Cheng-Wong Mei Ling Theresa v Oei Hong Leong
[2005] SGHC 194

Case Number : OS 644/2005

Decision Date : 14 October 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : C R Rajah SC, Anand Karthigesu and Moiz Sithawalla (Tan Rajah and Cheah) for the plaintiff; Loo Ngan Chor (Lee and Lee) for the defendant

Parties : Cheng-Wong Mei Ling Theresa — Oei Hong Leong

Courts and Jurisdiction – Court judgments – Declaratory – Whether court having power to grant declaration as to plaintiff's future rights as registered proprietor of land where such rights conditional upon plaintiff's successful application for declaration

Land – Easements – Rights of way – Vehicular access to property obstructed by security barrier on land belonging to adjoining property – No easement of way registered against certificate of title of adjoining property – Whether implied easement of way existing – Sections 99(1), 99(1A) Land Titles Act (Cap 157, 2004 Rev Ed)

1 By a sale and purchase agreement dated 20 April 2005 ("the Sale and Purchase Agreement"), Thye Hong Manufacturing Pte Ltd ("Thye Hong"), as registered proprietor, sold a property with an address at 48 Dalvey Road, Singapore ("No 48"), to the plaintiff, Theresa Cheng-Wong Mei Ling, a gynaecologist. The land, including the building thereon, is comprised in Certificate of Title Vol 96 Folio 98 ("the Certificate of Title"). The property was expressed to be sold subject, *inter alia*, to rights of way and other rights and easements (if any) affecting the property and endorsed on the Certificate of Title. As no easement of way was registered on the Certificate of Title that the property has appurtenant to it a right of way over the adjoining property, the sale was expressed to be subject to the purchaser obtaining a declaration in the terms asked for in Originating Summons No 644 of 2005. The application reads:

> A declaration that the property known as Lot No. 473 Town Sub-Division No. XXV together with the building thereon known as 48 Dalvey Road ("48 Dalvey Road") enjoys an implied easement of way in accordance with the provisions of Section 99(1) of the Land Titles Act, Cap 157 over the property known as Lot No. 472 (now forming part of Lot No. 1122) Town Sub-Division No. XXV together with the building thereon known as 48A Dalvey Road ("48A Dalvey Road") for the purpose of access to and from Dalvey Road as shown on the plan annexed hereto.

2 The defendant, Oei Hong Leong, is the registered proprietor of 48A Dalvey Road ("No 48A") which adjoins No 48. Vehicular traffic to Nos 48 and 48A from Dalvey Road and *vice versa* has to pass over the spur of land forming part of No 48A ("the crossover"). In December 2004, a security barrier was erected by the defendant across the crossover leading to both properties. The barrier obstructed passage to and from No 48. The barrier was from time to time raised either by the security guard or the defendant's domestic helper whenever the guard was off duty. A request made to the defendant by the company secretary of Thye Hong for a remote control device (to be supplied at Thye Hong's expense) to alleviate the inconvenience of summoning assistance for the barrier to be raised was met with silence.

3 Mr Chelva Rajah SC, assisted by Mr Anand Karthigesu and Mr Moiz Sithawalla, represents the plaintiff. Mr Loo Ngan Chor represents the defendant.

4 A registered proprietor holds his land absolutely free from all encumbrances, liens, estates, or

interests whatsoever other than those registered or notified on the certificate of title, save in the cases expressly mentioned: see s 46(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the Act"). It was common ground that no easement of way was registered on the defendant's title that it was subject to an easement of way in favour of the registered proprietor of No 48 and, on the title of No 48, that the ownership of this property had appurtenant to it a right of way over No 48A. Mr Rajah confirmed that the plaintiff's claim was entirely based on s 99(1) of the Act, which is an exception in s 46(1)(ii), namely, "any statutory easement implied under sections 98, 99, 101, 102 and 104".

