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EASEMENT—A PROPRIETARY INTEREST IN THE SERVIENT TENEMENT?

Wee Siew Bock v. Chan Yuen Yee Alexia Eve[1]

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I. INTRODUCTION

The Court of Appeal in the recent case of *Wee Siew Bock* laid down the legal proposition that "a dominant owner has *no* proprietary interest in the [servient] land".[2] This, it is respectfully submitted, raises doubts as to the true nature of an easement. This particular proposition is unfortunate as it will be demonstrated that an easement is indeed a proprietary interest in the servient land.[3]

II. NATURE OF AN EASEMENT

An easement in the words of Gray & Gray:[4]

> [C]omprises either a positive or a negative right to derive some limited advantage from the land of another. The easement must be annexed—that is, its benefit must be attached—to one parcel of land (the 'dominant tenement') and must be exercisable over another parcel of land (the 'servient tenement'). The easement entitles the dominant owner to use the servient land in a particular way or, indeed, to prevent the owner of the servient land from using his own land in a particular way.

In short, an easement has also been described as "either a right to do something or a right to prevent something"[5] being done on the servient land.

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1 [2012] 3 S.L.R. 1053 (C.A.) [*Wee Siew Bock*].

2 *Ibid*. at para. 64.

3 It is not the intention of this comment to discuss the other aspects of the decision in *Wee Siew Bock*.

4 K. Gray & S. F. Gray, *Elements of Land Law*, 5th ed. (Oxford: Oxford University Press, 2009) at para. 5.1.4.

5 J. R. Gaunt & P. Morgan, eds., *Gale on Easements*, 18th ed. (U.K.: Sweet & Maxwell, 2008) at para. 1-78.

III. Effect of Easement Validly Created and Acquired

A two-stage test must be satisfied before a right can be enforced as an easement. First, it is trite that the right concerned must possess the characteristics of an easement. These essential qualities of an easement were laid down in *Re Ellenborough Park*,[6] the *locus classicus* on the subject: (i) there must be a dominant and a servient tenement; (ii) the easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit; (iii) the dominant and servient tenements must be owned or occupied by different persons; and (iv) the right claimed must be capable of forming the subject-matter of a grant.[7] These common law precepts equally apply to easements under the *Land Titles Act*.[8] As provided thereunder, the interest in question must be one recognised by law as an easement,[9] and it must be expressed to be for the benefit of the dominant tenement, being land owned by a person other than the servient owner.[10] The nature of the easement, the extent of the land burdened by the easement, and the dominant tenement, among others, must also be clearly indicated.[11] The dominant tenement and servient tenement are defined to mean, respectively, the land to which the benefit of an easement has been made appurtenant and the land which is subject to the burden of an easement.[12]

Having established that the right has the essential characteristics of an easement, the second stage of the test requires one to go further to determine whether the easement has been created or acquired in the manner provided by law or in equity.

Under the *Land Titles Act* which provides for the Torrens system of land registration, easements can only be created or acquired by registration[13] or be implied as provided for in the *Land Titles Act*.[14] It is only upon registration that the relevant instrument is effective to pass the interest in the form of an easement in the land.[15] The registered easement is also conferred the quality of indefeasibility under the *Land Titles Act*.[16] Where the easements had existed before the land was brought under the *Land Titles Act*, section 46(1)(ii) therein provides that as subsisting easements they will bind the registered title as an overriding interest. Outside of the *Land Titles Act*, at common law, easements may be created or acquired in a variety of ways.[17]

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6 [1956] Ch. 131 at 140 (C.A.).

7 For a discussion of these requirements, see Gray & Gray, *supra* note 4 at paras. 5.1.22-5.1.67; C. Harpum, S. Bridge & M. Dixon, eds., *Megarry & Wade: The Law of Real Property*, 8th ed. (U.K.: Sweet & Maxwell, 2012) at paras. 27-004-27-025.

8 Cap. 157, 2004 Rev. Ed. Sing. [*Land Titles Act*].

9 *Ibid*., s. 95(1)(a).

10 *Ibid*., s. 95(1)(b).

11 *Ibid*., s. 97(3).

12 *Ibid*., s. 94(1).

13 *Ibid*., ss. 97, 101.

14 *Ibid*., ss. 98, 99.

15 *Ibid*., ss. 45(1), (2).

16 *Ibid*., s. 46(1). See also the definition of "proprietor", *ibid*., s. 4(1). The concept of indefeasibility was explained by Lord Wilberforce in *Frazer v. Walker* [1967] 1 A.C. 569 at 580, 581, a Privy Council case on appeal from New Zealand, to mean the immunity from attack by adverse claim to the land or interest in respect of which a registered proprietor enjoys. In other words, no adverse claim (except as specifically admitted by statute) may be brought against him.

