Frontfield Investment Holding (Pte) Ltd v Management Corporation Strata Title No 938 and Others
[2001] SGHC 161

Case Number : OS 1533/2000

Decision Date : 30 June 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : K Shanmugam, SC, K Muralidharan Pillai and Prakash Pillai (Allen & Gledhill) for the plaintiffs; Harry Wee and Andrew Ho (Braddell Brothers) for the defendants

Parties : Frontfield Investment Holding (Pte) Ltd — Management Corporation Strata Title No 938

Civil Procedure – Parties – Proper parties – Proceedings by partial owner of servient tenement – Whether other owner of servient tenement must be made party to proceedings – Whether parties before court has opposing interests on live issue

Land – Strata titles – Management corporation – Capacity to be sued – Whether management corporation proper defendant – Whether right in issue involves common property – Whether right of way forms part of common property

Land – Easements – Extinguishment – Abandonment of right of way – Mere non-user of right of way insufficient – Intention to abandon right of way – Whether intention to abandon right of way shown – Partial abandonment of rights – Whether court has power to extinguish easement on basis of obsolescence

(delivering the grounds of judgment of the court):

Introduction

This case involves a right of way. The two pieces of land concerned are situated in the East Coast and the closest roads are Marine Parade Road, St Patrick`s Road, and Jalan Rendang. Originally, they were both part of a bigger plot of land bounded to the south by the sea (which has now been pushed back and replaced by Marine Parade Road), to the east by Telok Kurau Road and to the north by St Patrick`s Road. At that time Jalan Rendang did not exist.

The dominant tenement is known as Lot 5915X of Mukim 26 (formerly known as Lot 120-12) and it is now the site of a condominium called Gracious Mansions. The servient tenement is the land known as Lot 98082L (formerly known as Lot 120-13). It is currently undeveloped. The right in issue is a right for the owners of Gracious Mansions to have full and free right of way and passage over the servient tenement in order to have access to St Patrick`s Road.

The named plaintiff is Frontfield Investment Holding (Pte) Ltd (`Frontfield`). According to the description in the action, Frontfield sues on their own behalf and also under a power of attorney. Frontfield owns five equal undivided one-sixth shares in the servient tenement. The owner of the remaining one-sixth share is Madam Lee Seok Chee, the donor of the power of attorney.

The first defendant in the action is the Management Corporation Strata Title No 938, the management corporation of Gracious Mansions (`the MC`). The subsidiary proprietors of the strata title lots forming part of Gracious Mansions are not parties to the action. The second, third and fourth defendants are the owners of adjacent lots which had originally been given the same right of way as

the owners of the dominant tenement. These defendants consented to having judgment entered against them and their purported right of way over the servient tenement was declared to have been extinguished pursuant to an order of court dated 22 November 2000. The action before me was, therefore, against the MC only.

The relief sought by Frontfield is a declaration that the right of way and passage and all other rights and easements appurtenant to the dominant tenement subsisting over the servient tenement have been extinguished. The grounds of the application are:

(1) that the right of way over the servient tenement has effectively been abandoned and therefore should be extinguished by operation of law;

(2) alternatively, there has been a partial abandonment of the right of way in that the right to have vehicular access enjoyed by the dominant tenement has been abandoned, leaving only a right to use the servient tenement as a footway;

(3) alternatively, the easement can, and in this case should be, extinguished on the basis of a change of circumstances which has made the easement obsolete.

Background facts

Attached to this judgment as an appendix is a copy of a certified government plan of the area in question which shows the respective positions of the dominant tenement (marked `C` in the plan) and the servient tenement (marked `B`). The map also shows the adjacent lots. One of these, the one marked `A` on the map, was formerly known as Lot 120-8. It contains a pre-war bungalow known as 398 Telok Kurau Road and some other buildings.

The servient tenement is a rectangular parcel of land. It has an average width of about 11m and a length of about 90m. The servient tenement was approved by the government to be used as a road in November 1951. It is vacant, grassy and unfenced except for the portion fronting St Patrick`s Road.

The parcel of land as it existed before the right of way was first established was some five acres in area and was known as Lot 120 of Mukim 26. It was a rectangular parcel then bounded by the sea towards the south, Telok Kurau Road towards the east, St Patrick`s Road towards the north and another plot of land towards the west. It was sold by Sir John Anderson to Ong Tiang Soon in July 1912.

In 1950, an application was made to court in connection with the trusts of the will of Ong Tiang Soon, deceased. Consequently permission was given for the sale of a portion of the original plot on the basis that the vendors would be allowed to retain a 36-foot wide right of way over the plot to be sold from either Telok Kurau Road or St Patrick`s Road. Various movements on the title took place thereafter and on 31 January 1952, the servient tenement, together with various other plots carved out of the original parcel, was conveyed to six members of the Lee Kong Chian family including Lee Seok Chee as tenants-in-common in equal one-sixth shares each. This conveyance contained a provision reserving unto the vendors `full and free right of way and passage to their other land adjoining the land hereby conveyed ... over the portion of land coloured green and marked "Road Reserve 36[quot ] 0" wide" ...`.

In the same year, approval for the subdivision of Lot 120 with the right of way on Lot 120-13 was given. Subsequently the area on which the right of way was located was approved as a `Reserve for

Road` in the Master Plan.

In October 1953, there was a deed of partition between Lee Seok Chee and the other five Lees who were parties to the conveyance of 31 January 1952. The purpose of this deed was to allocate the various lots purchased in 1952 among the various family members. By this deed, inter alia, Lot 120-12 (ie the dominant tenement) was conveyed to Lee Seng Tee:

> *TOGETHER with full and free right of way and passage to the said land with horses carts carriages motor cars and other vehicles in common with all others entitled to a like right of way over the land coloured green and marked "Road Reserve 36[quot] 0" wide" in the plan annexed to the Principal Indenture and now forming the whole of the land marked on the Government Resurvey Map as Lot 120-13 of Mukim XXVI and part of the land marked on the Government Resurvey Map as Lot 120-14 of Mukim XXVI ...*

At that time, the dominant tenement was locked in by various adjoining lots as well as the sea in the south. Jalan Rendang did not exist then and there was therefore no access to St Patrick`s Road from the dominant tenement. The purpose of the right of way over the servient tenement was thus to give the land-locked dominant tenement vehicular access to St Patrick`s Road.