History of the site

5 The facts were not in dispute. Mr Loo explained that it was for that reason that no affidavit was filed on behalf of the defendant to resist the application. Much of the information in the decision is distilled from the plaintiff's Affidavit of 20 May 2005 and the documents accompanying her Affidavit, as well as the documents exhibited in the Affidavit of Anand Karthigesu of 25 July 2005.

6 Prior to 14 July 1970, both Nos 48 and 48A formed part of Lot 45 Town Subdivision No XXV ("Lot 45") which was then owned by Singapore Tobacco Company (Private) Ltd ("Singapore Tobacco"). The plaintiff here relied solely on a plan dated 22 March 1969 together with a copy of the competent authority's written permission for amalgamation and subdivision of four lots of land dated 14 July 1970 approving the plan ("the Subdivision Plan"). The Subdivision Plan depicted the amalgamation and subdivision of Lots 44-5, 45, 46-6 and 53 Town Subdivision No XXV into 13 plots. Plot 6 is now Lot 473 (No 48) and Plot 7 became Lot 472 (now forming part of Lot 1122) (No 48A). According to an exhibit marked "AK-2", the Subdivision Plan was not coloured. As the land comprised within Lots 472 and 473 were in the common ownership of Singapore Tobacco, Mr Rajah accepted that there could not have been, at that point in time, "any subsisting easement" allowing access to Lot 473 from Lot 472. Lot 45 was brought under the Land Titles Act (Cap 276, 1970 Rev Ed) and a certificate of title was issued on 18 November 1971.

7 On 28 November 1971, Singapore Tobacco applied for new certificates of title to be issued for the 13 plots. New certificates of title were duly issued. For Lot 473, there was Certificate of Title Vol 96 Folio 98 dated 30 December 1971. For Lot 472, there was Certificate of Title Vol 96 Folio 97 dated 30 December 1971.

8 Singapore Tobacco later sold No 48 and the property was registered in the name of William Goei and Tan May Lee on 10 November 1975. The latter sold the property to Thye Hong who became the registered proprietor on 21 March 1980.

9 As for No 48A, there was an amalgamation of Lot 702 Town Subdivision No XXV with Lot 472 and they became Lot 1122 and a new certificate was issued. This was Certificate of Title Vol 306 Folio 165 dated 13 March 1987. Some three years later, Singapore Tobacco sold No 48A to the defendant who became its registered proprietor on 5 September 1990.

Preliminary objections

10 The defendant questioned the plaintiff's *locus standi* to seek the declaration here. The court was asked to grant a declaration based on hypothetical rights. The plaintiff had not yet acquired the property and only a registered proprietor was eligible to seek a declaration for an implied easement of way under s 99 of the Act. The common easements implied under s 99 exist in favour of a registered proprietor and not a purchaser of No 48. The present sale was nowhere near completion. The purchaser had only paid $10,000 under the contract for the property with a high price tag of $11.9m whereas the common experience of most people in the landed property market was a deposit of 10%

of the purchase price, which was the norm. There was no evidence as to the status of the transaction in the sense that there had been satisfactory compliance with the other various conditions of sale. To that end, a declaration in the terms sought would place the court in an invidious position for it would be entertaining a question which was moot or in abstraction. The rights of such a purchaser were, at best, hypothetical, rather than future, rights. Mr Loo cited *Bruce v The Commonwealth Trade Marks Label Association* (1907) 4 CLR 1569, where the High Court of Australia refused to entertain the question as it was not empowered to make a declaration on a moot question or an abstract proposition.

