular traffic using it would be so heavy as to substantially interfere with [Collin's] right of way … For ourselves, we have arrived at a similar view. As regards the element of danger, we are of the opinion that the volume of vehicular traffic that is likely to use the [S]ervient [T]enement in the near future would not be such as to constitute a danger to [Collin] in [its] enjoyment of the [R]ight of [W]ay.

Accordingly, in our judgment no case has been made out for a quia timet injunction at the present time.

25 In dismissing the appeal, Wee CJ added that Collin was not precluded from seeking any remedy in the future "if and when the facts and circumstances ... changed" (*id* at 204, [12]). It is not clear whether Wee CJ, in making that remark, had in mind circumstances where there might be substantial interference with Collin's enjoyment of the Right of Way or where HL's use of the Right of Way might contravene the *Harris v Flower* principle. As will be seen, the facts and the circumstances did change in 1997 after Lee Tat acquired title to the Servient Tenement.

(3) Our observations on the decisions of the HC and the CA in the First Action

26 We have the following observations on the decisions of the HC and the CA in the First Action:

(a) Chua J and the CA effectively rejected Collin's argument ("Collin's argument in the First Action"), which was based on the *Harris v Flower* principle, on the ground that that principle was not relevant for the purposes of determining the rights of Collin and HL *inter se* as dominant owners. This was because a dominant owner had no right or standing to challenge a fellow dominant owner's use of a right of way which both dominant owners were entitled to enjoy on the ground that such use infringed the terms of the grant. The question of whether a dominant owner's use of a right of way had exceeded the terms of the grant was a matter between the servient owner who had made the grant and the dominant owner, and not between two dominant owners having the same entitlement to enjoy that right of way. A dominant owner was only entitled to a remedy against his fellow dominant owner if the latter's use of the right of way had substantially interfered with the former's enjoyment of the same easement (see *Grange Heights (No 1) (HC)* ([19] *supra*) at 459, [10] and *Grange Heights (No 1) (CA)* ([24] *supra*) at 203, [7]). Correspondingly, HL's counterclaim that it was entitled to use the Right of Way to gain access to Lot 561 from Grange Road and *vice versa* was, in our view, correctly dismissed by Chua J since the then owner of the Servient Tenement was not a party to the First Action (see *Grange Heights (No 1) (HC)* at 461, [24]).

(b) Both Chua J and the CA found on the facts that HL had not substantially interfered with Collin's enjoyment of the Right of Way and dismissed Collin's claim on that ground (see *Grange Heights (No 1) (HC)* at 461, [22] and *Grange Heights (No 1) (CA)* at 204, [10]–[11]). In other words, the *Harris v Flower* principle was not relevant to the issue to be determined in the First Action.

(c) Both Chua J and the CA observed that it was highly improbable that vehicular traffic from Grange Heights after its completion would be so heavy as to substantially interfere with Collin's enjoyment of the Right of Way (see *Grange Heights (No 1) (HC)* at 460–461, [21] and *Grange Heights (No 1) (CA)* at 204, [10]). It should be noted, however, that these were

speculative statements of fact made in the context of whether there was substantial interference by HL with Collin's enjoyment of the Right of Way. These statements were *not* made in the context of a claim by a *servient* owner (*ie*, the owner of the Servient Tenement) that HL was not entitled to use the Right of Way for the purposes of Lot 561 and/or that such use would be excessive and contrary to the terms of the Grant. It should also be noted that the CA found that Collin "rarely use[d] [the Right of Way] and [was] unlikely to do so in the near future" (see *Grange Heights (No 1) (CA)* at 204, [10]).

The Second Action

(1) The decision of the HC

27 On 27 April 1989, the MC (which had by then been constituted under the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed)) commenced the Second Action for an injunction and damages against Lee Tat (as Collin was by then known) for blocking the Residents' access to and use of the Right of Way. Lee Tat had placed an iron gate across that end of the Servient Tenement which bordered Grange Road ("the Grange Road end of the Servient Tenement") and had erected a fence across that end of the Servient Tenement which bordered Grange Heights. The MC obtained an interim injunction restraining Lee Tat from obstructing the Residents' access to the Right of Way, and Lee Tat applied to have it discharged.

28 Lee Tat's application for the interim injunction to be discharged ("the Discharge Application") was heard by Punch Coomaraswamy J. Lee Tat's case was that the interim injunction should be discharged because:

(a) the Amalgamation had extinguished the MC's right of way over the Servient Tenement ("Issue (a) of the Second Action"); and

(b) the Residents were not entitled to use the Right of Way because they were using it not for the purposes of the dominant tenement in favour of which that right had been granted (*ie*, Lot 111[illegible]34), but for the purposes of Lot 561, the non-dominant tenement on which all the residential apartments in Grange Heights stood ("Issue (b) of the Second Action").

The CA in the Second Action took cognisance of the same issues (see *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301* [1992] 2 SLR 865 ("*Grange Heights (No 2) (CA)*") at 868, [13]) and, as will be seen, whether the CA decided those issues *then* has an important bearing on the outcome of this appeal. Issue (b) of the Second Action is in fact the same as Collin's argument in the First Action, which was premised on the *Harris v Flower* principle. Issue (b) of the Second Action also involves the same question as that encapsulated in the Main Issue as well as the issue raised in the Fourth Action.

29 In the HC, Lee Tat argued, in respect of Issue (a) of the Second Action, that the Amalgamation had extinguished the MC's entitlement to use the Right of Way because "Lot 111[illegible]34 [had] ceased to exist. It [had become] part of Lot 687."[note: 2] With regard to Issue (b) of the Second Action, Lee Tat relied on the *Harris v Flower* principle and contended, *inter alia*, that the Right of Way was "for [the] benefit of ... Lot 111[illegible]34 ... [and could not] be passed to Lot 687".[note: 3] In its defence, the MC argued that "[a]ll [the] cases cited by [counsel for Lee Tat were] between [a] dominant tenant and [a] servient tenant – [and] not between two dominant tenants".[note: 4] In making this submission, the MC effectively took the position that Lee Tat, not being the owner of the Servient Tenement, could not rely on Issue (b) of the Second Action. The MC further contended that Lee Tat had acquiesced in the Residents' use of the Right of Way since 1976.

30 The HC rejected Lee Tat's arguments on both Issue (a) of the Second Action and Issue (b) of the Second Action. Coomaraswamy J held that the Right of Way continued to exist in favour of Lot 111‖34 despite the Amalgamation and, since Lee Tat had conceded that there was no excessive use of the Right of Way by the Residents, Lee Tat was not entitled to close the Right of Way and prevent the Residents from using it. He accordingly dismissed the Discharge Application and granted the MC a permanent injunction restraining Lee Tat from interfering with the Residents' use of the Right of Way ("the 1990 Injunction"). Coomaraswamy J's reasons for so ruling are set out in *Management Corp Strata Title No 301 v Lee Tat Development Pte Ltd* [1990] SLR 1193 ("*Grange Heights (No 2) (HC)*") as follows (at 1195–1196, [7]–[11]):

> *The question before me is whether [Lee Tat is] entitled … to prevent the [R]esidents ... from using the [S]ervient [T]enement for gaining access to and from Grange Road. The question turns on the rights of the [MC] and [Lee Tat] and the extent of [their] rights over the [S]ervient [T]enement.* It is common ground that the [MC] as the [owner] of [L]ot 111‖34 and [Lee Tat] as [the owner] of [Lot] 111‖33 and [Lot] 111‖32 have a right of way over the [S]ervient [T]enement, which was granted to them or their predecessors in title …
>
> Plainly, the [MC's] right of way is derived from or based on the [R]ight of [W]ay given to [it] as [the owner] of [L]ot 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 ... part of [a] larger parcel of land known as [L]ot 687. However, the land is still there and the [R]ight of [W]ay ... remains intact. *The amalgamation of [Lot] 111‖34 and [Lot] 561 into one lot known as [L]ot 687 … does not destroy or extinguish the [R]ight of [W]ay* which runs with the land and enure[s] to the benefit of the owners for the time being of the land. Accordingly … the [MC] as [the owner] of the land, formerly known as [L]ot 111‖34 but now a part of [L]ot 687, still [has] the [R]ight of [W]ay over the [S]ervient [T]enement, and [Lee Tat] in erecting the gate and the fence [has] interfered with the [MC's] right of way.
>
> [Lee Tat] has not complained, and it is not [its] case, that there has been excessive use of the [S]ervient [T]enement by the [R]esidents ... Hence, the question of excessive use of the [S]ervient [T]enement does not arise.
>
> I now turn to the right[s] of [Lee Tat]. [It is] not the [owner] of the [S]ervient [T]enement; [it is] the [owner] of the dominant tenements, namely, [Lot] 111‖33 and [Lot] 111‖32 and [it] enjoy[s] a right of way over the [S]ervient [T]enement. *[It is] entitled to take necessary steps to protect [its] right of way and [to] have recourse to legal remedy against any interference of [its] enjoyment of that right. However, [it is] not entitled to erect the gate and the fence as [it] did and close the [R]ight of [W]ay, which [it has] in common with others.* [It has] not shown to me that [it is] entitled to do so. [It is] not complaining of any interference of [its right] of way by the [MC] or any residents of Grange Heights. That is certainly not [its] case here.
>
> In the result, the application for [the] discharge of the interim injunction is dismissed with costs. The substantive application in the originating summons is allowed, and I grant to the [MC] the injunction asked for and further order that [Lee Tat] remove the iron gate across the Grange Road end of the [S]ervient [T]enement and the fence across the Grange Heights end thereof.
>
> [emphasis added]

(2) The decision of the CA

31 Lee Tat's appeal to the CA was dismissed. The CA, in a judgment delivered by Goh Joon

Seng J, rejected Lee Tat's arguments (as set out at [28]–[29] above) and affirmed the decision of the HC on the following grounds (see *Grange Heights (No 2) (CA)* ([28] *supra*) at 869–871, [19]–[24]):

> Sub-division and amalgamation are only for the purposes of survey, conveyance and transfer of land and the issue of documents of title. On sub-division and amalgamation of land, the dominant tenement does not cease to exist and the right of way appurtenant thereto is not thereby extinguished. *On amalgamation, so long as the user [of] the servient tenement is not excessive, the enlargement of the dominant tenement by such amalgamation does not affect the existence of the right of way.* In *Graham & Anor v Philcox & Anor* [[1984] 1 QB 747] in an action by the owner of a dominant tenement against the owner of the servient tenement, it was held that the right of way appurtenant to the first floor of a coach house was not affected by the whole of the coach house being turned into one dwelling. May LJ, at pp 756–757, said:
>
> > In none of the judgments in any of the cases to which Mr Godfrey [counsel for the servient owner] referred us is there [any] suggestion that a mere alteration of a dominant tenement to which a right of way may be appurtenant is sufficient to extinguish it, or indeed to affect the entitlement to its use unless as the result of that alteration the extent of the user is thereby increased.
> >
> > In my opinion, therefore, the mere alteration of the coach house into one dwelling cannot have had any effect upon the existence of the right of way. It should be borne in mind that there was no evidence whatever before the judge that the actual or anticipated user by the plaintiffs of the way was in any way excessive, either in quantity or quality.
>
> *[Lee Tat] ... as [the owner] of [Lot] 11182 and [Lot] 11183 [is] only entitled to protection of [its] right of way over [the Servient Tenement] if [its] enjoyment of that right is substantially interfered with by the [MC].* ...
>
> ...
>
> The [R]esidents ... have not subjected [the Servient Tenement] to such heavy vehicular traffic as to substantially interfere with the right of way of [Lee Tat]. In fact, they do not use it for vehicular traffic at all but only as a footpath. ...
>
> Therefore, there is still no likelihood of such excessive user as to substantially interfere with [Lee Tat's] right of way over this servient tenement or to cause a nuisance to [Lee Tat].
>
> [emphasis added]

(3) Our observations on the decisions of the HC and the CA in the Second Action

32 The following are our observations on the decisions of the HC and the CA in the Second Action:

(a) With regard to Issue (a) of the Second Action, both the HC and the CA held that the Amalgamation did not destroy or extinguish the Right of Way. With respect, this issue did not have to be decided at all in the Second Action because neither the MC nor Lee Tat, as fellow dominant owners with equal entitlement to use the Right of Way, was in a position to question the existence of the easement *vis-à-vis* the other; only the then owner of the Servient Tenement could have done so.

(b) The HC cited no authority for its ruling on Issue (a) of the Second Action, but the CA referred to *Graham v Philcox* [1984] 1 QB 747 as authority for the principle that "[o]n amalgamation, so long as the user [of] the servient tenement [was] not excessive, the enlargement of the dominant tenement by such amalgamation [did] not affect the existence of the right of way" (see *Grange Heights (No 2) (CA)* ([28] *supra*) at 869, [19]). In our view, given the factual situation which existed at the time of the Second Action, this principle ("the principle stated by the CA in the Second Action") was wrong for the reasons stated below:

(i) If the Residents intended to reach their apartments in Grange Heights (which were all situated on Lot 561, the non-dominant tenement) from Grange Road, they would have to cross from Grange Road to, first, Lot 111⁄34 (the dominant tenement) and then Lot 561. It would have been contrary to the *Harris v Flower* principle for the Residents to use the Right of Way in this manner as it would have entailed using the Right of Way, which had been granted in favour of Lot 111⁄34, for the benefit of a non-dominant tenement (*viz*, Lot 561).

(ii) If the Residents intended to use the Right of Way to reach Grange Road from their apartments in Grange Heights, they would have to cross from Lot 561 to Lot 111⁄34 (the dominant tenement) first, before proceeding from Lot 111⁄34 to Grange Road. Although the Right of Way could be used for passage between Lot 111⁄34 and Grange Road (Lot 111⁄34 being one of the Dominant Tenements), such use of the Right of Way by the Residents at the time of the Second Action would inevitably have resulted in excessive use of the easement. This is because, at the time the Grant was made, the Right of Way (in relation to Lot 111⁄34) was meant to be enjoyed by only the occupants of and the visitors to the one bungalow which then stood on Lot 111⁄34 (*cf* the (approximately) 120 households residing in Grange Heights at the time of the Second Action).

(iii) In either of the situations delineated at sub-paras (i) and (ii) above, the owner of the Servient Tenement at the time of the Second Action would have been entitled to an order of court permanently restraining the Residents' unlawful use of the Right of Way. This in turn would have meant that, *vis-à-vis* the then owner of the Servient Tenement, the Residents were not entitled to use the Right of Way so long as Grange Heights stood on Lot 561 and Lot 111⁄34 (as amalgamated as Lot 687). The Right of Way would revive for the benefit of Lot 111⁄34 alone if that lot were restored to its original state as at the time of the Grant. This is because, as stated in Jonathan Gaunt QC & Paul Morgan QC, *Gale on Easements* (Sweet & Maxwell, 17th Ed, 2002) at para 12⁄77, "[a] previously existing right [of way] will *not* be affected by acts of excessive user or usurpation ... *if ... the extent of the excess can be ascertained*" [emphasis added]. However, at the time of the Second Action, it was practically impossible to restore Lot 111⁄34 to its original state due to the developments and changes which had taken place since the completion of Grange Heights (see further [93] below). In truth, at the time of the Second Action, the Right of Way had already effectively been extinguished by operation of law with respect to Lot 111⁄34 (see [93], [102]–[106] and [109] below).