17 See Gray & Gray, *supra* note 4 at paras. 5.2.1-5.2.86; Harpum, Bridge & Dixon, *supra* note 7, c. 28; Tan Sook Yee, Tang Hang Wu & Kelvin F. K. Low, eds., *Tan Sook Yee's Principles of Singapore Land*

Once the two-stage test is satisfied such that an easement is duly created and acquired, it will "annex a benefit to the dominant tenement (and a corresponding burden to the servient tenement) and therefore [has] the potential to affect the successors in title of either tenement."[18] This proprietary character of an easement will now be considered in greater detail.

IV. Easement as a Proprietary Interest

That an easement is a proprietary interest in the servient tenement is further explained by Gray & Gray in these words: "The dominant owner thus holds a certain limited quantum of property in the land over which his right is exercisable; and his proprietary interest in this servient tenement is known as an easement."[19] Butt similarly describes an easement as "a proprietary right enjoyed by the owner of land to carry out some limited activity on another person's land".[20] A recent decision of the Singapore High Court in *Botanica Pte Ltd v. Management Corporation Strata Title Plan No 2040*[21] categorised an easement as a species of real property that is "parasitic upon the land".[22] In *Frontfield Investment Holding (Pte) Ltd v. Management Corporation Strata Title Plan No 938*,[23] the High Court recognised an easement as part "of a bundle of property rights belonging to a landowner [which] cannot be easily discarded".[24] It has also been observed to the same effect that "[s]ince an easement… represents for the dominant owner an important and valuable *proprietary right*, the courts have been slow to hold that such rights (if otherwise unlimited in their terms) are brought to an end by subsequent events".[25] The emphasis once again is on the proprietary character of an easement which, being a property interest, is enforceable against the world as opposed to an interest or right which is merely personal in nature and is binding as between the immediate parties to a transaction and no further.[26]

Given the proprietary character of an easement, it has the capacity to affect third parties. Thus, a duly created and acquired easement has the effect of imposing a burden on the successors in title of the owner of the servient tenement and conferring an equivalent benefit on the successors in title of the owner of the dominant tenement. As aptly put, "[an easement] is a proprietary, not a personal, right and will therefore bind successors to the servient land and enure for the benefit of successors to the

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Law, 3rd ed. (Singapore: LexisNexis, 2009) at 633-653. See also *Conveyancing and Law of Property Act* (Cap. 61, 1994 Rev. Ed. Sing.), ss. 6, 53, 60.

[18] Gray & Gray, *ibid.* at para. 5.3.1.

[19] Gray & Gray, *ibid.* at para. 5.1.5, citing, *inter alia*, *Willies-Williams v. National Trust* (1993) 65 P. & C.R. 359 at 361 *per* Hoffmann LJ (easement itself represents "'land' vested in the proprietor of the dominant tenement"). See also Harpum, Bridge & Dixon, *supra* note 7 at para. 27-001.

[20] P. Butt, *Land Law*, 6th ed. (Sydney: Thomson Lawbook Co, 2010) at para. 16 07.

[21] [2012] 3 S.L.R. 476 (H.C.).

[22] *Ibid*. at para. 46, citing *London & Blenheim Estates Ltd v. Ladbroke Retail Parks Ltd* [1992] 1 W.L.R. 1278 at 1283 (Ch.).

[23] [2001] 2 S.L.R.(R.) 410 (H.C.).

[24] *Ibid*. at para. 44.

[25] Gray & Gray, *supra* note 4 at para. 5.2.87 [emphasis added].

[26] Lord Wilberforce was of the view that a property right or interest is one that is "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability": see generally *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175 at 1247G-1248A (H.L.). See also critique by K. Gray, "Property in Thin Air" (1991) 50 Cambridge L.J. 252.

dominant land".[27] This is reflected in the *Land Titles Act*, which provides for an existing registered interest, such as an easement, to bind a subsequent purchaser who becomes the registered proprietor of the servient land.[28] And upon registration of a transfer of land to which an easement is appurtenant, the easement shall pass to the transferee without any express mention in the transfer.[29]

In holding that a dominant owner has no proprietary interest in the servient tenement, the Court of Appeal in *Wee Siew Bock* had relied on a passage in the book entitled *The Singapore Torrens System*[30] authored by John Baalman, which reads as follows:

