Fragrance Realty Pte Ltd *v* Rangoon Investment Pte Ltd and others [2013] SGHC 70

Case Number : Originating Summons No 678 of 2012

Decision Date : 28 March 2013

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Ong Lian Min David and Lim Leng See (David Ong & Co) for the plaintiff; Hong May Leng Stephanie and Edwin Sim (Lexton Law Corporation) for 1st defendant; Mak Kok Weng (Mak & Partners) for the 2nd to 4th, 6th to 8th, 12th to 21st, 24th to 30th defendants.

Parties : Fragrance Realty Pte Ltd — Rangoon Investment Pte Ltd and others

Land – Adverse possession

Land – Easements – Acquisition

Land – Easements – Characteristics

28 March 2013

Belinda Ang Saw Ean J:

Introduction

1 This application *vide* Originating Summons No 678 of 2012 ("OS 678/2012"), concerned a strip of land with an area of about 92.2m^2, being part of Lot 6219X, Mukim 25 and situated at 340 Geylang Road, Singapore ("the Property"). I shall refer to the strip of land in question as the "encroached area". Fifteen years ago, the very same encroached area was the subject matter of an adverse possession claim in proceedings between the former registered owner of the Property, Shell Eastern Petroleum (Pte) Ltd ("Shell"), and the defendants in Originating Summons No 827 of 1997 ("OS 827/1997"). OS 827/1997 was dismissed in favour of the defendants in that case ("the OS 827 defendants"). Shell did not appeal against the decision of Warren L H Khoo J ("Khoo J") in *Shell Eastern Petroleum (Pte) Ltd v Goh Chor Cheok and others* [1999] 3 SLR(R) 236 ("*Shell Eastern*").

2 OS 678/2012 is a sequel to the litigation commenced by Shell against the OS 827 defendants, who were the subsidiary proprietors of a block of flats in a development known as Amazing Inn situated at Lorong 16 Geylang, Singapore. This block of flats is adjacent to the Property, and to the south side of the Property is a brick wall, which Khoo J described as a retaining wall in *Shell Eastern*. For consistency, I shall likewise refer to this brick wall as the "retaining wall". This retaining wall, it is now accepted, was erected by the developers of Amazing Inn in 1961. It is also accepted that the retaining wall was erected on land inside the boundary line of the Property. The encroached area consists of the area between the retaining wall and the boundary line of Amazing Inn. Shell sold the Property to the plaintiff, Fragrance Realty Pte Ltd ("Fragrance Realty"), on 10 November 2010. Fragrance Realty wanted to recover the encroached area, and in July 2012, commenced OS 678/2012 against Rangoon Investment Pte Ltd ("Rangoon Investment") and 29 other defendants. Subsequently, Fragrance Realty discontinued proceedings against the 22nd and 23rd defendants on 3 August 2012.

Counsel for Fragrance Realty, Mr David Ong ("Mr Ong"), informed the court that the 5th, 9th and 10th defendants were not opposing the present originating summons (OS 678/2012). Fragrance Realty was proceeding against Rangoon Investment, who was represented by Ms Stephanie Hong, and the remaining 24 defendants who were represented by Mr Mak Kok Weng ("Mr Mak"). For convenience, Rangoon Investment and the remaining 24 defendants are hereinafter collectively referred to as "the present defendants". The individual names of the present defendants can be found in Annexure A to this Grounds of Decision. The present defendants are the current subsidiary proprietors of Amazing Inn.

3 Fragrance Realty sought, *inter alia*: (a) a declaration that the present defendants' adverse title to the encroached area had been extinguished; (b) an order that the present defendants vacate the encroached area as well as demolish and set back the retaining wall; and (c) damages as a consequence of the present defendants' encroachment. For convenience, the precise prayers sought by Fragrance Realty in OS 678/2012 are set out in Annexure A to this Grounds of Decision.

4 Whilst some of the present defendants are the same as the OS 827 defendants, others are the successors-in-title of the remaining OS 827 defendants. The present defendants sought to argue that they had possessory title to the encroached area by reason of adverse possession. In the alternative, the present defendants claimed that they had acquired an easement by prescription over the encroached area.

5 An oral decision on OS 678/2012 was handed down on 20 March 2013. I now set out the full grounds for my decision.

Undisputed facts

6 Fragrance Realty is in the business of real estate development. As stated, on 10 November 2010, it purchased the Property from Shell, which had previously used the Property as a petrol station.

7 In 1961, the developers of Amazing Inn erected a retaining wall (*ie*, the retaining wall described at [2] above) for the development. This retaining wall was erected on the Property, and, as mentioned at [2] above, the encroached area is the area between the retaining wall and the boundary line of Amazing Inn. Since 1961, the residents of Amazing Inn have used the encroached area to park their cars and store their personal belongings in an aluminium shed put there.