11 Counsel for both sides had referred to the contract as a conditional contract. The important consideration was whether or not there was a valid contract. If there was a valid contract, the plaintiff would have an equitable interest in the property and the vendor would hold the property as constructive trustee: see Tan Sook Yee, *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) at p 355. In my view, the Sale and Purchase Agreement was a valid contract even though it was made subject to certain conditions. I would characterise cl 8 of the Sale and Purchase Agreement as a condition subsequent. Clause 8 provided that in the event the declaration was not obtained within six months from the date of the agreement, the agreement would then be deemed null and void. In the event, the deposit was to be refunded to the plaintiff who was obliged to return the title deeds to the property and withdraw all caveats filed on her behalf. Under the agreement, the plaintiff was fully responsible for the legal fees and expenses associated with obtaining a determination of the declaration sought. Whilst there may not be an up-to-date status report on the transaction, the fact of the matter is that the plaintiff had filed this Originating Summons and proceeded with the hearing of the Originating Summons. These were clear and strong indications of the plaintiff's genuine intention to complete the sale if her application succeeded, there being no other reason not to complete. The subject matter of the Originating Summons concerned an expensive piece of real estate with a potential problem on access to and from the property. I was of the view that the plaintiff with an equitable interest in the property had a real interest in raising the issue in dispute. I was not persuaded by Mr Loo's arguments that the application was premature. In this case, there was no dispute of facts. I was also mindful that the declaration sought in the Originating Summons would serve as a convenient procedure to determine essentially a question of construction of s 99 of the Act. The plaintiff was seeking a declaration as to her future rights as a registered proprietor which was conditional upon her succeeding before this court. This court has the power to grant a declaration of the nature sought even though it was based on a future right which were conditional upon the happening of an event: see Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501 which was reproduced, and his lordship's approach approved, in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2005] SGCA 47 at [15] and [25]. I therefore saw no reason to refuse, in the exercise of discretion, to entertain the application. In any case, the application was made in accordance with cl 8 of the Sale and Purchase Agreement and hence it had the consent of the registered proprietor, Thye Hong.

Statutory easements

12 Mr Rajah accepted that there was no subsisting easement of way enjoyed by the property as dominant tenement in existence at the date at which the land, together with houses built thereon, was brought under the provisions of the Act. At that time, the land, comprised within Lots 472 and 473, was in the common ownership of Singapore Tobacco. No express grant was given by Singapore Tobacco when No 48 was sold to William Goei. If anything, a personal licence to use the crossover for vehicular traffic was granted first to William Goei and then to Thye Hong by Singapore Tobacco, who remained the registered owner of No 48A until 1990. Such a personal licence was enforceable amongst the parties but did not bind the subsequent registered proprietor of No 48A. The fact that the access to and from the property was over the crossover for the last 30 years did not assist the

plaintiff. Section 97 of the Act provides that:

> An easement shall not be acquired over registered land by long-continued user adverse to a proprietor, nor by prescription, nor by any presumption of a lost grant, nor by any implication of law except as may be provided in this Act.

The only way an easement can be created under the Act is by way of registration of an instrument in the prescribed form and by endorsing a memorial on the folio of the register of the servient tenement and a notification on the folio of the dominant tenement: see ss 97(1), 97(5) and 97(6).

13 In these circumstances, Mr Rajah sought to rely on the statutory easement implied under s 99 of the Act. Section 99 reads:

> (1) Where the competent authority has approved the development and subdivision of any land comprised in an estate before or after 1st March 1994 and the subdivision plan has been submitted to the competent authority, there shall be implied, in respect of each lot of the estate which is used or intended to be used as a separate tenement, in favour of the registered proprietor of the lot and as appurtenant thereto, all the easements referred to in subsection (1A).
>
> (1A) The easements which shall be implied under subsection (1) are all such easements of way and drainage, for party wall purposes and for the supply of water, gas, electricity, sewerage and telephone and other services to the lot on, over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority relating to the estate, as may be necessary for the reasonable enjoyment of the lot and of any building or part of a building at any time thereon.
>
> …
>
> (8) In this section —
>
> "estate" means any land which has been subdivided into lots under the Planning Act (Cap.232), and includes —
>
> (*a*) land intended for use as easements to be made appurtenant to other lots within the same estate as shown in the subdivision plan submitted to the competent authority; and
>
> (*b*) undeveloped lots, if any, which are shown in the first subdivision plan submitted to the competent authority, each of which is capable of being subdivided as shown in one or more subsequent subdivision plans as and when submitted to or issued by the competent authority;
>
> "lot" means a parcel of land forming part of an estate to which the Chief Surveyor has allotted a Government survey lot number and also described as a "plot" in a subdivision plan submitted to the competent authority.