The dominant tenement was subsequently conveyed in December 1957, April 1961 and December 1980. Each conveyance contained an express provision purporting to transfer the right of way over the servient tenement. In the meantime, in 1967, Jalan Rendang came into being as a public road.

The main witness of fact on the events of the past 50 years was one Mr M Edaris bin Hussin. In about 1957 when Mr Edaris was ten years old his father found work as a grounds-keeper at 398 Telok Kurau Road, ie the property marked `A` on the map which is adjacent to both the dominant and servient tenements. Accommodation was provided for the family at 398 Telok Kurau Road and Mr Edaris has lived there ever since. After his father passed away, sometime in 1986, Mr Edaris took over the job of grounds-keeper for 398 Telok Kurau Road. His duties include taking care of the servient tenement.

Mr Edaris testified that in the early 1960s the compound of 398 Telok Kurau Road included the dominant tenement and therefore stretched all the way to what is now Jalan Rendang. There was no barrier between the two properties. Sometime in the 1970s, the dominant tenement was fenced up (thus preventing access to the servient tenement) but it remained as vacant land until Gracious Mansions was built in the 1980s.

The dominant tenement was conveyed to a company called Penford Pte Ltd in December 1980. It was this company that procured the construction of Gracious Mansions. This is a four-storey residential development containing 16 strata-title maisonette units. The building faces Jalan Rendang to the west and is fronted by a tarmac driveway while to the rear and eastern flank of the site is a turfed area. At the northern flank of the site are other site improvements which include a swimming pool and three other small buildings which accommodate the changing room, guardroom and bin centre. There are covered car parking lots available on part of the ground floor.

The boundaries of the dominant tenement are demarcated by chain-linked fencing with two sets of wide-span metal grille gates for vehicular/pedestrian access along Jalan Rendang. There is another gate at the southern flank of the site which allows pedestrian access to Marine Parade Road via a small bridge over a monsoon drain. There is also a gate along the common boundary with the servient tenement. This last gate was only erected in 1997. Until then, according to Mr Edaris, there had been

no gate or any opening leading from Gracious Mansions onto the servient tenement.

Mr Edaris said that, to the best of his memory, before the dominant tenement was fenced up in the 1970s, no one from the compound of that property and 398 Telok Kurau Road could gain access to St Patrick`s Road through the vacant servient tenement. Neither was there any access from St Patrick`s Road to Jalan Rendang through the servient tenement. This was because although there was and still is a gate in the fencing on the servient tenement facing St Patrick`s Road, this gate was usually kept locked. It was only opened on the occasions when the landowners` contractors went onto the land to mow the grass of the servient tenement.

Between the completion of Gracious Mansions in the mid-1980s and 1997, no one living there could have access to St Patrick`s Road by moving through the servient tenement because of the absence of a gate in the fencing around the dominant tenement. Even after the gate was constructed in 1997, access was restricted because the gate on the servient tenement facing St Patrick`s Road remained locked. The foregoing was part of the testimony of Mr Edaris. As far as he was concerned, the servient tenement was never used by anyone over all of the years that he lived at 398 Telok Kurau Road. The only persons he saw there were the landowners` grass-cutters.

Preliminary issues

There were two preliminary issues raised on behalf of the defence by Mr Harry Wee, counsel for the MC. The first one was that the owners of the servient tenement were not both before the court. The only party named in the action was Frontfield. Whilst it held a power of attorney from the other co-owner of the property, Madam Lee Seok Chee, that would have permitted it to do so, it had not made her a named party to the action. In the title of the action, Frontfield had inserted after its name the following words in parenthesis `acting on its own behalf and under a Power of Attorney No 7393/2000`. This, however, was insufficient to make Madam Lee a party to the action. The objection was that all parties making the claim had to be before the court as otherwise a decision would not be binding on the absentee claimant.

In response to this point, Mr Shanmugam, counsel for Frontfield, gave an undertaking on behalf of Madam Lee (who was then in court) that she would be bound by the decision in the case. He recognised that, technically, she was not a party to the action but submitted that her non-participation did not nullify the proceedings as Frontfield had a sufficient interest to prosecute the same. In a case like this where the relief sought was a declaration of the existence of a state of affairs, what was required for the matter to proceed was that there had to be a real question to be decided between two parties on opposing sides who had an interest in the matter. As long as that situation existed it was irrelevant that other interested parties had not been joined. I agree. In this case it was not essential for Madam Lee to be a party. Her participation was not required as the parties already before the court had (as I discuss below) an interest on opposite sides of a live issue.

The next preliminary issue was also on the proper parties who had to be before the court for the correct determination of the issues. The contention was that the plaintiff had sued the wrong defendants, ie the MC. They should instead have sued the subsidiary proprietors of Gracious Mansions. This submission was based on s 116(1) of the Land Titles (Strata) Act (Cap 158, 1999 Ed) (`the Act`) which reads:

> *Where all or some of the subsidiary proprietors of the lots in a subdivided building are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to common property), the proceedings may be*

taken by or against the management corporation as if it were the subsidiary proprietors of the lots concerned.

Counsel submitted that the above section permitted the MC to represent the subsidiary proprietors only in proceedings `for or with respect to common property`. He asserted that the right of way enjoyed by the dominant tenement over the servient tenement was not common property. The definition of common property in s 3 of the Act in relation to a condominium means `so much of the land for the time being not comprised in any lot shown in a strata title plan`. `Proprietorship of land` in turn is defined by the same section to include `the right of access to any highway onto which the land abuts`. Relying on ***Words and Phrases Judicially Defined*** by Roland Burrows, counsel stated the word `abut` means `to actually touch` and a `highway` is a way over which all members of the public are entitled to pass or re-pass. The result of these definitions was that the right of way was not part of the common property because the dominant tenement here did not abut a highway. It abutted the servient tenement which was only a reserve for road, not a highway. The only highway in the case was St Patrick`s Road and that was separated from the dominant tenement by other plots of land including the servient tenement.

It was further submitted that the MC was not the owner of the right of way and any decision against the MC would be ineffectual as the right of way was owned by the subsidiary proprietors. All of the subsidiary proprietors would have to be joined as defendants as each of them was an owner (as a tenant-in-common) of the common property under s 9(3) of the Act.