(c) In our view, *Graham v Philcox* does *not* support the principle stated by the CA in the Second Action. *Graham v Philcox* was concerned with the alteration of a dominant tenement in rather unusual circumstances. In that case, a right of way had been granted to the first floor flat of a coach house ("the upper flat"), but not the flat on the ground floor ("the lower flat"). The upper flat and the lower flat were originally occupied as two separate and distinct dwelling units. Subsequently, the entire coach house was conveyed to the plaintiffs, who occupied it as a single dwelling unit. The plaintiffs contended that they were entitled to continue using the right of way by virtue of s 62(2) of the Law of Property Act 1925 (c 20) (UK), which stated that a

conveyance of land was deemed to include "all ... easements ... at the time of the conveyance ... enjoyed with ... the land, houses, or other buildings conveyed ... or any part thereof". In response, the defendants, who were the owners of the servient tenement, argued that, since the dominant tenement for whose benefit the right of way was being claimed (namely, the entire coach house) was larger than the dominant tenement for whose benefit the right of way was originally granted (namely, the upper flat), under the *Harris v Flower* principle, the plaintiffs could not use the right of way given that the upper flat and the lower flat had been combined into a single residence. May LJ noted that "there was no evidence whatever ... that the actual or anticipated user by the plaintiffs of the [right of] way was in any way excessive, either in quantity or quality" (see *Graham v Philcox* at 757). It was in these circumstances that May LJ rejected the suggestion by the defendants' counsel that the mere alteration of a dominant tenement could extinguish an easement appurtenant to the land or affect the entitlement to use that easement (*id* at 756–757), and held that the effect of s 62 of the Law of Property Act 1925 was to annex the benefit of the right of way to the whole coach house (*id* at 757). In this regard, it is significant that *Gale on Easements* takes the view (at para 9-30) that *Graham v Philcox* "is really concerned with the operation of section 62 [of the Law of Property Act 1925] and does not affect the principle ... in *Harris v. Flower*".

(d) In our view, a non-dominant tenement cannot become, for the purposes of an easement created by a grant, part of the dominant tenement simply by amalgamation with the dominant tenement, especially where the non-dominant tenement is far larger than the dominant tenement (as in the present case, where Lot 561 is more than three times larger than Lot 111-34).

(e) It is clear that, in raising Issue (a) of the Second Action, Lee Tat did so, and could have done so, only in its capacity as a dominant owner (specifically, as the owner of the dominant tenements, Lot 111-32 and Lot 111-33) as it did not then own the Servient Tenement. Although the CA in the Second Action referred to *Graham v Philcox*, which (as mentioned in sub-para (c) above) involved a dispute between servient owners and dominant owners, there is nothing in *Grange Heights (No 2) (CA)* to suggest that the CA regarded Lee Tat's argument on Issue (a) of the Second Action as an assertion of the rights of the then owner of the Servient Tenement. In this connection, it is interesting to note that the CA stated in its judgment that Mutual had presumably been dissolved already (*id* at 867, [4]). This suggests that the CA, in deciding the appeal in the Second Action, did not have in mind the rights of the then owner of the Servient Tenement. Therefore, the decision of the HC and the CA that the Amalgamation had not destroyed the Right of Way was not intended to, and did not, bind the then owner of the Servient Tenement, who was not a party to the Second Action, but only bound Lee Tat as the dominant owner of Lot 111-32 and Lot 111-33. In other words, both the HC and the CA decided Issue (a) of the Second Action in the context of the rights of two dominant owners *inter se*.

(f) The HC's decision (at 1195–1196, [10] of *Grange Heights (No 2) (HC)* ([30] *supra*)) that Lee Tat, as a dominant owner, was only entitled to prevent the MC from substantially interfering with its enjoyment of the Right of Way – but not to block the MC's access to and use of the Right of Way – effectively amounted to a ruling that Lee Tat could not raise Issue (b) of the Second Action as only the then owner of the Servient Tenement had the requisite *locus standi* to raise that issue. This aspect of the HC's holding in the Second Action mirrors Chua J's dismissal of Collin's claim and HL's counterclaim in the First Action (see [23] and [26] above). The CA in the Second Action agreed with the HC that Lee Tat, not being the owner of the Servient Tenement, could only prevent its enjoyment of the Right of Way from being substantially interfered with by the Residents; apart from that, Lee Tat was not entitled to bar the Residents from using the Right of Way for the purposes of Lot 561 (see *Grange Heights (No 2) (CA)* at 869, [20]) as that was a matter between the Residents and the then owner of the Servient Tenement.

(g) The decisions of the HC and the CA, as set out at sub-paras (a) and (f) above, *did not* constitute a ruling on the merits of Issue (b) of the Second Action (which, as we pointed out at [28] above, involves the same question as that encapsulated in the issue raised in the Fourth Action). This is because Issue (b) of the Second Action could only be decided between the MC and the then owner of the Servient Tenement, and the latter was not a party to the Second Action. The HC and the CA held, in substance, that Lee Tat, which did not own the Servient Tenement at the time of the Second Action, had no *locus standi* to raise Issue (b) of the Second Action. The fact that Issue (b) of the Second Action was *not* decided is, in our view, all the more evident when one examines Lee Tat's written case for its appeal in the Second Action. At para 4.3 of its written case, Lee Tat submitted that:[note: 5]

> The real question for determination is whether the [Residents] are entitled to use [the Servient Tenement] as a right of way to their apartments, and not whether [Lee Tat is] entitled to stop them from using [the Servient Tenement].

The "real question" as framed by Lee Tat is essentially the same as Issue (b) of the Second Action. The CA in the Second Action did not rule on this point at all. Instead, like the HC, it focused on the circumstances in which Lee Tat, as a dominant owner, was entitled to protection, *vis-à-vis* the MC, of its entitlement to enjoy the Right of Way.

(h) Even if the decisions of the HC and the CA in the Second Action were relevant to Issue (b) of the Second Action and, thus, the issue raised in the Fourth Action, they would not necessarily have provided the MC with a defence (in the form of issue estoppel) to Lee Tat's claims in the Fourth Action. This is because the courts' decisions in the Second Action rested on the factual premise that, in spite of the Amalgamation, there was no likelihood of such excessive use of the Right of Way by the MC as to substantially interfere with Lee Tat's enjoyment of that easement or cause a nuisance to Lee Tat (see *Grange Heights (No 2) (HC)* at 1195–1196, [9]–[10] and *Grange Heights (No 2) (CA)* at 871, [24]). The factual situation would change if, for instance, the Right of Way were used by all or a substantial number of the Residents and their visitors simultaneously, in contrast to the scenario posited by the CA in the First Action (see *Grange Heights (No 1) (CA)* ([24] *supra*) at 203, [10]). As K R Handley, *Spencer Bower, Turner and Handley: The Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996) ("*Spencer Bower*") states at para 383, "[t]here is substantial authority that there can be no *res judicata* in a changing situation". Sundaresh Menon JC succinctly made the same point in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR 453 (at [34]) as follows:

> [T]he issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceeding and *the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change*. [emphasis added]

The Fourth Action

(1) The decision of the HC

33 In the Fourth Action, Lee Tat, as the owner of the Servient Tenement, sought the following reliefs:[note: 6]

> 1. a declaration that the ... easement [granted] in favour of inter alia, Lot 111[illegible]34 was not intended to be made appurtenant to ... Lot 561 and now part of Lot 687 ...
>
> 2. a declaration that the amalgamation of Lot 111[illegible]34 with ... Lot 561 ... to form Lot 687 did

not result in the conferment of any easement rights to Lot 561 and/or Lot 687 being land other than the dominant tenement (Lot 111|34);

3. a declaration that the right of way over Lot 111|31 shall not be used as an access to Lot 687;

4. a permanent injunction to prohibit all the owners, residents, occupants and/or visitors of the apartments in the condominium known as Grange Heights from using any part of Lot 111|31 to access Grange Heights from Grange Road and vice versa absolutely and indefinitely;

5. an order directing the Registrar of Titles and Deeds to expunge any and all entries, notices and registration of any easements or Orders of Court registered against Lot 111|31 in the Index to Land Books in the Registry of Deeds and [the] Land Register comprised in Certificate of Title Vol. 464 Folio 159;

6. further and/or alternatively, a declaratory order that all the owners, residents, occupants and/or visitors of the apartments in the condominium known as Grange Heights are not entitled to use any part of Lot 111|31 to access Grange Heights from Grange Road absolutely and indefinitely ...

34 It should be noted that the first three declarations sought by Lee Tat were nothing more than a restatement of the *Harris v Flower* principle. If those declarations had been granted by the court, it would have meant that the Residents would no longer be entitled to use the Right of Way to access Lot 561 from Grange Road and *vice versa*. The fourth, fifth and sixth reliefs were merely consequential orders to be made if the first three declarations were granted. In the Fourth Action, Lee Tat contended that it was entitled to bring up the Main Issue (as framed in the form of the issue raised in the Fourth Action) and could rely on the *Harris v Flower* principle for that purpose as it was suing in its capacity as the owner of the Servient Tenement; in contrast, in the First Action and the Second Action, it had raised the Main Issue (as framed in the form of Collin's argument in the First Action and Issue (b) of the Second Action respectively) as a dominant owner, and the courts in those actions had held that it was not entitled to raise that issue and to rely on the *Harris v Flower* principle in support of its case.

35 The MC's main defence in the Fourth Action was that Lee Tat was estopped from re-litigating the issue raised in the Fourth Action by cause of action and/or issue estoppel as that issue had already been decided against Collin (Lee Tat's predecessor in title) and Lee Tat in the First Action and the Second Action respectively. Lee Tat's reply was that neither form of estoppel could operate against it as it was suing in the Fourth Action as a servient owner, whereas it had litigated the First Action and the Second Action as a dominant owner. Based on this joinder of issue, the HC proceeded to determine whether estoppel applied.

36 The HC identified the issue raised in the Fourth Action as being the same as the Main Issue (see *Grange Heights (No 4) (HC)* ([8] *supra*) at [17]; see also [14] above), and held that Lee Tat was indeed estopped from re-litigating the issue raised in the Fourth Action as that issue had already been decided against Lee Tat in the Second Action (although it had not been decided against Collin in the First Action). The HC's reasoning was as follows (see *Grange Heights (No 4) (HC)* at [30]):

> … [The HC in the Second Action] had decided the Issue [*viz*, the issue raised in the Fourth Action], *ie* whether the [R]esidents ... could use the [R]ight of [W]ay to gain access not only to [L]ot 111|34 but also to [L]ot 561, since the question of interference with Lee Tat's rights was not the issue before [the court].

37 The HC then dealt with Lee Tat's argument that it was not estopped from bringing up the issue raised in the Fourth Action by either the decision in the First Action or that in the Second Action because it had not been a party to those actions in its capacity as a servient owner (*id* at [31]):

> ... Mr Tan [Lee Tat's lead counsel] stressed that [the HC in the Second Action] had noted that Lee Tat was not the owner of the [S]ervient [T]enement but the owner of dominant tenements. *He submitted that therefore there was no cause of action or issue estoppel against Lee Tat. Yet ... Mr Tan did not assert that Lee Tat could avoid such an estoppel, if it existed, on the ground that [Lee Tat] was now claiming in its capacity as [the] owner of the [S]ervient [T]enement. Mr Tan's argument was that the Issue had not been decided in either the First [Action] or the Second Action*. [emphasis added]

The statement in the above passage that Lee Tat's lead counsel had not asserted that Lee Tat could avoid the operation of cause of action or issue estoppel was a reference to the HC's comment that (*id* at [19]):

> … Mr Tan ... did not assert that if [the court] were to find that there was ... cause of action or issue estoppel against Lee Tat arising from the decisions in either one or both of the First [Action] and [the] Second [Action], Lee Tat could nevertheless avoid the estoppel because Lee Tat was a party in these two actions only in its capacity as [the] owner of two of the [D]ominant [T]enements. Accordingly, Mr Tan sought to establish that the Issue had not been raised or, if raised, had not been decided in either the First [Action] or the Second Action. Mr Edwin Lee, counsel for the [MC], sought to establish that it had been raised and decided or that it should have been raised.

Consequent upon this observation, the HC held that Lee Tat was estopped from arguing the issue raised in the Fourth Action as it had already been decided in the Second Action (*id* at [30]–[37]), and the fact that Lee Tat was not then the owner of the Servient Tenement was not relevant (*id* at [39]).

38 In our view, the HC's observation at [19] of *Grange Heights (No 4) (HC)* ([8] *supra*) is inherently self-contradictory as it suggests that Lee Tat could have avoided the operation of cause of action and/or issue estoppel if the court had found that estoppel did indeed arise. Clearly, what Lee Tat's counsel must have meant was that, since Lee Tat had not been a party to either the First Action or the Second Action as a servient owner (which was the capacity in which Lee Tat litigated the Fourth Action), it was not bound by the decisions or any rulings of fact or law made in those actions.

39 The HC's confusion is quite apparent from its finding that there was no cause of action or issue estoppel against Collin (as Lee Tat was known at the time of the First Action) arising from Chua J's decision in the First Action. In *Grange Heights (No 4) (HC)* ([8] *supra*) at [24]–[25], the HC held:

> 24 Chua J accepted [HL's] submission that Collin had no cause of action unless Collin proved that [HL's] steps had caused substantial interference with Collin's own right of way. After hearing arguments and inspecting the [R]ight of [W]ay, *Chua J found that there was no substantial interference with Collin's enjoyment of its right of way and dismissed Collin's claim with costs. [HL's] counterclaim was also dismissed with costs by Chua J as the judge was of the view that [HL] could not obtain the declarations [which] it sought because Collin was not the owner of the [S]ervient [T]enement.*

2 5 *In such circumstances, I was of the view that there was no cause of action or issue estoppel against Collin arising from Chua J's decision.*

[emphasis added]

40 The declarations sought by HL in its counterclaim in the First Action (see [21] above) were the exact counterparts of the reliefs sought by Collin in that action (see [19] above). One of the reliefs sought by Collin was a declaration that HL and the Residents were not entitled to use the Right of Way for the purposes of Lot 561; this relief addressed, in substance, the Main Issue (as framed in the form of Collin's argument in the First Action). Likewise, HL's counterclaim in the First Action brought into play the Main Issue. Chua J dismissed Collin's claim on the ground that Collin, not being the owner of the Servient Tenement, could not raise the Main Issue (as framed in the form of Collin's argument in the First Action) against HL. Correspondingly, he also dismissed HL's counterclaim because he held (correctly, in our view) that HL could not raise the Main Issue against Collin for the same reason (*viz*, Collin was not the owner of the Servient Tenement).

41 The HC in the Fourth Action, in holding that the First Action did not give rise to any estoppel against Collin, recognised that Collin's argument in the First Action had not been ruled on by either the HC or the CA in the First Action (see *Grange Heights (No 4) (HC)* ([8] *supra*) at [24]–[25] (reproduced at [39] above)). Logically, therefore, since Collin's argument in the First Action was the same as Issue (b) of the Second Action (see [28] above) and since Lee Tat had litigated the Second Action in the same capacity as that in which Collin litigated the First Action, the HC in the Fourth Action should, in our view, have found that Issue (b) of the Second Action had similarly not been decided in the Second Action. This is because Lee Tat, which was not the owner of the Servient Tenement at the time of the Second Action, could not have relied on Issue (b) of the Second Action in those proceedings. It therefore follows that the HC's finding in the Fourth Action that no estoppel arose against Collin as a result of the First Action was *inconsistent* with its ruling that an estoppel did arise against Lee Tat from the Second Action. In our view, the confusion arose because the HC in the Fourth Action assumed that, since what was in substance the Main Issue (as framed in the form of Issue (b) of the Second Action) had been canvassed by Lee Tat in the Second Action, the courts in that action must have decided that issue. This assumption is wrong as the true position is that the Main Issue was not decided in either the First Action or the Second Action for two reasons. First, it was not necessary for the courts in those actions to rule on the Main Issue for the purposes of deciding the respective questions before them, (namely, *vis-à-vis* the First Action, whether HL had substantially interfered with Collin's enjoyment of the Right of Way, and, *vis-à-vis* the Second Action, whether Lee Tat, as a dominant owner, was entitled to prevent the Residents, its fellow dominant owners, from using the Right of Way for access to and from Grange Road). Second, the Main Issue could only have been determined *vis-à-vis* the then owner of the Servient Tenement; the owner of the Servient Tenement was not, however, a party to either the First Action or the Second Action.