8 It appears that Shell did not object to the encroachment until 1996 (see [37] below). I should first explain that on 26 November 1992, the Property was brought under the Land Titles Act (Cap 157, 1985 Rev Ed) ("the 1985 LTA"), the then equivalent of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the 2004 LTA"), and a qualified title was issued in respect of it. On 2 May 1996, the caution on the qualified title was cancelled pursuant to an application made by Shell.

9 By the time Shell commenced OS 827/1997 to recover the encroached area, the doctrine of adverse possession had already been abolished by the Land Titles Act 1993 (Act No 27 of 1993) ("the 1993 LTA"), which replaced the 1985 LTA. Nonetheless, the OS 827 defendants still raised a claim of adverse possession to challenge OS 827/1997.

10 In *Shell Eastern*, Khoo J dismissed Shell's application, finding that the OS 827 defendants' adverse title was valid notwithstanding: (a) their failure to lodge a caveat under the 1993 LTA to protect their adverse title (see [13] below); and (b) the fact that Shell's title to the Property had become unqualified upon its application to cancel the caution on its qualified title. Khoo J was

doubtful as to whether the OS 827 defendants' interests were disclosed at the time Shell applied for the caution on its title to be removed (see [12] below).

The adverse possession argument

Legislative history

11 As this case concerns the application of the 2004 LTA, it is useful to outline the history of this Act at the outset. There was first the Land Titles Act (Cap 276, 1970 Rev Ed). In 1985, a revised edition, *viz*, the 1985 LTA, was published. Then, the 1993 LTA, which came into operation on 1 March 1994, abolished the doctrine of adverse possession and made significant changes to the law on adverse possession. Subsequently, further revised editions of the 1993 LTA came into being in 1994 (*viz*, the Land Titles Act (Cap 157, 1994 Rev Ed) ("the 1994 LTA")) and 2004 (*viz*, the 2004 LTA). It should be borne in mind that while the 2004 LTA applies in the present case, reference will be made in this Grounds of Decision to previous versions of the legislation and certain sections of the applicable provisions referred to now appear in a different form.

The decision in Shell Eastern

12 Mr Mak relied solely on the decision in *Shell Eastern* to assert the present defendants' adverse title to the encroached area. It was common ground that the encroached area was the same strip of land that was in dispute in *Shell Eastern*. In *Shell Eastern*, Khoo J held that as the OS 827 defendants' title to the encroached area by adverse possession had crystallised in 1973 before the Property was brought under the Torrens system to become registered land, s 177(3) of the 1993 LTA applied to preserve the OS 827 defendants' rights as adverse possessors. In particular, Khoo J seemed to be influenced by the ease with which the caution on the qualified title of Shell, the registered proprietor of the Property, could be unilaterally cancelled by Shell to the detriment of any subsisting interests of the OS 827 defendants. Khoo J found that Shell knew of the encroachment on the Property by the retaining wall and yet applied to cancel the caution on its qualified title (see *Shell Eastern* at [31]). While Khoo J did not find fraud or lack of *bona fides* on the part of Shell since this was not argued, he noted that "it would be only too easy for a registered proprietor to make an application, *ex parte*, to the Registrar to have a caution cancelled without disclosing any subsisting un-notified encumbrances, and to then claim to hold the land free of them" (see *Shell Eastern* at [32]). Based on this reasoning, Khoo J concluded that "the cancellation of a caution on the application of the original proprietor cannot be reliably treated as a definitive event to bring about indefeasibility in the way that a sale to a purchaser ... would be" (see *Shell Eastern* at [32]).

13 Accordingly, Khoo J held at [12] of *Shell Eastern* that:

> ... The failure of the [OS 827] defendants to lodge a caveat would only have had an adverse effect on them in relation to a purchaser from [Shell]. *Vis-à-vis* [Shell] as the original registered proprietor against whom the [OS 827] defendants had acquired title by adverse possession, the absence of a caveat had no effect on the [OS 827] defendants' title.