The submission that in order for the MC to be sued in this case the issue had to involve the common property is correct. This is shown both by s 116(1) and by s 33(2) which sets out the general situations in which a management corporation can sue or be sued. There are four of these situations. Only two are relevant. These are ss 33(2)(b) and (d) which provide that the management corporation may: `(b) sue and be sued in respect of any matter affecting the common property;` and `(d) be sued in respect of any matter connected with the parcel for which the subsidiary proprietors are jointly liable`.

I do not, however, agree with Mr Wee`s submission that a right of way is not part of the common property. The definition of land in the Act makes it clear that `the proprietorship of land ***includes*** natural rights to air, light, water and support and the right of access to any highway on which the land abuts` (emphasis is added) (see s 3, under the definition of `land`). The quoted words were obviously aimed at insuring that there was no doubt that the common property also comprised an easement over the land of a third party. So, both natural and acquired rights are referred to. The word used to preface these rights is `includes` which implies that apart from the right of access to a highway, there may in addition be other rights to which proprietorship of land entitles the proprietor but which have not been spelt out. In my judgment, the phraseology used contemplates that a right of way which had been created for the benefit of a piece of land which was subsequently brought under the Act would continue to be part of the rights belonging to the proprietor of that land. The fact that such right of way might not be covered by the phrase `right of access to any highway on which the land abuts`, cannot of itself exclude such right from being part of the common property.

In any case, in this instance, it can be argued that St Patrick`s Road is a highway on which the dominant tenement abuts and that the right of access over the servient tenement is covered by the definition of land. This is because, as Mr Shanmugam pointed out, if the word `abut` were to be given its strict dictionary meaning only, the reference to a right of access would be absurd. It is unnecessary to give the owners of a piece of land access to a highway which that land abuts if in

fact the land is immediately adjacent to the highway. In that case, the owners would be able to walk directly from their land onto the highway and no right of access would be required. The granting of the right of access implies access to a parcel of land that separates the dominant tenement from the highway so that without such access, persons using the dominant tenement would not be able to reach the highway.

It should also be noted that it has previously been taken for granted that a management corporation was a proper party in a case involving a right of way asserted over land which had been developed into a condominium. The case was **MCST Plan No 549 v Chew Eu Hock Construction Co** [1998] 3 SLR 366 . In that case, the management corporation concerned was sued by the owners of adjoining land who claimed a declaration of a right of way over a driveway on the land occupied by the condominium. The case went right up to the Court of Appeal without anyone even suggesting that there had been a misjoinder of parties and that the subsidiary proprietors should have been made defendants instead of the management corporation.

Further, the fact that the MC does not own the common property including the right of way, is irrelevant. As the person charged by the Act with the responsibility of maintaining the common property for the benefit of all proprietors, the MC has an interest in all matters relating to the common property. As has been judicially recognised, the MC has something akin to possession of the common property (see **RSP Architects Planners & Engineers v Ocean Front** [1996] 1 SLR 113). The right of way being part of the common property it would be the MC`s responsibility to ensure that it remains available for use by the subsidiary proprietors. In my opinion, it has a sufficient interest in the subject matter of the action to be sued. Additionally, under s 116(1) it could have been sued as if it were the subsidiary proprietors since proceedings could have been brought against the latter jointly as owners of the common property.

I am satisfied that there is no substance in either of the preliminary issues and that I should go on to consider the case on its merits.

Principles of abandonment of easements

Once an easement exists it is very difficult to extinguish it. This is because as stated in ***Gale on Easements*** (16th Ed) at [sect]12-15 unless the easement is granted for a term of years, the rights conferred by it are perpetual and accordingly are actually or potentially valuable rights. Therefore, it is not lightly to be inferred that the owner of such a right should give it up for no consideration. Nonetheless, since the existence of an easement is a restriction on the alienability of the servient tenement, the law has recognised over the years that an easement may be brought to an end in certain limited ways. One of these is by abandonment of the use of the easement. Proving abandonment is, however, no easy matter.

Gale on Easements summarises the principles on abandonment of an easement in [sect]12-45. It states:

> *Although it was stated in earlier editions of this book that:*
>
> *`There seems to be no doubt that discontinuous easements may be lost by mere non-user, provided such cessation to enjoy be accompanied by the intention to relinquish the right,`*
>
> *that statement could be misleading. The true rule would appear to be that*

mere non-user without more, however long, cannot amount to abandonment. Such non-user is evidence from which abandonment may be inferred but must be regarded in the context of the circumstances as a whole. The non-user may be explained by the fact that the dominant owner had no need to use the easement, in which case it will not be enough to establish abandonment. A presumption of abandonment will arise where there are circumstances adverse to the user and sufficient to explain the non-user, combined with a substantial length of time during which the dominant owner has acquiesced in that state of affairs or where the dominant owner does some act clearly indicating the firm intention that neither he nor any successor in title of his should thereafter make use of the easement. It has been said that abandonment is not to be lightly inferred: owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it. Further, if the dominant owner does not have any present need to exercise his right and does not object to conduct of the servient owner which temporarily renders the exercise of those rights difficult or impossible, it would be undesirable if such general and good neighbourly conduct could not be indulged in for fear of losing those rights for all time.

There is also a useful summary of the pronouncements of various judges on this issue as it arose before them over the years, in the Australian case of **McIntyre v Porter** [1983] 2 VR 439. There Anderson J had to consider whether the plaintiff was correct in his contention that the defendant or his predecessors had abandoned a right of way over the plaintiff`s land. The judge analysed the previous authorities and their effect at p 444 of his judgment:

*The plaintiff contends that the right of way claimed by the defendants was abandoned during the occupancy of the defendants` land by the defendants` predecessors over a long period. If the plaintiff is correct in his contention, it is immaterial that the defendants believed that they had the easement claimed and sought to take steps to assert their right, for an easement once abandoned is abandoned forever: **Tapling v Jones** [1865] 11 HL Cas 290, at p. 319; **Scott v Pape** [1886] 31 Ch D 554, at p. 558. In a case where an easement has existed, it may be determined by agreement (of which there is no evidence before me) or by abandonment. Abandonment is a question of intention of the owner of the dominant tenement, in this case one or more of the predecessors of the defendants (**Tapling v Jones** and **Scott v Pape**), and whether there was any intention may be inferred from the whole of the facts before the Court.*

*Mere non-user of itself is not conclusive of abandonment of a right of way, though it may be evidence of abandonment. So much is clear from the observations of several Judges in several cases. In **Swan v Sinclair** [1924] 1 Ch 254, at p. 266, Pollock, MR said: "Non-user is not by itself conclusive that a private right of easement is abandoned. The non-user must be considered with, and may be explained by, the surrounding circumstances. If those circumstances clearly indicate an intention of not resuming the user then a presumption of a release of the easement will, in general, be implied and the easement will be lost."*

*There is thus no minimum time. "It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury", said Lord Denman, CJ in **R v Chorley** [1848] 12 QB 515, at p. 519; 116 ER 960. His Lordship further said: "The period of time is only material as one element from which the grantee`s intention to retain or abandon his easement may be*

inferred against him; and what period may be sufficient in a particular case must depend on all the accompanying circumstances."