42 Other passages in the HC's judgment in the Fourth Action also show that the HC misunderstood what had been decided in the Second Action. In *Grange Heights (No 4) (HC)* ([8] *supra*), the HC commented on the CA's decision in the Second Action as follows:

34 I was ... of the view that the … part of the [CA's] judgment [in the Second Action] dealing with the enlargement of the dominant tenement by amalgamation and the case of *Graham v Philcox* [1984] QB 747 was the decision of the [CA] on the second contention raised by Lee Tat [*ie*, Issue (b) of the Second Action] …

35 It was not disputed that the second contention was the same as the Issue [*ie*, the issue raised in the Fourth Action]. However, Mr Tan [Lee Tat's lead counsel] went so far as to

assert that there was not even an *obiter [dictum]* by the [CA] on the second contention. He supported his argument by referring to (a) that part of [*Grange Heights (No 2) (CA)*], subsequent to the reference to *Graham v Philcox*, which mentioned, at 869, [20], that Lee Tat was only entitled to protection of its right of way if its enjoyment of that right was substantially interfered with by the [MC] and (b) the last part of [*Grange Heights (No 2) (CA)*], at 870 and 871, [23] and [24], which dealt with [the point that there was] no substantial interference with Lee Tat's right of way. Mr Tan suggested that the question of substantial interference was the issue in the Second Action.

36 Bearing in mind that both [the HC] and [the CA] had stated explicitly that it was not Lee Tat's case that there had been substantial interference with its right of way, it was obvious to me that that was not the issue in the Second Action.

37 Also, bearing in mind that [the CA] had clearly set out the two contentions of Lee Tat [*ie*, Issue (a) of the Second Action and Issue (b) of the Second Action], I was of the view that those were the issues and the [CA] did decide on both of them.

38 In the circumstances, the references in [the CA's] judgment to Collin's/Lee Tat's entitlement [to] protection if its right of way was substantially interfered with and to the non-substantial interference by the [R]esidents ... were *obiter dicta*.

...

41 In my view, an owner of some dominant tenements can raise the issue [of] the scope of the right of way enjoyed by another owner of another dominant tenement if it were alleged that the right of way enjoyed by the other owner affected the first owner's enjoyment of his own right of way. To this extent, I was of the view that Chua J could have granted the declaration sought by [HL] … in the First Action. In any event, the Issue was raised and argued by Lee Tat and answered in the Second Action. Accordingly, it did not lie in Lee Tat's mouth to argue that even if it had raised the Issue in the Second Action, it had no *locus standi* to do so.

...

43 In the circumstances, I was of the view that although Lee Tat had become the owner of the [S]ervient [T]enement, it remained bound by the decision of the [CA] in the Second Action on the Issue. There was issue estoppel. It was not entitled to raise the Issue afresh in [OS 825/2004]. Likewise, if Lee Tat had subsequently acquired another dominant tenement, assuming there was one to be acquired, it would still have been bound by the said decision. Otherwise, Lee Tat could raise the Issue afresh each time it acquired another dominant tenement.

44 Furthermore, if Lee Tat were not bound by the [CA's] decision in the Second Action because it is the owner of the [S]ervient [T]enement and if it were then to succeed in its argument on the Issue, this would mean that the [CA's] decision would be rendered nugatory.

43 We have the following observations on the above passages:

(a) With regard to [34]–[35] of *Grange Heights (No 4) (HC)* ([8] *supra*), *Graham v Philcox* ([32] *supra*) was *not* relevant to both the factual matrix in the Second Action and the decision of the CA therein because Lee Tat was then litigating as a dominant owner. In *Graham v Philcox*, the dispute was between servient owners and dominant owners as to the rights of the latter

under the grant which created the easement (see sub-para (c) of [32] above), whereas, in the Second Action, the dispute was between two dominant owners *inter se*. More importantly, contrary to what the HC in the Fourth Action thought (see [34] of *Grange Heights (No 4) (HC)*), Issue (b) of the Second Action was *not* decided by the CA in the Second Action for two reasons (in this regard, see also [41] above). First, that issue could only have been decided between the MC and the then owner of the Servient Tenement, which was *not* Lee Tat at that time. Second, it was not necessary for the court to decide Issue (b) of the Second Action for the purposes of determining the question before it, which was whether Lee Tat, *as a dominant owner*, was entitled to obstruct the Residents' access to and use of the Right of Way.

(b) With regard to [36] of *Grange Heights (No 4) (HC)*, the question of whether there had been substantial interference by the MC with Lee Tat's use of the Right of Way was not a live issue in the Second Action as Lee Tat had conceded that there was no such interference. That question (which concerned the rights of the MC and Lee Tat *inter se* as dominant owners) bore no relevance to the issue raised in the Fourth Action (which concerned the rights of the MC as a dominant owner and Lee Tat as a servient owner respectively). As a result of that concession coupled with the fact that Lee Tat did not at the time of the Second Action own the Servient Tenement, the HC's ruling in the Second Action that Lee Tat was not entitled to close the Right of Way so as to prevent the MC from using it was a foregone conclusion.

(c) With regard to [37] of *Grange Heights (No 4) (HC)*, the fact that the CA in the Second Action set out the two contentions of Lee Tat (*ie*, Issue (a) of the Second Action and Issue (b) of the Second Action) did not necessarily mean that the CA eventually decided both issues. In fact, as we pointed out earlier (at sub-para (g) of [32] above), the court ruled on Issue (a) of the Second Action only, but not Issue (b) of the Second Action. Following from its decision on Issue (a) of the Second Action (*viz*, that the Amalgamation did not affect the Residents' entitlement to use the Right of Way), the CA went on to hold that, since both Lee Tat and the Residents were equally entitled to use the Right of Way and since Lee Tat had not complained that the Residents had substantially interfered with its enjoyment of the Right of Way, Lee Tat had no right to prevent the Residents from using that easement. The CA's decision in the Second Action (and, likewise, the HC's decision in that action) did not imply that the Residents could use the Right of Way to access Lot 561 from Grange Road and *vice versa*. Clearly, the CA (as well as the HC) in the Second Action did not decide the Main Issue (as framed in the form of Issue (b) of the Second Action).

(d) With regard to [38] of *Grange Heights (No 4) (HC)*, the HC was wrong to hold that "the references in [the CA]'s judgment [in the Second Action] to ... Lee Tat's entitlement [to] protection if its right of way was substantially interfered with ... were *obiter dicta*" (*ibid*). In the Second Action, the fact that, as conceded by Lee Tat, there was no substantial interference with Lee Tat's enjoyment of the Right of Way lay at the heart of the CA's decision to affirm the HC's dismissal of the Discharge Application and the grant of the 1990 Injunction.

(e) With regard to [41] of *Grange Heights (No 4) (HC)*, we are of the view that the HC's statement that Chua J could have allowed HL's counterclaim in the First Action is wrong in law. Chua J had no jurisdiction to declare HL's rights against Collin in relation to the Right of Way as the latter was not the owner of the Servient Tenement at the time of the First Action. In any case, any declaration granted to HL would have been ineffective against the then owner of the Servient Tenement as it was not a party to the First Action. In our view, Chua J, in dismissing HL's counterclaim (see *Grange Heights (No 1) (HC)* ([19] *supra*) at 461, [24]), was effectively deciding that the Main Issue was not relevant to the issue before him.

(f) With regard to [43] of *Grange Heights (No 4) (HC)*, we agree that Lee Tat was bound by the CA's decision in the Second Action, but only in its capacity as the *dominant* owner of Lot 111 32 and Lot 111 33. It was not bound by that decision in its capacity as a *servient* owner, *viz*, as the owner of the Servient Tenement (in this regard, see our earlier observation at sub-para (e) of [32] above). It is an established principle that "[a] person who litigates in different rights is in law separate persons" (see *Spencer Bower* ([32] *supra*) at para 221 and the authorities cited at n 38 therein). Collin and Lee Tat did not participate in the First Action and the Second Action respectively as servient owners, and, thus, any decision made in those actions could not have affected Lee Tat's right as a servient owner after it acquired title to the Servient Tenement in 1997. Moreover, the Main Issue (as framed in the form of Collin's argument in the First Action and Issue (b) of the Second Action respectively) was not decided in both the First Action and the Second Action for the reasons stated at [41] above. Accordingly, Lee Tat could not have been estopped from litigating in the Fourth Action any issue affecting its interests in the Right of Way *as the owner of the Servient Tenement*, including the Main Issue (as framed in the form of the issue raised in the Fourth Action).

(g) With regard to [44] of *Grange Heights (No 4) (HC)*, contrary to the HC's view, a decision in Lee Tat's favour on the issue raised in the Fourth Action would not have rendered the CA's decision in the Second Action nugatory for two reasons. First, the CA's decision in the Second Action would continue to bind Lee Tat as a dominant owner. Second, the issue decided in the Second Action (which corresponds to Issue *(a)* of the Second Action) was different from the issue raised in the Fourth Action (which corresponds to Issue *(b)* of the Second Action).

(2) The decision of the CA

(A) THE MAJORITY JUDGMENT

44 As mentioned at [14] above, Lee Tat's appeal to the CA in the Fourth Action was dismissed by the Majority Judges on substantially the same grounds as those given by the HC. Unfortunately, the Majority Judges also misunderstood in equal measure the arguments of Lee Tat on the Main Issue (as framed in terms of the issue raised in the Fourth Action) and the question of estoppel. In contrast, Chao Hick Tin JA's dissenting judgment, in our view, explains clearly the issues which were *raised* in the First Action and the Second Action as well as the issues which were *actually decided* therein (see [62]–[66] below). We will first set out the relevant passages in the Majority Judgment for comment.

45 In *Grange Heights (No 4) (CA)* ([8] *supra*), the Majority Judges said at [2]:

> Agreeing with [the HC in the Fourth Action], we dismissed the appeal. In our judgment, issue estoppel arises because the precise issue in this appeal, which is whether the [R]esidents ... have a right of way over [the Servient Tenement] 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 [*ie*, the Second Action].

With respect, as we have explained earlier (see [41] as well as sub-paras (c) and (f) of [43] above), the "precise issue" mentioned in the above passage, which is in essence the Main Issue, was not decided in the Second Action (nor in the First Action) although it was raised in the Second Action (as well as the First Action). The courts in both the First Action and the Second Action did not find it necessary to determine the Main Issue for the purposes of determining the respective issues before them, which did not concern the point as to whether or not the Right of Way could be used for the benefit of Lot 561, a non-dominant tenement. Instead, in the First Action, the question before the

court was whether HL had substantially interfered with Collin's enjoyment of the Right of Way and, in the Second Action, the question before the court was whether Lee Tat, as a dominant owner, was entitled to prevent its fellow dominant owners (*ie*, the Residents) from using the Right of Way even though, as conceded by Lee Tat, there had been no excessive use of the easement by the Residents. The courts in the First Action and the Second Action effectively ruled that Collin (in the First Action) and Lee Tat (in the Second Action) were not competent to raise the Main Issue, which affected only the rights of the then owner of the Servient Tenement.

46 In *Grange Heights (No 4) (CA)* ([8] *supra*) at [13], the Majority Judges, in response to Lee Tat's argument that it had not been a party to the Second Action as a dominant owner, said:

> We ... note that none of the cases cited by Lee Tat 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. Accordingly, we reject [Lee Tat's] *locus standi* argument [*ie*, Lee Tat's argument that it had no *locus standi* to raise the Main Issue in the Second Action].

With respect, the logic in this passage is questionable. The mere fact that the cases cited by Lee Tat did not show that a dominant owner could not challenge a fellow dominant owner's inappropriate use of a right of way did not mean that the opposite proposition was true and that Lee Tat therefore had the requisite *locus standi* in the Second Action to bring up the Main Issue (as framed in the form of Issue (b) of the Second Action).

47 We note that, in support of its argument on the Main Issue, Lee Tat cited the following authorities: *Harris v Flower* ([19] *supra*), *Re Gordon and Regan* (1985) 15 DLR (4th) 641 ("*Gordon and Regan (HC)*"), *Bracewell v Appleby* [1975] Ch 408 and *Peacock v Custins* [2002] 1 WLR 1815. Except for the Canadian case of *Gordon and Regan (HC)*, which concerned a dispute *between dominant owners inter se*, the other three cases, which were all decisions of the English courts, concerned disputes *between servient owners and dominant owners vis-à-vis* the extent of the latter's rights over easements appurtenant to their dominant tenements.

48 In *Gordon and Regan (HC)* ([47] *supra*), the dispute, as just mentioned, was between dominant owners *inter se*, and the court applied the *Harris v Flower* principle in adjudicating the dispute. Briefly, the facts of that case were as follows. Two dominant owners ("the applicants") wanted to sub-divide the dominant tenement which they owned into two, with the intention that the owners of the sub-divided properties would drive over the right of way to park their vehicles on a non-dominant tenement adjoining the applicants' dominant tenement. The applicants sought from the court a declaration that the proposed use of the right of way by the owners of the sub-divided properties was not prohibited by the terms of the deed which granted the right of way. Their fellow dominant owners ("the respondents"), who were entitled to use the same right of way, objected. The Ontario High Court, citing *Harris v Flower* ([19] *supra*), held that the proposed use of the easement by the owners of the sub-divided properties as an access route to the non-dominant tenement was not permitted; its decision was affirmed on appeal by the Ontario Court of Appeal (see *Re Gordon and Regan* (1990) 66 DLR (4th) 384 ("*Gordon and Regan (CA)*")).

49 At first glance, *Gordon and Regan (HC)* ([47] *supra*) might give the impression that a dominant owner is entitled to rely on the rights of a servient owner in order to prevent a fellow dominant owner from using a right of way which is common to both dominant tenements in excess of the terms of the grant. Indeed, the Majority Judges in the Fourth Action relied on this very case to reject Lee Tat's contention that only a servient owner could rely on the *Harris v Flower* principle (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [13]). However, the decision in *Gordon and Regan (HC)* has to be understood in the light of the relief which the applicants sought. The question before the

Ontario High Court was whether or not the applicants' proposed use of the right of way was prohibited by the terms of the deed which created the easement – it was in the context of construing the ambit of the right of way that the court invoked the *Harris v Flower* principle. Furthermore, a careful reading of *Gordon and Regan (HC)* reveals that no argument was raised before the Ontario High Court as to whether the applicants, as dominant owners, were competent to raise the *Harris v Flower* principle against the respondents; the Ontario High Court (and likewise the Ontario Court of Appeal) appeared to have assumed that that could be done. For these reasons, we do *not* regard *Gordon and Regan (HC)* as authority for the proposition that a dominant owner is entitled to assert the rights of a servient owner against a fellow dominant owner for the purposes of contending that the latter's use of an easement, which is common to both dominant tenements, exceeds the terms of the grant creating that easement. As Chua J held in the First Action (see [26] above), a dominant owner has no *locus standi* to complain about a fellow dominant owner's use of a right of way that may be contrary to the terms of the grant. That right belongs to the servient owner alone. The right of a dominant owner in relation to protection of the easement appurtenant to his dominant tenement is limited to ensuring that his enjoyment of the easement is not substantially interfered with by any party, including his fellow dominant owner and the servient owner. In this regard, it may be of interest to note that, in the Second Action, the MC itself had argued before the HC that Lee Tat, not being the owner of the Servient Tenement at that time, was not competent to raise the Main Issue in that action (see [29] above). The MC made a similar submission at para 40 of its written case for the appeal in the Second Action, as follows:[note: 7]

> ... [Lee Tat has] not shown that there has been ... excessive user of the [S]ervient [T]enement. In fact, it is not [Lee Tat's] case that there has been excessive use of the [S]ervient [T]enement by the [R]esidents ... This was not an issue. *Even assuming that there is excessive use, which is denied, it would be for the owner of the [S]ervient [T]enement to restrict the [MC's] use of the [S]ervient [T]enement and not [Lee Tat]. [Lee Tat is] not the [owner] of the [S]ervient [T]enement and therefore [is] not in any position to complain*, especially when the [MC has] not even interfered with [its] rights. [underlining in original omitted; emphasis added]

In the Fourth Action, however, the MC departed from the above position (see further sub-para (e) of [80] below).