14 The learned judge reiterated his conclusion at [35] of *Shell Eastern*, which reads as follows:

> It is my conclusion, therefore, that the [OS 827] defendants' *adverse title*, which had matured long before the land was brought under the provisions of the Land Titles Act, *remains valid* notwithstanding the fact that they never lodged any caveat while the land was subject to qualified title and notwithstanding that [Shell's] title has since become unqualified as a result of the cancellation of the caution. *The [OS 827] defendants' title, however, stands on an extremely*

precarious footing. It is exposed to the risk of being over-reached by a purchaser from [Shell], as it has not been notified on the register. That is a consequence to which all persons who have an interest in registered land which is not within the exceptions in s 46 [of the 1993 LTA] or which has not been notified on the register, are exposed. Whether the [OS 827] defendants can still protect their interest by lodging a caveat in accordance with the general provisions of s 115 is not a matter before me. [emphasis added]

15 It is quite clear that *Shell Eastern* was an *in personam* judgment. There is a fundamental distinction between judgments *in rem* and judgments *in personam* or *inter partes* judgments. A judgment *in rem* determines the status of a particular subject matter and is binding on the world at large, including third parties (see *Payna Chettiar v Low Meng Seng and others* [1998] 1 SLR(R) 657 at [24] and *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2006 Reissue) at para 120.209). On the other hand, a judgment *in personam* is *inter partes* and is conclusive only as between the parties and their privies of its existence, its date and its legal consequences (see *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR(R) 405 at [21] and *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2006 Reissue) at para 120.208). Although *Shell Eastern* concerned the right to real property, it was clear from the terms of Khoo J's decision that the decision only bound Shell and the OS 827 defendants. In that case, the OS 827 defendants' title was held to be valid against Shell as the original registered proprietor, but not against a third-party purchaser from Shell (see *Shell Eastern* at [12] and [34]).

16 As stated, Shell did not appeal against Khoo J's decision. Hence, the rights which the OS 827 defendants acquired as a result of the *Shell Eastern* decision were created by the decision itself. The OS 827 defendants' position after the *Shell Eastern* decision was *sui generis*. Their rights over the encroached area were akin to but not entirely consistent with those of licensees, in that their rights involved exclusive possession of the encroached area and were irrevocable as long as Shell remained the registered proprietor of the Property.

17 Notwithstanding Khoo J's use of the phrase "defendants' adverse title" in [35] of *Shell Eastern*, no proprietary interest over the encroached area was actually conferred on the OS 827 defendants; their rights were enforceable only against Shell pursuant to Khoo J's judgment, and a third-party purchaser from Shell could overreach their "title". Moreover, the holding in *Shell Eastern* was quite narrow: Khoo J did not grant any positive relief and merely dismissed Shell's application, expressly declining to consider whether the OS 827 defendants could still somehow protect their adverse title by lodging a caveat in the approved form (see *Shell Eastern* at [35]). In the present originating summons (OS 678/2012), the rights of Fragrance Realty and the present defendants had to be determined afresh according to the current prevailing law, *ie*, the 2004 LTA.

Absence of a protective caveat

18 The present defendants did not dispute that no caveat had been lodged to protect their interests as adverse possessors of the encroached area. However, they relied on *Shell Eastern* as well as the case of *Liwen Holdings Pte Ltd v Ng Ker San and another and other actions* [2001] 1 SLR(R) 743 ("*Liwen Holdings*") as authority for the proposition that since their title by adverse possession had crystallised long before the Property became registered land, their adverse title was preserved and could not be overreached by a subsequent purchaser who, in this particular case, knew about the encroachment before it bought the Property from Shell.

19 For ease of reference, I set out briefly those provisions in the various predecessor versions of the 2004 LTA that are relevant to adverse possession. Before the 1993 LTA came into operation on 1 March 1994, an adverse possessor of unregistered land could acquire possessory title, provided that

at least 12 years had elapsed since the date of commencement of the adverse possession (see ss 9(1) and 18 of the Limitation Act (Cap 163, 1985 Rev Ed) ("the Limitation Act")). The 1993 LTA abolished the doctrine of adverse possession, albeit with certain savings provisions for possessory rights which had already crystallised. With regard to unregistered land, s 177(3) of the 1993 LTA effectively preserved title acquired by adverse possession which had already crystallised as at 1 March 1994. Section 177(3) of the 1993 LTA provided as follows:

> (3) Nothing in this section [*ie* s 177, which amended the Limitation Act to preclude an action to recover land from an adverse possessor] shall —
>
> (*a*) enable any action to be brought which was barred by the Limitation Act immediately before the commencement of the [1993 LTA] (referred to in this subsection as the appointed day);
>
> (*b*) affect any action commenced before the appointed day; or
>
> (*c*) revive any title to land which was extinguished by the operation of the Limitation Act in force immediately before the appointed day.

20 With regard to registered land, s 50 of the 1993 LTA (which now appears, *mutatis mutandis*, as s 50 in the 2004 LTA) precluded the acquisition of title by adverse possession. Section 50 of the 2004 LTA now provides that:

> Except as provided in section 174(7) and (8), no title to land adverse to or in derogation of the title of a proprietor of registered land shall be acquired by any length of possession by virtue of the Limitation Act (Cap. 163) or otherwise, nor shall the title of any proprietor of registered land be extinguished by the operation of that Act.