*In **Crossley & Sons Ltd v Lightowler** [1867] 2 Ch App 478, in which the remarks of Lord Denman, CJ were approved, Lord Chelmsford, LC, at p. 482, stressed that the intention was always a question to be decided on the facts of each particular case when he said: "The authorities upon the question of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of his intention, to be decided on the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind."*

*In recent times, in **Treweeke v 36 Wolseley Road Pty Ltd** [1973] 128 CLR 274 at p. 288, Walsh, J said: "But in my opinion the authorities do not warrant the view that the length of time during which non-use continues is unimportant. I think the longer it continues the more readily will the conclusion be reached that the person entitled to the benefit of the easement may be deemed to have abandoned it, unless of course there is proof of facts or circumstances which provide a satisfactory explanation for the non-user which negative any intention of abandonment."*

In ***McIntyre*** itself the judge concluded on the evidence that the right of way had been abandoned. The facts that led him to this conclusion were that the right of way in contention had not been used between 1923 and the date of the action (about 1982), that a gate had been erected in the fencing that divided the two plots of land concerned and that gate was so small that only a person could pass through it (although the right granted was inter alia for horses, carts, wagons and other carriages to pass and re-pass over the right of way), that the only use made of the gate had been as a means for social visits between the occupants of the two premises, that the gate had been nailed up in the 1930s and, in the 1960s, trees had been planted along the boundary which had grown into a substantial barrier between the dominant and servient tenements. Further, the defendants had had available and had made use of, other more convenient means of access.

Review of authorities

Crossley & Sons v Lightowler [1867] LR 2 Ch App 478, one of the cases mentioned in Anderson J`s judgment (supra), dealt with a right to discharge effluent material into a river. It was one of the earliest cases in which it was accepted that an easement had been abandoned. The plaintiff was the owner of land on the banks of a river and he sought to restrain the defendants from fouling the river. The defendants occupied land which had for 20 years up to 1839 contained a dye-works. While the dye-works were operating, foul water from those works had been discharged into the river. The dye-works were, however, dismantled in 1839 and afterwards, the buildings were gradually removed. The plaintiff contended that the right to foul the river had been abandoned. In giving judgment for the plaintiff, Lord Chelmsford LC stated (at pp 482-483):

With respect to the prescriptive right derived from the Messrs. Irving, the Plaintiffs say, that if such right was ever acquired it had been abandoned long before the Defendants commenced business at their works. The authorities

upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of ***Reg. v. Chorley*** *(Unreported) shews that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of a right. Lord Denman, in delivering the judgment of the Court in that case, said: "We apprehend that an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time." And again: "It is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement, and the intention in him which it indicates, which are material for the consideration of the jury." It is, therefore, a question of fact, whether the acts of the parties who succeeded the Messrs. Irving were of so unequivocal a nature as clearly to denote an intention to relinquish the right to foul the stream which they had exercised previously.*

Another case in which abandonment of an easement was found, and one on which Mr Shanmugam placed a great deal of reliance, was **Swan v Sinclair** [1924] 1 Ch 254. The facts were that in 1871, houses and shops in Essex Road, Islington, were put up for sale at auction in 11 lots. One of the conditions was that a strip of land 15ft in width running the entire length of the lots and being the rear portions of the back gardens of the houses should be formed into a roadway, and that the lots were sold subject to and with the benefit of a right of way from the back garden of each house along the proposed roadway into Church Road, which bounded the side of lot 1, on the south-west. Lot 1 was conveyed subject to the right of way of the owners of the other lots, and lots 2 and 3 were each conveyed with the benefit of and subject to the right of way. In each of the conveyances, an obligation was cast on the purchaser to contribute towards the expense of forming the road. In the subsequent title deeds relating to the plaintiff`s and the defendant`s properties, the existence of the right of way was expressly mentioned. In 1873, a purchaser of lot 1 granted a lease of it to the plaintiff`s father subject to the right of way. In July 1904, that lease was assigned to the plaintiff subject to the right of way of the owners of the other lots. In 1911, the plaintiff purchased lots 2 and 3, subject to and with the benefit of the right of way. It appeared that at the time of sale in 1871, the several lots were divided from one and another by fences which extended across the 15ft strip and that a brick wall separated lot 1 from Church Road. It also appeared that from 1871 to 1922 the roadway was physically incapable of being used as such. The condition of the site of the proposed roadway had never been altered throughout that period and the plaintiff himself did nothing from 1911 to 1922 to assert his rights. In 1883, the plaintiff`s father by levelling up part of the site of lot 1, caused a sheer drop of 6ft to occur on the strip between that lot and the adjoining lot 2. In 1919, the plaintiff pulled down part of the wall which had since 1871 separated the end of the strip from Church Road and erected gates there. The plaintiff`s lease of lot 1 expired in 1922 and shortly thereafter, the defendant, who was then the owner of lot 1, challenged the plaintiff`s right to have access to Church Road through lot 1 by erecting a wall across the site of the roadway between lot 1 and lot 2. The plaintiff sought a declaration that he was entitled as the owner of lots 2 and 3 to a general right of way along the site of the proposed roadway at the rear and forming part of lot 1 into Church Road.

In the headnotes of the case, it was stated that the court by a majority, had held that although the mere non-user of the right of way was not conclusive evidence of its abandonment, yet having regard

to the facts (as stated in [para]36) and the conduct of the plaintiff and his predecessors in title, there was sufficient evidence of the abandonment of the right of way in question. Indeed the decision of the dissenting judge turned on the point that there was not sufficient evidence, apart from non-user, to indicate an intention of abandoning and not resuming the use of the right. The majority judges were fully aware that non-user by itself was insufficient but their interpretation of the facts satisfied them that the additional requirement had been met.