50 In any event, even if *Gordon and Regan (HC)* ([47] *supra*), as affirmed on appeal in *Gordon and Regan (CA)* ([48] *supra*), were good authority for the proposition that a dominant owner may invoke the rights of the servient owner against a fellow dominant owner, it would not matter in the Present Action because that proposition does not represent the law in Singapore and is in fact contrary to the law as it was stated or understood by the courts in the First Action and the Second Action (see, respectively, [26] and sub-para (f) of [32] above).

51 The Majority Judges held that the four prerequisites for issue estoppel to operate were present in the Fourth Action (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [14]–[15]). In their view, the first two requirements (*viz*, (a) that there be a final and conclusive judgment on the issue in question on the merits, and (b) that the judgment be by a court of competent jurisdiction) had been met by the HC's and the CA's decisions in the Second Action. The third requirement (namely, identity of the parties in the two sets of proceedings being compared (*viz*, the Second Action and the Fourth Action)) was also satisfied as (*id* at [14]):

> The reality is that the effective parties are the same. The same parties in both actions have either sued or defended claims in their own right (*ie*, [in a] personal capacity as opposed to [a] representative capacity) and that did not change even though the cause of action in the earlier proceedings was not identical with the cause of action in the present proceedings. ... The

present case is not about cause of action estoppel and it was not put forward as such at the appeal.

With respect, the parties to the Second Action were not identical to the parties in the Fourth Action because Lee Tat was sued as a *dominant* owner in the Second Action, whereas, in the Fourth Action, it sued as a *servient* owner. As stated earlier at sub-para (f) of [43] above, it is an established principle that "[a] person who litigates in different rights is in law separate persons" (see *Spencer Bower* ([32] *supra*) at para 221).

52 As for the last of the four requirements needed for issue estoppel to operate (*ie*, identity of subject matter in the two sets of proceedings being compared), the Majority Judges likewise found that it had been satisfied. Their reasoning was as follows (see *Grange Heights (No 4) (CA)* ([8] *supra*)):

> 15 … The correct approach to identify the issue [for the purposes of ascertaining whether there is the requisite identity of subject matter] is to ask what had been litigated and, secondly, what had been decided. In the case of issue estoppel, the decision on the issue must have been a "necessary step" to the decision or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision" …
>
> 16 ... We are of the view that the change in [the] status of Lee Tat from [being the] owner of two dominant tenements in the previous proceedings [*ie*, the Second Action] to [being the] owner of the [S]ervient [T]enement in this current action makes no difference to the rights of the [MC] ... and hence the [R]esidents ... over the [S]ervient [T]enement which were decided in the 1989 proceedings [*ie*, the Second Action]. It was decided in the 1989 proceedings that it was lawful for the [R]esidents ... to use the [S]ervient [T]enement as a [footpath] to access Grange Road and *vice versa*. [The HC] held that the [R]ight of [W]ay ran with the dominant tenement [*ie*, Lot 111**I**34] even though it had become part of a larger plot of land [*ie*, Lot 687]. The easement continued despite the [A]malgamation and enured to the benefit of the [MC] ... and hence the [R]esidents ... The ruling was necessary and essential to the [HC's] decision that Lee Tat was not entitled to erect the iron gate and [the] fence. We give no credence to [Lee Tat's] assertion that the [MC's] rights were irrelevant to [the HC's] decision, and that the [HC] had confined [its] decision to the finding that Lee Tat was only entitled to complain of any substantial interference with its enjoyment of the [R]ight of [W]ay.
>
> 17 … Whether the [R]esidents ... could use the [R]ight of [W]ay on [the Servient Tenement] for the benefit of not only the dominant land, Lot 111**I**34, but also the adjoining non-dominant land, Lot 561 … is clearly part of the subject matter of the present proceedings as it was an issue that was so clearly part of the subject matter of the 1989 proceedings.

53 With respect, the Majority Judges' understanding (as set out in the passage reproduced above) of what was decided by the HC in the Second Action is not borne out by the issues put before the HC. As identified by the CA in the Second Action (see *Grange Heights (No 2) (CA)* ([28] *supra*) at 868, [13]), Lee Tat had contended before the HC that: (a) the Amalgamation had extinguished the MC's entitlement to use the Right of Way; and (b) the Residents were not entitled to use the Right of Way to access Lot 561 from Grange Road and *vice versa* (these are the same arguments which we have defined at [28] above as Issue (a) of the Second Action and Issue (b) of the Second Action respectively). The HC in the Second Action decided that, *vis-à-vis* the MC as the dominant owner of Lot 111**I**34, the Amalgamation had not affected the Right of Way, which continued to exist, and, since Lee Tat had conceded that its enjoyment of the Right of Way had not been substantially interfered with by the Residents, Lee Tat had no right to prevent the Residents from using the Right

of Way. In other words, as we highlighted earlier (at sub-para (g) of [32] above), the HC did not rule on Issue (b) of the Second Action as it did not need to do so. It did rule on Issue (a) of the Second Action, but only in relation to Lee Tat as a dominant owner. The CA in the Second Action affirmed the HC's decision and likewise did not rule on Issue (b) of the Second Action (see again sub-para (g) of [32] above). In short, there was no identity of subject matter between the issue raised in the Fourth Action and the issue decided in the Second Action.

54 It is arguable that, even if the HC and the CA in the Second Action had decided that the Residents were entitled to use the Right of Way to access Lot 561 from Grange Road and *vice versa* (*ie*, even if the courts in the Second Action had ruled on Issue (b) of the Second Action, which involves the same question as that encapsulated in the issue raised in the Fourth Action as well as the Main Issue (see [28] above)), the decision on Issue (b) of the Second Action would not have been binding on Lee Tat as a servient owner in the Fourth Action. We are mindful of the fact that our position on this particular point contradicts the ruling by the Majority Judges in the Fourth Action that "the change in [the] status of Lee Tat from [being the] owner of two dominant tenements in the [Second Action] to [being the] owner of the [S]ervient [T]enement in [the Fourth] [A]ction [made] no difference to the rights of the [MC] ... and hence the [R]esidents" (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [16]). In this respect, counsel for the MC relied on the Majority Judges' statement at [16] of *Grange Heights (No 4) (CA)* to argue before us that the Majority Judges had in fact decided that the status of Lee Tat as a servient owner was irrelevant for the purposes of issue estoppel, and that this aspect of the Majority Judgment would estop Lee Tat from re-litigating the significance, if any, of the different capacities in which it had participated in the Second Action and the Fourth Action respectively. While this interpretation of what the Majority Judges stated at [16] of *Grange Heights (No 4) (CA)* is not implausible, it seems to us that, since that passage mentions only the MC's and the Residents' rights, the Majority Judges overlooked altogether the question of whether the change in Lee Tat's status in the interim between the Second Action and the Fourth Action made any difference to Lee Tat's rights. In our view, the crucial question is not whether the change in Lee Tat's status made any difference to *the MC's and the Residents'* rights (which could only have been *vis-à-vis* Lee Tat as a fellow dominant owner), but whether it made any difference to *Lee Tat's* rights as a servient owner. It also seems to us that the statement at [16] of *Grange Heights (No 4) (CA)* was made in the context of the Majority Judges' (erroneous) understanding that the HC in the Second Action had decided that a dominant owner was entitled to assert the rights of a servient owner against a fellow dominant owner.

55 In our view, of the four requirements necessary to establish an estoppel in respect of the issue raised in the Fourth Action, only one was satisfied by the decision in the Second Action – namely, the requirement that the judgment on the issue in question be made by a court of competent jurisdiction. The other three prerequisites (*viz*, a final and conclusive judgment on the issue concerned on the merits, identity of the parties and identity of the subject matter) were not satisfied. The courts in the Second Action did not make any final and conclusive judgment on the merits of Issue (b) of the Second Action (which involves the same question as that encapsulated in, *inter alia*, the issue raised in the Fourth Action); there was no identity of subject matter between the Second Action and the Fourth Action as the issue *decided* in the Second Action (*ie*, Issue (a) of the Second Action) was different from the issue *raised* in the Fourth Action (which, as just mentioned, corresponds to Issue (b) of the Second Action); and the parties to these two actions were not identical.

56 The Majority Judges in the Fourth Action considered that the three sets of committal proceedings taken out by the MC against Lee Tat for breach of the 1990 Injunction (referred to collectively as "the Committal Proceedings") reinforced the "incontrovertible effect" (see *Grange Heights (No 4) (CA*) ([8] *supra*) at [18]) of the HC's decision in the Second Action that "it was lawful

for the [R]esidents ... to use the [S]ervient [T]enement as a [footpath] to access Grange Road and *vice versa*" (*id* at [16]). It will be recalled that, in the Second Action, the HC granted the 1990 Injunction, which was a permanent injunction restraining Lee Tat from obstructing the Residents' access to and use of the Right of Way (see [30] above). After acquiring title to the Servient Tenement in 1997, Lee Tat placed a chain across the Grange Road end of the Servient Tenement. As a result, the MC commenced the first of the Committal Proceedings ("the First Committal Proceedings"). Pursuant to the First Committal Proceedings, Lee Tat gave an undertaking to the court as follows (see *Grange Heights (No 4) (CA)* at [18]):

> The MC ... [is] at liberty to send a notice to all residents of Grange Heights that they have a right of way over [the Servient Tenement] and that the sign against trespassers [which Lee Tat had erected] does not apply to them.

This undertaking was subject to an express reservation that Lee Tat was entitled to commence any legal action which it might be advised to take. In July 1999, in the second of the Committal Proceedings, Lee Tat was fined $3,000 for having affixed a low chain to bar the Residents from accessing the Right of Way; it was also ordered to pay the MC costs fixed at $10,000. In March 2004, the MC took out the third of the Committal Proceedings, this time because Lee Tat had erected two concrete cones to block the Residents' access to the Right of Way. The cones were removed before the proceedings were heard, but, nevertheless, the High Court ordered Lee Tat to pay the MC costs on an indemnity basis fixed at $13,000.

57 The Majority Judges in the Fourth Action appeared to regard Lee Tat's giving of the undertaking pursuant to the First Committal Proceedings and Lee Tat's failure in the Committal Proceedings as a whole to bring up the issue raised in the Fourth Action as an acknowledgement by Lee Tat that it was bound by the 1990 Injunction, which was made by the HC in the Second Action on the basis that, *vis-à-vis* Lee Tat, the MC was entitled to use the Right of Way as a footpath for access between Lot 561 and Grange Road. In contrast, Chao JA in his dissenting judgment did not deal with this issue from the viewpoint of estoppel but, instead, from the viewpoint of *laches* or acquiescence. He did not regard Lee Tat's failure in the Committal Proceedings to bring up the issue raised in the Fourth Action as an acknowledgement by Lee Tat that it was bound as a servient owner by the 1990 Injunction. He held that Lee Tat's delay in instituting OS 825/2004 to litigate the issue raised in the Fourth Action had not caused the MC any "irreparable prejudice" (*id* at [81]), and that Lee Tat could not be faulted for either *laches* or acquiescence. We agree with Chao JA on this point. Lee Tat, when giving the undertaking to the court in the First Committal Proceedings, had expressly reserved the right to commence such legal action as it might be advised to take (see [56] above). Pursuant to that reservation of right, Lee Tat was *entitled* to bring an action to seek judicial determination of the issue raised in the Fourth Action (indeed, Lee Tat subsequently commenced OS 825/2004 for this very purpose), but it was not *obliged* to bring such an action at all, nor was it obliged to bring such an action by any particular point in time.

58 The only other question that may be raised in relation to the Committal Proceedings is whether, as a result of Lee Tat's failure in those proceedings to bring up the issue raised in the Fourth Action, Lee Tat was barred from litigating that issue in the Fourth Action under what may loosely be termed "the extended *res judicata* doctrine" – a point which the CA in the Fourth Action did not consider. (If Lee Tat was indeed thus barred, then, by application of the same doctrine, Lee Tat should not be permitted to bring up the issue raised in the Fourth Action (*ie*, the Main Issue) in the Present Action.) The extended *res judicata* doctrine, whose origin is usually attributed to Sir James Wigram VC's decision in *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313, states that (*id* at 115; 319):

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (*except under special circumstances*) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, *except in special cases*, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. [emphasis added]

It is important to note the "special circumstances" exception to the extended *res judicata* doctrine which Sir Wigram himself laid down in *Henderson v Henderson*, as set out in the above quotation. In the Privy Council case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 ("*Yat Tung Investment Co Ltd*"), Lord Kilbrandon, commenting on *Henderson v Henderson*, stated (see *Yat Tung Investment Co Ltd* at 590):

> The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless *"special circumstances" are reserved in case justice should be found to require the non-application of the rule*. [emphasis added]

It has also been established by case authority that "abuse of the court's process is the true basis for the operation of the extended [*res judicata*] doctrine" (see *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 517 at [23]; see also *id* at [22]).

59 In our view, the extended *res judicata* doctrine should not apply to Lee Tat's conduct (or inaction) in the Committal Proceedings for two reasons.

60 First, when Lee Tat gave its undertaking to the court in the First Committal Proceedings, it expressly reserved to itself the right to commence any legal action which it might be advised to take as a result of its having acquired title to the Servient Tenement. The MC and/or the court could have rejected this reservation of right by Lee Tat, but neither of them did so. The outcome of the second and the third of the Committal Proceedings did not advance the matter further in so far as the extended *res judicata* doctrine is concerned as Lee Tat was content to pay the fine (in the second of the Committal Proceedings) and the costs (in both the second and the third of the Committal Proceedings) imposed by the court for obstructing the Residents' use of the Right of Way. It is true that, after acquiring ownership of the Servient Tenement in 1997, Lee Tat could have brought a *separate* action for, *inter alia*, a declaration that the MC was no longer entitled to use the Right of Way and that the 1990 Injunction was not binding on it (Lee Tat) as the servient owner. But, given that (as Chao JA pointed out in his dissenting judgment) the failure of Lee Tat to do so did not cause the MC irreparable prejudice in any way, there has, in our view, been no abuse of process by Lee Tat which warrants the application of the extended *res judicata* doctrine to its conduct in the Committal Proceedings.

61 The second reason why the extended *res judicata* doctrine should not apply is that Lee Tat's express reservation of its right in the First Committal Proceedings to commence such legal action as it might be advised to take is, in our view, sufficient to constitute "special circumstances" (*per* Sir Wigram in *Henderson v Henderson* ([58] *supra*) at 115; 319) which justify an exception being made to the operation of this doctrine. As a result of this reservation of right, Lee Tat's exercise of

that right in commencing OS 825/2004 to seek a judicial ruling on the issue raised in the Fourth Action cannot be said to be an abuse of process for the purposes of the extended *res judicata* doctrine. Given these circumstances, it is our view that justice requires the non-application of this doctrine.

(B) THE DISSENTING JUDGMENT

62 As mentioned earlier (at [44] above), Chao JA delivered a dissenting judgment in the appeal in the Fourth Action. He first dealt with the question of whether Lee Tat's argument that the Residents could not use the Right of Way as a means of access between Lot 561 and Grange Road had any merit. He answered this question in the affirmative and noted that the HC in the Fourth Action had recognised that point (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [52]). Citing, *inter alia*, *Harris v Flower* ([19] *supra*) , *Williams v James* (1867) LR 2 CP 577, *John Purdom v John A Robinson* (1899) 30 SCR 64, *Gordon and Regan (CA)* ([48] *supra*)), *Bracewell v Appleby* ([47] *supra*) and *Peacock v Custins* ([47] *supra*), Chao JA held that, as a matter of law, the Right of Way, which had been granted for the benefit of Lot 111[illegible]34, could not be used for the benefit of Lot 561, which was not one of the Dominant Tenements (see *Grange Heights (No 4) (CA)* at [52]–[59]). He also rejected (*id* at [61]) any notion that the use of the Right of Way for the benefit of Lot 561 was ancillary to its use for the benefit of Lot 111[illegible]34; rather, the MC, in his view, was seeking to "unilaterally extend" (*ibid*) the Right of Way beyond the terms of the Grant.