21 Sections 174(7) and 174(8) of the 2004 LTA, the savings provisions in respect of registered land, read as follows:

> (7) Where at any time before 1st March 1994 a person —
>
> (*a*) was in adverse possession of any registered land; and
>
> (*b*) has lodged an application for a possessory title to the land under the provisions of the repealed Act [*ie* the 1985 LTA] and the application has not been withdrawn but is on that date pending in the Land Titles Registry,
>
> the application shall be dealt with in accordance with the provisions of the repealed Act in force immediately before that date.
>
> (8) Where at any time before 1st March 1994 a person —
>
> (*a*) was in adverse possession of any registered land; and
>
> (*b*) was entitled to lodge an application for a possessory title to the land under the provisions of the repealed Act which were in force immediately before that date,
>
> he may, within 6 months of that date make an application to court for an order to vest the title in him or lodge an application for a possessory title to the land and the application shall be dealt

with in accordance with the provisions of the repealed Act in force immediately before that date.

22 In *Liwen Holdings*, the adverse possessors' title crystallised before the land was converted to registered land in June 1994. No caveat was lodged and the land was subsequently sold to the plaintiff. The learned judge in *Liwen Holdings* was of the opinion that s 50 of the 1993 LTA did not apply where title by adverse possession had crystallised before 1 March 1994, and, thus, s 177(3) of the 1993 LTA applied to preserve the adverse possessors' rights notwithstanding the fact that no caveat had been lodged (see *Liwen Holdings* at [40]–[42]). Similarly, Khoo J in *Shell Eastern* held that s 50 of the 1993 LTA did not apply as the OS 827 defendants' title by adverse possession had crystallised long before the Property became registered land. Section 177(3) of the 1993 LTA therefore barred Shell from reviving its title to the encroached area (see *Shell Eastern* at [21]–[22]).

23 In my view, *Shell Eastern* and *Liwen Holdings* do not assist the present defendants. These two cases are no longer good law in light of the later Court of Appeal decision of *TSM Development Pte Ltd v Leonard Stephanie Celine née Pereira* [2005] 4 SLR(R) 721 ("*TSM Development*"), which was followed in *Fones Christina v Cheong Eng Khoon Roland* [2005] 4 SLR(R) 803. In *TSM Development*, the Court of Appeal criticised the decisions in *Shell Eastern* and *Liwen Holdings* (see the discussion of these two cases at [38]–[40] and [41]–[42] respectively of *TSM Development*). The Court of Appeal also explicitly rejected the proposition that s 50 of the 1994 LTA (now s 50 of the 2004 LTA) was inapplicable whenever possessory title crystallised before the land became registered land (see *TSM Development* at [27]–[28]). Rather, the correct position was that this section did not apply only where title by adverse possession crystallised before the land in question became registered land, *provided* that land continued to be *unregistered land as at 1 March 1994* (see *TSM Development* at [32]). As for s 177(3) of the 1993 LTA, the Court of Appeal held that although this provision preserved crystallised possessory title in land that remained unregistered as at 1 March 1994, it did not do so indefinitely; if the adverse possessor failed to lodge a caveat before the registered proprietor's title became unqualified, his rights would effectively lapse pursuant to s 46(1) of the 1994 LTA (also s 46(1) in the 2004 LTA), which provides that the estate of the registered proprietor shall be paramount subject only to a few exceptions (see *TSM Development* at [45]).

24 The proper approach to the present defendants' claim of adverse possession is summarised in *TSM Development* at [48] as follows:

> ... In dealing with adverse possession claims, the key question to consider is whether or not the land was registered land on that date [*ie* 1 March 1994]. If the land was already registered land by that time and 12 years of adverse possession had not been completed yet, s 50 of the new LTA [*ie* the 1994 LTA] would preclude the adverse possessor from perfecting his inchoate title. In contrast, if the land was registered land as at 1 March 1994 and possessory title had already been acquired, such title would be upheld only if the case came within s 172(7) or the adverse possessor complied with s 172(8) [ss 174(7) and 174(8) respectively in the 2004 LTA]. ...