> The owner of land who grants an easement does no more than to part with a fraction of his dominion over the servient land. He simply enables the grantee to do that which, without the grant, would have been unlawful; in other words, to commit what otherwise would have been an act of trespass, or of nuisance. The grantor continues to be the owner of the soil, and the only obligation which rests on him is to refrain from doing anything which would substantially interfere with the enjoyment of the easement by the grantee. Thus if the grantor of a right of way wishes to use the way himself he can do so without needing any express provision in the grant, for the simple reason that he is the owner of the soil. And he can allow other persons to use it also, either informally, or by granting them easements. In fact the number of additional licences or easements which a servient owner can create is limited only by the test above mentioned—*i.e.* whether the additional grants increase the burden on the servient land to an extent (*e.g.* by congesting traffic on a right of way) which substantially interferes with the rights of the original grantee.

Was the Court of Appeal correct in summarising from Baalman's passage above that a dominant owner has no proprietary interest in the servient tenement in the form of an easement? It is respectfully submitted that on a closer reading of Baalman's passage, no such proposition as stated by the Court of Appeal can be found therein. This is not surprising considering that Baalman's passage above was not intended to be an exhaustive exposition of the law on easement. With due respect, Baalman was merely describing, in the passage, the nature and extent of an easement *simpliciter* which a dominant owner has over the servient tenement without going into the conceptual and jurisprudential aspect of whether an easement is or is not a proprietary interest.

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[27] Gaunt & Morgan, *supra* note 5 at para. 1-01. See also E. H. Burn & J. Cartwright, eds., *Cheshire and Burn's Modern Law of Real Property*, 18th ed. (Oxford: Oxford University Press, 2011) at 634 ("Easements… are property rights: they attach to the land in respect of which the right is exercisable (generally referred to as the *servient tenement*) so as to burden it in the hands of successive owners.")

[28] *Land Titles Act*, *supra* note 8, s. 46(1): "… any person who becomes the proprietor of registered land… shall hold that land free from all encumbrances, liens, estates and interests *except such* as may be *registered* or notified in the land-register…" [emphasis added]. See also *ibid*., ss. 94(1), 97(3).

[29] *Ibid*., s. 101(1) and so long as it subsists, an easement shall continue to be appurtenant to every part of the dominant tenement (*ibid*., s. 101(3)). See also *ibid*., s. 63(1): "The proprietor of an estate in land… may transfer the same by an instrument of transfer in the approved form, and upon… registration… the estate or interest of the transferor… *together with all easements… shall pass to and be vested in the transferee thereof as proprietor*." [emphasis added].

[30] J. Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (Singapore: Govt. Printer, 1961) at 178, 179.

Notwithstanding that the Court of Appeal correctly articulated that the servient owner "does *not* part with ownership and/or all of his ownership rights in relation to the [servient tenement and that] he merely parts with a *fraction* of his dominion rights over the [servient tenement]" and that the dominant owner "only acquires a *limited interest* over the [servient tenement]",[31] it is clear, in light of the discussion above, that the dominant owner does indeed have a proprietary interest in the servient tenement by way of an easement which is enforceable against third parties.

Did the Court of Appeal intend to refer to ownership when it used the words "proprietary interest"? This would be consistent with the law on easements that a dominant owner has no right of ownership to the part of the servient land over which the easement exists.[32] However, given that the word "ownership" was used elsewhere in the judgment[33] and could have been similarly used in this particular instance but was not suggests that this was not so intended by the court.

That the dominant owner has a proprietary interest is not inconsistent with another legal proposition laid down by the Court of Appeal, namely, that a dominant owner "can only prevent actions that will substantially interfere with his reasonable enjoyment of the easement."[34] This is because each deals with a different matter: the former is concerned with the binding effect of an easement on third parties while the latter involves a determination of the scope and extent of a dominant owner's right of enjoyment of an easement on the servient land.

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[31] *Supra* note 1 at paras. 60, 61.

[32] See *Reilly v. Booth* (1890) 44 Ch. D. 12 at 26 (C.A.); *Copeland v. Greenhalf* [1952] Ch. 488 at 498; *Re Ellenborough Park*, *supra* note 6 at 175, 176 (whether the grant was "inconsistent with the proprietorship or possession of the alleged servient owners"); *Butler v. Muddle* (1995) 6 B.P.R. 13984 at 13986 (an easement is not "the equivalent of ownership" of the servient land). That an easement is no more than a right over land and not a right to possession of it can also be seen in *Copeland v. Greenhalf* and *Re Ellenborough Park*.

[33] See *supra* note 1 at paras. 60, 66.

[34] *Ibid*. at para. 64.