63 Chao JA said (at [62] of *Grange Heights (No 4) (CA)* ([8] *supra*)):

> [I]t is important not to confuse cases such as *Harris v Flower* with a case where the dominant tenement is put to more intensive use. *White v Grand Hotel, Eastbourne, Limited* [1913] 1 Ch 113 was such a case which held that a change in user of the dominant tenement did not affect the right of way granted to the dominant tenement.

What Chao JA meant in the above passage was that the *Harris v Flower* principle is not concerned with whether a more intensive use of a dominant tenement would breach the terms of the right of way granted to that tenement. The latter question raises a different issue, namely, that of the frequency and quantum of use of a right of way, which is a question of fact. In contrast, *Harris v Flower* ([19] *supra*), as Chao JA rightly recognised, is authority for a more fundamental principle of *entitlement*, namely, entitlement to use a right of way for the purposes of land (in this case, Lot 561) to which the right of way is not appurtenant (see *Grange Heights (No 4) (CA)* at [59]). In the present case, the issue of the frequency and quantum of use of the Right of Way as a means of access between Lot 561 and Grange Road will become relevant only if the Main Issue is decided in favour of the Residents. It should be noted, however, that, even if entitlement to use a right of way is established, a more intensive use of the right of way resulting from an alteration of the dominant tenement may lead to the extinguishment of the easement, as can be seen from certain authorities which were not cited to the CA in the Fourth Action (see further [97]–[101] below).

64 On the question of issue estoppel, Chao JA held that Lee Tat was not estopped from raising the Main Issue (as framed in the form of the issue raised in the Fourth Action). He gave the following reasons for his decision.

65 First, the Main Issue (as framed in the form of Issue *(b)* of the Second Action) had not been answered in the Second Action (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [74] and [82]). Instead, the issue decided in the Second Action was whether the Amalgamation had extinguished the MC's right of way over the Servient Tenement, *ie*, Issue *(a)* of the Second Action (*id* at [74]). Chao JA elaborated (*ibid*):

> [T]his court in the [S]econd [A]ction ... only decided the first contention [*ie*, Issue (a) of the Second Action]. It did not discuss the implications of the fact that all the three residential blocks of Grange Heights stand on what was previously Lot 561. To hold that this court had in the [S]econd [A]ction decided the issue [*ie*, Issue (b) of the Second Action] would be to say that this court had rejected *Harris v Flower*, and all other authorities before and after it, by a side wind, when *Graham v Philcox* itself did not reject *Harris v Flower* but thought that it was inapplicable on the facts of the case. It is *unthinkable* that such a monumental change to the common law was intended by the [CA in the Second Action] without even discussing *Harris v Flower* and the other related cases and without offering any reasons why a different approach should be adopted in Singapore. Not a word was uttered [by the CA in the Second Action] disapproving [of] *Harris v Flower*. I cannot see any compelling reasons why we should deviate from *Harris v Flower* especially where the implications of such a deviation would be immense. At that juncture [*viz*, at the time of the Second Action], Lee Tat's rights were purely those of a dominant [owner], its interest being to ensure that its enjoyment of the [R]ight of [W]ay was not interfered with: see 869, [20] of [*Grange Heights (No 2) (CA)*] ... Though [Lee Tat] tried to, it could not really raise the issue of trespass. What Lee Tat could raise was [the complaint] that its enjoyment of the [R]ight of [W]ay had been interfered with but it did not do so, and not having raised that, it had no basis to question [the MC's] exercise of the [R]ight of [W]ay, far less to obstruct the [R]ight of [W]ay which ... Lot 111**|**34 ... enjoyed over the [S]ervient [T]enement. [emphasis added]

66 Second, Chao JA held that, even if the CA in the Second Action had ruled that the Residents were entitled to use the Right of Way for the purposes of Lot 561 (*ie*, even if the CA in the Second Action had determined the Main Issue (as framed in the form of Issue (b) of the Second Action) in the MC's favour), it did not follow that that decision must necessarily give rise to issue estoppel. He held that such a decision would have been a collateral decision, and referred (at [75] of *Grange Heights (No 4) (CA)* ([8] *supra*)) to the following passage from *Spencer Bower* ([32] *supra*) at para 201:

> Only determinations which are necessary to the decision, and fundamental to it, will found an issue estoppel. Other determinations, however positive, cannot.

Applying this principle, Chao JA held that, even if the CA in the Second Action had determined the Main Issue, that part of the CA's decision "was certainly not needed, nor was it the foundation upon which relief was granted to [the MC] in that action" (see *Grange Heights (No 4) (CA)* at [77]). The key point of the CA's decision in the Second Action, he emphasised, was that, since Lee Tat had not alleged that its enjoyment of the Right of Way as a dominant owner had been substantially interfered with by the Residents, Lee Tat was not entitled to prevent the MC (a fellow dominant owner) from enjoying that easement, which had been granted in favour of both the dominant tenement owned by the MC (*ie*, Lot 111**|**34) and the two dominant tenements owned by Lee Tat (*ie*, Lot 111**|**32 and Lot 111**|**33).

67 We are in full agreement with Chao JA's analysis of the issues and the conclusions which he reached in his dissenting judgment (including his decision on the point concerning *laches* or acquiescence, which we discussed at [57] above). However, it should be noted that Chao JA did not address the issue as to whether, in the Second Action, Lee Tat, as a dominant owner, was entitled to assert the rights of the then owner of the Servient Tenement against the MC, its fellow dominant owner (see in this regard [49]–[50] above).

The nub of the Estoppel Question: Does issue estoppel arise from the Majority Judgment in the Fourth Action?

The context in which the Estoppel Question has arisen

68 In the Present Action, Lee Tat resurrected all the arguments which had been rejected by the HC and the Majority Judges in the Fourth Action. In the court below, the Judge embarked on a thorough examination of the issues raised and the decisions made in the Previous Actions. He held that those decisions had established the MC's entitlement to use the Right of Way (see *Grange Heights (No 3) (HC)* ([2] *supra*) at [21]–[22], [26]–[27] and [29]–[30]) and, therefore, Lee Tat had to proceed with the Present Action on the basis that "the MC still had a right of way over [the Servient Tenement]" (*id* at [32]). In effect, the Judge decided that Lee Tat was estopped by the Majority Judgment in the Fourth Action from re-litigating the Main Issue in the Present Action. Interestingly, the Judge recognised that the issue decided in the Second Action was *not* the same as the issue raised in the Fourth Action. He held, however, that, notwithstanding this difference, issue estoppel arose because the premise underlying the issue decided in the Second Action was the same as that underlying the issue raised in the Fourth Action (*id* at [32]):

> ...
>
> (b) ... The decision of [the HC in the Second Action] to dismiss [Lee Tat's] application to discharge the interim injunction and allow the [MC's] substantive action must have been on the basis that the MC was still entitled to enjoy the [R]ight of [W]ay over [the Servient Tenement]. Likewise for the decision of the Court of Appeal in the Second Action ...
>
> (c) *In the Fourth Action ... the Issue [*ie*, the issue raised in the Fourth Action] was different* because it concerned the question [of] whether the [R]ight of [W]ay could be used not only to gain access to ... [L]ot 111**|**34 but to then cross over from ... [L]ot 111**|**34 to ... [L]ot 561. However, the Issue was still [decided] on the premise that the existence and enjoyment of the [R]ight of [W]ay *per se* was not in dispute.
>
> [emphasis added]

69 With respect, if the issue decided in the Second Action was different from the issue raised in the Fourth Action, as it clearly was (because the issue decided in the Second Action was Issue *(a)* of the Second Action, whereas the issue raised in the Fourth Action corresponded to Issue *(b)* of the Second Action), Lee Tat could not have been estopped from bringing up the issue raised in the Fourth Action (as framed in the form of the Main Issue) in the Present Action. Furthermore, the Judge was wrong to regard the premise underlying the issue decided in the Second Action (which was that Lee Tat, being only the owner of the dominant tenements, Lot 111**|**32 and Lot 111**|**33, and not the owner of the Servient Tenement, had no standing to argue that the MC had no right of way over the Servient Tenement) as being the same as the premise underlying the issue raised in the Fourth Action. The former premise no longer prevailed in the Fourth Action as Lee Tat had by then acquired ownership of the Servient Tenement and, indeed, had commenced the action as a servient owner. For the reasons we have given, we are of the view that the Judge's decision in the Present Action as well as the decisions of the HC and the Majority Judges in the Fourth Action – *viz*, that issue estoppel operated against Lee Tat in relation to the Main Issue – were wrong.

70 This brings us to the nub of the Estoppel Question: Is Lee Tat estopped by the Majority Judgment in the Fourth Action, under the principle of *res judicata*, from raising the Main Issue in the Present Action *even though* the Majority Judges *wrongly* held that that issue had already been decided in the Second Action? This question is not concerned with the application of the doctrine of *stare decisis*. If it were, we would have no hesitation in departing from the Majority Judgment. Instead, the issue before us involves the application of the doctrine of estoppel *per rem judicatam* in

its conventional form (as opposed to the extended *res judicata* doctrine delineated earlier at [58] above). Specifically, we have to consider when exceptions may be made to the operation of *res judicata*. In our view, the proper approach in deciding this question is to begin by considering the policy reasons underlying the doctrine of *res judicata* as a substantive principle of law.

The policy reasons underlying the doctrine of res judicata

71 *Spencer Bower* ([32] *supra*) states (at paras 9–10) that estoppel by *res judicata* is a rule of substantive law founded on policy. The policy reasons underlying the rule are, first, "the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" (*id* at para 10) and, second, "the right of the individual to be protected from vexatious multiplication of suits and prosecutions" (*ibid*) (*cf* the policy which underlies the extended *res judicata* doctrine as stated at [58] above). In *New Brunswick Railway Company v British and French Trust Corporation, Limited* [1939] AC 1, the House of Lords (*per* Lord Maugham LC) said (at 19–20):

> The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them …

Similarly, in *Republic of India v India Steamship Co Ltd* [1993] AC 410, Lord Goff of Chieveley said (at 415) that the principle of *res judicata*:

> ... is founded upon the public interest in finality of litigation rather than the achievement of justice as between the individual litigants.

72 The general rule is that, where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle"), and, therefore, the doctrine of *res judicata* applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal" (see *Spencer Bower* ([32] *supra*) at para 15; see also the Majority Judgment in *Grange Heights (No 4) (CA)* ([8] *supra*) at [25]).

73 However, the courts have never accepted *res judicata* as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the court's erroneous decision were to form the basis of an estoppel against the aggrieved party or parties (see further [74]–[78] below; *cf* the exception to the extended *res judicata* doctrine set out at [58] above). In such a case, the tension between the justice principle and the finality principle is resolved in favour of the former.

Circumstances in which the doctrine of res judicata does not operate

(1) The established exception: The decision relied on as the basis of issue estoppel contains a very egregious error

74 The established exception outlined in the preceding paragraph ("the *Arnold* exception") was recognised by the House of Lords in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93

("*Arnold*"). In that case, Walton J had, in an earlier action between a landlord and its tenants ("the Earlier Action") involving a rent review clause ("the Clause"), construed the Clause against the tenants, with the result that the tenants had to pay a higher rent each time a rent review was required. The tenants asked Walton J for leave to appeal and for a certificate under s 7 of the Arbitration Act 1979 (c 42) (UK) stating that the case involved a question of law of general importance or a question which, for some other special reason, ought to be considered by the English Court of Appeal ("the requisite certificate"). Walton J refused both requests. The tenants then appealed against his refusal to grant them the requisite certificate, but were unsuccessful. Subsequently, the English Court of Appeal indicated in two other cases concerning similar rent review clauses that Walton J's construction of the Clause in the Earlier Action was wrong. Prior to the next rent review, the tenants in *Arnold* sought to re-litigate the meaning of the Clause by bringing a fresh action ("the Later Action") to determine the basis on which rent reviews under the lease were to be conducted. The landlord applied to strike out the Later Action on the ground of issue estoppel. The House of Lords held that the tenants were not estopped from raising the construction of the Clause in the Later Action as the circumstances were so special that justice required that the tenants, who had suffered from the egregious mistake of Walton J in the Earlier Action, be permitted to reopen this question of construction in later proceedings.

75 Lord Keith of Kinkel (with whom all the other law lords in *Arnold* ([74] *supra*) agreed), after reviewing the policy considerations underlying the principle of issue estoppel, said (*id* at 109):

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to [the] courts to recognise that in special circumstances inflexible application of it may have the opposite result*, as was observed by Lord Upjohn … in the *Carl Zeiss* case [1967] 1 A.C. 853, 947. [emphasis added]

In relation to the last sentence of the above passage, Lord Keith had, in an earlier part of his judgment in *Arnold*, commented on Lord Upjohn's statement in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 ("*Carl Zeiss Stiftung (No 2)*") at 947 as follows (see *Arnold* at 107):

> In the same case [*ie*, *Carl Zeiss Stiftung (No 2)*] Lord Upjohn went so far as to express doubts about the application to issue estoppel of the full breadth of the statement by Wigram V.IC. in *Henderson v. Henderson*, 3 Hare 100. He said, at p. 947:
>
> > "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

76 At 109 of *Arnold* ([74] *supra*), Lord Keith, in considering what would constitute "special circumstances enabling an issue to be re-opened" (*ibid*), said:

> Your Lordships should appropriately, in my opinion, regard the matter as entire and approach it from the point of view of principle. *If a judge has made a mistake, perhaps a* ***very egregious*** *mistake,* as is said of Walton J.'s judgment here, *and a later judgment of a higher court overrules his decision* in another case, do considerations of justice require that the party who suffered from the mistake should be shut out, when the same issue arises in later proceedings with a different subject matter, from reopening that issue? [emphasis added in italics and bold

italics]

77 On the facts of *Arnold* ([74] *supra*), Lord Keith held that the tenants should be allowed to reopen the construction of the Clause in the Later Action for the following reasons (*id* at 110–111):

> In the instant case, there was no right of appeal against the judgment of Walton J. because he refused to grant a certificate that the case included a question of law of general importance. There can be little doubt that he was wrong in this refusal ... I consider that anyone not possessed of a strictly legalistic turn of mind would think it 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. ... There is much force also in the view that the landlord, if the issue cannot be reopened, would most unfairly be receiving a very much higher rent than [it] would be entitled to on a proper construction of the lease. The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the [tenants] permission to reopen the disputed issue. Upon the whole matter I find myself in respectful agreement with the passage in the judgment of Sir Nicolas Browne-Wilkinson V.-C. where he said [in *Arnold v National Westminster Bank Plc*] [1989] Ch. 63, 70–71:
>
> > "In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can *never* be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case."
>
> [emphasis in original]

78 In our view, the *Arnold* exception should likewise be recognised by our courts. Indeed, it appears that the Majority Judges in the Fourth Action endorsed this exception in principle when they commented, with specific reference to Lord Keith's judgment in *Arnold* ([74] *supra*) at 109, that "no 'special circumstance exception' exist[ed] [in the appeal in the Fourth Action] ... such as to prevent the operation of issue estoppel" (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [25]). We should, however, emphasise that it will be rare for the *Arnold* exception to be invoked successfully as it would be difficult to establish that any judicial error by itself would qualify as "special circumstances" which justify a departure from the doctrine of issue estoppel. In this regard, we would highlight the unusual circumstances which arose in *Arnold* (see [74] and [77] above).

79 We will now examine whether the circumstances in the present case bring it within the *Arnold* exception. The special circumstances in *Arnold* ([74] *supra*) were as follows:

(a) Walton J refused to grant the tenants leave to appeal and also denied them the requisite certificate. As such, the tenants had no right of appeal against his construction of the Clause in the Earlier Action.

(b) Subsequently, in two decisions on rent review clauses with similar wording as that of the Clause in *Arnold*, the English Court of Appeal indicated that the interpretation adopted by Walton J in the Earlier Action was wrong.

