Management Corporation Strata Title Plan No 301 *v* Lee Tat Development Pte Ltd [2010] SGCA 39

Case Number : Civil Appeal No 148 of 2009

Decision Date : 10 November 2010

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Francis Xavier SC, Mohammed Reza, Looi Ming Ming, Paul Tan Beng Hwee and Jeremy Gan (Rajah & Tann LLP) for the appellant; Tan Cheng Han SC (TSMP Law Corporation) and Ernest Balasubramaniam (Unilegal LLC) for the respondent.

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

Courts and Jurisdiction

Res Judicata

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 1 SLR 645.]

10 November 2010 Judgment reserved.

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

Introduction

1 This is an appeal by the appellant, the Management Corporation Strata Title Plan No 301 of Grange Heights ("the MC"), against the decision of the High Court judge ("the Judge") in Originating Summons No 875 of 2009 ("the Present Action") dismissing the MC's application for a declaration that the Court of Appeal ("the CA") has statutory and/or inherent jurisdiction to reopen and set aside an earlier decision which it made and reconstitute itself to rehear the matters dealt with in that decision (see *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] 1 SLR 645 ("the First Instance Judgment")).

2 The Present Action is yet another court proceeding between the MC and the respondent, Lee Tat Development Pte Ltd ("Lee Tat"), after more than 35 years of litigation between these parties and their respective predecessors in title. The parties' dispute centres on whether the residents of and visitors to Grange Heights (collectively referred to hereafter as "the Residents") are entitled to use a right of way over Lot 111-31 of Town Sub-Division 21 ("the Servient Land") for access between Grange Road and the land upon which Grange Heights sits, *viz*, Lot 687 of Town Sub-Division 21 ("the Grange Heights site"), which is an amalgamation of Lot 111-34 of Town Sub-Division 21 ("Lot 111-34") and Lot 561 of Town Sub-Division 21 ("Lot 561"). For ease of discussion, in this judgment, we shall continue to refer to Lot 111-34 and Lot 561 by their respective lot numbers even though they no longer exist as two separate and distinct lots.

3 The last decision in this marathon saga of litigation was the decision of this court ("the 2008 CA") in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 ("*GH (No 8)*"), where the court decided to re-examine the core dispute between the parties with regard to the said right of way over the Servient Land ("the Right of Way") and

determine the status of the easement in order to bring finality to the dispute once and for all. After a comprehensive and intensive examination of the factual matrices of and the legal issues decided in the previous proceedings, the 2008 CA concluded as follows (see *GH (No 8)* at sub-paras (e)–(f) of [111]):

> (a) by reason of the principle established in *Harris v Flower* (1904) 74 LJ Ch 127 ("the *Harris v Flower* principle"), which entails that a right of way granted over a servient tenement for the benefit of a dominant tenement cannot be used for the benefit of a non-dominant tenement, the Residents could not use the Right of Way for access between Grange Road and Lot 561 as the grant of the Right of Way made in 1919 by the original owner of the Servient Land ("the 1919 Grant") had covered (*inter alia*) Lot 111-34, but not Lot 561; and
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> (b) the Residents also could not use the Right of Way for access between Grange Road and Lot 111-34 (even though, as just mentioned, the 1919 Grant had extended to that lot) as the Right of Way had been extinguished by operation of law where that lot was concerned.

4 As events have turned out, the 2008 CA's judgment has not in fact achieved the objective of bringing finality to the parties' dispute over the Right of Way as the MC has once again commenced proceedings, this time, by applying in Summons No 3446 of 2009 ("SUM 3446/2009") to set aside the 2008 CA's judgment on the ground that it was reached in breach of natural justice. Specifically, the MC alleges that it was not heard on "the basis upon which [the 2008 CA] ultimately based its decision". [note: 1] The orders sought by the MC in SUM 3446/2009 are the following: [note: 2]

> 1. The judgment in Civil Appeal No. 20 of 2007/G dated 1 December 2008 [*ie*, the judgment in *GH (No 8)*] be set aside.
>
> 2. The [CA] be reconstituted to-rehear and/or re-consider the matters arising in Civil Appeal No. 20 of 2007/G.
>
> 3. Such other orders or consequential relief that the [CA] may find necessary.

The grounds of the MC's application are set out in the affidavit of Mr Ivan Steinbock ("Mr Steinbock"), the chairman of the MC, filed on 29 June 2009 ("Mr Steinbock's affidavit").

Background to the Present Action

5 To explain how the filing of SUM 3446/2009 led to the Present Action, it is necessary for us to set out briefly the history of the litigation between the parties and their respective predecessors in title over the Right of Way (for the full background, see *GH (No 8)* at [2]–[67]).

The plots of land relevant to the Right of Way

6 The Servient Land, along with Lot 111-30 of Town Sub-Division 21, Lot 111-32 of Town Sub-Division 21 ("Lot 111-32"), Lot 111-33 of Town Sub-Division 21 ("Lot 111-33") and Lot 111-34 (collectively, "the Dominant Lands"), originally belonged to a company called Mutual Trading Ltd ("MTL"). In 1919, when MTL was in liquidation, it sold the Dominant Lands to various parties whilst retaining ownership of the Servient Land. To provide access from the Dominant Lands to Grange Road and *vice versa*, MTL made the 1919 Grant conferring the benefit of the Right of Way on each of the purchasers of the Dominant Lands in the following terms: [note: 3]

> And together with full and free right and liberty for the Purchaser his executors administrators

and assigns being the owner or owners for the time being of the land hereby conveyed or any part thereof and their tenants and servants and all other persons authorised by him or them in common with others having a similar right from time to time and at all times hereafter at his and their will and pleasure to pass and repass with or without animals and vehicles, in along and over the [Servient Land].

7 The MC's predecessor in title, Hong Leong Holdings Ltd ("HLH"), became the owner of Lot 111-34 in 1970, and Collin Development Pte Ltd ("Collin"), which was subsequently renamed Lee Tat (*ie*, the respondent), became the owner of Lot 111-32 and Lot 111-33 in 1973. When HLH acquired Lot 111-34 in 1970, it also acquired the adjacent lot, Lot 561, which (with a land area of 9,631.6m^2) was more than three times the size of Lot 111-34 (which had a land area of 3,066.1m^2). Subsequently, HLH amalgamated the two lots to form the Grange Heights site in order to develop Grange Heights. Unlike Lot 111-34 (which has access to Grange Road), Lot 561 has no access to Grange Road, but it fronts two other public roads, namely, River Valley Grove (which leads to River Valley Road) and St Thomas Walk (which leads to River Valley Road as well as Killiney Road).

8 It would appear that when HLH bought Lot 561 to amalgamate it with Lot 111-34 for residential development, it decided that the development should have an address and a name associated with Grange Road rather than with either Killiney Road or River Valley Road. In the Present Action, the MC has candidly admitted that its principal objective in SUM 3446/2009 is to have the 2008 CA's judgment set aside, with a view to restoring the status quo *ante* in respect of the Right of Way (*ie*, the status quo prior to the 2008 CA's decision, with the Residents having the right to use the Right of Way for at least pedestrian traffic, if not for vehicular traffic as well, between Grange Road and the Grange Heights site). This is not so much to enable the Residents to actually use the Right of Way for pedestrian and/or vehicular traffic between Grange Road and the Grange Heights site, but, rather, to maintain the current address and/or the current name of Grange Heights. It appears that the MC's concern is that if the Right of Way cannot in law be used for the benefit of the Grange Heights site, Grange Heights might not be able to retain its current address and/or its current name, and that would depreciate the market value of the residential units in Grange Heights by about 20%. To put this argument in its proper perspective, it is necessary to point out that when the Official Receiver put up the Servient Land for sale in late 1996, it invited both the MC and Lee Tat to tender for the land. The MC did not submit any bid, and Lee Tat eventually purchased the Servient Land from the Official Receiver on 27 January 1997 at the price of $3.02m.

The development of Grange Heights

9 When HLH drew up its plans to develop Grange Heights in 1970, it submitted a proposed layout plan which included a road over the Servient Land as a means of access between Grange Road and the development. That appears to have been an attempt by HLH to secure a permanent right to use the Right of Way to cross from Grange Road to Lot 111-34 and thence to Lot 561, and *vice versa*. The proposed layout plan was rejected by the planning authorities on the ground that HLH did not own the Servient Land. The layout plan that was eventually approved excluded the proposed road over the Servient Land from the development.

10 Grange Heights was completed in 1976. It comprises, *inter alia*, 120 residential apartments, a car park for 188 cars and a swimming pool, all situated on Lot 561, as well as two tennis courts and changing rooms, which are situated on Lot 111-34. As noted by the 2008 CA in *GH (No 8)* at [91], the Residents have been using St Thomas Walk for both vehicular and pedestrian traffic to and from the Grange Heights site ever since Grange Heights was completed. In contrast, during the same period, the Residents:

(a) did not use the Right of Way for vehicular traffic between Grange Road and the Grange Heights site in any meaningful way (although this is disputed by Mr Steinbock); and

(b) used the Right of Way for pedestrian traffic so infrequently that it fell into disrepair, which led the MC to commence proceedings in 2004 (via Originating Summons No 706 of 2004 ("OS 706/2004")) for a declaration that it was entitled *vis-à-vis* Lee Tat to repair and/or maintain the Right of Way for pedestrian and/or vehicular use.

The first action

11 The first action in this long-running saga of litigation ("the First Action") was commenced in 1974 when Grange Heights was still under construction. Collin objected to the use of the Right of Way by HLH and its contractors for access to the building site on Lot 561, contending (based on the *Harris v Flower* principle) that such use was excessive and interfered with its (Collin's) enjoyment of the Right of Way. Collin sought a declaration that HLH and its contractors were not entitled to use the Right of Way in the aforesaid manner, as well as an injunction restraining HLH and its contractors from using the Right of Way in that manner.

12 HLH's defence was that Collin, being a dominant owner, could not invoke the *Harris v Flower* principle to restrict the enjoyment of the Right of Way by another dominant owner; only the owner of the Servient Land ("the Servient Owner") had the *locus standi* to do so. It was argued that Collin, as a dominant owner, had no cause of action against HLH unless Collin could prove that the use of the Right of Way by HLH and its contractors had caused substantial interference with its (*ie*, Collin's) enjoyment of the easement. HLH also counterclaimed for (in essence) a declaration that it was entitled to use (as well as to authorise other persons to use) the Right of Way for access to Lot 111-34 "*or elsewhere*" [emphasis added] (see *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 618 ("*GH (No 1)*") at [8]) – *ie*, including Lot 561 – so long as such use did not substantially affect Collin's enjoyment of the Right of Way.

13 At first instance, F A Chua J upheld (in *GH (No 1)*) HLH's defence as outlined in the preceding paragraph. He found that there was no evidence of substantial interference with Collin's enjoyment of the Right of Way by HLH and its contractors, and thus dismissed Collin's claim. He also dismissed HLH's counterclaim for the declaration mentioned at [12] above on the ground that the declaration could only be obtained against the Servient Owner, which was not Collin at that time. Only Collin appealed against Chua J's decision; that appeal was unsuccessful (see *Collin Development (Pte) Ltd v Hong Leong Holdings Ltd* [1974–1976] SLR(R) 806).

14 Two points may be noted about the First Action. First, HLH's counterclaim was the second failed attempt by HLH to secure a permanent right to use the Right of Way for access from Grange Road to Lot 111-34 and thence to Lot 561, and *vice versa* (as regards HLH's first failed attempt, see [9] above). These two attempts show that HLH was aware that the Right of Way could not be used for the benefit of Lot 561. Second, because Collin was not the Servient Owner at the time of the First Action, what we shall hereafter call "the *Harris v Flower* issue" – *ie*, the issue of whether HLH (and subsequently, its successor in title, the MC) was entitled *as against the Servient Owner* to use the Right of Way for access between Grange Road and Lot 561 – was *not* decided in the First Action.