25 Taking 1961 as the date of commencement of adverse possession, Shell's title to the encroached area would have been extinguished by 1973. However, although 12 years of adverse possession had been completed as at 1 March 1994, the Property had also been converted to registered land. Section 50 of the 2004 LTA applied such that the present defendants could only assert an adverse title if they fell within s 174(7) or s 174(8) of the 2004 LTA. As the present defendants did not lodge a caveat in respect of their interest in the encroached area within the requisite time period, they did not fall within the exceptions to s 50 of the 2004 LTA and thus did not acquire adverse title to the encroached area. Accordingly, Fragrance Realty's title to the encroached area has not been extinguished by the adverse possession of the present defendants and/or their predecessors in title, the OS 827 defendants (hereafter referred to collectively as "the present/OS

827 defendants" where appropriate): see *TSM Development* at [48].

Bona fide purchaser

26 Mr Mak argued that Fragrance Realty knew of the encroachment before it purchased the Property and, as such, Fragrance Realty was not a *bona fide* purchaser of the Property. Thus, the present defendants' adverse title to the encroached area was preserved and could not be overreached by Fragrance Realty, which bought the Property knowing of the encroachment. In light of the discussion above, the present defendants' *bona fide* purchaser argument was misconceived: the *bona fides* of a purchaser, in terms of whether it knows of an encroachment on registered land which it intends to buy, is irrelevant in this area of the law. As Mr Ong rightly pointed out, the principle of indefeasibility of title in s 47(1) of the 2004 LTA provides that except in the case of fraud, a purchaser of registered land is not affected by notice of any unregistered interest, notwithstanding any rule of law or equity to the contrary. Further, both s 47(2) and s 49(2) of the 2004 LTA clarify that knowledge of any unregistered interest does not itself amount to fraud. The effect of these provisions is that Fragrance Realty's knowledge of the present defendants' encroachment on the Property and/or their unregistered interest in the encroached area as adverse possessors has no bearing on the question of title to that parcel of land. However, Fragrance Realty's knowledge is relevant in assessing the other reliefs that it sought in OS 678/2012 (see [38] below).

The easement argument

27 The present defendants claimed in the alternative an easement by prescription over the encroached area (the servient tenement for the purposes of the easement argument), on the basis that the OS 827 defendants (as the present defendants' predecessors-in-title) had used the encroached area to park their cars and store their personal belongings for more than 20 years. In response, Mr Ong contended that an easement could not be established on the facts for the following reasons: (a) the OS 827 defendants had acquired title to the encroached area as adverse possessors by 1973 and, as such, the present defendants could only show user of the encroached area as a "servient tenement" for 12 years (*ie*, from 1961 to 1973); and (b) the present defendants' exclusive possession of the encroached area was fatal to their claim to an easement over that area.

28 The basic principles of law governing the acquisition of rights by prescription were not in dispute before me. Accordingly, the three issues to be decided in relation to the present defendants' easement argument were as follows:

(a) First, could the present defendants show user of an easement over the encroached area for a continuous period of 20 years?

(b) Second, did the rights claimed by the present defendants over the encroached area oust the possession of Fragrance Realty (the servient owner) such that these alleged rights could not amount in law to an easement over the encroached area?

(c) Third, did Fragrance Realty and/or its predecessor-in-title, Shell, consent to or acquiesce in the acquisition of the alleged easement by the present/OS 827 defendants?

20 years' continuous user

29 Singapore law recognises the acquisition of an easement by prescription under the doctrine of the lost modern grant, albeit within circumscribed limits (see *Xpress Print Pte Ltd v. Monocrafts Pte Ltd* [2000] 2 SLR(R) 614 and *Lim Hong Seng v East Coast Medicare Centre Pte Ltd* [1994] 3 SLR(R)

680 ("*Lim Hong Seng*")). Under the doctrine of the lost modern grant, the court presumes, on proof of 20 years' continuous user as of right (*ie*, user that is not forcible (*nec vi*), not secret (*nec clam*) and not permissive under a licence (*nec precario*) (see *Sturges v Bridgman* (1879) 11 Ch D 852) ("*Sturges v Bridgman*")), that an easement of the right enjoyed has been expressly granted but that the deed of grant has been lost. This fiction operates even though it may be clear that no grant was ever made. In the context of registered land, an easement by prescription will only be valid if the easement was already subsisting at the date on which the land concerned became registered land (see s 46(1)(ii) of the 2004 LTA and *Lim Hong Seng* at [52]). Thus, the present defendants must show user of an easement over the encroached area for the 20 years preceding 26 November 1992 (the date on which the Property became registered land) in order to establish their claim. That is, the present defendants bear the burden of establishing that from 26 November 1972 onwards, there was at least 20 years' uninterrupted enjoyment of an easement over the encroached area by the present/OS 827 defendants for the purpose of parking their cars and storing their personal belongings.