One of the judges in the majority, Warrington LJ, analysed the situation as follows (at p 269):

> *In the present case the user of the road has been rendered impossible by not only the continuance of obstructions existing at the date of the grant, but also by the creation of a fresh one by the raising, in 1883, of the level of the land over which the way would pass. It seems to me that these circumstances, adverse to user, and sufficient in themselves to explain the non-user, combined with the great length of time during which no objection has been made to their continuance, nor effort made to remove them, are sufficient to raise the presumption that the right has been abandoned, and has now ceased to exist. It is contended that we ought to hold that the right was merely in abeyance, and could at any time be revived when occasion arose. I cannot myself see anything in the circumstances to suggest that the owners of the dominant tenement contemplated a future use of the way, and if they had done so I think they ought to have made their position clear.*

The other judge in the majority, Sargant LJ, stated that the question that had to be faced was whether there had been, by the end of the year 1918, or indeed by the date of the conveyance to the plaintiff in 1911, such an acquiescence in, or implied acceptance of, the continuing and increased obstruction of the proposed back road as to evidence an abandonment. His answer (at p 275) was that the facts of this case showed that during a period of at least 38 years there had not merely been non-user of the way but acquiescence (in the sense of quiescence without active protest or assertion of right) in an indefensible and increased obstruction of the right. The case subsequently went up to the House of Lords where it was decided against the plaintiff but on a different ground, ie that the right of way had never come into existence in the first place. The issue of abandonment was thus irrelevant.

Submissions of the parties

Frontfield`s submission was that in this case all the requirements of abandonment of easement were present. First, there had been a substantial period of non-user and, in fact, as established by the unchallenged evidence of Mr Edaris, there had been no user at all of the right of way from the time it was first granted up to the date of the action. That was a period of some 48 years. Secondly, the non-user did not stand alone but was part of a whole range of circumstances which indicated a positive intention on the part of the owners of Gracious Mansions never to use the right of way.

These circumstances related to the construction of the condominium. In the first place, by the time it was built, there was a public right of way, Jalan Rendang, immediately abutting the dominant tenement which gave access to St Patrick`s Road and which therefore made the right of way over the servient tenement superfluous. Secondly, the condominium was designed so that the main access to it was from Jalan Rendang by a dual carriageway over which both pedestrians and vehicles could pass. It was wide enough, in fact, to allow two-way vehicular traffic. Then, there was a fence built all around the condominium which made it impossible for persons on the dominant tenement to have

access to the servient tenement. There was no gate in this fence leading to the servient tenement until 1997. Thirdly, the swimming pool, the guardhouse, the bin centre and the changing room had been built in such a way as to make it impossible for vehicles to gain access to the servient tenement from the dominant tenement even before the gate was constructed. The construction of the gate did not change this position. It only made pedestrian access a possibility. The chairman of the MC who gave evidence confirmed that it had never even crossed the MC`s mind to tile up the swimming pool in order to make it possible for vehicles to use the right of way.

Mr Shanmugam submitted that the acts described above were so unequivocal in nature as clearly to denote an intention to abandon the easement. He drew a parallel with the dismantling of the dye-works in ***Crossley*** `s case (supra) as an indication of a permanent intention. He pointed out that it had not been proved in that case that there was a positive intention not to build any further dye-works but that this had been inferred from the removal of the first building. In this case he asked the court to infer from the manner of construction adopted by Penford Pte Ltd, then the owner of the dominant tenement, that they had no intention of using the right of way. He also drew parallels with the situation in ***Swan v Sinclair*** (supra) where at all material times the land intended for the right of way was not usable as such due to no road having been built and because of the obstruction caused by dividing fences and the difference in ground levels. Here, he said the access to St Patrick`s Road over the servient tenement was fenced up and the gate was locked. Thus, nobody could use it except the owners of the servient tenement. Secondly, that from the 1970s up to 1997, because of the existence of a fence around the dominant tenement, no one could have access from there onto the servient tenement and thirdly, right from 1952 when the right of way was first created up to date, no road had been made. It was a grass patch. So, Mr Shanmugam submitted, nobody asserted the right of way and nobody used it and in fact everyone acquiesced in not using it as a right of way.

Mr Wee was not impressed by Mr Shanmugam`s arguments. He emphasised the value to the dominant tenement of an easement and quoted several authorities to demonstrate the difficulty that the servient tenement has in ridding itself of the burden of the easement. Mr Wee submitted that his authorities showed that length of time of non-user (up to 175 years in one case) and physical impediments in relation to the use of a right of way (like ditches and fences) were not sufficient to establish abandonment and, a fortiori, that the circumstances relied on here were inadequate for that purpose. The right of way had not been used in this case simply because there was a convenient alternative route. Thus, it could not be inferred from the non-user that there was an intention to abandon the right of way.

My views

I appreciate the arguments made by Mr Wee and have no quarrel with the principles of law expounded by him. I recognise that an easement such as the one in dispute here is part of a bundle of property rights belonging to a landowner and therefore cannot be easily discarded. In my view, however, the circumstances here go beyond simple non-user and do evince the necessary intention to abandon. In this connection, it is significant that despite knowing about the right of way (as it must have since the same was mentioned in the conveyance in 1980) Penford Pte Ltd went about the construction of Gracious Mansions as if the right of way did not exist at all. No intention to use it was displayed in the design of the development. A road could have been constructed over the right of way. Instead the money went to constructing a main access leading onto Jalan Rendang. Secondly, the facilities of the condominium were placed so that they blocked vehicular access to the servient tenement. Thirdly, not even the possibility of pedestrian access was considered since no gate was constructed leading to the servient tenement. What is significant in this construction is that all these items are permanent items, or at least as permanent as man-made edifices can be. They are not easily or cheaply removed

and some of them at least were designed as selling points aimed at attracting the persons who subsequently became the subsidiary proprietors. Such persons would not have expected extensive reconstruction to take place in the foreseeable future or that the driveway, swimming pool and other amenities would be removed or switched around so as to allow them to use a right of way which they would then have had to construct as a tarred road at considerable expense. It appears to me that Penford Pte Ltd not only evinced an intention to abandon the right of way for itself but also for its intended successors in title as it provided them with facilities that were not compatible with the full use of the right of way.