The second action

15 The second action between the parties ("the Second Action") was commenced in 1989 when Lee Tat (as Collin was by then known) tried to close off the Right of Way by erecting a gate and a fence on the Servient Land. The MC obtained an interim injunction to restrain Lee Tat from interfering

with the Residents' use of the Right of Way (see *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [1990] 2 SLR(R) 634 ("*GH (No 3)*") at [6]). Lee Tat applied to discharge the interim injunction, contending that:

(a) the Residents could no longer use the Right of Way for the benefit of Lot 111-34 (even though that lot was one of the Dominant Lands) as that lot ceased to exist when it was amalgamated with Lot 561 to form the Grange Heights site, with the result that the Right of Way was extinguished *vis-à-vis* that lot (*ie*, Lot 111-34); and

(b) the Residents were not entitled to use the Right of Way for the benefit of Lot 561 as that lot was not one of the Dominant Lands (in this regard, Lee Tat invoked the *Harris v Flower* principle just as Collin had done in the First Action).

16 In the High Court, P Coomaraswamy J dismissed Lee Tat's application and granted the MC a permanent injunction on the grounds that (see *GH (No 3)* at [8]–[11]):

(a) the amalgamation of Lot 111-34 with Lot 561 had not destroyed the Right of Way *vis-à-vis* Lot 111-34 as that plot of land continued to exist; and

(b) Lee Tat had admitted that the Residents had not substantially interfered with its enjoyment of the Right of Way.

17 Lee Tat's appeal against Coomaraswamy J's decision ("the 1992 appeal") was dismissed by the CA ("the 1992 CA"). In finding for the MC, the 1992 CA said (see *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [1992] 3 SLR(R) 1 ("*GH (No 4)*")):

> 20 [Lee Tat] ... as [the owner] of [Lot] 111-32 and [Lot] 111-33 [is] only entitled to protection of [its] right of way over [the Servient Land] if [its] enjoyment of that right is substantially interfered with by the [MC]. ...
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> …
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> 23 The [R]esidents ... have not subjected [the Servient Land] to such heavy vehicular traffic as to substantially interfere with the right of way of [Lee Tat]. *In fact, they do not use it for vehicular traffic at all but only as a footpath*. ...
>
> 24 Therefore, there is still no likelihood of such excessive user as to substantially interfere with [Lee Tat's] right of way over [the] [S]ervient [Land] or to cause a nuisance to [Lee Tat]. …
>
> [emphasis added]

18 Three points may be noted about the Second Action. First, the MC based its case before the 1992 CA on the premise that the Residents had used the Right of Way only as a footpath and not for vehicular traffic. This premise was also the causative basis of the 1992 CA's decision in the 1992 appeal. Second, the MC argued (just as HLH had done *vis-à-vis* Collin in the First Action) that Lee Tat could not rely on the *Harris v Flower* principle because Lee Tat was not the Servient Owner. It follows from this argument that if Lee Tat were to acquire the title to the Servient Land, the MC would be estopped from arguing that Lee Tat, in its capacity as the Servient Owner, could not invoke the *Harris v Flower* principle. But, as we shall see (at, *inter alia*, [21] below), even after Lee Tat became the Servient Owner, the MC continued to argue that Lee Tat could not rely on the *Harris v Flower* principle. Third, both the MC and Lee Tat litigated the Second Action as dominant owners with

the same right to enjoy the Right of Way (the rights of HLH and Collin *inter se* as dominant owners were also the very basis of the High Court's and the CA's decisions in the First Action (see [13] above)). This meant that the *Harris v Flower* issue, which concerned the rights of the *Servient Owner*, was *not* decided in the Second Action.

The third and fourth actions

19 In the third action between the parties ("the Third Action"), the MC, via OS 706/2004, sought a declaration that it was entitled as against Lee Tat to repair and/or maintain the Right of Way for pedestrian and/or vehicular use. Lee Tat was by then the Servient Owner, having acquired the title to the Servient Land from the Official Receiver in January 1997 (see [8] above). Lee Tat responded to the Third Action by filing a separate action against the MC ("the Fourth Action") for the following reliefs: [note: 4]

> 1. a declaration that the grant of easement [*ie*, the 1919 Grant as defined at sub-para (a) of [3] above] in favour of inter alia, Lot 111-34 was not intended to be made appurtenant to … Lot 561 and now part of [the Grange Heights site] …;
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> 2. a declaration that the amalgamation of Lot 111-34 with … Lot 561 … to form [the Grange Heights site] did not result in the conferment of any easement rights to Lot 561 and/or [the Grange Heights site] being land other than the dominant tenement (Lot 111-34);
>
> 3. a declaration that the [R]ight of [W]ay over [the Servient Land] shall not be used as an access to [the Grange Heights site];
>
> 4. a permanent injunction to prohibit all the owners, residents, occupants and/or visitors of the apartments in the condominium known as Grange Heights from using any part of [the Servient Land] to access Grange Heights from Grange Road and vice versa absolutely and indefinitely;
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> 5. an order directing the Registrar of Titles and Deeds to expunge any and all entries, notices and registration of any easements or Orders of Court registered against [the Servient Land] in the Index to Land Books in the Registry of Deeds and Land Register comprised in Certificate of Title Vol. 464 Folio 159;
>
> 6. further and/or alternatively, a declaratory order that all the owners, residents, occupants and/or visitors of the apartments in the condominium known as Grange Heights are not entitled to use any part of [the Servient Land] to access Grange Heights from Grange Road absolutely and indefinitely …

20 In view of the reliefs sought by Lee Tat in the Fourth Action, the High Court, with the consent of the parties, heard that action first. This resulted in the Fourth Action being decided before the Third Action even though it was commenced later.

The Fourth Action

21 It can be seen from the reliefs sought in the Fourth Action that Lee Tat was once again invoking the *Harris v Flower* principle to prevent the Residents from using the Right of Way for the benefit of Lot 561, but, this time, in a different capacity as the Servient Owner. Contrary to its previous position in the Second Action (where it had, in effect, argued that Lee Tat, not being the Servient Owner, could not raise the *Harris v Flower* issue), the MC contended before the High Court in the Fourth Action that the *Harris v Flower* issue had already been decided against Collin/Lee Tat in

the First Action and the Second Action, and was therefore *res judicata*. Lee Tat argued to the contrary – namely, no estoppel, whether in the form of cause of action estoppel or issue estoppel, applied to the *Harris v Flower* issue because, given that the issue could only be decided in relation to the Servient Owner and given that Collin/Lee Tat did not own the Servient Land at the time of the First Action and the Second Action, the issue was not decided in either of those actions.

22 The High Court *did not* accept the MC's submission that the *Harris v Flower* issue had been decided in the *First* Action (see *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2004] 4 SLR(R) 828 ("*GH (No 5)*") at [24]–[27]), but it *did* agree with the MC that the issue had been decided by the 1992 CA in the 1992 appeal (see *GH (No 5)* at [30]–[37]). The High Court thus ruled on the Fourth Action in the MC's favour. On appeal by Lee Tat, the CA ("the 2005 CA"), by a majority (Chao Hick Tin JA dissenting), upheld the High Court's decision that Lee Tat was estopped by *res judicata* from raising the *Harris v Flower* issue as the issue had already been decided by the 1992 CA (see *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*GH (No 6)*") at [14]–[26]). It is important to note that the 2005 CA did not determine the *Harris v Flower* issue on the merits; instead, it merely ruled on whether that issue had been decided in the Second Action, with the majority of the 2005 CA ("the Majority Judges") ruling in the affirmative and Chao JA, in the negative.

The Third Action

23 Following the outcome of Lee Tat's appeal in the Fourth Action ("the 2005 appeal"), the High Court understandably held in the Third Action that the MC was entitled as against Lee Tat to repair and/or maintain the Right of Way for pedestrian and/or vehicular use, and granted the MC a declaration to that effect (see *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2007] 2 SLR(R) 554 ("*GH (No 7)*")). Lee Tat appealed against the High Court's decision.

24 The 2008 CA reserved judgment at the conclusion of the hearing of Lee Tat's appeal ("the 2008 appeal"), and subsequently directed the parties to make submissions on two questions. The first question ("the First Further Question"), which consisted of two limbs, was as follows: [note: 5]

(a) whether the relief granted by the High Court in *GH (No 7)*, which effectively permitted the Residents to use the Right of Way for *vehicular* traffic as well as pedestrian traffic, was precluded on the ground of *res judicata* or abuse of process on the MC's part by reason of the earlier decisions in *GH (No 4)* and *GH (No 6)*, which were premised on the Right of Way being used only as a footpath; and

(b) if it were indeed the case that the Right of Way could be used only as a footpath, what the dimensions and the appropriate surfacing of the footpath would be.

25 The second question posed by the 2008 CA ("the Second Further Question") was as follows: [note: 6]

> … [T]he Court of Appeal [*ie*, the 2008 CA] invites parties to make further written submissions o[n] the following question:
>
> > In view of the change in circumstances in recent years – in particular, the present state of disrepair of the [Right of Way] that, according to the [MC], has made both pedestrian and vehicular traffic difficult, as well as the collective sale offer of Grange Heights condominium in November 2007 – does the Court have the power to extinguish the easement and order

compensation to be paid by [Lee Tat]? If so, how is this compensation to be calculated?

2 *The Court of Appeal wishes to state that this question is asked without prejudice to the question of whether or not [Lee Tat] is entitled to re-open the issue as to whether the [MC] has lost the [R]ight of [W]ay by reason of the merger of Lots 111-34 and 561 to form [the Grange Heights site]*.

[emphasis added]

26 On 1 December 2008, the 2008 CA delivered its judgment in *GH (No 8)* and allowed Lee Tat's appeal on three separate and distinct grounds, namely (see *GH (No 8)* at [111]):

(a) The *Harris v Flower* issue was not *res judicata* as a matter of law as it had never been decided on the merits by the courts in the previous proceedings from *GH (No 1)* to *GH (No 7)*. Thus, Lee Tat was not estopped from raising the *Harris v Flower* issue.

(b) The Majority Judges' decision in the 2005 appeal – *viz*, that the *Harris v Flower* issue was *res judicata* – was an egregious error, and there was sufficient similarity between the circumstances in the Third Action and the circumstances in the House of Lords case of *Arnold and Others v National Westminster Bank Plc* [1991] 2 AC 93 ("*Arnold*") to warrant applying the exception to *res judicata* laid down in *Arnold* ("the *Arnold* exception") to the Majority Judges' decision.

(c) The Residents were not entitled to use the Right of Way for access between Grange Road and Lot 561 because of the *Harris v Flower* principle. They were also not entitled to use the Right of Way for access between Grange Road and Lot 111-34 as the easement had been extinguished by operation of law *vis-à-vis* that lot.

The events leading to the Present Action

27 Approximately seven months after the 2008 CA delivered its judgment, the MC filed SUM 3446/2009. The application was premised on the assumption that the 2008 CA was not *functus officio* – *ie*, on the assumption that the CA had statutory jurisdiction under s 29A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") and/or inherent jurisdiction to reopen and set aside its decision in an earlier case despite having already disposed of that case. In view of the jurisdictional assumption underlying SUM 3446/2009, the Registrar of the Supreme Court ("the Registrar") directed the MC to file a fresh action for that jurisdictional point to be decided as a preliminary issue by the High Court. This led the MC to commence the Present Action for the following declarations: [note: 7]

1. A declaration that pursuant to section 29A of the [SCJA] and/or the inherent jurisdiction of the courts, the [CA], as the court of last resort in the Republic of Singapore, has the jurisdiction and power to reopen and set aside an earlier decision of its own and to reconstitute itself to rehear and/or reconsider the matters arising therefrom;

2. Consequently, a declaration that the [CA] does therefore have the jurisdiction and power to grant the reliefs sought by the [MC] in [SUM 3446/2009] …

The hearing in the court below

The MC's arguments

28 In the court below, the MC's case proceeded on the basis that the Present Action concerned "only one legal question", [note: 8] namely: [note: 9]

> [W]hether, *on the assumption* that its decision was arrived at in breach of natural justice, [the CA] has the jurisdiction to reopen and set aside a previous decision of its own as the nation's court of last resort. [emphasis added]

The MC's submission on this legal question was that the CA had both statutory and inherent jurisdiction to reopen and set aside a decision which it had made in breach of natural justice, and, thus, the declarations sought in the Present Action ought to be granted.