(c) The change in the law, as indicated by the above two decisions of the English Court of Appeal, made it unjust that the tenants should be burdened with having to pay for the remaining period of the lease a rent derived from "a construction of [the Clause] which [was] highly unfavourable to [them] and ... generally regarded as erroneous" (*id* at 110).

(d) Even if the tenants were estopped from raising the construction of the Clause in the Later Action, there would still have been arbitration on the rent payable under the Clause at each successive rent review date if the parties failed to agree on the relevant sum.

80 In the present case, the circumstances that may warrant the application of the *Arnold* exception are the following:

(a) Neither the HC nor the CA in the Second Action decided the Main Issue (as framed in the form of Issue (b) of the Second Action) on the merits (see sub-para (g) of [32] above). As such, the Majority Judges in the Fourth Action held – wrongly (and contrary to the dissenting judgment of Chao JA) – that the Main Issue had been decided in the Second Action (see [45] and [53] above).

(b) The Majority Judges held that Lee Tat was precluded by the doctrine of issue estoppel from raising the Main Issue in the Fourth Action even though not all the essential elements of issue estoppel were satisfied (see, *inter alia*, [55] above).

(c) Notwithstanding the decision of the Majority Judges, it is likely that there will be continuing litigation between Lee Tat and the Residents on many issues which have yet to be resolved, such as the type of use which the Residents may lawfully make of the Right of Way. In particular, the question of whether the Residents, who had used the Right of Way "only as a footpath" (see *Grange Heights (No 2) (CA)* ([28] *supra*) at 870, [23]) at the time of the Second Action, may now use this easement for vehicular traffic has not been decided (see *Grange Heights (No 3) (HC)* ([2] *supra*) at [36]–[37]). Given this likelihood of further litigation between the parties, we agree with Lord Keith's statement in *Arnold* ([74] *supra*) at 110 that the public interest in seeing an end to litigation (which would entail upholding the operation of issue estoppel to the Majority Judgment) is of little weight in these circumstances.

(d) Even if the Majority Judges were right in holding that the Main Issue had been decided in the Second Action, the decision in the Second Action as the Majority Judges interpreted it (*viz*, that the Residents could use the Right of Way for the benefit of not only Lot 111**I**34 but also Lot 561) would have been contrary to established law, a point which Chao JA noted in his dissenting judgment (see *Grange Heights (No 4) (CA)* ([8] *supra*) at [74]). Therefore, in holding that Lee Tat was estopped by the decision in the Second Action from litigating the Main Issue in the Fourth Action, the Majority Judges effectively perpetuated an erroneous legal position *vis-à-vis* the MC's rights over the Servient Tenement.

(e) The Majority Judges did not notice that the MC made contradictory arguments in the Fourth Action, as compared to the Second Action, on the question of whether the Main Issue had been decided in the Second Action. In the Second Action, the MC successfully argued (with respect to the *Harris v Flower* principle) that Lee Tat had no standing to raise the Main Issue as the latter was not the owner of the Servient Tenement. In other words, in the Second Action,

the MC succeeded in its submission that the Main Issue could not be decided in that action. In the Fourth Action, however, the MC took the converse position and argued that not only had Lee Tat raised the Main Issue in the Second Action, but that issue had also been decided in the Second Action (see *Grange Heights (No 4) (CA)* at [13]). The Majority Judges accepted the MC's argument, with the result that an estoppel arose against Lee Tat in the Fourth Action *vis-à-vis* the Main Issue.

(f) Even if Lee Tat were allowed to raise the Main Issue in this appeal and even if it were to then succeed in its case on this issue, the Residents would not be inconvenienced in not being able to use the Right of Way for access between their apartments on Lot 561 and Grange Road. This is because the Residents can still reach Lot 561 via St Thomas Walk (see [4] above), which they have in fact used ever since Grange Heights was completed (see [18] above). Further, as we noted at [18] above, the Residents may also use River Valley Grove for access to Lot 561.

(g) As a result of the Majority Judgment, the current legal position *vis-à-vis* the Main Issue is that "[i]t was decided in the [Second Action] that it was lawful for the [R]esidents ... to use the [S]ervient [T]enement as a [footpath] to access Grange Road and *vice versa*" (see *Grange Heights (No 4) (CA)* at [16]). This has in turn prevented Lee Tat from making optimal use of the Servient Tenement in terms of developing it in conjunction with the two dominant tenements that Lee Tat owns (*viz*, Lot 111 32 and Lot 111 33) – something which Lee Tat would be able to do if it were permitted to litigate the Main Issue and if it were to then succeed in its case on that issue.

81 In our view, the aforementioned circumstances qualify as "special circumstances" (*per* Lord Keith in *Arnold* ([74] *supra*) at 109) for the purposes of the *Arnold* exception. The Majority Judgment contained an egregious error (in so far as it stated that the Main Issue had been decided in the MC's favour in the Second Action), and its effect was to prevent Lee Tat from raising the Main Issue in the Fourth Action (and likewise before the Judge in the Present Action) even though that issue had never been decided on the merits. This has caused grave injustice to Lee Tat in that it has been prevented from raising a fundamental issue concerning its rights as the owner of the Servient Tenement (*ie*, the Main Issue), which might be decided in its favour if it were permitted to litigate that issue. In our view, there is sufficient similarity between the circumstances in *Arnold* and those in the present case to justify our holding that there are "special circumstances" (*id* at 109) in this case which warrant the application of the *Arnold* exception.

(2) The issue which is the subject matter of the alleged estoppel has not in fact been decided on the merits

82 In *Arnold* ([74] *supra*), the issue which the tenants were *prima facie* estopped from re-litigating in the Later Action as a result of Walton J's decision in the Earlier Action (*viz*, the construction of the Clause) was decided on the merits in the Earlier Action. In contrast, in the present case, the Main Issue (which is the subject matter of the estoppel alleged against Lee Tat) has never been decided on the merits by either the courts in the Previous Actions or the Judge in the Present Action. In our view, this distinction of fact does not take the present case outside the confines of the *Arnold* exception in so far as that exception is based on considerations of justice. In our view, the objection to applying issue estoppel in this appeal is more fundamental, namely, the Main Issue has never been decided on the merits and, thus, it cannot possibly be the subject of an estoppel. It must be remembered that the doctrine of issue estoppel is predicated upon (*inter alia*) the basis that the issue which is said to be the subject matter of the estoppel *has been decided on the merits*. To hold that issue estoppel applies to an issue which has never been decided on the merits is not only a contradiction of the legal basis underlying the doctrine of issue estoppel, but also

a travesty of justice and a denial of the right to be heard that is fundamental to the legal process. In our view, where the issue which is said to be the subject matter of the alleged estoppel has not in fact been decided on the merits, this factor alone entails that issue estoppel should not apply. This factor may be considered as another category of "special circumstances" (see *Arnold* at 109) for the purposes of the *Arnold* exception, but, in our view, it can and should form a separate and independent basis for not applying the doctrine of issue estoppel. This conclusion accords with the policy underpinning the doctrine of *res judicata*, which is that, where a cause of action or an issue has been finally and conclusively adjudicated *on the merits* by a court of competent jurisdiction, that cause of action or issue may not subsequently be re-litigated by the same parties (see [13] above).

83 In the present case, the MC relied on the decisions of the CA in both the Second Action and the Fourth Action as giving rise to an estoppel against Lee Tat. However, neither decision was a decision on the merits of the Main Issue, notwithstanding that the Majority Judges asserted at [16] of *Grange Heights (No 4) (CA)* ([8] *supra*) that "*[i]t was decided in the [Second Action]* that it was lawful for the [R]esidents ... to use the [S]ervient [T]enement as a [footpath] to access Grange Road and *vice versa*" [emphasis added]. No issue estoppel on the Main Issue can arise from the Second Action because that issue (as framed in the form of Issue (b) of the Second Action) was not decided in that action (see, *inter alia*, sub-para (g) of [32] and [53] above). In the Fourth Action, the Majority Judges merely ruled on whether or not the Main Issue had been adjudicated in the Second Action (which question they answered in the affirmative). The only estoppel that can arise out of the Fourth Action is the Majority Judges' decision on this particular question. But, that question is not the subject matter in the present appeal; instead, the subject matter is the Main Issue.

Our decision on whether issue estoppel arises from the Majority Judgment

84 In our view, therefore, Lee Tat is not estopped by the doctrine of issue estoppel from arguing the Main Issue before us because the *Arnold* exception applies to the Majority Judgment and, further, because the Main Issue has in fact never been decided on the merits. We now turn to consider the Main Issue itself.

The Main Issue: May the Residents use the Right of Way to access Lot 561 from Grange Road and *vice versa*?

The Harris v Flower principle

85 The short answer to the Main Issue – *ie*, whether the Residents may use the Right of Way to access Lot 561 from Grange Road and *vice versa* – is "no". In *Harris v Flower* ([19] *supra*), Romer LJ said (at 132):

> The law really is not in dispute. If a right of way [is] granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B.

Romer LJ further said (at 133):

> [I]n the present case the defendant might have erected a building on the land coloured pink [*ie*, the dominant tenement in *Harris v Flower*] and used it for a contractor's business, and made use of the right of way for that purpose; but what he is really doing here is, under the guise of the enjoyment of the dominant tenement, to try and make the right of way become a right of way for the enjoyment of both lands, the pink and the white [the white land being a non-dominant tenement which the defendant also owned and which adjoined the dominant tenement], and

> [thereby use] the land coloured pink as a mere continuation of the right of passage from the pink to the white. That is not what is justified by the grant, and the plaintiff is entitled to say it is in excess of the grant, and a declaration in his favour ought to be made accordingly.

The rule stated by Romer LJ is a particular application of the more general principle that a dominant owner may use a right of way only for the purposes of the dominant tenement in favour of which the right of way was granted, and not for the purposes of any other land. As Cozens-Hardy LJ put it in *Harris v Flower* (at 133):

> What is the right of way? It is a right of way for all purposes – that is, *for all purposes with reference to the dominant tenement*. The question is whether the defendant has not attempted, and is not attempting, to enlarge the area of the dominant tenement. The land coloured white is entirely landlocked by the acts of the defendant. The only access is by the passage over the land coloured pink; and it is, in my judgment, impossible to use the right of way so as to enlarge the dominant tenement in that manner. [emphasis added]

86 In *Gordon and Regan (HC)* ([47] *supra*), Griffiths J said in the High Court of Ontario (at 646):

> The authorities have consistently held that it is of the very essence of a right of way that it be appurtenant to some particular parcel of land. A right of way granted as an easement incidental to a specified property may not be used by the grantee for the same purpose in respect of another property. That is, it has been held that the owner of the dominant tenement cannot increase the burden on the servient tenement by using the right of way to go to property to which it is appurtenant and then passing over that property to reach adjoining property.

87 On appeal, the Ontario Court of Appeal ruled as follows (see *Gordon and Regan (CA)* ([48] *supra*) at 384):

> The appellant seeks to extend the benefit of the right of way to lands purchased by the dominant [owner] after the right of way was obtained. No authority for that entitlement has been offered and in this case *it would be particularly inappropriate [to extend the benefit of the right of way] because the added lands have an exit which does not require any passage over the right of way*. [emphasis added]

88 In *Miller v Tipling* (1918) 43 DLR 469, a decision of the Ontario Supreme Court, Mulock CJ Ex said (at 475):

> The law is well-established that a right of way appurtenant to a particular close must not be used colourably for the real purpose of reaching a different adjoining close. *This does not mean that where the way has been used in accordance with the terms of the grant for the benefit of the land to which it is appurtenant, the party having thus used it must retrace his steps. Having lawfully reached the dominant tenement, he may proceed therefrom to adjoining premises to which the way is not appurtenant;* ***but, if his object is merely to pass over the dominant tenement in order to reach other premises, that would be an unlawful user of the way*** ... [emphasis added in italics and bold italics]

89 In *Alvis v Harrison* (1991) 62 P & CR 10 (a Scottish case in which the House of Lords stated that the law in Scotland on easements was the same as that in England), Lord Jauncey of Tullichettle, delivering the only substantive speech in the judgment, said (at 15–16):

> Before turning to the facts of this case it may be convenient to state certain general principles

applicable to servitude rights of access and their use:

> (1) Where a right of access is granted in general terms the owner of the dominant tenement is entitled to exercise that right not only for the purpose of the use to which the tenement is then being put but also for any other lawful purposes to which it may be put thereafter. …
>
> (2) The right must be exercised *civiliter*, that is to say, reasonably and in a manner least burdensome to the servient tenement. …
>
> …
>
> (4) *A servitude right of access enures to the benefit of the dominant tenement and no other. Thus it cannot be communicated for the benefit of other tenements contiguous thereto.* … In *Irvine Knitters Ltd.* v. *North Ayrshire Coop. Society Ltd.* [1978 SC 109], the Lord President ... said:
>
> > What [dominant owners] may not do ... is to use the way, or permit its use by others, to obtain access to subjects other than the dominant tenement, whether or not they happen to be heritable proprietors of those other subjects. *They may not, in short, increase the scope of the right of access, and in particular they may not use the way for the purpose of securing access for persons or goods to subjects contiguous to the dominant tenement by using the dominant tenement merely as a bridge between the end of the lane and the non-dominant subjects*.

[emphasis added]

90 The *Harris v Flower* principle was recently restated in *Peacock v Custins* ([47] *supra*) and applied therein to facts similar to those in the present appeal. In *Peacock v Custins*, the claimants were the owners of 15 acres of agricultural land ("the red land") that had the benefit of a right of way over land belonging to the defendants ("the yellow land"). The easement was expressed in the title deeds to both properties as being a "right of way at all times and for all purposes" (*id* at [2]) in favour of the owner of the red land, and in the conveyance of the red land to the claimants as a "right of way over the roadway coloured yellow" (*id* at [3]). The red land (the dominant tenement) was identified in the title deed to that property and also in the title deed to the yellow land. In 1997, the claimants sold part of a different property without retaining any right of way to the part which was not sold ("the blue land"). That part, which covered about ten acres, happened to abut the red land. Both plots of land were let to a tenant who farmed them as one unit. The claimants contended that they and their tenant were entitled to use the right of way over the yellow land for gaining access to the blue land. The English Court of Appeal rejected the claim, holding that, under the *Harris v Flower* principle, such use would be trespass. Schiemann LJ (delivering the judgment of the court) said (at [24]–[25] of *Peacock v Custins*):

> 24 The right to use a right of way is determined by the terms of the grant, specifying the dominant tenement for the purposes of which the right is created. Trespass is whatever is not permitted by the grant. The right is not to use the way for the purposes of benefiting any property, provided that the total user does not exceed some notional maximum user which that beneficiary might have been entitled to make for the purposes of the dominant tenement. If that were the test, the beneficiary might in some circumstances use the way entirely for purposes other than those of the dominant tenement. *The right is to use the way for the purposes of the dominant tenement only*. The grant, when made, had a notional value which would be identified

by reference to those purposes and their likely impact. Use for other purposes would be likely to carry its own notional commercial value. The claimants are claiming to use a way granted for the limited purposes of the 15 acres of red land for the extended or additional purpose of accessing and cultivating at the same time the further 10 acres of the blue land. That extended or additional use is of self-evident commercial value to the claimants, but any value attaching to it cannot have been embraced in the notional value attached to the actual right of way for the benefit of the red land.