30 Apart from the requirement of 20 years' continuous user, the elements of an easement demonstrate that an easement must be a right over *someone else's* land, and not one's own land. Easements have four basic characteristics: (a) there must be a dominant tenement and a servient tenement; (b) the alleged easement must "accommodate" the dominant tenement; (c) the owner of the dominant tenement (*ie*, the dominant owner) and the owner of the servient tenement (*ie*, the servient owner) must be different persons; and (d) the alleged easement must be capable of being the subject matter of a grant (see *Re Ellenborough Park* [1956] Ch 131; *Halsbury's Laws of Singapore* vol 14 (LexisNexis, 2009 Reissue) at para 170.0382). In the present context, the present defendants could have an easement over the encroached area only if their predecessors in title, the OS 827 defendants, did *not* have possessory title to that parcel of land from 26 November 1972 onwards. However, it is not disputed that the OS 827 defendants' title to the encroached area as adverse possessors had already crystallised by 1973.

31 Arguably, if an adverse possessor fails to lodge a caveat to protect his interest as required by the 2004 LTA, the question arises as to whether his possessory title *vis-à-vis* the registered proprietor is extinguished "*ab initio*" or only after he fails to lodge a caveat in respect of his possessory title within the prescribed time. The latter seemed to be the position taken by Mr Ong, such that the OS 827 defendants remained the "owners" of the encroached area by adverse possession from 1973 until the time when the title to the Property became unqualified, at which point the OS 827 defendants were precluded from claiming adverse possession. In contrast, Mr Mak argued that a possessory title was extinguished *vis-à-vis* the registered proprietor "*ab initio*" if the adverse possessor failed to lodge a caveat to protect his interest. Even though counsel stated their respective positions, they did not fully address the point. In these circumstances, it is unsatisfactory for me to try to dispose of this issue. In any event, I did not have to decide this issue as the easement argument could be resolved on other grounds.

Ouster of the possession of the servient owner

32 The second issue set out at [28] above was whether the rights claimed by the present defendants over the encroached area (*ie*, the right to park their cars and store their personal belongings) were consistent with the nature of an easement. For a right to be properly regarded as an easement, it cannot oust the possession of the servient owner (see *Tan Sook Yee's Principles of Land Law* (Tan Sook Yee *et al* eds) (LexisNexis, 2009) at p 628 and *Halsbury's Laws of Singapore* vol 14 (LexisNexis, 2009 Reissue) at para 170.0399).

33 Mr Ong cited various authorities like *Copeland v Greenhalf* [1952] Ch 488, *Lim Hong Seng, Grigsby v Melville* [1972] 1 WLR 1355 and *Sturges v Bridgman* (see [29] above) in support of the

proposition that no easement in law could have been acquired in the present case because Fragrance Realty and/or its predecessor-in-title (*ie*, Shell) could not physically prevent the present/OS 827 defendants from using the encroached area because of the retaining wall. In other words, the present/OS 827 defendants had possession of the servient tenement to the exclusion of the servient owner.

34 While I agreed with the principles espoused by the authorities cited by Mr Ong, I was also aware of other cases which recognised as easements rights that involved the exclusive occupation of the servient tenement. The House of Lords in *Moncrieff v Jamieson* [2007] 1 WLR 2620 ("*Moncrieff*") held that a right to park vehicles on the servient tenement was capable of being constituted as ancillary to an express grant of a right of access over the servient tenement in so far as the former right was reasonably incidental to the enjoyment of the dominant tenement. What is important to note for present purposes is that Lord Scott of Foscote and Lord Neuberger of Abbotsbury endorsed the view that "a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation, on the basis that the essential requirement is that the servient owner retains possession and control" (see *Moncrieff* at [57], [59] and [143]). However, Lord Neuberger also emphasised that as this point was not necessary to dispose of the appeal and had not been fully addressed by counsel, "it would be dangerous to try and identify [the] degree of ouster ... required to disqualify a right from constituting a servitude or easement" (see *Moncrieff* at [143]). It should be noted that in *Moncrieff*, the House of Lords' holding was limited to whether a right to park on the servient tenement could be implied as being ancillary to an *express grant* of a right of vehicular access over that parcel of land. Moreover, the circumstances of that case were unique in that there was no difficulty or "significant harm to the interests of the servient owner" since the predecessors-in-title of the parties had effectively agreed that a right to park would be limited to two vehicles at any time (see *Moncrieff* at [145]–[146]).