29 Apropos the CA's *inherent* jurisdiction, the MC submitted that it was "an independent and unwritten basis of jurisdiction, quite apart from statute or the Rules of Court". [note: 10] In the MC's view, the CA necessarily had inherent jurisdiction to reopen and set aside a decision which it had made in breach of natural justice because:

(a) there was a particular need for the apex court of any nation to have the jurisdiction to self-correct; and

(b) the courts, as masters of their own procedure, must have inherent jurisdiction to do justice on the particular facts of each case.

30 In support of the above submissions, the MC referred to (*inter alia*) the following authorities: *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117, O 92 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1, *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260, the House of Lords case of *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 ("*Pinochet (No 2)*"), the English Court of Appeal ("the English CA") case of *Taylor and another v Lawrence and another* [2003] QB 528 ("*Taylor*") and also the views of Prof Jeffrey Pinsler in "Inherent Jurisdiction Re-Visited: An Expanding Doctrine" (2002) 14 SAcLJ 1 ("Prof Pinsler's article").

31 The MC further submitted that there could be few situations more deserving of the exercise by the CA of its inherent jurisdiction to reopen and set aside its own decisions than a situation where the previous decision in question was rendered in breach of natural justice. This was because natural justice possessed a fundamental quality of the highest order, in that the twin pillars of natural justice and the overarching requirement of procedural fairness were fundamental to any modern concept of a fair hearing (citing Gerry Maher, "Natural Justice as Fairness" in *The Legal Mind: Essays for Tony Honoré* (Neil MacCormick & Peter Birks eds) (Clarendon Press, 1986) ch 6 at p 107). In this connection, it may be recalled that the twin pillars of natural justice are:

(a) the rule that no one may act as a judge in his own cause ("the bias rule"); and

(b) the rule that no person should be condemned without his having been heard and/or without his having been given prior notice of the allegations against him ("the hearing rule").

32 With regard to the *statutory* jurisdiction of the CA to reopen and set aside a decision which it had made in breach of natural justice, the MC submitted that the CA's decision in *Koh Zhan Quan Tony v Public Prosecutor and another motion* [2006] 2 SLR(R) 830 ("*Tony Koh*") showed that the CA had such jurisdiction by virtue of s 29A of the SCJA. In the MC's view, that section gave the CA

jurisdiction to "set aside any judgment (including its own) in appropriate circumstances", [note: 11] which would include jurisdiction to set aside any decision that the CA had made in breach of natural justice. It was argued that the doctrine of *functus officio*, which would preclude a court from reopening its decision on a case once it had disposed of that case, did not apply where the challenge to the CA's previous decision was brought on the basis of a procedural, as opposed to substantive, miscarriage of justice. In this respect, the MC submitted that the relief which it sought apropos the 2008 CA's judgment would not involve reopening the merits of that judgment.

33 The MC also emphasised "[t]he mission and spirit of s 29A(4) [of the SCJA]", [note: 12] and submitted that "where a breach of the rules of natural justice [was] alleged, the CA [was] not barred from, and indeed would, if anything, be obliged to rectify the miscarriage of justice". [note: 13] In this connection, the MC contended that justice had not been done in the 2008 appeal because it had been denied the right to be heard on the *Arnold* exception, which, in its view, was pivotal to the 2008 CA's decision.

34 With regard to *Arnold*, the MC contended that the case did not stand as authority for an "egregious error" exception to *res judicata* (even under English law); on the contrary, the correctness of a decision in law was irrelevant to its finality as between the parties concerned under the doctrine of *res judicata*. It was argued that there were strong policy reasons for not recognising an "egregious error" exception to *res judicata* in Singapore as such an exception would undermine certainty and confidence in the legal system: nothing could be more undesirable than to permit a litigant to re-litigate a decision made against it by the CA, which decision had every appearance of finality, in the hope that a differently constituted bench might be persuaded to take a view which its predecessor had rejected.

35 The MC submitted that the *Arnold* exception, far from being an "egregious error" exception to *res judicata*, was instead a narrow exception that was applicable only when there was "new material, whether new factual evidence or a subsequent change in the law, such as to amount to 'special circumstances' to avoid the usual doctrine of finality in litigation" [note: 14] [emphasis in original omitted] in the larger interest of justice. (As an aside, it may be noted that in the present appeal, the MC has gone further to contend that "[t]he *Arnold* exception cannot apply when the decision in question is that of an apex court".) [note: 15]

Lee Tat's arguments

36 Lee Tat's main submissions in the court below were that:

(a) the CA's jurisdiction and powers were determined by the SCJA; and

(b) once the CA had given a decision on a case before it, it was *functus officio* in so far as that case was concerned as it had no enabling jurisdiction under s 29A of the SCJA and/or no inherent jurisdiction to reopen and set aside its earlier decision.

In support of these submissions, counsel referred to (*inter alia*) the following authorities: *Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR(R) 529, *Abdullah bin A Rahman v Public Prosecutor* [1994] 2 SLR(R) 1017, *Lim Choon Chye v Public Prosecutor* [1994] 2 SLR(R) 1024, *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 and *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336.

37 In Lee Tat's view, s 29A of the SCJA did not confer on the CA *statutory* jurisdiction to reopen

and set aside its earlier decisions as the section applied only to matters relating to appeals from the High Court, and not to earlier decisions of the CA. Since the CA had no statutory jurisdiction to reopen and set aside its earlier decisions, it did not have *inherent* jurisdiction to do so either as such alleged inherent jurisdiction would clearly fall outside the scope of the CA's statutory jurisdiction as set out by the express words of the SCJA. In this regard, Lee Tat submitted that *Pinochet (No 2)*, one of the authorities cited by the MC apropos the CA's inherent jurisdiction (see [30] above), was not relevant as it was a case involving apparent bias, which had not been alleged by the MC in the Present Action.

38 Lee Tat further contended that *Pinochet (No 2)* (and also *Taylor*, another case cited by the MC) did not support the proposition that a court was obliged to ask all the parties to make submissions on matters which it had independently identified before it could rule on those matters. In any case, Lee Tat pointed out, the parties had in fact been invited by the 2008 CA, after the hearing of the 2008 appeal, to make written submissions on *res judicata*, abuse of process and the extinguishment of a right of way (see *GH (No 8)* at [17]). In the circumstances, Lee Tat submitted, it was within the competence of the 2008 CA to decide on the applicability of the *Arnold* exception without requiring counsel to make any submissions on this point.

The Judge's decision

39 The Judge, in a reserved judgment (*viz*, the First Instance Judgment), dismissed the Present Action. In order to preserve the nuances in his judgment, we reproduce in full below the relevant passages of the First Instance Judgment which set out his analysis of the doctrine of *res judicata* and the CA's jurisdiction:

> 4 … [W]hat is the predominant rule? If there is finality (*res judicata*) then there is no question of achieving individual justice for the parties because the finality principle outweighs the justice principle. If that were the case, it does not matter [whether] the previous court had committed a simple error or, as the 2008 [CA's] judgment … and Lord Keith in *Arnold* … described it – an "egregious error". The point is not whether the [CA] may correct an egregious error but whether it can correct an egregious error at all when the matter is *res judicata*. An outrageous or notorious (a dictionary meaning of "egregious") error ought to be corrected but only when the court has the jurisdiction to do it. The doctrine of *res judicata* serves to mark the point of finality; and the point of finality in litigation is that one does not envisage eventuality after finality. That would mean that after a matter is *res judicata* any egregious error, or, as alleged in this case, [any] decision made in breach of natural justice must be left to lie in respect of the same matter between the same parties. If challenges such as the present one … by the [MC] were to go on, the correction of the breach of natural justice might itself be challenged on the ground of the court having made an egregious error or another breach of natural [justice] … or [on] some other inventive ground importing similarly emotive, but vague sentiments. It is an important aspect of the function of law to be clear and not vague; to be precise and consistent so that it can be understood and followed. Even if the 2008 [CA's] judgment was wrong because it was itself made in egregious error, the case had ended with the final judgment of the final court of appeal; and I therefore need only repeat what was cited above [from [72] of *GH (No 8)*] – "the public interest in the finality of litigation ('the finality principle') outweighs the public interest in achieving justice between the parties ('the justice principle')".
>
> …
>
> 6 … *The [CA] is at full liberty to reverse its position and depart from the law if it thinks that the law was made as a result of an egregious (or any) error, but it can only do so in a different*

case. Final must be final – not almost final or conditionally final. To see some small justice done in an individual case may be at the cost of greater injustice unseen. The notion of doing "justice" may itself be a moot [point] as a result. … [T]he point I make here is that the overturning of a case when the matter is *res judicata* may not mean that justice was necessarily done. When two different coram of the [CA] ha[ve] reached opposing conclusions, who is to say which was right? And so, without finality, when would it end? In my view, if the complaint concern[s] only an error made by the [CA], egregious or otherwise[,] the matter ends there. Convening [the CA] to rule that the 2008 [CA's] judgment was wrong … would be to compound an error by repeating it.

7 [The MC], however, was advocating a different point. [It] argued that an error arising from a breach of natural justice transcend[ed] an egregious error. It is an attractive idea, but is it tenable? …

…

9 The inherent powers that [the MC] wants to urge the [CA] to exercise [are] much wider, and [are] similar to that in *Taylor* and *Pinochet (No 2)* where the respective courts held that even after final judgment had been delivered the court had an inherent power to reopen the case. These two cases were clearly decided on policy grounds since the phrases "inherent power" and "doing justice" have no clearly defined limits. "Inherent power" should not be used as though it were the joker in a pack of cards, possessed of no specific designation and used only when one [does] not have the specific card required. The same might be said of "doing justice" because one man's justice can be another man's injustice. "Inherent power" does not mean unlimited power, and if a substantive power to reopen a case on [the] merits is to be given, it must come expressly from the legislature. A court's "inherent power" is a useful residual power to overcome minor hitches or errors so as to give effect to the main judgment. Although the two English authorities [*ie*, *Taylor* and *Pinochet (No 2)*] support [the MC's] submission that the [CA] has the inherent power to correct a procedural wrong, I hesitate to hold that the same policy grounds should apply in our courts. First, the policy grounds in both *Taylor* and *Pinochet (No 2)* were not seriously questioned in those cases themselves. Whether it is policy or idiosyncrasy, a ruling will transcend its origin and become law over time. Secondly, in *Pinochet (No 2)* the House of Lords was moved by the apprehension that if the perception of apparent bias was not corrected there would be a loss of public confidence in the administration of justice. … Thus it seems to me that the ground for invoking the inherent jurisdiction of the court to rehear a substantive matter that [is] otherwise *res judicata* [is] one founded on the overriding need to uphold public confidence in the judiciary and the administration of justice. If that [is] so, as I think it is, then we cannot ignore the different grades of procedural wrongs. The apparent bias of the judge seem[s] to be the only one. Both *Taylor* and *Pinochet (No 2)* stand as direct authority for the principle that the apparent bias of the judge may justify the setting aside of a final judgment. There are different grades of procedural wrongs. Not all of them would justify setting aside a final judgment. The [MC]'s complaint before me on the improper procedure ground was … different from that in *Taylor* and *Pinochet (No 2)*. It was based on the complaint that the [MC] was not given the chance to advance [its] argument on a point which [it] now says was … crucial in the court's decision.

…

11 [Lee Tat]'s answer to *Taylor* and *Pinochet (No 2)* was based on the argument that the [CA] was a statutory creation. It thus derives its jurisdiction and power strictly from the enabling words of the statute and no more. It is a strong argument. The relevant statutory provision [is] s 29A of the [SCJA] … Lawyers often have difficulty with the words "and subject to the provisions of this Act" [in s 29A(4) of the SCJA]. Does it mean that the [CA] cannot arrogate to

itself "inherent powers" since strictly, Parliament had not reserved that power which it could have done very simply and in a single line? *Taylor* and *Pinochet (No 2)* too, were decided the way they were because there were no statutory provisions. I ha[ve] already expressed my doubts as to the applicability of *Taylor* and *Pinochet (No 2)*, but in any event, even if they represent an exception, the exception occupies a very narrow space and would be limited to the implicit power to set aside a final judgment and rehear the case only on the ground that otherwise it would seriously diminish public confidence in the integrity of the courts and the administration of justice. It will not apply to a case such as this where the only charge [is] that the judgment might well have been wrong on the merits, whether because of an egregious error or [because of] the failure to hear counsel's arguments.