I also note that at all times there had been a fence and a padlocked gate between the front of the servient tenement and St Patrick`s Road which made it impossible for anyone to exit onto St Patrick`s Road from the servient tenement. This blocking of the right of way was not objected to by either the present or the previous owners of the dominant tenement. Their quiescence in the face of an action that was contrary to the right granted while not conclusive of abandonment is further indication of their disinterest in the right of way.

One of the cases cited by Mr Wee was **Wilsons Brewery v West Yorkshire Metropolitan County Council** (Unreported) where it was held that in order for there to be an abandonment of easement there must be overt and unequivocal evidence of an intention upon the part of the dominant tenement to abandon that easement. In my judgment, the facts of this case as I have discussed them plainly display the requisite overt and unequivocal intention.

Other cases considered

I should, however, deal with the other cases which Mr Wee cited. The first of these is **Ward v Ward** [1852] 7 Exch 838(Unreported) where the right of way in question had not been used for about 26 years. The right of way was upheld. It was found that the reason for the non-user was that there was a more easy and convenient means of access to the dominant tenement than that provided by the right of way. The rationale of this case was that apart from non-user there were no other circumstances to raise the presumption of abandonment. It was also significant that if the right of way was struck down, the owner of the dominant tenement would have been without the means of any access to his property. There is a useful commentary by Anderson J in ***McIntyre*** `s case (supra) on the factors that distinguish ***Ward*** `s case (supra) from a case like that before him and the one before me. He said (at p 446):

> *In my opinion, **Ward**`s Case depends on its own facts, and does not lay down any principle that the use of an alternative means of access to the dominant tenement is necessarily irrelevant to the question whether non-user may amount to an abandonment of a right of way. **Ward**`s Case dealt with agricultural land, where the temporary availability of an easier means of access might encourage the use of a shorter route over other land. In the present case the defendants` land is town land, already in the throes of subdivision even in 1855, and has always had a permanent frontage to Fredericks Court, to which the disputed land likewise gave access, and the apparent lack of utility of the right of way over so many years emphasizes the probability of its abandonment. As the judgment in **Ward**`s Case indicates, it was a case determined on the facts and it does not assist the defendants in this case. It is no more than an illustration of the proposition that a long period of non-user may call for an explanation which may be provided by the circumstance that there had been for the time being a shorter and more convenient means of access to the dominant tenement.*

With respect, I entirely agree.

The next case cited by Mr Wee was also cited in the ***McIntyre*** case (supra). It is **Gotobed v Pridmore** [1970] 115 Sol Jo 78. The defendants there occupied a lane which ran from the southern boundary of the plaintiff`s land. The defendants owned the land on either side of the lane. The plaintiff claimed a right of way over the lane. The previous owner of the plaintiff`s land had maintained a dyke and a post and rails fence between it and the lane. The lane itself had been cultivated by the defendants for four years between 1942 and 1946 and surrounded by a barbed wire fence since 1948, being used thereafter for chickens and grazing. The judge held that the right of way had been abandoned but his decision was reversed on appeal. The report of the decision stated that Buckley LJ had said:

> *To establish abandonment the conduct of the dominant owner must have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title should thereafter make use of the easement ... The defendants had relied on the long absence of use of the lane by the plaintiff`s predecessor, the absence of any indication on his part to resume use and his failure to protest about the uses to which the defendants had put the lane. However, the ploughing of the plaintiff`s land was not in the least inconsistent with an intention to retain the right of way. The cultivation of the lane had been mostly during the second world war when an objection to such use might have been unpatriotic. The fence around the lane was an insubstantial kind and the failure to object to it would be a very slight ground for inferring any intention to abandon. The failure to maintain an earth bridge across the dyke and the maintenance of the fence on the plaintiff`s land were not proper matters from which to infer a resolution to abandon. The court was impressed by ease with which the physical state of affairs could have been altered so as to restore the use of the right of way.*

The above account shows very clearly how different the circumstances were in ***Gotobed*** from the circumstances before me. There again, the land involved was agricultural land and the structures and usage which prevented the use of the right of way were not only temporary but also insubstantial and easily removed so as to enable the re-use of the right of way. The structures and usage of the dominant tenement here have not been dictated by patriotic concerns. They are solid structures intended to be permanent fixtures and removing them would take time and cost a great deal. ***Gotobed*** `s case does not help the MC.

The next two cases can be dealt with quickly. First, **James v Stevenson** [1893] AC 162. This was cited mainly for the observation of Sir Edward Fry at p 168 that `it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it`. I have no quarrel with that statement but it does not help the MC since I consider the actions of the dominant owners here do assert an intention to abandon. The second case **Obadia v Morris** [1974] 232 EG 333, is not relevant as it is a case where the owners of the dominant tenement were unaware of the existence of the right of way and it was held that if you were ignorant of a right you could not form an intention to abandon it. Ignorance is not in issue here.

Treweeke v 36 Wolseley Road [1973] 128 CLR 274 was a decision of the High Court of Australia. The right of way in issue there was to enable the occupiers of lot A to pass over a strip of land in lot B to get access to the beach at Double Bay, Sydney. The right was created in 1927 and at all times parts of it had been impassable by reason of vertical rock faces and, since 1928, by reason of an impenetrable bamboo plantation. Further, in 1956 the owner of lot B installed a swimming pool across

part of the right of way and in 1958 she erected an iron fence across the way. At no time had the owners or occupiers of lot A used the entire right of way. They had used an alternative way along lot C but this became unavailable in 1967. In 1971 the owner of lot B sought a declaration that the right of way had been abandoned. It was held by a majority of two to one that the non-user of the right of way and other acts and omission of the owner of lot A did not require the inference of abandonment of the right of way.

