EASEMENTS AND COVENANTS IN SABAH

Tan Kam Cheong v. *Stephen Leong Kan Song and Anor.*[1]

Holt C.J. once criticised that selection of old English reports collectively known as the Modern Reports in that "they make us [The judges] out to be a parcel of blockheads".[2] There are moments in reading the above case, when one wonders whether any such assistance from the reporter is required. It is, in any event provided: *Re Nisbet and Potts' Contract*[3] is twice referred to as *Re Nosbett and Pitt's Contract,* and there are glaring discrepancies between the judgment and the headnote. Be that as it may, the primary interest of the case, small though it is, is in the analysis by the Federal Court of easements and restrictive covenants. To borrow a phrase from Sam Goldwyn, if Holt C.J. were alive today, he would turn in his grave.

The facts of the case were refreshingly simple. The dispute arose from the sale by a common vendor of a seven-storey commercial building in Sabah, held on a 999 year lease, to two separate purchasers, A and B. Both sales seem to have taken an inordinately long time to complete, during most of which period both parties were in occupation, but the transfers were finally registered on the same day in 1971. A bought the ground and first floors, B the remaining 5. The water for the entire building was supplied from tanks on the top floor and it was agreed, orally and later in writing[3a] between A and the vendor, that A should have access via the building's common staircase, to the top floor in order to inspect the tanks. However B (the appellant) who wanted to use his five floors as an extension to his adjacent hotel began, with the approval of the planning authority, to make structural alterations to the building involving the sealing and eventual demolition of the staircase. The result was that A's agreed route to the top floor could not be used. When A (after a considerable lapse of time), objected, B offered an alternative route via the adjacent building, his hotel. However A's response was to bring this action to assert his claim to the agreed access to the tanks.

A was claiming an easement of right of way via the common staircase; a restrictive covenant binding on B and preventing him from interfering with A's access to the top floor; and the rights of a co-owner as against B. At first instance A's claim was upheld; a mandatory injunction was issued and damages of $70,000 were awarded. On appeal, the Federal Court held that there was a restrictive covenant, imposed by means of a scheme of development: but the imposition of an injunction was reversed and damages were reduced to $5,000, the court being satisfied that suitable alternative access was available.

[1] [1980] 1 M.L.J. 36.
[2] *Slater* v. *May* (1704) 2 Ld. Ray M. 1071 at 1072.
[3] [1906] 1 Ch. 386.
[3a] The agreement, so far as is relevant, provided that all owners of the other floors should have free access to the roof, that the staircase should be opened to use by the respective owners, and be kept clean, hygienic and maintained by them and that the stairs should be jointly maintained by them in equal proportions.

To deal with the claim to an easement first, the Federal Court did not deal with this altogether satisfactorily. There was no doubt that the four traditional properties of an easement were present. The court seems to have rejected the claim on two grounds:[4] firstly that it lacked precision, and secondly that the two properties formed one unit held under one title. As to the first, it is not clear why a claim to the use of a staircase, contained in a written agreement, should be any less "precise" than any other means of access long recognised by the law. As to the second, it would seem to mean that a tenant could never have an easement against his landlord, or against another tenant of the same landlord, which is clearly not the case.[5] Not surprisingly, no authority was cited here. The court did not even consider the possibility of an easement of necessity (which would have solved the problem of how such a right of way was acquired). Most cases of necessity deal with a situation where the owner of a piece of property is somehow cut off from other property that he owns. That was not strictly the case here, the roof belonging to B, the owner of the sixth floor. However the case seems analogous with *Wong* v. *Beaumont Properties*[6] where a tenant was held to have a right to install and maintain a ventilation system on his landlord's retained premises so as to enable him to run a restaurant on the demised premises without contravening the local health regulations and, indeed the terms of the lease itself. The question then would be whether access by the staircase was necessary as a matter of fact, in view of the alternative access from the adjacent hotel. A would not be able to maintain a claim to a way of necessity on the ground that the alternative access was inconvenient[7] (here his main objection to the route via the hotel was that it was frequented by prostitutes and his reputation would suffer if he was seen to be making regular visits). Here however, the alternative way was used only by permission, and that cannot defeat a claim to an easement of necessity.[8] This seems, then to be one possible way of deciding the case.

In fact the court held that there was a right of access via the staircase not by virtue of an easement but by way of a restrictive covenant contained in the purchase agreement between the vendor and A. It was held that the arrangement between the vendor, A, and B constituted a scheme of development and that on that basis the agreement between A and the vendors was binding on B.[9] This is really rather bizarre. There is no evidence of any sort of "scheme" being contemplated by the parties; there was no evidence of a division into lots of the sort contemplated by *Elliston* v. *Reacher*[10] (though, to be sure, that is no longer regarded as essential).[11] More to the point, the essence of a scheme, namely a system of "mutually enforceable restrictions in the interests of *all* the purchasers and their successors"[12] is missing. If a development scheme were to be implied

4 [1980] 1 M.L.J. 36 at pp. 38-39.
5 See, e.g. *Wright* v. *Macadam* [1949] 2 K.B. 744.
6 [1965] 1 Q.B. 173.
7 *Titchmarsh* v. *Royston Water Co. Ltd.* (1899) 81 L.T. 673.
8 *Barry* v. *Hasseldine* [1952] Ch. 835.
9 [1980] 1 M.L.J. 36 at pp. 39-41.
10 [1908] 2 Ch. 374.
11 *Baxter* v. *Four Oaks Properties Ltd.* [1965] Ch. 816.
12 Megarry and Wade, The Law of Real Property, 4th ed. 1975, p. 770.

wherever a building is divided in this way and a covenant of this sort taken, the result would be quite extraordinary. Another odd point about the court's approach is that the need to decide the existence of a scheme will usually only arise if at all in the context of the passing of the benefit. A here was the original covenantee, so that question did not arise. The only question was the running of the burden, and that would seem to be answered positively: the covenant was made in the name of the servient owner and his successors in title, and it touched and concerned the land. It was however, partly positive in nature in that it required the stairs to be maintained. That aspect could not be enforced.

The third holding of the court is equally difficult to support. This was that A and B were co-owners and that the interference with the staircase by B transgressed A's rights as a tenant in common.[13] Here the court seems to be referring back to its earlier statement that the property was one unit. (Incidentally, if easements are ruled out by this "fact", why are restrictive covenants treated differently?) It is clearly erroneous to suggest that the owners of separate parts of the same building are necessarily co-owners. The headnote contains the even more fantastic statement that A and B were joint tenants. If this were true, it would mean that on the death of one of the purchasers, his share would pass to the other.

All in all, the court did not deal very satisfactorily with the case, even if the end result was justifiable. Two major questions, as to the possibility of a way of necessity, and as to whether the covenant was "restrictive", were not discussed at all, while the court became enmeshed in such irrelevancies as building schemes and tenancy in common. In a way it is regrettable that there has been no appeal; at least we might then be given a clear statement of the law.

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[13] [1980] 1 M.L.J. 36 at p. 41.