[emphasis added]

40 The Judge's reasoning in the above quotation may be summarised as follows:

(a) The principle that there should be finality in litigation ("the finality principle") outweighed the principle that justice must be achieved between the parties ("the justice principle"). Therefore, there should be no exceptions to *res judicata*, except in the case of a judgment tainted by bias.

(b) The 2008 CA was wrong to depart from the finality principle in the 2008 appeal. But, even though the 2008 CA's decision was erroneous, the finality principle mandated that the decision was binding on the High Court and should not be departed from even by the CA itself.

(c) It followed that the MC should not be granted the declarations sought in the Present Action as the grant of those declarations would pave the way for a fresh coram of the CA to be convened to set aside the 2008 CA's judgment, when that judgment was *res judicata* as between the MC and Lee Tat. The Present Action must, therefore, be dismissed.

The present appeal

41 Prior to the hearing of the present appeal against the Judge's decision, this court informed counsel for the respective parties (via a letter from the Registrar dated 5 April 2010) that they were expected to be familiar with the entire history of the matter when they argued the appeal. In particular, the MC's counsel was instructed to address the CA on the arguments which the MC claimed it had not been given an opportunity to make in the 2008 appeal.

The MC's arguments

42 The MC's arguments before this court, as set out in the MC's written case dated 29 January 2010 filed for this appeal and the additional submissions which the MC tendered to this court, may be summarised as follows:

(a) The Judge was wrong to hold that the finality principle outweighed the justice principle. Such an approach was inimical to the fundamental constitutional role of the courts. It was also contrary to the decision of this court in *Tony Koh*, and perhaps contrary to even the 2008 CA's decision and case law around the world.

(b) Given that there was a right to natural justice, there must be a remedy for a breach of that right (citing *Shaughnessy, District Director of Immigration and Naturalization v United States Ex Rel Mezei* 345 US 206 (1953), *Lee Hsien Loong v Singapore Democratic Party and*

others and another suit [2008] 1 SLR(R) 757, *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"), *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597, *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404, *William Marbury v James Madison, Secretary of State of the United States* 5 US 137 (Cranch) (1803) at 163–166 and *Ex parte in the matter of the United States, Owner of the American steamship "Western Maid"* 257 US 419 (1922) at 433).

(c) The CA had inherent jurisdiction to set aside its own decisions made in breach of natural justice (citing Prof Pinsler's article at p 10, and also *Pinochet (No 2)* and *Taylor* apropos the English position).

(d) A decision made in breach of natural justice was invalid and was liable to be set aside *ex debito justitiae* (citing *Grafton Isaacs v Emery Robertson* [1985] AC 97 ("*Isaacs*"), which was followed here in *Sunny Daisy Ltd v WBG Network (Singapore) Pte Ltd* [2008] 4 SLR(R) 769 as well as in Malaysia in *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364 and *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 MLJ 201).

(e) The Judge's ruling that a breach of the hearing rule would not be a sufficient basis for the court to reopen and set aside a final judgment was an unjustified restriction of the principle established in *Pinochet (No 2)* and *Taylor*, which was that any *unfair* process would justify the setting aside by an apex court of its own judgment (citing *State Rail Authority of New South Wales v Codelfa Construction Proprietary Limited* (1982) 150 CLR 29, *Brogden v Arnold* [2003] NZAR 80 and R *v Nakhla (No 2)* [1974] 1 NZLR 453, which (in the MC's view) showed that an apex court always had jurisdiction to correct procedural errors because (*inter alia*) every court had a duty to abide by the rules of natural justice).

43 The MC emphasised that the Judge's decision was based on the erroneous premise that the MC was challenging the 2008 CA's decision on the merits and was contending that the 2008 CA erred in applying the *Arnold* exception to the Majority Judges' decision in the 2005 appeal – which was *not* in fact what the MC was seeking to do. The MC submitted that it was seeking, instead, to set aside the 2008 CA's decision on the ground of breach of natural justice, specifically, on the ground that the breach of the hearing rule in the 2008 appeal had resulted in manifest unfairness to the MC.

44 In his written note dated 19 May 2010 and his oral submissions at the hearing before us, counsel for the MC accepted that the 2008 CA was correct to hold that the Majority Judges erred in deciding in the 2005 appeal that:

(a) the change in Lee Tat's capacity from that of being solely a dominant owner in the First Action and the Second Action to that of being both a dominant owner as well as the Servient Owner in the Fourth Action did not make a difference to Lee Tat's rights in respect of the Right of Way; and

(b) issue estoppel applied to bar Lee Tat from raising the *Harris v Flower* issue in the Fourth Action.

This concession implies that the MC now accepts that the Majority Judges' decision in the 2005 appeal was wrong. At the same time, however, the MC also contends that the 2008 CA's decision (regardless of whether it was right or wrong) should be set aside as having been made in breach of the hearing rule in that the MC was not heard on the *Arnold* exception in the 2008 appeal.

45 The MC's counsel submitted that in the present appeal, the MC would only be seeking to persuade this court to reopen the 2008 CA's judgment: [note: 16]

> … to the limited extent of permitting [the MC]:
>
> (a) To argue the applicability and scope of the *Arnold* exception; and
>
> (b) To adduce evidence as to the "special circumstances" that [the MC] would rely upon in the context of the *Arnold* exception (including the hardship it would suffer in the reversal of the 2005 CA Decision [*ie*, the Majority Judges' decision in the 2005 appeal]),
>
> in relation to both of which [the MC] has not been heard.

46 The arguments which the MC wishes to make on "the applicability and scope of the *Arnold* exception" [note: 17] (in the event that the 2008 CA's decision is indeed reopened) are essentially the same as the arguments advanced before but unaddressed by the Judge (see [35] above). The MC has also made a further submission, *viz*, that the *Arnold* exception does not apply to the decisions of an apex court (see, likewise, [35] above).

47 Leaving aside for the moment the MC's argument that the *Arnold* exception does not apply to an apex court's decisions, "the 'special circumstances' that [the MC] would rely upon in the context of the *Arnold* exception" [note: 18] are as follows: [note: 19]

> (1) There was an expectation created from 1974 to 2004 on the basis of the Court decisions in the First and Second Actions that the [R]ight of [W]ay existed (*vis-à-vis* Lee Tat) for the benefit of the amalgamated lot [*ie*, the Grange Heights site].
>
> (i) The construction and design of [Grange Heights] – the condominium (apart from having a Grange Road address and being named after Grange Road) was built facing Grange Road with the kitchens facing St Thomas Walk.
>
> (ii) The other entrances are not suitable for emergency vehicles such as fire trucks to enter. Entering through St Thomas Walk would require a fire truck to go against the flow of traffic because of the low ceiling of the main lobby; similarly, entering through River Valley Grove would be impossible because of the low carpark ceiling.
>
> (iii) In October 1996, the Official Receiver offered only Lee Tat and [the MC] an option of bidding for the servient tenement [*ie*, the Servient Land]. Because the Official Receiver made it clear to [the MC] that the servient tenement would be sold subject to the [R]ight of [W]ay, it [*ie*, the MC] did not make efforts to bid [for]/purchase it. Instead, Lee Tat bought it but subject to the [R]ight of [W]ay. …
>
> (iv) The purchase of the servient tenement by Lee Tat on 27 January 1997 was recorded in an Indenture of Conveyance, which was registered on 29 January 1997. The Indenture of Conveyance specifically refers to an Order of Court dated 30 December 1996 (registered on 19 January 1997), which formally vested the servient tenement in the Official Receiver and record[ed] it as being subject to the [R]ight of [W]ay. …
>
> (v) Between January 1997 and 2004, Lee Tat took no action to challenge the existence of the [R]ight of [W]ay on the basis that it was now the servient tenement owner.

(2) This long-standing expectation further crystallized as a result of the 2005 CA Decision [*ie*, the Majority Judges' decision in the 2005 appeal]. Transactions of sale (about 13 purchases) and tenancies that took place thereafter were made on the basis that there was a right of way.

(3) Without the Grange Road access, there is serious financial prejudice as the value of Grange Heights is significantly lower … as a River Valley property.

(i) In 2005–2006, St Thomas Walk properties were selling at between about $600 and $1100 psf (Chestbright and Airview Towers respectively).

(ii) In 2006, Grange Road properties were selling at approximately $1800 psf (The Grangeford).

(4) Now that the issue is at the fore, the proprietors (at an EOGM held on 8 May 2010) and the MC are content with a limited right of way comprising a narrow footpath. This may enable the Court to achieve a just result. See: *Bracewell v Appleby* [1975] Ch 408; *Yickvi Realty Pte Ltd v Pacific Rover Pte Ltd* [2009] 4 SLR(R) 951, where the Courts fashioned a remedy that resulted in a just compromise between the parties' respective proprietary interests and rights.

Lee Tat's arguments

48 Before us, Lee Tat reiterated its arguments in the court below – namely, (a) the CA is *functus officio* after giving its decision on the case before it; and (b) the CA, whose jurisdiction and powers are delineated by the SCJA, does not have statutory jurisdiction to reopen and set aside its previous decisions, and therefore does not have inherent jurisdiction either in this regard.

49 With regard to the complaint by the MC that it was not heard on the *Arnold* exception in the 2008 appeal, Lee Tat's counsel argued that that did not constitute a breach of natural justice because, as a general principle, a court was not limited to considering only the cases cited by the parties (see *Pacific Recreation* at [32]). *A fortiori*, it would not be a breach of natural justice for a court to rely on a case or proposition that none of the parties had cited when there were other cases or propositions before the court on a point which was related to or broader than the point in issue (citing, in addition to *Pacific Recreation*, *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 478 (*per* Lord Simon of Glaisdale) and *Spring v Guardian Assurance Plc and Others* [1995] 2 AC 296 at 316 (*per* Lord Goff of Chieveley)).

50 With regard to the *Arnold* exception, Lee Tat's counsel contended that it could operate in special circumstances (see *Arnold* at (*inter alia*) 107, where Lord Keith of Kinkel referred to Sir James Wigram VC's statement in *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 that there might be "special cases" (at 115; 319) in which *res judicata* would not apply), and that the pertinent special circumstances were not limited to a change in the law, but included the emergence of new material which could not by reasonable diligence have been adduced in the earlier proceedings between the same parties. Lee Tat's counsel also referred to Neuberger LJ's statements in *Coflexip SA v Stolt Offshore MS Ltd (No 2)* [2004] FSR 708 ("*Coflexip SA (No 2)*") that "issue estoppel ha[d] become less strict over the last fifty years or so" (at [50]) and that "the decision in *Arnold* itself represented a change, or at the very least a significant development, in the law" (at [52]).

51 In addition, counsel for Lee Tat pointed out that there was "no foundational basis" [note: 20] for the Present Action. This was because the Present Action was premised on the assumption that the MC had not been heard on *res judicata* and the *Arnold* exception in the 2008 appeal, when the 2008 CA's directions to the parties to make submissions on the First Further Question and the Second

Further Question had in fact given the MC the fullest possible opportunity to address all the material issues considered by the 2008 CA. In other words, Lee Tat contended that there was no factual basis for the Present Action, and that the court was being asked to do something which it should decline to do, namely, to decide a hypothetical case.