14 The uncontested facts turned upon the interpretation of the Subdivision Plan and s 99 of the Act. Mr Rajah argued that it was in the course of subdivision that the easement of way was created under s 99(1) of the Act as if such an easement had been expressly granted. It was by this procedure in s 99 that the easement now in question came into existence. Mr Rajah submitted that

No 48A was affected by an implied easement of way under s 99 of the Act as all the conditions of the section were met. The conditions were that:

(a) there was approval by a competent authority for the development and subdivision of any land comprised in an estate;

(b) the relevant subdivided lot was intended for use as a separate tenement;

(c) the easement of way to be implied was necessary for the reasonable enjoyment of the land and of any building or part of a building at any time thereon; and

(d) the easement was on, over or under the land appropriated or set apart for these purposes on the approved subdivision plan.

Mr Loo did not take issue with the second condition. He did not agree that the other conditions were established.

15 The Chief Planner's letter of 14 July 1970 permitted the subdivision of the amalgamated land into 13 plots. Significantly, permission for Plots 1 to 8 was confined strictly to subdivision and not development of those plots which already had an existing house or dwelling standing on each plot of land. The approval letter subdivided and created Plots 9 and 11 as vacant land demarcated for future development. Notably, no outright permission was granted for their actual development. The permission for subdivision was qualified in that no development was in fact permitted to take place on Plots 9 and 11 without the prior approval of the competent authority. Plot 10, which was sandwiched in between Plots 9 and 11, was a road reserve and Plots 12 and 13 were reserved for road widening. Plot 10 as a road reserve was for road frontage for Plots 9 and 11 and access to the general road system. In short, permission for development (with details of development) must still be applied for.

16 It is helpful to quote in full the text of the written permission.

THE COMPETENT AUTHORITY UNDER SECTION 9(3) OF THE PLANNING ORDINANCE NO. 12 of 1958 GRANTS:

Written permission for the use of the site edged red for amalgamation and subdivision of lots 44-5, 45, 46-6 & 53 T.S.XXV at Nassim Road into 13 plots as follows:–

Plots (1) to (8) each to contain an existing house;

Plots (9) and (11) for future development and not to be developed without the prior approval of the Competent Authority;

Plot (10) for a 40' 0" wide road reserve;

Plot (12) & (13) for road widening purposes;

as depicted on plan (R) in D.C. 802/55.

L.O. Receipt No.094969.

Signed A.G.S DANARAJ

Chief Planner

14 July 1970

1 7 In my judgment, s 99 of the Act was inapplicable in the present case. The approval did not meet the first condition of s 99(1) (see [14] above). The Subdivision Plan did not relate to both the development and subdivision of the amalgamated lots. The words used by the subsection are "development and subdivision". The word "*and*" is to be read conjunctively. The approval by the competent authority must be for development *and* subdivision although it is not necessary that development *and* subdivision must take place at the same time. In *MCST Plan No 549 v Chew Eu Hock Construction Co Pte Ltd* [1998] 3 SLR 366 ("*Chew Eu Hock*"), the Court of Appeal noted that s 98 of the Land Titles Act (Cap 157, 1994 Rev Ed) applied to the situation where there was an approved "subdivision" *simpliciter* and s 99 of the 1994 Act applied where there was an approved development and subdivision. In the appellate court's view, there was no reason why a situation could not be under both sections. The question for the appellate court was whether there was an approved "development and subdivision" of land comprised in an "estate" falling within s 99 of the 1994 Act. The brief facts are found in [28] of the judgment, which I reproduce for convenience.