35 Given the appropriate set of facts, the right to park is capable of existing as an easement in law. However, it was quite clear that factually, this case fell on the side of the authorities cited by Mr Ong such that the present defendants' claim of the acquisition by prescription of an easement of parking over the encroached area could not succeed. No easement by prescription could be made out as the facts in evidence demonstrated that the servient owner (previously Shell and now, Fragrance Realty) had no beneficial use of or control over the encroached area. Indeed, the right claimed by the present defendants would render the actual ownership of the servient owner illusory. The encroached area was enclosed by the retaining wall to form part of the compound of Amazing Inn. The retaining wall was a clear manifestation of possession of the encroached area by the present/OS 827 defendants, to the exclusion of Shell/Fragrance Realty on the other side of the retaining wall. The retaining wall cut off access between the Property and the encroached area. Thus, the regular parking of vehicles by the present/OS 827 defendants and their storage of personal belongings in the aluminium shed there, within the perimeters of Amazing Inn's premises, constituted the taking of exclusive possession of the encroached area. The right of the servient owner (*viz*, Shell/Fragrance Realty) to use the encroached area was completely curtailed for all periods.

Whether there was consent or acquiescence by the servient owner

36 The present defendants also failed on the third issue set out at [28] above. Consent or acquiescence on the part of the servient owner lies at the root of prescription. As stated by Parker LJ in *Mills and Another v Silver and Others* [1991] 1 Ch 271 at 288:

> ... [T]he crucial matter for consideration is whether for the necessary period the use is such as to bring home to the mind of a reasonable person that a continuous right of enjoyment is being asserted. If it is and the owner of the allegedly servient tenement knows or must be taken to

know of it and does nothing about it the right is established. ...

37 In the present case, the facts in evidence showed that at best, Shell became aware of the encroachment on the Property only on 5 January 1996. [note: 1] This means that there was less than 20 years of continuous user of the encroached area before the Property became registered land on 26 November 1992. The present defendants' claim to an easement by prescription therefore failed.

Damages

38 In OS 678/2012, Fragrance Realty sought various declarations and orders, including an order that the present defendants pay damages to it for the loss and damage arising as a consequence of their encroachment on the Property. Fragrance Realty alleged that such encroachment had held up its development of the Property. The present defendants, however, claimed that Fragrance Realty stopped construction work on the Property unilaterally, and that it already had notice of the encroachment before it purchased the Property from Shell. In support of this contention, the present defendants exhibited a copy of a topographical survey on the Property dated 16 September 2010. [note: 2] That survey showed encroachment on the Property and it appeared to be prepared for one Dr James Koh. On its part, Fragrant Realty exhibited a similar (but simplified) topographical survey on the Property dated 7 June 2012. [note: 3]

39 I agreed with Mr Mak's submission that Fragrance Realty knew or, at the very least, ought to have known of the present defendants' encroachment before it purchased the Property from Shell. The two topographical surveys were similar and were prepared by the same registered surveyor. "Dr. James Koh" appeared to be the alias of Koh Wee Meng, the managing director of Fragrance Realty. [note: 4] Moreover, this very encroachment had been at the centre of the *Shell Eastern* litigation, which lasted from 1997 to 1999.

40 In light of the above, while Fragrance Realty succeeded on the point that the present defendants had no adverse title to nor any easement over the encroached area, I declined to award Fragrance Realty any damages. I agreed with the present defendants' arguments that Fragrance Realty had not acted reasonably in commencing construction work on the Property with the knowledge that the present defendants were using the encroached area. It went ahead with construction works on the Property and did not act promptly to take legal action against the present defendants. It waited for almost two years after acquiring the Property before commencing OS 678/2012. Fragrance Realty did not explain why it made no protest against the present defendants' use of the encroached area for almost two years. Indeed, Fragrance Realty implicitly permitted the present defendants to continue using the encroached area for almost two years after it purchased the Property from Shell. This is significant for the reason that it undermines Fragrance Realty's damages claim. Moreover, if there was any delay as alleged, Fragrance Realty was instrumental in causing the delay to the development of the Property. It was only in OS 678/2012 that Fragrance Realty alleged that its development of the Property was held up because of the present defendants' trespass. It seems to me that the alleged loss arising from the delay in construction was avoidable. Applying the avoidable loss rule in mitigation, Fragrance Realty cannot recover damages in respect of its alleged loss which it could have avoided by taking reasonable steps. Accordingly, I disallowed Fragrance Realty's claim for damages arising from the present defendants' use of the encroached area, which use was already subsisting at the time Fragrance Realty acquired the Property.

Conclusion

41 For the reasons above, I granted a declaration that Fragrance Realty's title to the encroached

area (that part of Lot 6219X, Mukim 25 highlighted in blue and annexed to OS 678/2012) had not been extinguished by adverse possession on the part of the present defendants. In light of this, I made no order as to prayers (1) to (3) of OS 678/2012 (see Annexure A to the Grounds of Decision for the precise terms of the prayers (1) to (3)).