52 Counsel for Lee Tat also urged this court to take into consideration the following forensic tactics of the MC in the previous proceedings between the parties:

(a) In the 2005 appeal, the MC relied on *Arnold* to argue that there were no special circumstances that prevented the operation of *res judicata*, which argument was accepted by the Majority Judges (see [25] of *GH (No 6)*). This showed that the MC was fully aware of the significance and relevance of *Arnold* and the *Arnold* exception at the time of the 2008 appeal (which was heard after the 2005 appeal). Yet, the MC chose not to refer to *Arnold* and/or the *Arnold* exception in any of the written submissions which it filed for the 2008 appeal. In the circumstances, it was "invidious" [note: 21] of the MC to allege that it had not been given the opportunity to be heard on the *Arnold* exception in the 2008 appeal. The true position, Lee Tat submitted, was that: [note: 22]

> The [2008] CA gave the [MC] as much as it gave [Lee Tat] virtually *carte blanche* to address it on all aspects pertaining to the issue of "res judicata" including the "issue-estoppel" rule, the exception to that rule and **Arnold** . [underlining and emphasis in bold in original]

(b) In the Fourth Action, the MC successfully persuaded both the High Court and the Majority Judges that Lee Tat was not entitled to raise the *Harris v Flower* issue because the 1992 CA had already decided the issue against Lee Tat in the 1992 appeal. However, the MC had in fact submitted in the 1992 appeal that the *Harris v Flower* issue was not relevant as Lee Tat was not the Servient Owner at that time. That argument was accepted by the 1992 CA, which meant that the *Harris v Flower* issue was *not* decided in the 1992 appeal.

(c) Prior to the hearing of the 2005 appeal, Lee Tat's counsel sought to ascertain from the MC's counsel whether the MC had argued in the 1992 appeal that the *Harris v Flower* issue was not relevant, but the MC's counsel did not respond to this query. According to Lee Tat's counsel, Lee Tat became aware that the MC had made such an argument only after reading the 2008 CA's judgment in *GH (No 8)*.

53 Lee Tat's final submission was that the 2008 CA's judgment was, in any event, plainly correct on the compelling ground that the 2008 CA had ruled against the MC on a separate and even more fundamental point, *viz*, the *Harris v Flower* issue – which concerned the rights of Lee Tat as the *Servient Owner* and the MC as the dominant owner of Lot 111-34 – was not *res judicata* because it had *never* been decided *on the merits* in all the previous actions between the parties and their respective predecessors in title prior to the 2008 appeal.

The issues to be decided in this appeal

54 In view of the reliefs sought by the MC in the Present Action, there are two questions which we have to decide in this appeal, namely:

(a) whether the CA has statutory jurisdiction under s 29A of the SCJA and/or inherent jurisdiction to reopen and set aside a decision which it made in breach of natural justice and rehear the matters dealt with in that decision; and

(b) if the CA has the aforesaid jurisdiction, whether the declarations sought by the MC in the Present Action should be granted.

We shall hereafter refer to these two questions as "Question (a)" and "Question (b)" respectively.

Question (a)

55 We can answer Question (a) quickly. In our view, the CA *has* inherent jurisdiction to reopen and rehear an issue which it decided in breach of natural justice as well as to set aside (in appropriate cases) the whole or part of its earlier decision founded on that issue. If the CA (or, for that matter, any other court) has decided an issue against a party in breach of natural justice, it cannot be said that the CA was fully apprised or informed at the material time of all the relevant considerations pertaining to that issue, and, therefore, the CA cannot be said to have applied its mind judicially to that issue. In other words, the CA would not have exercised its jurisdiction properly *vis-à-vis* that issue, and, therefore, it cannot to be said to be *functus officio* in the sense of having exhausted its power to adjudicate on that issue. Nothing in the SCJA prescribes for this situation, and we see no justification to circumscribe the inherent jurisdiction of this court (which would be the effect if we were to rule that the CA has no inherent jurisdiction to reopen an issue which it decided in breach of natural justice) as that could potentially result in this court turning a blind eye to an injustice caused by its own error in failing to observe the rules of natural justice.

56 A breach of natural justice, whether involving a breach of the bias rule or a breach of the hearing rule, is basically a procedural wrong because it denies the aggrieved party a full, fair and impartial hearing. Of course, not every breach of natural justice is equally serious. For this reason, we agree with the Judge that there are "different grades of procedural wrongs" (see the First Instance Judgment at [9] (reproduced earlier at [39] above)), and that not every procedural wrong entitles the aggrieved party to be reheard and/or to have a final judgment set aside.

57 As a matter of principle, where a decision is made in breach of the bias rule, that decision *must* be set aside and the matters dealt with therein reheard. A decision tainted by bias is a non-decision because it is not made by an impartial judicial mind, but is instead corrupted by the existence of a conflict of interest. Even apparent bias (as opposed to actual bias) is sufficient justification for a final judgment to be set aside *ex debito justitiae* (see *Pinochet (No 2)* as well as [9] of the First Instance Judgment) because if such a judgment is allowed to stand, that may affect public confidence in the Judiciary.

58 However, the same consideration does not apply to a decision made in breach of the hearing rule. The authorities relied on by the MC – *viz*, *Isaacs*, *Craig v Kanssen* [1943] KB 256 and *Kofi Forfie, Odikro of Marban v Barima Kwabena Seifah, Kenyasehene* [1958] AC 59 – do not contradict this distinction between a breach of natural justice involving the bias rule and a breach involving the hearing rule.

59 As a matter of principle, a breach of the hearing rule *does not* entail that the tainted decision *must* be set aside. Instead, it merely requires that: (a) the aggrieved party be given, *in appropriate cases*, the opportunity to be heard on the issues on which he was not heard; and (b) the court thereafter considers whether its previous decision was correct and, if it finds that that decision was not correct, either sets aside or rectifies (depending on what the circumstances of the case require) that decision (see further [60] below). In other words, where the hearing rule is breached, the aggrieved party has a *prima facie* right to be heard on the matters on which he has not been heard, *but only on those matters and not on any other matters in respect of which no allegation of breach*

of the hearing rule has been made. Natural justice does not require that the aggrieved party be over-compensated by being given more than what he claims he has been denied, *ie*, a fair hearing on the matters on which he was not heard. However, if a hearing on those matters will not change the ultimate outcome of the case (*ie*, if the aggrieved party will still lose the case even if he is given a hearing on the matters on which he was not heard), then the hearing would be in vain and an exercise in futility. In such a situation, the court would be entitled to exercise its discretion not to grant the aggrieved party a hearing on the matters on which he was not heard – as the Judge did in the court below on the ground that even if the 2008 CA's decision were wrong, it should still be *res judicata* as between the MC and Lee Tat.

60 Assuming that it is appropriate for the court to grant the aggrieved party a hearing on the issues on which he was not heard, the court has to go on to consider, after the hearing, whether to uphold, set aside or vary its earlier decision. In this regard, we find the following comments of this court pertinent even though they were made in the context of a breach of the hearing rule in arbitration proceedings (see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [91]):

> If … the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, *the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award*. [emphasis added]

61 We should add that in cases where a decision made in breach of natural justice (whether involving the hearing rule or the bias rule) is to be set aside, only the tainted part of that decision needs to be set aside. The other parts of the decision which are not tainted by the breach of natural justice would still stand and would be binding on the parties concerned.

Question (b)

62 Turning now to Question (b) (see sub-para (b) of [54] above), the Judge did not grant the MC the declarations sought in the Present Action because, in his view, the grant of those declarations would, at the highest, pave the way for a fresh coram of the CA to be convened to set aside the 2008 CA's judgment – something which the Judge felt should not be done because the 2008 CA's judgment, even if it were wrong, should be *res judicata* as between the MC and Lee Tat. The Judge felt that he ought not to provide an opportunity for another coram of the CA to compound the error made by the 2008 CA (namely, failing to apply *res judicata* to the Majority Judges' decision in the 2005 appeal) by reversing the 2008 CA's judgment. The objective of the Judge in so ruling was noble. But, was his decision correct in law?

63 The MC submitted that it was not because the Judge, in effect, went off on a tangent – *viz*, he proceeded on the erroneous premise that "the *'gravamen'* of [the MC's] application to set aside the 2008 CA['s] [d]ecision was that the 2008 CA was '***wrong*** *to have overturned'* the 2005 CA Decision [*ie*, the Majority Judges' decision in the 2005 appeal]" [note: 23] [emphasis in italics and bold italics in original], when the basis of the MC's application was "not the ***error*** arising from the breach of natural justice, but the breach of natural justice ***itself***" [note: 24] [emphasis in bold italics in original]. In our view, this criticism that the Judge decided the Present Action on the wrong premise is unfounded because the Judge did address the issue of whether a breach of natural justice by the CA justified the setting aside of a final judgment (see in this regard the First Instance Judgment at [7]–[11]). He held that "in cases other than cases of alleged bias of the judge, finality in a decision outweigh[ed] the individual interests of a particular litigant" (see the First Instance Judgment at [10]). In our view,

the MC really has no answer to this ground for dismissing the Present Action since it accords with its submissions that there should not be an "egregious error" exception to *res judicata* and that the *Arnold* exception does not apply to the decisions of an apex court.

64 The MC has also emphasised that in contending that the Judge went off on a tangent as described at [63] above, it is not arguing that the 2008 CA's decision was wrong. We find this submission disingenuous. Of course, the MC must be contending that the 2008 CA's decision was wrong. This is because the MC is, in effect, seeking to argue that if it had been given the opportunity to address the 2008 CA on the material issues in the 2008 appeal (or, to be more precise, on the *Arnold* exception specifically, since that is the issue which the MC alleges it was not heard on), the 2008 CA would not have decided the 2008 appeal in Lee Tat's favour, but would instead have upheld the Residents' right to use the Right of Way, even if it limited such right to use of the easement only as a footpath. This is precisely why the MC wishes to have the 2008 CA's decision set aside. In short, the MC is attempting to do precisely what it claims it is not doing – *viz*, challenging the 2008 CA's decision on the merits. It follows, all the more, that the MC has no answer to the Judge's reason for dismissing the Present Action (which was that the 2008 CA's decision should not be set aside even if it were wrong and/or were made in breach of natural justice).

65 We, of course, disagree with the Judge's insistence that *res judicata* is absolute and that "[f]inal must be final" (see [6] of the First Instance Judgment), save in cases involving a breach of the bias rule. As we decided in the 2008 appeal, *res judicata* is not absolute. In the circumstances and for the reasons stated in *GH (No 8)* at [73] (elaborated on at [95]–[97] below), justice is better than finality and the justice principle should prevail over the finality principle so as to avert the *grave injustice that would result if* res judicata *were applied*. This exception to *res judicata* – which is in essence the *Arnold* exception – is not a new exception. It was accepted in *Henderson v Henderson*, the *locus classicus* on *res judicata*, that there might be "special cases" (*per* Sir Wigram VC at 115; 319, in a passage which was cited in *Arnold* at, *inter alia*, 107) where *res judicata* would not apply. Reference may also be made to Neuberger LJ's statements in *Coflexip SA (No 2)* at [50] and [52] (reproduced earlier at [50] above). In our view, contrary to what the Judge feared, sanctioning a narrow exception to *res judicata* in the form of the *Arnold* exception will not necessarily lead to judicial anarchy or an unacceptable degree of uncertainty in the law. This is because, given the threshold of grave injustice intrinsic to the *Arnold* exception, the cases in which the exception can be applied will be few and far between. *Arnold* was one such case (see [87]–[89] below), and the same may be said of the 2008 appeal, given the circumstances before the 2008 CA (see [93]–[98] below).

66 Although we disagree with the Judge's underlying reason for dismissing the Present Action (which was that there should be no exception to the finality principle apart from cases where the bias rule was breached), we agree with the result reached by the Judge on the ground that the grant of the declarations sought by the MC will not serve any useful purpose. This is because the declarations are sought as a precursor to the hearing of SUM 3446/2009, in which the issue to be decided is whether the 2008 CA's decision should be set aside. It may be recalled that that decision was based on three separate and distinct grounds (see [26] above), namely:

(a) the *Harris v Flower* issue was not *res judicata*;

(b) the *Arnold* exception was applicable to the Majority Judges' decision in the 2005 appeal that Lee Tat was estopped from raising the *Harris v Flower* issue; and

(c) the Residents were not entitled to use the Right of Way for both access between Grange Road and Lot 561 as well as access between Grange Road and Lot 111-34.