> Lots 544, 545 and 546 were derived from Lot 331 which in turn was derived from Lot 32. As early as 2 January 1960, written permission was given for the development of two pairs of semi-detached houses and two single storey bungalows on part of Lot 32. Subsequently, development on the remaining part of Lot 32 was initiated; and on 9 July 1963 written permission for the development of a 10 storey building, the Golden Tower, comprising 40 flats and a 4 storey building comprising 24 flats on such part of Lot 32 was granted by the competent authority. Lot 32 was subsequently subdivided into Lots 325-331 in 1967. Lot 331 was the big plot of land comprising the Golden Tower and the two bungalows with the said driveway providing access to the bungalows. Lot 331 was brought under the Land Tittles Act on 23 June 1980. On 24 September 1980 written permission was granted for subdivision of Lot 331 into three lots, namely: Lot 544 on which stands the Golden Tower, and Lots 545 and 546 on each of which then stood a single storey bungalow.

I should mention that it was a planning condition for subdivision of Lot 331 into three lots that a 20ft driveway was to be granted by the owners on Lot 544 in favour of Lots 545 and 546. In that case, the respondent sought a declaration that they were entitled to an easement over the 20ft driveway under s 99 of the 1994 Act. On the facts, an easement of way was implied under s 99. *Chew Eu Hock* is helpful authority on the interpretation of the present version of s 99.

18 The appellate court agreed with Lai Kew Chai J ([1998] 1 SLR 1027) that the prerequisites to implication of the easements set out in the then s 99 involved two separate and different processes, namely, development and subdivision of any land. The rationale for the introduction of s 99 was stated at para (e) of the Explanatory Statement to the Land Titles Bill 1992 (Bill No 36 of 1992):

> to impose statutory easements in respect of parts of a development which are commonly used by the owners of separate building lots within the development, for example, roads serving the development; and such an amendment will do away with the necessity of registering documents creating easements of right of way with the Land Title Registry; …

However, both processes (development and subdivision) need not take place at the same time. They could be applied for and granted at different times. Thus, where the subdivision of land was first approved of and the approval for the development followed later, a right of way in connection with the development could be implied under s 99 of the Act. In the present case, the Chief Planner's approval was for the amalgamation and then the subdivision of the amalgamated land into 13 plots.

The plaintiff in her Affidavit appreciated this point.

19 Under s 99, easements similar to s 98 easements, including easements of way, are implied in an "estate" which is defined as land subdivided into lots including undeveloped lots which are featured in the first subdivision plan submitted to the competent authority. The definition also includes land intended for use as easements to be made appurtenant to other lots within the same estate as shown in the subdivision plan submitted to the competent authority. Mr Rajah focused on the word "estate" and the statutory definition in support of his argument that condition (a) was met (see [14] above). That, in my view, turned the provision on its head and ignored the important two prerequisites: "development" *and* "subdivision". Mr Loo argued for another reason that the present case fell outside the definition of "estate". I shall return to that point below. Suffice it to say that the conclusion I reached was sufficient to dispose of the Originating Summons in the defendant's favour. I should, in context, add that if there should be "development" of the property in the future, the question of easements to be implied under s 99 could be revisited.

20 There was another added reason for dismissing the application. Mr Loo pointed out that the words "appropriated or set apart" in s 99(1A) must be given effect to. Mr Loo contended that land devoted to a right of way must be clearly indicated on the subdivision plan. In the present case, no land was set apart for the purpose of a right of way on the Subdivision Plan over the crossover. A mere depiction of a driveway does not amount to land being set apart for an easement. He cited *Chew Eu Hock* ([17] *supra*) for the proposition that the mere fact that a plan showed one lot abutting against another did not automatically suggest that an easement was to be implied from the plan. In *Chew Eu Hock*, the Court of Appeal explained in [50]:

> In the present case, the plan attached to the certificate of title of Lot 545 shows that the said driveway on Lot 544 immediately abuts Lot 545 providing it access to and from Minbu Road. The same plan was attached to the certificate of title of Lot 544. However, having regard to the terms of ss 46 and 97 of the Act we find it difficult to follow the majority decision of the High Court in *Dabbs v Seaman* and hold that the right of way over the said driveway abutting Lot 545 is an 'inherent characteristic' of Lot 545 or that the easement was implied from the plans annexed to the certificates of title. The fact remains that such easement of way was not registered or notified in the land register. The only provisions for implying an easement under the Act are ss 98, 99, 101, 102 and 104. We have held that s 99 applies in this case.