25 Considering the position as a matter of principle, we would consider that the defendants are entitled to the declaration that they seek [*viz*, a declaration that the claimants were not entitled to use the right of way over the yellow land to gain access to the blue land]. In our judgment the authorities to which we have referred, and, in particular, *Harris v Flower* … also confirm that, where a court is being asked to declare whether the right to use a way comprises a right to use it to facilitate the cultivation of land other than the dominant tenement, the court is not concerned with any comparison between the amount of use made or to be made of the servient tenement and the amount of use made or that might lawfully be made within the scope of the grant. *It is concerned with declaring the scope of the grant, having regard to its purposes and the identity of the dominant tenement*. The authorities indicate that the burden on the owner of the servient tenement is not to be increased without his consent. But burden in this context does not refer to the number of journeys or the weight of the vehicles. Any use of the way is, in contemplation of law, a burden, and one must ask whether the grantor agreed to the grantee making use of the way for that purpose. Although in *Harris v Flower* Vaughan Williams LJ mentioned, at p 132, the "heavy and frequent traffic" arising from the factory which "could not have arisen without the user of the white land as well as of the pink", the view we take of the reasoning in all three judgments in that case ... is that *all three judges were addressing not the question of additional user, but the different question*: whether the white land was being used for purposes which were not merely adjuncts to the honest use of the pink land (the dominant tenement); or, rephrasing the same question, *whether the way was being used for the purposes of the white land as well as the dominant tenement.*

[emphasis added]

91 We conclude our survey of the case law by highlighting that the present case, when compared to the facts in *Peacock v Custins* ([47] *supra*) and those in *Harris v Flower* ([19] *supra*), is *a fortiori* one where the dominant owner attempted to extend the benefit of the right of way to a non-dominant tenement in breach of the *Harris v Flower* principle. The MC sought to extend the benefit of the Right of Way to a non-dominant tenement (*ie*, Lot 561) which is more than three times larger than the dominant tenement (*ie*, Lot 111[illegible]34), and on which now stands 120 apartments, a car park for 188 cars and also a swimming pool. If the Right of Way is extended to benefit Lot 561, it would increase the burden on the Servient Tenement in a way that could never have been contemplated by Mutual when it granted the Right of Way for the benefit of Lot 111[illegible]34. Moreover, as the Ontario Court of Appeal pointed out in *Gordon and Regan (CA)* ([48] *supra*) at 384, allowing a dominant owner to extend the benefit of a right of way to a non-dominant tenement is especially inappropriate when there are (as in the present case) alternative access routes to the non-dominant tenement (see [87] above). As mentioned earlier (at [4] and [18] above), Lot 561 has always had two exits at St Thomas Walk and River Valley Grove respectively: the former leads to both River Valley Road and Killiney Road, while the latter leads to River Valley Road. The Residents have been able to use and have in fact used St Thomas Walk for both vehicular and pedestrian traffic for more than 30 years, and there is no evidence to show why they could not have used River Valley Grove in the same manner. In contrast, during the same period, they have not used the Right of Way for vehicular traffic in any meaningful way and, as the evidence showed, they might have used it for

pedestrian traffic only intermittently.

Our ruling on the Main Issue

92 As Chao JA pointed out in his dissenting judgment in the Fourth Action (see [63] above), the *Harris v Flower* principle is directed at the question of entitlement to use a right of way, and not at the question of the quantum of such use. We agree with this statement (see also *Peacock v Custins* ([47] *supra*) at [24]–[25] (reproduced at [90] above)). On this basis, our conclusion on the Main Issue is clear. The Residents have no right to use the Right of Way to access Lot 561 (where all the 120 residential apartments comprised in Grange Heights are situated) from Grange Road and *vice versa*. In the first case (*ie*, where the Residents use the Right of Way to pass from Grange Road to Lot 111⎮34 and then Lot 561), the Right of Way would be used for the purposes of Lot 561 (a non-dominant tenement), which is not permitted under the *Harris v Flower* principle. In the converse case (*ie*, where the Residents first pass from Lot 561 to Lot 111⎮34, and then use the Right of Way to pass from Lot 111⎮34 to Grange Road), there would be excessive use of the Right of Way in so far as passage between Lot 111⎮34 and Grange Road is concerned. This is because the easement would be used by the occupants of and the visitors to 120 residential apartments, as opposed to the occupants of and the visitors to the one bungalow which originally stood on Lot 111⎮34 (see sub-para (b)(ii) of [32] above; see also [104] below).

May the Right of Way be used for the benefit of Lot 111⎮34 alone?

93 Our decision on the Main Issue still leaves an important secondary issue to be considered, *viz*: May the Right of Way be used for the benefit of Lot 111⎮34 (which is now an indivisible part of Lot 687) *alone*? In our view, the answer to this question is likewise "no" because the Right of Way has already been extinguished *vis-à-vis* Lot 111⎮34 by operation of law due to the following factors, which we will elaborate on at [102]–[105] and [109] below:

(a) the development of Grange Heights as an integrated residential development consisting of 120 residential apartments, a car park for 188 cars, a swimming pool, two tennis courts and other ancillary facilities, such that Lot 111⎮34 can now be used only together with Lot 561 and not on its own as a distinct plot of land;

(b) the impossibility on Lee Tat's part of ascertaining the extent of the Residents' excessive use of the Right of Way and putting a stop to such use, except by preventing the Residents from using the Right of Way altogether; and

(c) the drastic change in circumstances arising from the Amalgamation, the construction of Grange Heights as well as the escalation of the price of residential property in the locality of Grange Heights over the years (coupled with the virtual inevitability of Lot 111⎮34 being redeveloped for even more intensive use in future).

Ways in which an easement may be extinguished

94 In *Gale on Easements* ([32] *supra*), three ways in which easements may be extinguished are listed at paras 12⎮01, 12⎮08 and 12⎮13 respectively, namely:

(a) by operation of law (*ie*, the common law);

(b) by statute; and

(c) by release, either express or implied.

In the present case, the MC has argued, and we agree, that there is no legislation in Singapore which expressly empowers the courts to extinguish a right of way. Extinguishment by express release does not apply as the MC has not executed any deed of release; neither is extinguishment by implied release applicable in view of HL's and the MC's repeated assertions of the Residents' entitlement to use the Right of Way in the Previous Actions as well as in the Present Action. What remains to be considered is extinguishment by operation of law.

Extinguishment of an easement by operation of law

95 It is established law that unity of ownership of the dominant tenement and the servient tenement will extinguish the easement over the latter, but that does not apply in the present case since the dominant tenement (*viz*, Lot 111[illegible]34) and the Servient Tenement continue to be owned by different parties. The law also recognises that an easement may be extinguished if it is no longer able to serve the dominant tenement in the manner intended by the grant (where the easement is created by a grant) or the prescriptive right that gave rise to the easement (where the easement is acquired by prescription, which has no application under Singapore law). There are two situations in which this can happen. The first is where the dominant tenement has been altered to such an extent that the continued use of the easement for the benefit of the dominant tenement would impose on the servient tenement an excessive burden which was not intended under the grant (*eg*, where a dwelling house is converted into a hotel); the second is where the easement is no longer able to benefit the dominant tenement as a result of some supervening event (*ie*, the purpose for which the easement was granted has been frustrated). We will now consider these situations *in seriatim*.

(1) Extinguishment due to alteration of the dominant tenement

96 In *Graham v Philcox* ([32] *supra*), May LJ stated at 756–757 that the mere alteration of a dominant tenement would *not* be sufficient to extinguish the easement appurtenant to that tenement "*unless* as the result of that alteration the extent of the user [was] thereby increased" [emphasis added] (*id* at 757). In this regard, May LJ did not appear to have in mind a case where the dominant tenement was enlarged by amalgamation with a far larger non-dominant tenement (which is what has happened as a result of the Amalgamation). Even if he did have such a scenario in mind, the principle stated by May LJ would not, in our view, assist the MC in the present case since the Amalgamation has resulted in a significant increase in the quantum of use of the Right of Way.

97 The following cases provide a helpful illustration of the principle enunciated by May LJ at 756–757 of *Graham v Philcox* ([32] *supra*). In *British Railways Board v Glass* [1965] Ch 538 ("*British Railways Board*"), the dominant tenement, a caravan site, had a prescriptive right of way over a railway level crossing. The English Court of Appeal held (by a majority) that, even though use of the caravan site had multiplied five times over the years, this did not amount to a change in the dominant tenement which was sufficiently radical to extinguish the prescriptive right of way since that easement was meant for the benefit of the dominant tenement as, specifically, a caravan site. As Harman LJ explained (*id* at 562):

> [A] mere increase in the numbers of the caravans using the site is not an excessive user of the right. A right to use a way for this purpose or that has never been to my knowledge limited to a right to use the way so many times a day or for such and such a number of vehicles so long as the dominant tenement does not change its identity.

Harman LJ accepted that (*id* at 562–563):

> *If there be a radical change in the character of the dominant tenement, then the prescriptive right will not extend to it in that condition. The obvious example is a change of a small dwelling-house to a large hotel*, but there has been no change of that character according to the facts found in this case. The caravan site never became a highly organised town of caravans with fixed standings and roads and all the paraphernalia attendant on such a place and in my opinion the judge was right in holding that there had been no such increase in the burden of the easement as to justify the plaintiffs [*ie*, the servient owners] in seeking as they did by injunction ... to prevent [the] use [of the dominant tenement] as what in the statement of claim [was] called "a caravan camp or site." [emphasis added]

Although Harman LJ made his comments in relation to a right of way acquired by *prescription* (which, as mentioned at [95] above, is not a recognised mode of acquiring an easement under Singapore law), his comments are, in our view, equally relevant for the purposes of determining whether a right of way created by a *grant* has been extinguished due to an alteration of the dominant tenement. (The same applies to the other cases involving prescriptive rights of way which we shall discuss at [98] and [101] below.)

9 8 *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & CR 978 ("*Giles*") was another case in which it was held that the change in the dominant tenement did not extinguish the easement appurtenant to it. There, the defendant intended to demolish two houses on the dominant tenement (a former convent site) and to erect thereon a three-storey block of six flats as well as a bungalow and seven garages, all of which would have the benefit of a vehicular right of way that had been acquired by prescription. It was held that this development did not involve a radical change in the character or identity of the dominant tenement, and so would not lead to excessive use of the right of way. After referring to the passage from *British Railways Board* ([97] *supra*) at 562 (reproduced at [97] above), Brightman J said (at 987 of *Giles*):

> The important [considerations], to my mind, are "change of identity" and "radical change in character." In my view, the use of the convent site for the erection of seven modern dwelling units in place of the two existing houses, cannot properly be described as "changing the identity" or "radically changing the character" of the convent site. I think it is evolution rather than mutation. Assuming a right of way to exist over the terraced roadway for the benefit of the convent site, that right existed to serve the purposes of the convent site as the site of dwelling-houses and the convent site will continue to be used for dwelling-houses. *To some extent, of course, the matter must be one of degree,* because *I quite see that the erection of a skyscraper block of flats on the convent site might well be said to cause a radical change in the character of the dominant tenement which alters its identity.* But that is not what is proposed here. [emphasis added]

99 On the other side of the divide are the Canadian case of *Malden Farms Ltd v Nicholson* (1956) 3 DLR (2d) 236 ("*Malden Farms*") and the English case of *Jelbert v Davis* [1968] 1 WLR 589. In the former, the defendant built a beach resort on the dominant tenement, which was previously used as a private residence. As a result, a right of way which had been expressly granted to the dominant tenement ended up being used by hundreds of members of the public. The Ontario Court of Appeal held that this amounted to a change in the dominant tenement which resulted in excessive use of the right of way. In *Jelbert v Davis*, the plaintiff farmer enjoyed a right of way "at all times and for all purposes over the [servient tenement] … in common with all other persons having the like right" (*id* at 593). He obtained permission to use part of his land as a tourist caravan and camping site for up to 200 caravans and/or tents between April and October of each year. The English Court of Appeal held that the use of the right of way by 200 caravans would cause considerable inconvenience to the servient owners and would plainly amount to excessive use. In this regard, Lord Denning MR pointed

out (*id* at 595) that:

> Although the right is granted "at all times and for all purposes," nevertheless it is not a sole right. It is a right "in common with all other persons having the like right." It must not be used so as to interfere unreasonably with the use by those other persons, that is, with their use of it as they do now, or as they may do lawfully in the future. The only way in which the rights of all can be reconciled is by holding that none of them must use the way excessively.

As for whether a particular new or proposed use of a dominant tenement might lead to excessive use of an easement, Lord Denning remarked, with his customary acuity (*id* at 596), that:

> The question ... turns on the facts and circumstances of the particular case. Is the proposed user so extensive as to be outside the reasonable contemplation of the parties at the time the grant was made?

100 An extremely important point to note is that, in determining whether an easement has been extinguished by an alteration of the dominant tenement, it is not the change in the dominant tenement *per se* that is crucial but, rather, the consequent, inevitable increase (if any) in *the quantum of use of the easement*. This is illustrated by the English High Court's decision in *Atwood v Bovis Homes Ltd* [2001] Ch 379 ("*Atwood*").

101 In *Atwood* ([100] *supra*), which concerned an easement of drainage acquired by prescription, Neuberger J distinguished an easement of drainage from a right of way. In respect of the latter, he summarised the case law *vis-à-vis* the impact of an alteration of the dominant tenement as follows (*id* at 387–388):

> 1 The only case where the question at issue was whether a change in the nature of use (as opposed to intensification of the existing use) of the dominant tenement could destroy or result in an impermissible enjoyment of a right of way obtained by prescription was *Wimbledon and Putney Commons Conservators v Dixon*, [(1875)] 1 Ch D 362.
>
> 2 Not only in the decision in the *Wimbledon* case (binding on me as a decision of the Court of Appeal), but in other cases, it has been stated or assumed to be right that a substantial change in the nature of the use of the dominant tenement will result in the right to use the way, obtained by prescription, being either destroyed or [rendered] impermissible.
>
> 3 There is a dispute between the parties in relation to the observations of the Court of Appeal in the *Wimbledon* case, and indeed in the other cases, as to the proper analysis of those observations. *Is the principle that a radical alteration in the use or nature of the dominant tenement* ***of itself*** *puts an end to, or renders impermissible any use of, the right of way? This is what I shall call the "strict rule". Alternatively, is the rule more flexible, namely, that a radical change in the use or nature of a dominant tenement will lead to such a conclusion,* ***unless the change is such that it will not result in any significant increase in the quantum****, or of any significant alteration in the nature,* ***of the use of the way*** *from that enjoyed in relation to the original use of the way.* ***By "quantum" I mean frequency of usage****, and by "nature" I mean, for instance, lorries, motor cars, pedestrians, bicycles and so on.*
>
> 4 In that connection, observations which one sees in the cases, whether part of the ratio (as in the *Wimbledon* case) or included as the obiter observations (as in *Williams v James*, [(1867)] LR 2 CP 577 and *British Railways Board v Glass* [1965] Ch 538), relating to a change from a field to a factory, from a house to a hotel or from a field to a house building site, do not

seem to me to be decisive. They all carry with them the understandable assumption that the changes would involve an increase in the quantum of the user and/or a change in the nature of the user of the way resulting from the change in the use of the dominant tenement.

5 The advantage of the flexible rule is that it can be said to be in accordance with commercial common sense ... Why should the owner of the servient tenement, in that capacity, care about a change of use to the dominant tenement, however radical, if it can be shown that it makes no difference to the quantum or nature of the use of the way? It could be said to be contrary to common sense that, if a right of way has been obtained by prescription in favour of a building being used as a hotel, the right to use the way would be lost if the owner of the dominant tenement changed the use to a house and could demonstrate that it was inconceivable that anything other than a diminution in the quantum of the use [would] arise and that there [would] be no change in the nature of the use.

6 The advantage of the strict rule is that it leads to a relative degree of certainty. It might be asked how one could predict the extent of the future likely use of the way following a change of use of the dominant tenement. For instance, what would be the position if the radical change of use was itself changed or subsequently intensified? It might also be asked, is one to compare the projected use of the way following the change of use of the dominant tenement with the historic actual use of the way, or with what might have been the maximum permitted use of the way in relation to the original use of the dominant tenement?

7 *I would tentatively suggest that the rule may be that, if there is a subsequent radical change in the use of the dominant tenement, a right of way acquired by prescription can only continue to be used in connection with the dominant tenement* ***if the court can be satisfied that the change cannot result in the use of the way being greater in quantum*** *or different in character from that [while the way] was for any continuous period of 20 or 40 years [used] ... in connection with the original use of the dominant tenement.* (For completeness, I should explain that the periods of 20 or 40 years are selected on the basis of the periods necessary to obtain an easement, be it a right of way or other easement, by prescription.) The onus would be on the owner of the dominant tenement, and would, I suspect, normally be difficult to satisfy in relation to a right of way.