67 In our view, it is pointless to set aside the 2008 CA's decision and grant the MC a hearing on the *Arnold* exception (*viz*, the issue which the MC claims it was not heard on in the 2008 appeal) because the rulings of the 2008 CA as set out at sub-paras (a) and (c) of [66] above entail that even if the ruling at sub-para (b) thereof were discounted, the outcome of the 2008 appeal would still be the same. In this regard, it bears reiteration that the MC has conceded before us that the ruling at sub-para (a) of the preceding paragraph is correct; *ie*, the MC now accepts that the Majority Judges erred in ruling in the 2005 appeal that the *Harris v Flower* was *res judicata* (see [44] above). We also note that the MC has not argued that the *Arnold* exception is applicable to the rulings set out at sub-paras (a) and (c) of the preceding paragraph. It follows that these two rulings are *res judicata* as between the MC and Lee Tat. Indeed, we would go further to state that if Lee Tat had been permitted to raise the *Harris v Flower* issue in the 2005 appeal (which, as just mentioned, the MC now accepts Lee Tat should have been allowed to do) and if the Majority Judges had ruled on the merits of that issue, they (and also Chao JA) would undoubtedly have decided (as the 2008 CA did in *GH (No 8)*) that the *Harris v Flower* principle prevented the Residents from using the Right of Way for access between Grange Road and Lot 561. Accordingly, the Judge's decision to dismiss the Present Action as an exercise in futility is essentially correct. The power of the court to grant a declaration is discretionary, and where the court feels that a declaration will serve no useful purpose, no declaration will be granted (see *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [74]).

Observations on the allegation by the MC that it was not heard on the Arnold exception in the 2008 appeal

68 What we have stated above is sufficient to dispose of this appeal. However, we think it is necessary for us to also comment on the assumption made by the MC in the Present Action – *viz*, the assumption that there was a breach of the hearing rule in the 2008 appeal in that the MC was not heard on the *Arnold* exception. This is because if this assumption is left unanswered, a reader of this judgment might think that the present appeal is being conveniently dismissed on technical grounds. That may in turn affect public confidence in the CA and, as a corollary, public confidence in the administration of justice in this country. For this reason, we propose to set out the factual matrix of the 2008 appeal so as to give the full and complete backdrop of the MC's allegation of breach of the hearing rule by the 2008 CA.

69 Mr Steinbock's affidavit, which was filed in support of SUM 3446/2009, contains assertions that:

(a) The reasons given by the 2008 CA for its decision in the 2008 appeal were not argued at the hearing of the appeal or otherwise canvassed before the 2008 CA. Lee Tat did not even cite *Arnold* or at any time argue that there was an "egregious error" exception to *res judicata*.

(b) None of the matters pivotal to the 2008 CA's decision were raised in the course of the 2008 appeal.

These are basically the complaints of the MC *vis-à-vis* the 2008 appeal. Although the second complaint refers to all the matters pivotal to the 2008 CA's judgment, the crux of that complaint is not that the 2008 CA erred in holding that the *Harris v Flower* issue was not *res judicata* (as mentioned at, *inter alia*, [44] above, the MC now concedes that this ruling is correct) or that the 2008 CA's ruling on the Residents' lack of entitlement to use the Right of Way (whether for the benefit of Lot 561 or for the benefit of Lot 111-34) was wrong, but that the 2008 CA's application of the *Arnold* exception was wrong and that if the MC had been heard on that exception, it could (or would) have persuaded the 2008 CA to decide otherwise. In other words, the substance of the MC's complaint concerns the *Arnold* exception, and the MC has used that part of the 2008 CA's judgment

which deals with this exception as a peg to hang its case for setting aside the *whole* of the 2008 CA's judgment.

70 We accept that the 2008 CA did not ask the MC to address it on the *Arnold* exception specifically – but, neither did it ask Lee Tat to do so. In that sense, neither party was heard on the *Arnold* exception, but only in that sense. Both parties were, however, aware that *res judicata* was in issue in the 2008 appeal. Indeed, *res judicata* loomed large in both the Fourth Action and the Third Action as Lee Tat's case in those two actions was that the *Harris v Flower* issue was not *res judicata* because it had not been decided *vis-à-vis* Collin/Lee Tat as the Servient Owner in either the First Action or the Second Action, both of which had been litigated by Collin/Lee Tat solely as a dominant owner.

71 The question which arises from the MC's allegation of breach of the hearing rule in the 2008 appeal is whether, taking into consideration the parties' respective submissions (both written and oral) in that appeal and the two further questions from the 2008 CA (*ie*, the First Further Question and the Second Further Question set out at, respectively, [24] and [25] above), there was sufficient material upon which the MC could have made submissions on: (a) the doctrine of *res judicata* generally; (b) exceptions to *res judicata*; (c) whether the *Harris v Flower* issue was *res judicata*; and (d) whether the Right of Way had been extinguished because of the drastic change in the character and the nature of use of Lot 111-34 as described in *GH (No 8)* at [102]–[105]. In our view, the material facts in this regard fall into four categories, namely:

(a) the parties' respective written cases for the 2008 appeal;

(b) the parties' respective submissions on the First Further Question and the Second Further Question;

(c) the MC's knowledge of the *Arnold* exception at the time of the 2008 appeal; and

(d) the parties' respective positions before the 2008 CA as to whether the *Harris v Flower* issue had already previously been decided on the merits.

The parties' respective written cases for the 2008 appeal

72 The written cases filed by Lee Tat and the MC respectively for the 2008 appeal show that both parties directly addressed the question of whether the *Harris v Flower* issue was *res judicata*.

73 In its written case filed on 7 May 2007, Lee Tat submitted as follows: [note: 25]

> The earlier decisions of the Court had focused on the contest of two dominant tenements and never decided *the issue of whether land not being the express beneficiary of a right of way [might] nevertheless exploit such right of way against the owner of the servient tenement*. [emphasis added]

74 In response, the MC, in its written case filed on 8 June 2007, contended:

> 36. … [T]he [Majority Judges'] decision in the [2005 appeal] itself makes [the MC's] entitlement to the [R]ight of [W]ay a matter that is *res judicata*. Even if, as Lee Tat claims, the [Majority Judges] had misinterpreted [the decision in] the Second Action (which, it is humbly submitted, is certainly not the case), the [Majority Judges'] decision … itself gives rise to issue estoppel on all the issues that Lee Tat had raised in the Fourth Action.

…

38. These issues [*ie*, the reliefs sought by Lee Tat in the Fourth Action (reproduced at [19] above)] were considered and dismissed in the Fourth Action. Hence, [the MC's] entitlement to the [R]ight of [W]ay has been unequivocally decided by these honourable courts.

…

122. … It is humbly submitted that Lee Tat's appeal must fail, not … least because:

…

122.9. Lee Tat's unrelenting insistence on the Issue [*ie*, the *Harris v Flower* issue] is[,] on any count, a blatant abuse of process. Lee Tat also cannot be allowed to side-step the real issue (of repair) at hand, and by a side-wind, mount a collateral attack on the earlier decisions.

[emphasis in original omitted]

75 The argument underlying the above quotation – *viz*, that Lee Tat was estopped from raising the *Harris v Flower* issue – was a constant refrain in the MC's written case for the 2008 appeal. It is thus abundantly clear that *res judicata* was very much in play before the 2008 CA, with the MC contending that the *Harris v Flower* issue was *res judicata* because it had already been decided against Lee Tat twice: first, by the 1992 CA in the 1992 appeal, and, second, by the Majority Judges in the 2005 appeal (who ruled that the 1992 CA had decided the *Harris v Flower* issue against Lee Tat).

The parties' respective submissions on the First Further Question and the Second Further Question

76 Lee Tat's and the MC's respective written submissions on the First Further Question and the Second Further Question likewise show that both parties were clearly aware that *res judicata* was a live issue in the 2008 appeal.

77 The First Further Question raised the issue of whether the MC was precluded by *res judicata* or abuse of process from asserting in the Third Action a right *vis-à-vis* Lee Tat to use the Right of Way for vehicular traffic in addition to pedestrian traffic, given that the 1992 CA and the Majority Judges had accepted (in, respectively, the 1992 appeal and the 2005 appeal) the MC's argument that the Residents had not substantially interfered with Lee Tat's enjoyment of the Right of Way because they used the Right of Way *only* as a footpath and not for vehicular traffic (see *GH (No 4)* at [23] and *GH (No 6)* at [24]).

78 In its written submissions filed on 27 September 2007 apropos the First Further Question, Lee Tat submitted: [note: 26]

If the [MC] wish[es] to enlarge the [R]ight of [W]ay for vehicular use, Lee Tat should be entitled to argue that the principle in Harris v Flower (1904) 91 LT 816 should now be applicable. *In addition, this Honourable Court should no longer be restricted by any of its earlier decisions*. [underlining in original; emphasis added in italics]

The italicised part of the above quotation might give the impression that Lee Tat was relying on the doctrine of *stare decisis*, as opposed to *res judicata*, in its written submissions on the First Further

Question. It is clear, however, from the overall tenor of those submissions that the doctrine invoked by Lee Tat was that of *res judicata*.

79 This was also the MC's understanding, as can be seen from the MC's reply to Lee Tat's written submissions on the First Further Question. The MC contended (*inter alia*) that any finding in the Second Action and the Fourth Action that the Residents had used the Right of Way only as a footpath related to "the state of affairs existing at that point in time[,] … [which was] not an unalterable state". [note: 27] The MC submitted (citing *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [34]) that this was significant because no issue estoppel could arise in changing circumstances. The MC further argued that even if the 1992 CA and the Majority Judges had found that the Right of Way could be used only as a footpath, such a finding would have been collateral to the main issue decided, which was the *Harris v Flower* issue. No issue estoppel could arise based on a collateral finding.

80 The Second Further Question raised the issue of whether the 2008 CA had the power to extinguish the Right of Way "[i]n view of the change in circumstances". [note: 28] Lee Tat submitted that the 2008 CA did have such power by virtue of s 29A of the SCJA, and contended that the Right of Way should be extinguished because, *inter alia*, given the change in circumstances since the 1919 Grant was made, the purpose for which the Right of Way had been granted no longer existed where Lot 111-34 was concerned.

81 The MC criticised Lee Tat's submissions as a "stubborn refusal to accept the basic doctrine of *res judicata*", [note: 29] and as being based on the erroneous notion that "the doctrine of *res judicata* somehow [did] not apply to cases which ha[d] reached [the CA]" [note: 30] [emphasis in original omitted]. The MC contended that the question of whether the Right of Way had been extinguished was a matter that had already been decided by the 1992 CA in the 1992 appeal and the Majority Judges in the 2005 appeal, and Lee Tat was merely attempting to re-litigate a point that was already *res judicata*. These arguments by the MC show that it knew that *res judicata* was a key issue in the 2008 appeal.

The MC's knowledge of the Arnold exception at the time of the 2008 appeal

82 Significantly, at the time of the 2008 appeal, the MC not only knew that *res judicata* was an important issue, but was also aware of, specifically, the *Arnold* exception. During the hearing of this appeal, we were informed by counsel for Lee Tat (and this was not denied by counsel for the MC) that in the 2005 appeal, the MC referred to *Arnold* and argued (successfully) that there were no special circumstances which could prevent *res judicata* from applying to the 1992 CA's decision in the 1992 appeal (see sub-para (a) of [52] above). The MC also referred the 2005 CA to *Henderson v Henderson*, [note: 31] a pertinent decision relied on by Lord Keith when he expounded the *Arnold* exception (see [50] above). In their written decision in *GH (No 6)*, the Majority Judges did not refer to *Henderson v Henderson*, but, significantly, they cited *Arnold* in accepting the MC's argument that "no 'special circumstances exception' existed … such as to prevent the operation of issue estoppel" (see *GH (No 6)* at [25]).

The parties' respective positions on whether or not the Harris v Flower issue was res judicata

83 It is evident from the foregoing that the MC could have made submissions on the *Arnold* exception to the 2008 CA if it had wanted to. Indeed, given the MC's position before the 2008 CA that the *Harris v Flower* issue was *res judicata* and given our adversarial system of trial, it would not have been unreasonable to expect the MC to have addressed the 2008 CA on possible exceptions to

res judicata – especially the *Arnold* exception – so as to pre-empt any potential rebuttal to its contention that the *Harris v Flower* issue was *res judicata*. Considering that the MC took precisely that pre-emptive step in the 2005 appeal (by citing *Arnold* as well as *Henderson v Henderson* to the 2005 CA), we find it surprising that the MC did not think it necessary and/or prudent to adopt a similar approach in the 2008 appeal, especially when the 2008 CA had indicated (via the qualification to the Second Further Question (see [25] above)) that Lee Tat might be permitted to *reopen* an issue which had already been ruled on in the Second Action (*viz*, the issue of whether the Right of Way had been lost as a result of the amalgamation of Lot 111-34 and Lot 561 to form the Grange Heights site). Indeed, one may argue that it is equally surprising that the MC is relying on its own omission to raise the *Arnold* exception in the 2008 appeal (despite being aware of that exception to *res judicata* and of the importance of *res judicata* in that appeal generally) as the basis for setting aside the 2008 CA's judgment on the ground that it (the MC) was not given the opportunity to be heard on the *Arnold* exception in that it was not asked to address the 2008 CA on the exception.