2 1 Mr Rajah's argument was that "access" handwritten on the Subdivision Plan against Plot 7 comprehended a "right of way" and that was enough to manifest an intention to dedicate it as an easement. I did not accept that submission. First, the word "access" cannot be used exegetically to mean "easement of way" merely by drawing an analogy with a "right of way". "Access" and "right of way" are not two different names for the same subject matter, *ie*, an easement of way.

22 I now move on to the second reason. I refer to Singapore Tobacco's application on 28 November 1971 for the issuance of 13 new certificates of title for the separate plots of land comprised in and in accordance with Plots 1 to 13 as shown in the Subdivision Plan. Indeed, land on the Subdivision Plan was set apart for special purposes like road reserve and road widening (*ie*, Plots 10, 12 and 13) and new certificates of title were issued to Singapore Tobacco for these three plots created by the subdivision. I did not doubt that the suitability of the land for subdivision and the ease of access to the proposed lots would be considered on an application for a permit to subdivide. It must be remembered that at that time in 1969, Singapore Tobacco as the owner of Plots 6 and 7 (Nos 48 and 48A) after subdivision would hold the same rights of access as were previously enjoyed by Singapore Tobacco before subdivision. It was put that the land was suitable for subdivision and ease of access to each of the proposed lots would be sufficient. But for s 99 of the Act to apply, the

question is: Was there on the Subdivision Plan land appropriated or set apart for easement of way as may be necessary for the enjoyment of Plot 6 and of any building or part of a building at any time thereon? Section 99 lists some common easements and these will be implied, where shown, as easements to be made appurtenant to other lots in the approved subdivision plan. And how are the relevant easements to be so shown? There must be delineation of land as a roadway appropriated or set apart on the subdivision plan for use as an easement of way to be made appurtenant to other lots. Bearing in mind the common law position that no easement of way could be created on one's own land, I was not prepared to draw the inference that the strip of land on which the word "access" was handwritten and which abutted the boundary of Plot 6 was intended to be a right of way appurtenant to Plot 6. It could not and did not amount to a delineation of the strip of private land on Plot 7 as a roadway set apart on the Subdivision Plan for the use of Plot 6 to pass and re-pass for the reasonable enjoyment of Plot 6. An easement is a property right and I could not see how the approval for subdivision in 1969 created, as the present application supposed that it could be, an easement of way without the land being particularly appropriated or set apart.

23 The need to indicate on the approved subdivision plan the common easements to be implied was highlighted in the Report of the Select Committee on the Land Titles Bill (Parl 3 of 1993) presented to Parliament on 18 August 1993. Paragraph 25 of the report states:

> It is, however, not feasible to imply a common set of easements for all developments. The Committee therefore recommends that clause 99 describe the common easements and these will be implied where indicated in the approved subdivision plans.

24 The other argument raised by Mr Loo against granting the declaration was that the implied easement over the crossover land could not be regarded as "necessary for the reasonable enjoyment of the lot and of any building or part of a building at any time thereon" within the meaning of s 99 of the Act. Mr Loo said the driveway could be repositioned. Having chosen not to file an affidavit he had no basis raising that contention. I need not deal with this condition in view of the ruling above.

Result

25 For these reasons, I made no declaration on the terms sought by the plaintiff. The Originating Summons was accordingly dismissed with costs fixed at $20,000 excluding disbursements. I also ordered that the existing access arrangement to 48 Dalvey Road is to remain at status quo pending an appeal in the matter, provided the Notice of Appeal is filed within two weeks from the date these Grounds of Decision are made available to the parties.