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Singapore Court of Appeal finds easement abandoned and no longer subsisting under section 46(1) of Land Titles Act

Lian Kok Hong v Lee Choi Kheong & Ors [2010] SGCA 19

In *Lian Kok Hong v Lee Choi Kheong & Ors*, the Singapore Court of Appeal found that a long acquiescence by the successive owners of a plot of land to the right of way over a neighbouring strip being fenced off amounted to acquiescence to the right of way being rendered unusable and constituted a conscious act of abandonment.

Facts

The appellant was the owner of the land comprised in Lot 187-157 on which house No 72 Belmont Road was built (hereinafter referred to as “**72 Belmont Road**”), while the respondents were the owners of Lot 185-156 on which house No 70 Belmont Road was built (hereinafter referred to as “**70 Belmont Road**”)

Both 70 and 72 Belmont Road were part and parcel of the same property comprised in Lot 187-102 until their common owner subdivided the land and sold 70 Belmont Road to the respondents’ predecessor in title in 1949, whilst retaining ownership of 72 Belmont Road. After the subdivision, the owner of 70 Belmont Road would not have been able to gain access to Belmont Road except through plot A, whilst the owner of 72 Belmont Road would have been able to do so through both plot B and plot A. Plot B was part of 72 Belmont Road, while plot A was part of 70 Belmont Road. The common owner of Lot 187-102 granted to the owner of 70 Belmont Road a right of way over plot B and reserved to herself as the owner of 72 Belmont Road a right of way over plot A. Since 1949, both 70 and 72 Belmont Road have changed ownership many times.

72 Belmont Road and 70 Belmont Road were brought under the Land Titles Act (the “**LTA**”) on 15 December 1971 and 22 December 1977 respectively.

In 1971, Koh, the then owner of 72 Belmont Road constructed a chain-linked fence along the common boundary of the two houses and fenced off plot A. The fence effectively became a party wall separating the two properties and deprived FEOAC, the then owner of 70 Belmont Road, of its right of way over plot B (which was adjacent to plot A) to gain access to Belmont Road. There was no evidence that FEOAC had ever objected to plot B being fenced off and thereby preventing FEOAC from using plot B as a right of way. Since then, plot B had been fenced off, unavailable for use as a right of way to all successive owners of 70 Belmont Road until the issue as to its existence was raised by the respondents.

The respondents wanted to build a gate at the entrance of plot A where it meets Belmont Road. The appellant objected to this and applied for an injunction to restrain the respondents. In retaliation, the respondents counterclaimed that, as owners of 70 Belmont Road, they were entitled to a

right of way over plot B. The High Court dismissed the appellant's action and allowed the counterclaim. The appellant appealed to the Court of Appeal against the High Court's decision.

Mutuality

The High Court judge had held that, on the facts of this case, the easements over plots A and B were created to be mutually co-existing and that, therefore, one could not be abandoned without abandoning the other. The Court of Appeal disagreed, holding that the right of way over plot B could be abandoned without affecting the right of way of both owners over plot A. It might be that if the mutual easements together constituted a right of way of necessity for both owners, neither easement could be abandoned without one house becoming landlocked. Except on this ground, there was, in principle, no reason why one dominant owner may not abandon his right of way over the relevant servient tenement, if he was still able to access the main road without the use of the right of way over the servient tenement.

Subsistence of right of way under section 46(1) of LTA

The right of way over plot B and the right of way over plot A were subject to the common law as both easements were created before the relevant lands were brought under the LTA. Section 46 of the LTA confers an indefeasible title on the registered proprietor in the circumstances. However, section 46(1)(c)(ii) subjects such indefeasibility to any "subsisting easement" which was in existence at the date on which the land was brought under the provisions of the LTA.

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

The court noted that 72 Belmont Road was brought under the LTA on 15 December 1971. On that day, FEOAC, the owner of 70 Belmont Road undoubtedly had a subsisting right of way over plot B. It was only after Koh had become the proprietor of 72 Belmont Road that she fenced off the right of way. What the facts showed was that the action of Koh in fencing off plot B would have been done openly, and the owners of 72 Belmont Road would have seen it happening or would have known about it shortly after plot B had been fenced off. Evidently, they did not object to plot B being fenced off or consider Koh's action worth protesting against. The facts also showed that all successive owners of 70 and 72 Belmont Road (up to September 2007 when the respondents purchased 70 Belmont Road) conducted themselves as if either the right of way had never existed or that they had no use for it, since they knew or ought to have known of the prior existence of the easement as any competent conveyancer would have ascertained this with reasonable diligence.

The Court of Appeal was of the view that, if the proprietor of 70 Belmont Road had, in 1971 or shortly thereafter, taken action to recover the right of way over plot B, he would have been entitled to do so and that action alone would have confirmed that the right of way had not been abandoned.

Was the right of way abandoned by 1994 or 2007?

By the time the appellant purchased 72 Belmont Road in February 1994, plot B had been fenced off for more than 20 years without any protest by the successive owners of 70 Belmont Road. This situation subsisted for another 13 years, until 2007 when the respondents raised the issue for the first time in these proceedings to reclaim the right of way over plot B.

In the court's view, these facts were sufficient to conclude that the owners of 70 Belmont Road, the dominant tenement, had abandoned the right of way over plot B. It was not so much the actual non-user that was crucial in this case, but the long acquiescence by the successive owners of 70 Belmont Road to the right of way over plot B being fenced off. Such conduct amounted to acquiescence to the right of way being rendered unusable and would amount to a conscious act of abandonment.

Extinguishment of easement by operation of law

It was not necessary for the court to consider whether the easement had been extinguished as the court was satisfied that the easement had been abandoned by the time the appellant purchased 72 Belmont Road in 1994 and certainly by the time the respondents purchased 70 Belmont Road in 2007.

If you would like to discuss the impact of this case on your business, please contact:

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