Certain passages from the judgment of McTiernan J, one of the judges who found in favour of the dominant tenement, show the reasoning of the majority. He said:

> *It was always impossible to use the right of way at the place where each fence was put, by reason of the steepness of the place. In any case, neither fence is immovable. It would appear that at the place where the low retaining wall is built the strip of land was usable as a means of passage towards the beach. The wall is not immovable. As regards the obstruction caused by the growth of bamboo, this could be dealt with by removing some of the growth by a job of pruning. It is a curious feature of the case that the owner of the servient tenement is relying upon things done by herself which she says are obstructions to passage along the strip of land subject to the right of way. [at p 280]*
>
> *... I do not think that it is a reasonable conclusion that the building of the fence [in 1933] amounted to an abandonment of the right of way or was intended as such. The evidence shows that it was not expensive; it is movable; and it is within the dominant tenement. A gate could be inserted in the fence to admit of egress from and access to the servient tenement. The evidence of this incident is not, in my opinion, so cogent that it is reasonable to find that the erection of the fence amounted to a renunciation or disclaimer of the right of way ...*
>
> *The important element in the case is non-user of the total length of the strip of land as a way. Part of it was frequently used as far as an opening in the boundary fence to which the strip of land is adjacent. Residents of the home units [built on Lot A] went through that opening and proceeded from there over the neighbouring allotment to the beach. Their reason for turning aside from the boundary would appear to be that the strip of land was not passable further on. The grant by which the right of way was created imposes no obligation on either the servient owner or the dominant owner to make the strip of land passable. An obligation to do so does not arise at law or at equity. The case is one of mere non-user ... The non-user of the total length of the way can reasonably be put down to its precipitous condition at places. It is not reasonable to attribute non-user to renunciation of such a pleasant amenity as a path to the beach at Double Bay. There is ample evidence of the utilisation of passable parts of the locus in quo of the right of way as the first stage of daily journeys to the beach by residents of No. 36 Wolseley Road, the dominant tenement ... In my opinion, upon the whole of the evidence there is clear proof of the intention of the respondent to retain the right of way. [at pp 283-285]*

The differences between that case and the present are many. First, the major obstructions to the right of way there were created by the owner of the servient tenement and not the owner of the dominant tenement as here. This led to a discussion of acquiescence in the creation of such obstructions which is not relevant in our case. Secondly, part of the right of way was always used. Thirdly, it was found that the reason for non-use of certain parts of the right of way was that those areas were physically impassable. That situation does not exist here. It is possible to walk and even drive across the servient tenement though doing so may not be a completely pleasant experience.

Fourthly, McTiernan J was able to find on the evidence there that there was positive proof of the intention of the dominant owner to retain the right of way. Such proof positive is not available here.

The final case I need deal with is **Benn v Hardinge** (Unreported) which is the one where the right of way had not been used for 175 years before the proceedings started and yet the Court of Appeal, reversing the judge at first instance, held that the right of way had not been abandoned. There were two issues, the first being whether the laying out of a private carriageway along certain farmland created a right of way in favour of Mr Benn and the second was whether although the carriageway had not been used for 175 years, Mr Benn could still claim the right of way which he now needed since his alternative access had become waterlogged.

The main judgment was delivered by Dillon LJ. He found that the existence of the right of way had been established and then went on to consider the issue of abandonment. In this connection, he noted that little had happened to either the servient or dominant tenement since the grant which had changed the situation. The land remained `pleasantly rural`. There had been no erection on either side. He also noted that there was virtually no evidence at all that anyone occupying Mr Benn`s farm had ever sought to use the right of way for any purpose at all. But the simple explanation for that was that there was no need because they had alternative access. The judge examined many previous authorities including the ***Crossley*** and ***Treweeke*** cases (supra). He also considered ***Swan v Sinclair*** (supra) in some detail and concluded (at p 257): `It seems to have been established by ***Ward v Ward*** and ***Swan v Sinclair*** that mere non-user, which can be explained by having no need to use, if so explained, is not enough to amount to an abandonment.` Dillon LJ then turned to ***Gotobed v Pridmore*** (supra) and observed that its circumstances bore some resemblance to the circumstances of the case before him. After quoting in detail from the judgment, he concluded:

> *I take the law to have been laid down in clear terms by the judgment of the court in **Gotobed v Pridmore**. In view of that and the many expressions of the high authority in the cases to which I have referred, to the effect that there must be an intention to abandon, I do not feel it is open to us in this court to say that the way must be presumed to have been abandoned merely because it was not used because no one had occasion to use it, even for so long as 175 years. It is important in this context that the photographs show such a rural and unchanged situation on the servient owner`s site of the boundary line. This is not an area where there has been great change and the plaintiff`s land is used for farming sheep rather than for any matter which could not have been in contemplation at the time of the enclosure. [at pp 260-261]*

Hirst LJ also expressed his views on the issue of abandonment. He considered that the principle that a court had to apply was authoritatively laid down by the Court of Appeal in the ***Gotobed*** case (supra) and that was that mere abstinence from the use of an easement was insufficient to establish an intention to abandon its benefit. He went on:

> *In the present case, apart from the clear evidence of non-user, there are in my judgment no other circumstances to raise the presumption of abandonment. The matters relied upon by Mr. Wood, namely the broken-down gate B and the continuous ditch, are easily remediable by the installation of a new gate and the construction of a small bridge over the ditch, and, in consequence, those two factors do not justify an inference that any previous owner resolved to give up the right of way altogether. Compare the similar facts in **Gotobed**`s case. If there were any onus upon the plaintiff to explain the non-user - which in my judgment there is not in the present case - then he could readily do so by the fact there were other means of egress into Hackhurst Lane. [at p 261]*

...

> *In **Gotobed**`s case, Buckley L.J. concluded his judgment in the passage, which my Lord has just quoted, pointing out that the right of way, although it was of no particular significance to the owner for the time being, was nevertheless a piece of property of potential value. In my judgment, the same applies **mutatis mutandis** here. The right of way was always a piece of property of latent value, though not actually exploited because of the alternative means of egress into Hackhurst Lane, to which I have just referred. The abandonment of such a valuable latent piece of property should not be lightly inferred since it might be of significant importance in the future, as has in fact occurred during the present plaintiff`s ownership. Mrs. Benn`s [evidence] is that the gates into Hackhurst Lane get "waterlogged in bad weather [and are] not passable at certain times of year," whereas the right of way "once [the] ditches are drained [is] not such [a] difficult route. [at p 262]*