...

9 Whichever of the two rules is correct, it is clear that a prescriptive right of way arises from a fictional grant. Whether the flexible rule or the strict rule applies, it is accepted ... that *the general purpose of the rule is to ensure that the owner of the dominant tenement does not use the way for a purpose, or to a degree, not contemplated by the fictional grant*.

[emphasis added in italics and bold italics]

In our view, although Neuberger J stated the law on a tentative basis, the principle which he suggested at 388 of *Atwood* is helpful in our local context for determining whether a right of way created by a grant has been extinguished due to a change in the dominant tenement.

102 In the present case, the dominant tenement (*ie*, Lot 111 34) has changed in terms of its *character* and its *nature of use*. With regard to the change in character, the Amalgamation destroyed the physical identity of Lot 111 34 as a distinct lot, in that the boundary which previously separated it from Lot 561 was obliterated and the two lots became Lot 687. Consequently, Lot 111 34 can no longer be used as a stand-alone lot, but only as an ancillary to Lot 561; and, given the number of

residential apartments which now stand on Lot 561, Lot 111⎮34 may be used by the occupants of and the visitors to some 120 households. In terms of the change in the nature of use, Lot 111⎮34, which previously had on it a bungalow with a tennis court, was originally used for residential purposes, but is now used for recreational purposes, as evinced by the tennis courts and the changing rooms which presently stand on it. It might be argued that, since the recreational facilities on Lot 111⎮34 are intended for the enjoyment of the Residents, this lot is in essence still being used for residential purposes. We are not, however, persuaded by this argument since none of the residential apartments in Grange Heights is located on Lot 111⎮34, with the result that none of the Residents actually lives on this plot of land. Clearly, Lot 111⎮34 is being used exclusively for recreational, as opposed to residential, purposes, and the use of the Right of Way to access Lot 111⎮34 from Grange Road and *vice versa* would be for that particular purpose only.

103 The above changes to the character and the nature of use of Lot 111⎮34 would result in a significant increase in the quantum of use of the Right of Way if (contrary to our decision at [93] above) the Residents are permitted to continue using this easement for the purposes of Lot 111⎮34 alone. It might be argued, by way of rebuttal, that, in practice, only a handful of the Residents and their visitors would use the Right of Way for access between Lot 111⎮34 and Grange Road at any point in time, given the limited number of tennis courts on Lot 111⎮34; therefore, the current quantum of use of the Right of Way (if it is still permitted to be used in relation to Lot 111⎮34) would not be significantly greater than the quantum of use which existed at the time of the Grant. This contention is, however, untenable because, for the purposes of determining whether an alteration of a dominant tenement has led to excessive use of the easement appurtenant to it, what is significant is the increase in the number of people *entitled to use* the easement, and not the increase in the number of people out of those entitled to the benefit of the easement who *actually use* the easement at any particular juncture. This is evident from Lord Denning's explanation in *Jelbert v Davis* ([99] *supra*) that the change in the dominant tenement in that case would result in excessive use of the right of way in question because (*id* at 596):

> *[I]f* this caravan site is used to its full intensity for 200 units, there would be such congestion that it would interfere with the reasonable use by [the servient owners] of their own right of way ... [emphasis added]

104 In our view, the above statement is applicable to Lee Tat's right to enjoy the Right of Way in its capacity as the owner of the Servient Tenement and as the dominant owner of Lot 111⎮32 and Lot 111⎮33, given that some 120 households and their visitors may potentially use the Right of Way (assuming that this easement may still be used for the benefit of Lot 111⎮34). Mutual could never have intended the Right of Way to be used by such a large number of people, considering that only one bungalow stood on Lot 111⎮34 at the time of the Grant. Such intensification in the use of the easement in the present case far exceeds that which occurred in *British Railways Board* ([97] *supra*) and *Giles* ([98] *supra*), and is akin to that which featured in *Malden Farms* ([99] *supra*) as well as in the examples given by Harman LJ in *British Railways Board* (*viz*, of a small dwelling house being converted to a large hotel) and Brightman J in *Giles* (*viz*, of a skyscraper being constructed on a former convent site) respectively.

105 The above increase in the quantum of use of the Right of Way is permanent and irreversible. Given that Lot 111⎮34 now forms an integral and indivisible part of a much larger plot of land (*viz*, Lot 687), it is inconceivable that Lot 111⎮34 will ever revert to a state in which the use of the Right of Way for its benefit is of the same intensity as that which prevailed when this easement was used for the benefit of Lot 111⎮34 in its original state – in other words, it is not possible for the use of the Right of Way *vis-à-vis* Lot 111⎮34 to ever be lawful again. Further, because of the Amalgamation and the resultant loss of the physical identity of Lot 111⎮34 as a distinct lot, it is not possible for Lee Tat

to ascertain the extent of the Residents' excessive use of the Right of Way and put a stop to such use. A resident of Grange Heights who has crossed from Grange Road to Lot 111 34 via the Right of Way may, after reaching Lot 111 34, further cross over to Lot 561 without even realising that he has done so – *ie*, a resident of Grange Heights may inadvertently stray from a lawful use of the Right of Way to an unlawful use. Correspondingly, Lee Tat will never be in a position to determine whether any particular instance of use of the Right of Way by the Residents exceeds the terms of the Grant. This is a significant point because, although "[e]xcessive use of an easement *does not of itself* put an end to the easement or qualify the rights under it" [emphasis added] (see Peter Butt, *Land Law* (Lawbook Co, 4th Ed, 2001) at para 1672), it is also the law that "if the owner of the servient tenement cannot otherwise abate the excessive user of the easement he may obstruct the whole use of it" (see *Gale on Easements* ([32] *supra*) at para 12 82). In our view, the present case is precisely one in which Lee Tat, the owner of the Servient Tenement, cannot halt the Residents' excessive use of the Right of Way except by precluding the Residents from using the easement altogether. That being the case, there is no reason why Lee Tat would not be entitled to a permanent injunction restraining the Residents from using the Right of Way *in toto*. We accept that the grant of such a permanent injunction would not in itself extinguish the Right of Way because, as stated by May LJ in *Graham v Philcox* ([32] *supra*) at 756:

> The fact that a court may grant an appropriate injunction ... does not ... either extinguish or suspend the easement. *Provided that the owner of the dominant tenement subsequently reverts to lawful use of the easement*, his prior excessive use of it is then irrelevant. [emphasis added]

However, given that there is, as we have just mentioned, no practical possibility of the Residents ever reverting to a lawful use of the Right of Way, the easement is effectively non-existent *vis-à-vis* Lot 111 34 as, in practical terms, it can never again benefit the Residents or their successors in title.

106 Applying the principles set out in the cases discussed earlier (at [97]–[101] above) to the factual situation delineated at [102]–[105] above, we hold that the alterations in the character and the nature of use of Lot 111 34, *coupled with the resultant increase in the quantum of use of the Right of Way*, have resulted in the extinguishment of this easement *vis-à-vis* Lot 111 34. The Residents can no longer use the Right of Way for the benefit of Lot 111 34 alone without breaching the terms of the Grant.

(2) Extinguishment due to frustration of the purpose for which the easement was granted

107 Turning to the second of the two situations in which an easement may be extinguished on the ground that it is no longer able to serve the dominant tenement in the manner originally envisaged (see [95] above), the English Court of Appeal's decision in *Huckvale v Aegean Hotels* (1989) 58 P & CR 163 ("*Huckvale*") is notable, in our view, for expressly keeping open the possibility that the English courts may recognise a "change in circumstances" doctrine for the purposes of modifying or extinguishing an easement. Even though *Huckvale* was an appeal against an interlocutory injunction and the court ultimately decided that the issue of whether the easement in that case had been extinguished by operation of law was apt for adjudication by a trial judge, we agree with the opinion expressed by Slade LJ, who said (at 173):

> ... I would for my part be prepared to accept in principle that, even in a case of that nature [*ie*, where both the dominant tenement and the servient tenement still exist], *circumstances might have changed so drastically since the date of the original grant of an easement* (for example by supervening illegality) *that it would offend common sense and reality for the court to hold that an easement still subsisted.* Nevertheless, I think the court could properly so hold only in a very clear case. [emphasis added]

Slade LJ added that (*ibid*):

> [T]he court should be slow to hold that an easement has been extinguished by frustration, unless the evidence shows clearly that because of a change in circumstances since the date of the original grant there is no practical possibility of [the easement] ever again benefiting the dominant tenement in the manner contemplated by that grant.

108 In contrast, Nourse LJ was more tentative in his approach to the question of whether an easement which accommodated the dominant tenement at the date of the grant but which subsequently failed to accommodate it was thereby extinguished by law even though the dominant tenement still existed. On the one hand, Nourse LJ observed (see *Huckvale* ([107] *supra*) at 170) that the proposition that an easement could be extinguished on this ground was "novel and unsupported by any authority which ha[d] been cited to [the court]"; on the other hand, he also recognised that "it could not be said that there might not be a case whose facts would attract its operation" (*ibid*).

109 In our view, the same factors which we set out earlier (at [102]–[105] above) in relation to the alteration of Lot 111⏐34 would justify our holding that "it would offend common sense and reality ... to hold that [the] easement still [subsists]" (*per* Slade LJ in *Huckvale* ([107] *supra*) at 173). Due to the change in the character and the nature of use of Lot 111⏐34, coupled with the ensuing increase in the quantum of use of the Right of Way, this easement (if it continues to be used in relation to Lot 111⏐34) would now be used for a purpose which is different from that which prevailed when the Grant was made, and at an intensity which is far greater than the intensity of use at the time of the Grant. This situation is irreversible not only because of the Amalgamation and the development of Grange Heights, but also because, having regard to the escalation of the price of residential property in the area where Grange Heights is located as well as the prevailing and future cost of residential property in that area, it is absolutely unrealistic to contemplate any future owner of Lot 111⏐34 ever reverting to the original use of this plot, *ie*, as a residential site for a single dwelling unit. Indeed, Lot 111⏐34 will almost certainly be redeveloped for even more intensive use in future. In short, there is no realistic possibility of the Right of Way ever again benefiting Lot 111⏐34 in the manner envisaged under the Grant. On this basis, we are of the view that the Right of Way has also been extinguished by frustration.

Our observations on the use of the Right of Way for vehicular traffic

110 It may be recalled that one of the issues raised before the Judge in the court below was whether the Residents had abandoned their entitlement to use the Right of Way for vehicular traffic by not utilising the easement for this purpose in any meaningful way since 1976. In the Second Action, the CA was under the impression that the MC's stance in relation to the use of the Right of Way for vehicular traffic was that the Residents "[did] not use [the Right of Way] for vehicular traffic at all but only as a footpath" (see *Grange Heights (No 2) (CA)* ([28] *supra*) at 870–871, [23]). The MC subsequently contended otherwise in the third of the Committal Proceedings, and asserted that what it meant was that "[t]he easement did not become subject to vehicular use exclusively, but *continued* to [be] used as a footpath, in accordance with the terms of [the] easement"[note: 8] [emphasis in original] and, thus, the Residents had not stopped using the Right of Way for vehicular traffic. In support of its argument, the MC tendered (*inter alia*) affidavits deposed by two of the Residents in March 2004 asserting that they had used the Right of Way for vehicular traffic[note: 9] (one of the deponents added that he had stopped driving along the Right of Way only sometime in 2003 because of the poor condition of the Right of Way).[note: 10] In the court below, the Judge declined to make any ruling on the question of whether the Right of Way had been used for vehicular traffic after 1976 since it was not relevant to the issue before him, which was the Main Issue (see *Grange Heights (No 3) (HC)* ([2] *supra*) at [36]–[37]). Given our ruling that the Right of Way has

been extinguished *vis-à-vis* Lot 111⁄34, it is likewise unnecessary for us to comment further on the use of this easement for vehicular traffic.

Summary of our rulings

111 We summarise our rulings on the pertinent issues considered in this appeal as follows:

(a) The Main Issue was not decided on the merits by either the courts in the Second Action (see sub-para (g) of [32] above) or the courts in the Fourth Action (see [36] and [83] above).

(b) The Majority Judges, in holding that the Main Issue had been decided by the courts in the Second Action and that, consequently, Lee Tat was estopped from bringing up the Main Issue in the Fourth Action, made an egregious error since three out of the four essential elements of issue estoppel were not satisfied (see [55] above).

(c) Due to the circumstances outlined at [80] above, there would be grave injustice to Lee Tat if it were estopped by the Majority Judgment from raising the Main Issue before this court. For this reason, the *Arnold* exception applies in the present case.

(d) In any event, since the Main Issue has never been decided on the merits, the doctrine of issue estoppel cannot possibly operate to preclude Lee Tat from raising the Main Issue in the present appeal. This is because the doctrine of issue estoppel is predicated on the issue which is the subject matter of the estoppel having already been decided on the merits (see [82] above).

(e) Our decision on the Main Issue is that (see [92] above):

(i) by reason of the *Harris v Flower* principle, the Residents are not entitled to use the Right of Way to pass from Grange Road to Lot 561 as this easement was granted for the benefit of Lot 111⁄34, and not Lot 561; and

(ii) the Residents also may not cross from Lot 561 to Lot 111⁄34 and then further cross from Lot 111⁄34 to Grange Road via the Right of Way as this would result in excessive use of the Right of Way where passage between Lot 111⁄34 and Grange Road is concerned.

(f) The Residents also may not use the Right of Way for the benefit of Lot 111⁄34 alone because this easement has already been extinguished *vis-à-vis* Lot 111⁄34 by operation of law due to the permanent and irreversible change in the character and the nature of use of Lot 111⁄34 as well as the drastic change in circumstances since the date of the Grant, including in particular the rise over the years in the price of residential property in the area where Grange Heights is located (see [93], [102]–[105] and [109] above). As a result of these developments, the Right of Way is no longer able to benefit Lot 111⁄34 in the manner intended by the Grant.

Conclusion

112 In the event, we allow Lee Tat's appeal and set aside the decision of the Judge that the MC is entitled to repair and/or maintain the Right of Way. We are not, however, in a position to make any declaratory orders in relation to the existence of the Right of Way *vis-à-vis* Lot 111⁄34 as such relief has not been sought by Lee Tat in the Present Action.

113 With respect to the costs of the proceedings here and below, we are of the view that, given the course which this appeal took as well as the manner in which Lee Tat and the MC argued their

respective cases, each party should bear its own costs and disbursements. The security deposit is to be returned to Lee Tat.

[LawNet Admin Note: Appendix 1 is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

[note: 1]See the Appellant's Core Bundle, vol 2 at p 30.

[note: 2]See p 2 of the certified transcript of the notes of argument of the hearing before Coomaraswamy J on 8 September 1989 ("the notes of argument for 8 September 1989").

[note: 3]*Ibid*.

[note: 4]See p 5 of the notes of argument for 8 September 1989.

[note: 5]See the Supplemental Record of Appeal, vol 4A at p 453.

[note: 6]See OS 825/2004 (Record of Appeal, vol 3A at pp 131–135).

[note: 7]See the Supplemental Record of Appeal, vol 4B at pp 996–997.

[note: 8]See para 25 of the affidavit of Rustom Minocher Ghadiali filed on 4 March 2004 (at Supplemental Core Bundle vol 3, p 461).

[note: 9]See paras 5–6 of Ivan Steinbock's affidavit filed on 4 March 2004 (at Supplemental Record of Appeal vol 4D, p 1348) and paras 5–6 of Lim Yong Chuan's affidavit filed on 4 March 2004 (at Supplemental Record of Appeal vol 4D, p 1355).

[note: 10]See para 7 of Ivan Steinbock's affidavit filed on 4 March 2004 (at Supplemental Record of Appeal vol 4D, p 1348).

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Appendix I