84 In comparison, given that Lee Tat's position in the 2008 appeal was that the *Harris v Flower* issue was not *res judicata*, it might reasonably be thought that there was no reason for Lee Tat to argue that the *Arnold* exception was not applicable. Such an argument would be relevant only if the *Harris v Flower* issue were *res judicata*, and, as just mentioned, Lee Tat's position in the 2008 appeal was that the issue was not *res judicata*.

Summary of our observations on the MC's allegation

85 To summarise our observations on the allegation by the MC that it was not heard on the *Arnold* exception in the 2008 appeal, whilst it is true that the MC was, in the literal sense, not heard on that exception, neither was Lee Tat. In view of the material facts outlined at [72]–[84] above, it would not be unreasonable for an observer to come to the conclusion that the MC in fact had the opportunity to address the 2008 CA on the *Arnold* exception. In our view, the real question for consideration is not whether the MC was heard on the *Arnold* exception in the 2008 appeal, but, rather, whether, having regard to the material facts which we have just discussed, the MC should have addressed the court on that exception.

The MC's submissions on the Arnold exception

8 6 *Vis-à-vis* the *Arnold* exception proper, the MC has made two submissions (see [35] above) which, in our view, merit some comment. The first is that the 2008 CA erred in regarding the *Arnold* exception as an "egregious error" exception to *res judicata*, when it was actually a narrow exception to *res judicata*. The second is that the *Arnold* exception does not apply to the decisions of an apex court. We do not find these submissions persuasive. To explain why we are of this view, it is necessary to first examine *Arnold* itself.

The decision in Arnold

87 The material facts of *Arnold* are as follows. The landlord granted the tenants a lease for a term of some 32 years, with rent reviews to take place at intervals of approximately five years. A dispute over the construction of the rent review clause arose at the first rent review. The matter was referred to an arbitrator, who construed the rent review clause against the landlord. The landlord then appealed to the English High Court. The appeal was heard by Walton J, who construed the rent review clause in a manner unfavourable to the tenants. The tenants applied to Walton J for leave to appeal to the English CA and for a certificate under s 1(7)(*b*) of the Arbitration Act 1979 (c 42) (UK) ("the requisite UK Arbitration Act certificate") that the case involved a question of law of general public importance or a question which, for some other special reason, should be considered by the

English CA. Walton J refused both applications. The tenants appealed to the English CA, which dismissed the appeal.

88 Subsequently, in two proceedings between other parties on similar rent review clauses, the English CA held that Walton J's construction of the rent review clause in the earlier action between the landlord and the tenants was wrong. When the next rent review between the landlord and the tenants came up, the tenants sought to reopen Walton J's decision in the previous action, which, as between them, would ordinarily have been *res judicata*. The issue went up to the House of Lords, which decided (in *Arnold*) that *res judicata* (whether in the form of cause of action estoppel or issue estoppel) was not absolute, and that the *special circumstances* in that case called for a departure from the strict doctrine of *res judicata* in order that justice might be done to the tenants.

89 The exact words used by Lord Keith to explain the House of Lords' reasoning were as follows (see *Arnold* at 109–110):

> … [T]he law [is] that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to [the] courts to recognise that in special circumstances[,] inflexible application of it may have the opposite result …
>
> It is next for consideration whether the further relevant material which a party may be permitted to bring forward in the later proceedings is confined to matters of fact, or whether what may not entirely inappositely be described as a change in the law may result in, or be an element in special circumstances enabling an issue to be re-opened. … Your Lordships should appropriately, in my opinion, regard the matter as entire and approach it from the point of view of principle. If a judge has made a mistake, perhaps a very egregious mistake, as is said of Walton J.'s judgment here, and a later judgment of a higher court overrules his decision in another case, do considerations of justice require that the party who suffered from the mistake should be shut out, when the same issue arises in later proceedings with a different subject matter, from reopening that issue?
>
> …
>
> In the instant case there was no right of appeal against the judgment of Walton J. because he refused to grant a certificate that the case included a question of law of general public importance. There can be little doubt that he was wrong in this refusal … I consider that anyone not possessed of a strictly legalistic turn of mind would think it most unjust that [the] tenant[s] should be faced with a succession of rent reviews over a period of over 20 years all proceeding upon a construction of [the] lease which is highly unfavourable to [them] and is generally regarded as erroneous. … There is much force also in the view that the landlord, if the issue cannot be reopened, would most unfairly be receiving a very much higher rent than [the rent which it] would be entitled to on a proper construction of the lease. … Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the [tenants] permission to reopen the disputed issue. …

The MC's conception of the Arnold exception is too narrow

90 It can be seen from the above extract from *Arnold* that Lord Keith's primary consideration in formulating the *Arnold* exception was that the exception was intended to serve the wider interests of justice, with the "overriding consideration in mind" (at 107, citing *Carl Zeiss Stiftung v Rayner & Keeler Ltd and Others* [1967] 1 AC 853 ("*Carl Zeiss Stiftung*") at 947 *per* Lord Upjohn) being "to work justice and not injustice" (see *Arnold* at 107, likewise citing *Carl Zeiss Stiftung* at 947). From this perspective, there is no reason to believe that Lord Keith meant to limit the application of the *Arnold* exception to cases where at least one of the two factors specified in *Arnold* – *viz*, "further material relevant to the correct determination of a point involved in the earlier proceedings, … being material which could not by reasonable diligence have been adduced in those proceedings" (at 109) and "a change in the law" (at 109), which factors have been paraphrased by the MC as, respectively, "new factual evidence [and] a subsequent change in the law" [note: 32] [emphasis in original omitted] – is present. In other words, the rationale which underlies the *Arnold* exception does not seem to support the MC's narrow conception of the scope of this exception.

91 In this regard, it is significant that *Arnold* is, strictly speaking, not a case where there was a change in the law after the decision which was said to give rise to an estoppel was made, except, perhaps, where the landlord and the tenants were concerned. Pertinently, there was no change in the law on the construction of the rent review clause which was before Walton J. Instead, what transpired was that Walton J construed that clause wrongly, and his erroneous decision was *res judicata* as between the landlord and the tenants. When the English CA, in subsequent cases involving similar rent review clauses, rejected Walton J's decision, the English CA did not change the law or make new law *vis-à-vis* the interpretation of rent review clauses of the type in issue in *Arnold*; it merely corrected Walton J's erroneous construction of that type of rent review clause.

92 As a result of these rulings of the English CA, Walton J's decision would cause grave injustice to the tenants if they were bound by it at the next rent review. In this regard, it is important to note that Walton J's decision, although only a decision of the English High Court, was equivalent to a decision of an apex court where the landlord and the tenants were concerned because Walton J refused to grant the tenants either leave to appeal or the requisite UK Arbitration Act certificate. The House of Lords was of the view that, given the circumstances, an exception should be made to *res judicata* because it was "most unjust that [the] tenant[s] should be faced with a succession of rent reviews over a period of over 20 years all proceeding upon a construction of [the] lease which [was] highly unfavourable to [them] and … generally regarded as erroneous" (see *Arnold* at 110).

93 The legal position confronting Lee Tat at the time of the Third Action (prior to the 2008 CA's ruling in the 2008 appeal) was similar to that confronting the tenants in *Arnold*. The Majority Judges' decision in the 2005 appeal (*viz*, that the *Harris v Flower* issue was *res judicata* because the 1992 CA had decided it on the merits in the 1992 appeal) was clearly wrong because the 1992 CA had not in fact decided the *Harris v Flower* issue on the merits and, further, not all the requisites of issue estoppel were present in the 2005 appeal. The result of the Majority Judges' decision was to perpetuate "grave injustice" (see *GH (No 8)* at [81]) to Lee Tat as the Servient Owner so long as the Residents had the right to use the Right of Way contrary to the terms of the 1919 Grant, and it was this consideration which led the 2008 CA to hold that it was justifiable to invoke the *Arnold* exception in the 2008 appeal.

94 In our view, given the concern with justice which underlies the House of Lords' decision in *Arnold* and the 2008 CA's decision in the 2008 appeal, there does not seem to be any reason to confine the application of the *Arnold* exception to the narrow ambit espoused by the MC.

The 2008 CA did not regard the Arnold exception as an "egregious error" exception

95 In *GH (No 8)*, the 2008 CA expressly stated (at [81]) that "[t]he Majority Judgment [*ie*, the Majority Judges' decision in the 2005 appeal] contained an egregious error". The MC understood this statement to mean that the 2008 CA applied the *Arnold* exception based solely on the ground of the Majority Judges' egregious error in the 2005 appeal. That was not, however, how the 2008 CA approached the *Arnold* exception. The egregious error of the Majority Judges was merely the starting point of the 2008 CA's inquiry into whether there were special circumstances in the 2008 appeal that warranted the application of the *Arnold* exception. After its inquiry, the 2008 CA answered this question in the affirmative.

96 The exact reasoning of the 2008 CA on this point was as follows (see *GH (No 8)*):

> 80 In the present case, the circumstances that may warrant the application of the *Arnold* exception are the following:
>
> (a) Neither the [High Court] nor the [1992] CA in the Second Action decided the Main Issue [*ie*, the *Harris v Flower* issue] … on the merits … As such, the Majority Judges in the [2005 appeal] held – wrongly (and contrary to the dissenting judgment of Chao JA) – that the Main Issue had been decided in the Second Action …
>
> (b) The Majority Judges held that Lee Tat was precluded by the doctrine of issue estoppel from raising the Main Issue in the Fourth Action even though not all the essential elements of issue estoppel were satisfied …
>
> (c) Notwithstanding the decision of the Majority Judges, it is likely that there will be continuing litigation between Lee Tat and the Residents on many issues which have yet to be resolved, such as the type of use which the Residents may lawfully make of the Right of Way. In particular, the question of whether the Residents, who had used the Right of Way "only as a footpath" (see [GH (No 4)] … at [23]) at the time of the Second Action, may now use this easement for vehicular traffic has not been decided (see [*GH (No* 7)] … at [36]–[37]). Given this likelihood of further litigation between the parties, we agree with Lord Keith's statement in *Arnold* … at 110 that the public interest in seeing an end to litigation (which would entail upholding the operation of issue estoppel to the Majority Judgment [*ie*, the Majority Judges' decision in the 2005 appeal]) is of little weight in these circumstances.
>
> (d) Even if the Majority Judges were right in holding that the Main Issue had been decided in the Second Action, the decision in the Second Action as the Majority Judges interpreted it (*viz*, that the Residents could use the Right of Way for the benefit of not only Lot 111-34 but also Lot 561) would have been contrary to established law, a point which Chao JA noted in his dissenting judgment (see [*GH (No 6)*] … at [74]). Therefore, in holding that Lee Tat was estopped by the decision in the Second Action from litigating the Main Issue in the Fourth Action, the Majority Judges effectively perpetuated an erroneous legal position *vis-à-vis* the MC's rights over the Servient [Land].
>
> (e) The Majority Judges did not notice that the MC made contradictory arguments in the Fourth Action, as compared to the Second Action, on the question of whether the Main Issue had been decided in the Second Action. In the Second Action, the MC successfully argued (with respect to the *Harris v Flower* principle) that Lee Tat had no standing to raise the Main Issue as the latter was not the owner of the Servient [Land]. In other words, in the Second Action, the MC succeeded in its submission that the Main Issue could not be decided in that action. In the Fourth Action, however, the MC took the converse position and argued

that not only had Lee Tat raised the Main Issue in the Second Action, but that issue had also been decided in the Second Action (see [*GH (No 6)*] at [13]). The Majority Judges accepted the MC's argument, with the result that an estoppel arose against Lee Tat in the Fourth Action *vis-à-vis* the Main Issue.