Mr Wee`s emphasis was the same as that of Lord Justice Hirst. He impressed upon me that I should not deprive the dominant tenement of a valuable right simply because that right had not been exercised for years. In this case, there was no cause to use the servient tenement for access to St Patrick`s Road before the construction of Gracious Mansions since the dominant tenement was unoccupied. After the erection of that building, the use of the right of way was still unnecessary because of the existence of Jalan Rendang. If non-use was the only relevant fact, Frontfield would fail. The factor which distinguishes ***Benn v Hardinge*** (supra) from the present case is the issue of development. Both judges, as can be seen from the analysis above, were impressed by the essentially unchanged nature of the two pieces of land over the period of 175 years. The situation at the date of the hearing was very much as it had been at the date the right of way was created. Here, significant changes have taken place. First, a public road has been built which offers convenient and permanent access to St Patrick`s Road. Secondly, the dominant tenement has been so developed as to take advantage of the access offered by the public road and to put obstacles in the way of the use of the right of way. The importance to Mr Benn of the right of way over Mr Hardinge`s land was that waterlogging would from time to time make the alternative route impassable. Here, given the state of development of the public road compared with that of the right of way, it is difficult to envisage a situation in which the road would be impassable and the grassy vacant land offer the only possible access to St Patrick`s Road. This factor of latent need to use the right of way which played such an important part in ***Benn v Hardinge*** is completely absent from this case. In my judgment, the present case is more akin to ***McIntyre v Porter*** (supra) than ***Benn v Hardinge*** .

Conclusion on abandonment

I conclude therefore, that the right of way over the servient tenement has been abandoned by the owners of Gracious Mansions. The cases cited by Mr Wee are distinguishable on the facts.

Partial abandonment

The alternative argument put forward by Mr Shanmugam was that if there had not been a total abandonment of the right of way, there had at least been a partial abandonment in that the right to have vehicular access to the servient tenement had been given up. On this argument, the right of way would be limited to pedestrian access. His submission was that the authorities clearly show that the law recognises that an easement creates a parcel of separate rights and some of these rights can

be abandoned without necessarily affecting the others.

The authority cited in support of this proposition was an Australian case, **Proprietors Strata Plan No 9968 v Proprietors Strata Plan No 11173** [1979] 2 NSWLR 605. That was a case where the right of way granted was for vehicular access. The contention put forward was that the easement had been abandoned wholly or in part meaning that the right to use it otherwise than on foot had been abandoned. Needham J reasoned:

> *As a matter of pure theory, there seems to be no reason why the law should not recognise such a partial abandonment. An easement is not unlike a fee simple, in the sense that it comprises a number of rights. In each case, they are rights which enure to the benefit of the dominant tenement, and to the detriment of the servient. It is open to contracting parties to provide that an easement, particularly in the case of a non-continuous easement such as a right of way, shall include certain of such rights and shall exclude others. An obvious example, in relation to a right of way, can be found in Parts I and II of Sch. VIII to the **Conveyancing Act**, that is, rights of carriageway and rights of footway. If such separation of rights can be achieved expressly, I can see no reason why they cannot be achieved by implication from conduct.*
>
> *... [the judge then considered two cases which had been cited to him and continued]*
>
> *I do not think that either of these cases requires me to hold that abandonment of one of the rights included in the parcel of rights created by the grant is not possible. I think it may well be more difficult to establish such abandonment where there is user of other rights over the locus, but that is, of course, a different question. There is a decision directly in point - admittedly given prior to the two decisions I have mentioned - in which Macfarlan J. held that a right of carriageway could be pruned down to a right of footway by virtue of such acts and omissions as would at common law be sufficient to infer abandonment: **Webster v Strong** (33). The land in that case was under the Torrens System, and the trial judge stated a case to the Full Court on the question whether the fact that the grantee`s certificate of title stated that he was entitled to a right of carriageway over the site of the way was conclusive in his favour that he was so entitled. The Full Court answered the question in the affirmative, and their conclusion was followed and applied by Gillard J. in **Riley v Pentilla** (34). These decisions must, of course, be considered in the light of the provision of s. 89 of the **Conveyancing Act**, but the conclusion of Macfarlan J. as to implied abandonment of a right to use vehicles, other than vehicles able to go through a 4-foot gateway, supports the view I have reached as a matter of principle. I am, therefore, of opinion that, where the grant of an easement creates a parcel of rights, the grantee may, by reason of his appropriate acts or omissions, be held to have abandoned one or more of such rights.*

Since Needham J went on to hold that the facts of his case did not disclose an intention to abandon any part of the right of way and the dominant tenement still had vehicular access over the way, his views as stated above were dicta. Mr Wee submitted that I should therefore disregard them. Accepting that they are dicta and also persuasive rather than binding, I consider Needham J`s opinion to be logical and coherent. I cannot see any logical reason why a party should not be able to evince an intention to give up part of his rights without affecting the whole of his rights as long as the part surrendered is severable from that retained. In this case, the owners of the dominant tenement had made it impossible for themselves to enjoy vehicular access to the servient tenement and at the

least, they have evinced an intention to abandon that right. If necessary, therefore, I would have found in favour of Frontfield on this argument on this issue.

Obsolescence

The final argument put forward by Frontfield was that I should strike down the easement as being obsolete and unnecessarily encumbering the servient tenement. I listened to Mr Shanmugam`s arguments with great interest as indeed did Mr Wee though he did not find it necessary to reply to them. I need not deal with the contentions in detail in view of my earlier findings. I will, however, express my views briefly.

As the law stands at present, I do not accept that there is any doctrine that entitles me to do what Mr Shanmugam wants me to. Case after case has emphasised the value of an easement to the dominant tenement and the weight of evidence that must be adduced to allow the court to infer that the easement has been voluntarily given up. Such a situation is inimical to any right on the part of the court to unilaterally strike down an easement because it considers the easement obsolete. In other jurisdictions it has been found necessary to statutorily empower the courts to do this. It is clear that such powers do not spring from the common law as it currently stands. Our Parliament has not given the court any powers of extinguishment of easements. It has only empowered the court to, in certain circumstances, extinguish or vary restrictions on land which has been brought under the land titles system. For the time being, Parliament has not seen fit to legislate on the extinguishment of easements for obsolescence. In the absence of such legislation, I do not think that I can, sitting as a judge of first instance, exercise any such power.

Conclusion

Having found that the easement has been abandoned I therefore declare that the right of way and passage and all other rights and easements appurtenant to land marked on the Government Resurvey Map as Lot 5915X (being part of the former Lot 120-12) of Mukim 26 subsisting over that piece of land marked on the Government Resurvey Map as Lot 98082L (formerly known as Lot 120-13) of Mukim 26 have been extinguished. I will hear the parties on costs and any other consequential order that may need to be made.

Outcome:

Declaration granted.