42 I further ordered that the present defendants remove at their own cost and expense all sheds, altars, moveable property and other structures from the encroached area within *one month* of the date of this order, failing which Fragrance Realty would be at liberty to do the same at the cost and expense of the present defendants. As for the retaining wall encroaching on the Property, I ordered Fragrance Realty to demolish that retaining wall and re-site a dividing wall in the correct position at its own cost and expense. Further, the demolition of the retaining wall was to be subject to the same one-month time limit granted to the present defendants. This dealt with prayers (4) and (5) of OS 678/2012. I made no orders on prayers (6) and (7), which were, in my opinion, unnecessary.

43 As for the damages sought in prayer (8) of OS 678/2012, in light of my findings above, I ordered that if the present defendants failed to vacate the encroached area within one month of the date of this order, Fragrance Realty was at liberty to pursue a separate claim against them for damages for trespass.

44 Finally, I ordered the respective parties to bear their own costs of this action.

ANNEXURE A

Prayers sought by the Plaintiffs, FRAGRANCE REALTY PTE LTD in OS No 678 of 2012/M against 1) RANGOON INVESTMENT PTE LTD (D1) 2) IRENE HOE KIM LUAN (D2) 3) TAN MAU KIEN (D3) 4) HO CHIONG SONG alias HO HIONG SONG (D4) 5) SONG CHUE CHAN (D5) 6) LIM SOON WAH (D6) 7) LEE TAI KOON (D7) 8) LEE TAH FEI (D8) 9) ONG MOH NYUET (D9) 10) NG SOCK SUAN (D10) 11) LEE LAY CHENG (D11) 12) LEE KHENG HENG (D12) 13) YEE SWEE KHONG (D13) 14) TEO JOCK SONG (D14) 15) YEO KHOON GEE (D15) 16) RAJASULOSNA (D16) 17) MADHAVAN S/O RAMANAIR GOVINDA NAIR (D17) 18) HUANG CHENGHONG (D18) 19) HUANG MEI ZHEN (D19) 20) ONG CHYE HENG (D20) 21) LOI SOO MOI (D21) 22) LEW CHING HOON (D24) 23) TAY CHOON HEE (D25) 24) LEE LAY CHENG (D26) 25) YEK NAI KING (D27) 26) CHEN LIHONG (D28) 27) TAN TECK HENG (D29) 28) HO MEI YONG (D30) (collectively referred to as "the Defendants")

1. That the Plaintiffs are granted a declaration that they are the true and rightful owners of all the property situate at 340 Geylang Road, Singapore as highlighted in red on the plan of the property annexed to the Originating Summons No 678 of 2012 ("the Plaintiffs' Premises").

2. A declaration that the Defendants' entitlement or title as adverse possessors of the strip of land shaded and highlighted in blue on the plan of the property annexed to the Originating Summons No 678 of 2012 has been extinguished ("the Encroached Area").

3. A declaration that the Concrete Wall standing on the Plaintiffs' Premises as shown in the plan annexed to the Originating Summons No 678 of 2012 is encroaching on the Plaintiffs' Premises.

4. That the Defendants be ordered to demolish and remove the Concrete Wall and its foundation within 7 days from the order to be made hereon at the Defendants' costs failing which the Plaintiffs, their employees, agents, servants, workmen or contractor shall be at liberty to demolish and remove the Concrete Wall and its foundation at the costs of the Defendants.

5. That the Defendants be ordered to remove all moveable property or sheds or altars or metal

fence or structures in the Encroached Area within 7 days from the date of the order to be made hereon at the Defendants' costs failing which the Plaintiffs, their employees, agents, servants, workmen or contractor shall be at liberty to demolish, remove and discard, without liability whatsoever, such moveable property or sheds or altars or metal fence or structures in the Encroached Area at the costs of the Defendants.

6. That the Defendants provide to the Plaintiffs, their employees, agents, servants, workmen or contractor to carry out the aforesaid works.

7. That the Defendants, their servants or agents undertake not to interfere with the management and execution of the aforesaid works.

8. That the Defendants be ordered to pay to the Plaintiffs their loss and damage arising from the Defendants' encroachment of the Plaintiffs' Premises, such loss and damage to be assessed.

9. That the Defendants be ordered to pay to the Plaintiffs the costs of this action to be agreed or taxed; and

10. Such further or other relief as the Honourable Court deems fit.

[note: 1] See the Bundle of Affidavits filed in OS 827/1997 at Tab B; *Shell Eastern* at [31].

[note: 2] Affidavit of Lim Soon Wah (6th Defendant), Exhibit LSW 1.

[note: 3] Affidavit of Koh Wee Meng, Exhibit KWM-3 at Tab 3.

[note: 4] *Ibid*.