(f) Even if Lee Tat were allowed to raise the Main Issue in this appeal [*ie*, the 2008 appeal] and even if it were to then succeed in its case on this issue, the Residents would not be inconvenienced in not being able to use the Right of Way for access between their apartments on Lot 561 and Grange Road. This is because the Residents can still reach Lot 561 via St Thomas Walk …, which they have in fact used ever since Grange Heights was completed … Further, as we noted … above, the Residents may also use River Valley Grove for access to Lot 561.

(g) As a result of the Majority Judgment, the current legal position *vis-à-vis* the Main Issue is that "[i]t was decided in the [Second Action] that it was lawful for the [R]esidents ... to use the [S]ervient [Land] as a [footpath] to access Grange Road and *vice versa*" (see [*GH (No 6*)] at [16]). This has in turn prevented Lee Tat from making optimal use of the Servient [Land] in terms of developing it in conjunction with the two dominant tenements that Lee Tat owns (*viz*, Lot 111-32 and Lot 111-33) – something which Lee Tat would be able to do if it were permitted to litigate the Main Issue and if it were to then succeed in its case on that issue.

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

[emphasis added]

97 The 2008 CA's approach mirrored that of the House of Lords in *Arnold*, where Lord Keith did not apply the criterion of egregiousness to sieve out mistakes of a lesser degree in respect of which no exception to *res judicata* should be made, but instead used the expression "a very egregious mistake" (at 109) as the starting point of an inquiry into whether "considerations of justice require[d] that the party who suffered from the mistake should be shut out … from reopening [the] issue [in respect of which the mistake was made]" (at 109; also quoted at [76] of *GH (No 8)*).

98 It may also be noted that the 2008 CA did not find that the special circumstances before it were *the same* as the circumstances before the House of Lords in *Arnold*, but held, instead, that there was "sufficient similarity" (*see GH (No 8)* at [81]) between the two sets of circumstances. A material factor (absent in *Arnold*) which the 2008 CA took into account was the fact that in the 2005 appeal, the MC advanced a legal argument on the *Harris v Flower* issue which it knew (or, at least, ought to have known) was unmeritorious – namely, the argument that the *Harris v Flower* issue was *res judicata* as it had already been decided against Lee Tat by the 1992 CA. As mentioned earlier (see, *inter alia*, [21] above), this argument was in direct opposition to the MC's argument on the

Harris v Flower issue in the 1992 appeal, where the MC had contended – successfully – that Lee Tat, not being the Servient Owner at that time, could not raise the *Harris v Flower* issue. In the 2005 appeal, the MC managed to persuade the Majority Judges to accept its submission that the *Harris v Flower* issue was *res judicata* – a decision which the MC now concedes was wrong (see, *inter alia*, [44] above). In our view, this factor transcends the sort of "special circumstances" which Lord Keith had in mind in his exposition of the *Arnold* exception. It may be argued, by way of rebuttal, that, given our adversarial system of trial, it was open to the MC to make whatever submissions it deemed appropriate to its case in the Fourth Action as the court could and would have rejected those submissions which it considered unmeritorious. We do not agree with this argument. Counsel should always adhere to the highest standard of advocacy and refrain from tendering to the court arguments which they know or should know are lacking in merit and/or contrary to established law.

99 In this connection, it is also pertinent to note that during the hearing of this appeal, evidence emerged that in the 2005 appeal, the MC appeared to have deliberately suppressed (by omission) the fact that its submissions on the *Harris v Flower* issue in that appeal (*ie*, the 2005 appeal) were contradictory to its submissions on that same issue in the 1992 appeal (see sub-para (c) of [52] above). In our view, this evidence may be said to exacerbate the MC's conduct in advancing to the 2005 CA a contradictory argument on the *Harris v Flower* issue (as compared to its argument on that issue in the 1992 appeal), and may be regarded as "new material" [note: 33] [emphasis in original omitted] which justifies the 2008 CA's decision to apply the *Arnold* exception even on the MC's narrow conception of this exception. This evidence may also be viewed as evidence of a special circumstance of an egregious nature in that the MC's conduct in the 2005 appeal led the Majority Judges to hold – wrongly (as the MC has now conceded) – that the *Harris v Flower* issue was *res judicata*.

The Arnold exception applies to an apex court's decisions as well

100 As mentioned earlier (see [35] above), another submission which the MC made before this court (although not in the court below) *vis-à-vis* the *Arnold* exception is that the exception does not apply to the decisions of an apex court. We are unable to see why the *Arnold* exception should be thus limited since the doctrine of *res judicata* is not based on the hierarchical status of the court which made the decision that is said to give rise to an estoppel, but is instead based on the finality principle, which applies to all court decisions that have become final, either because they have not been appealed against or because they have been finally and fully disposed of on appeal.

The twists and turns in the litigation over the Right of Way

101 Before we conclude this judgment, we wish to make one final observation on this protracted saga of litigation over the Right of Way. The law on easements is well-established where the rights of dominant owners *inter se* are concerned, and likewise *vis-à-vis* the rights as between a dominant owner and a servient owner. The scope of the 1919 Grant (as regards the Dominant Lands entitled to the benefit of the Right of Way) was not in dispute; neither was the *Harris v Flower* principle. These factors should have produced a straightforward and clear-cut judgment on the rights of the parties (and their respective predecessors in title) *vis-à-vis* the Right of Way at the various stages of ownership of the Servient Land. This, however, did not turn out to be the case. In the Fourth Action, the MC exploited its (and also HLH's) earlier success against Collin/Lee Tat in the First Action and the Second Action by asserting that the *Harris v Flower* issue had already been decided against Collin/Lee Tat in those two actions (when the issue had not in fact been decided) and was thus *res judicata* for the purposes of the Fourth Action (when it was not). This argument was misleading, but, nevertheless, the Majority Judges accepted it (wrongly, as the MC has now conceded) on the basis of what, in their view, was decided in the 1992 appeal. The result was that the MC secured for itself

a right which it was in fact not legally entitled to have – namely, the right to use the Right of Way for pedestrian traffic between Grange Road and Lot 561. In the Third Action (which was decided after the Fourth Action), the MC sought to extend this right to cover *vehicular* traffic, but failed before the 2008 CA, which not only reaffirmed the *Harris v Flower* principle, but also applied that principle in ruling on the rights *inter se* of the MC (as the dominant owner of Lot 111-34) and Lee Tat (as the Servient Owner) in respect of the Right of Way.

102 As mentioned earlier (at [3] above), the 2008 CA intended its decision to bring finality to this long-running dispute over the Right of Way. However, that was not to be. Aggrieved by the "drastic change in what [it hitherto] believed had been [its] land law rights", [note: 34] the MC filed SUM 3446/2009 to set aside the *whole* of the 2008 CA's decision on the ground that it was not heard on the *Arnold* exception by the 2008 CA – ignoring entirely, in this regard, the implications of the 2008 CA's rulings that: (a) the *Harris v Flower* issue was not *res judicata* as it had previously never been decided on the merits; (b) the Residents were not entitled to use the Right of Way for access between Grange Road and Lot 561 because of the *Harris v Flower* principle; and (c) the Residents were also not entitled to use the Right of Way for access between Grange Road and Lot 111-34 because that easement had been extinguished by operation of law where Lot 111-34 was concerned. The incongruity of the MC's grievance speaks for itself when all these circumstances are taken into consideration.

Summary of our rulings and our conclusion

103 In summary, there are only two questions which we need to decide in this appeal, *viz*, Question (a) and Question (b) (see [54] above). Our rulings on these two questions are as follows:

(a) The CA has inherent jurisdiction to reopen and set aside its own decisions made in breach of natural justice and rehear the matters dealt with in such decisions. How this jurisdiction is to be exercised depends on the nature of the breach – a breach of the bias rule will entitle the aggrieved party to have the judgment set aside *ex debito justitiae* and the matters dealt with therein reheard, whilst a breach of the hearing rule will (in appropriate cases) entitle the aggrieved party to a hearing on the matters on which he was not heard, with the court deciding only after such a hearing whether the impugned judgment is to be set aside.

(b) Regardless of which rule of natural justice is breached, if the impugned decision is indeed to be set aside, only the tainted part of the decision (as opposed to the entire decision) needs to be set aside.

(c) The grant of the declarations sought by the MC in the Present Action will not serve any useful purpose for the reasons stated at [66]–[67] above.

104 For these reasons, we affirm the Judge's decision to dismiss the Present Action. This appeal is thus dismissed with costs here and below as well as the usual consequential orders.

[note: 1] See para 22 of Mr Ivan Steinbock's affidavit filed on 29 June 2009 ("Mr Steinbock's affidavit") (at vol 2, p 46 of the Core Bundle filed by the MC on 29 January 2010 ("ACB")).

[note: 2] See ACB vol 2, p 33.

[note: 3] See ACB vol 2, pp 237–239.

[note: 4] See Originating Summons No 825 of 2004 filed by Lee Tat on 26 June 2004.

[note: 5] See p 40 of the certified transcript of the notes of evidence of the hearing before the 2008 CA on 23 August 2007.

[note: 6] See the letter dated 18 February 2008 from the Registrar of the Supreme Court ("the Registrar's 18 February 2008 letter").

[note: 7] See ACB vol 2, pp 35–36.

[note: 8] See para 1 of the MC's written submissions dated 7 October 2009 ("the MC's 7 October 2009 written submissions") (at ACB vol 2, p 165).

[note: 9] *Ibid*.

[note: 10] See para 33 of the MC's 7 October 2009 written submissions (at ACB vol 2, p 175).

[note: 11] See para 3(b) of the MC's 7 October 2009 written submissions (at ACB vol 2, p 166).

[note: 12] See para 3(b)(iii) of the MC's 7 October 2009 written submissions (at ACB vol 2, p 166).

[note: 13] *Ibid*.

[note: 14] See para 28 of the MC's 7 October 2009 written submissions (at ACB vol 2, p 174); see also para 27.2 of the Appellant's Case dated 29 January 2010 filed by the MC ("the Appellant's Case").

[note: 15] See para 27.2 of the Appellant's Case.

[note: 16] See para 3 of the written note dated 19 May 2010 of the MC's counsel ("the MC's 19 May 2010 written note").

[note: 17] See para 3(a) of the MC's 19 May 2010 written note.

[note: 18] See para 3(b) of the MC's 19 May 2010 written note.

[note: 19] See para 8(b) of the MC's 19 May 2010 written note.

[note: 20] See para 7 of the Respondent's Case dated 26 February 2010 filed by Lee Tat.

[note: 21] See para 11 of the written outline dated 19 May 2010 of Lee Tat's oral submissions ("Lee Tat's 19 May 2010 outline submissions").

[note: 22] See para 12 of Lee Tat's 19 May 2010 outline submissions.

[note: 23] See para 31 of the Appellant's Case.

[note: 24] See para 32 of the Appellant's Case.

[note: 25] See Contention 2 at p 15 of Lee Tat's written case for the 2008 appeal.

[note: 26] See p 10 of Lee Tat's written submissions filed on 27 September 2007 (at vol 4, p 331 of the Supplemental Record of Appeal filed on 9 February 2010 ("Supplemental ROA")).

[note: 27] See para 33 of the MC's written submissions filed on 4 October 2007 apropos the First Further Question (at Supplemental ROA vol 4, p 746).

[note: 28] See the Registrar's 18 February 2008 letter.

[note: 29] See para 2(ii) of the written submissions filed by the MC on 17 March 2008 for the Second Further Question (at Supplemental ROA vol 4, p 917).

[note: 30] See para 2(ii) of the written submissions filed by the MC on 17 March 2008 for the Second Further Question (at Supplemental ROA vol 4, pp 917–918).

[note: 31] See para 85 of the Respondent's Case dated 30 December 2004 filed by the MC for the 2005 appeal.

[note: 32] See, *inter alia*, para 27.2 of the Appellant's Case.

[note: 33] *Ibid*.

[note: 34] See para 18 of Mr Steinbock's affidavit (at ACB vol 2, p 45).