Claim No J10CL008

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 12 June 2023

Before :

HIS HONOUR JUDGE MONTY KC

- -

Between :

(1) HAREPATH SW19 LIMITED
(2) HAREPATH (WIMBLEDON) LIMITED

Claimants

- and -

(1) MR ASLAN KUFTA
(2) MS DANIELA VIGNJEVIC
(3) NEW GENERATION CARS LIMITED

Defendants

- -

Mr Rupert Cohen (instructed by **Penningtons Manches Cooper LLP**) for the **Claimants**
Mr Jerome Wilcox (instructed on **Direct Access**) for the **Defendants**

Hearing date: 6 June 2023

- -

Approved Judgment

HHJ Monty KC:

1. This claim concerns an industrial estate at Elm Grove in Wimbledon. Vehicular access to the estate is along a roadway which is owned by the Claimants. The First and Second Defendants own a garage at the end of the roadway which benefits from a right of way along the roadway, that right having been expressly granted to the Defendants' predecessors in title by a Transfer dated 14 July 1971. The Defendants claim that they and their predecessors in title have been parking on the roadway since their acquisition of their part of the land in 1984, as have their customers. The Defendants claim to have an easement allowing them to park there. The claim and counterclaim raise a number of other interrelated issues which are not directly of relevance for the moment.

2. On 16 January 2023, the Claimants applied for an order striking out paragraphs 12 and 13 of the Amended Defence and Counterclaim pursuant to CPR 3.4(2), alternatively for summary judgment against the Defendants in relation to those paragraphs.

3. At the hearing of that application on 6 June 2023, the Claimants were represented by Mr Rupert Cohen of counsel and the Defendants by Mr Jerome Wilcox of counsel. I am very grateful to them both for their skeleton arguments and focussed oral submissions.

4. The principles I apply on this application are as follows.

5. CPR 3.4(2) gives the court the power to strike out a claim where (a) the statement of case discloses no reasonable grounds for bringing (or defending) the claim; (b) the statement of case is an abuse of the court's process or likely to obstruct the just disposal of proceedings; or (c) there has been a failure to comply with a rule, practice direction or court order.

6. CPR 24 provides that the court may give summary judgment where it considers that there is no real prospect of a claimant succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

7. The strike-out provisions in CPR 3.4(2) focus on pleaded claims which are "unreasonably vague, incoherent, vexatious, scurrilous or obviously ill founded and other cases which do not amount to a legally recognisable claim or defence": see the notes in the White Book to that paragraph. There is an overlap with the summary judgment provisions in CPR 24. The principles on a summary judgment application are by now so well known that I need not set them out here other than by reference to CPR 24.2 and *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

8. In *King v Steifel* [2021] EWHC 1045 (Comm), Cockerill J held as follows:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line

and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

9. Paragraph 12 of the Amended Defence and Counterclaim reads as follows (there are two paragraphs numbered (iii) and I have set out paragraph 12 as it appears in the pleading):

"12. It is the defendants' case that, over the course of several decades, both the 1st and 3rd defendants, by their servants and agents, their predecessors' in title and their servants or agents and all their respective clients and customers have parked vehicles, caused vehicles to be parked, permitted vehicles to have been parked or themselves permitted vehicles to be parked, for limited reasonable periods of time, on or over the land coloured yellow (and the land coloured blue insofar as that may be relevant) for the purposes of their various business activities. The implications of this are either separately or cumulatively the establishment of an:-

i) easement/implied right to park on the land coloured yellow for those purposes in line with the test laid out in Moncrieff v Jamieson given there has never been any deprivation of possession of the servient tenement.

ii) easement by implication or by necessity or indeed mutual intention (an intended easement) given the essential nature of the easement of parking is so essential to the enjoyment of the land and the contemplation of its use as a business and/or garage such that the land and therefore the various businesses cannot function in the ordinary way or be used without it.

iii) a quasi-easement under the rule in Wheeldon v Burrows given the continuous and apparent nature of the easement, the necessary nature of the easement to the reasonable enjoyment of the land sold and the continuing nature of the use at the time of sale

iii) a new easement by satisfying the four rules of recognition adopted in re: Ellenborough Park such that it would be appropriate for a court to specify and define the new easement so that there is a 'limited right to park on any part of the land coloured yellow for the defendants, their servants or agents and their customers within normal working hours between Monday to Saturday so long as no other user is prevented from using the land coloured yellow under the terms of the existing grant but for this exception' or similar."

10. It was conceded by the Defendants that they no longer sought to rely on sub-paragraph ii) or on the first sub-paragraph iii), and that these should be struck out. It was also conceded that the second sub-paragraph iii) should also be struck out.

11. Thus the only sub-paragraph which the Defendants seek to rely on is sub-paragraph i) which asserts an easement/implied right to park on the roadway "in line with the test in Moncrieff v Jamieson".

12. *Moncrieff v Jamieson* [2007] UKHL 42 does not set out a "test" for an implied easement. As is said in Gale on Easements, 21st Edition, at paragraph 9-123, *Moncrieff* dispelled any residual doubts as to whether a right to park could be an easement.

13. As the speech of Lord Neuberger makes clear, *Moncrieff* restates the law which is that such an easement can only be claimed on two bases.

14. The first is the well-known principle, established by *Wheeldon v Burrows* (1879) 12 Ch D 31 at page 49, that on the sale of part of a piece of land owned by the grantor, "there will pass to the grantee all those continuous and apparent easements (by which, of course, [is meant] quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted".

15. Mr Wilcox confirmed that having conceded that sub-paragraph iii) is to be struck out, the Defendants did not rely on this first basis.

16. The second is the equally well-known line of authorities – stemming from *Jones v Pritchard* [1908] 1 Ch 630 and *Pwllbach Colliery Company Ltd v Woodman* [1915] AC 634 – for the proposition that "the grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment" (see *Jones* at 638) and that easements may be impliedly created in such a case not because of "the terms of the grant itself", but because of "the circumstances under which the grant was made" (see *Pwllbach Colliery* at 646-7).

17. Mr Wilcox confirmed that the Defendants' case under sub-paragraph i) was that second basis outlined in Lord Neuberger's speech in *Moncrieff*. In so far as sub-paragraph i) refers to *Moncrieff* as laying out a "test", Mr Wilcox confirmed that it was indeed this second basis, together with the proposition that the court could look at events from 1984 (the date when the Defendants' predecessors in title acquired their land, there being no evidence about the position between the Transfer in 1971 and 1984 from the Defendants other than some hearsay which I will mention shortly) in order to reach a view about "the circumstances under which the grant was made". This proposition is derived from another passage in Lord Neuberger's speech at [128]:

> "If one is entitled to take into account events subsequent to 1973 (and it is unnecessary to express a view as to whether that is permissible), it seems to me that the facts set out in paragraphs 13 to 18 of Lord Hope's speech would serve to reinforce the conclusion reached by the Sheriff."

18. Lord Hope had set out, in those paragraphs, a summary of the use of the land in that case from 1983 in circumstances where the relevant express grant was in 1973.

19. I think it is right to note that the facts of *Moncrieff* were somewhat unusual and a way removed from the facts of the present case.

20. In *Moncrieff*, the respondents owned a property in a remote location which was at the foot of a steep escarpment such that it was inaccessible by vehicles. The disposition in 1973 had therefore included a right of access to the property from the public road. The

House of Lords held that in the particular circumstances, the right of access included a right to park. As Lord Scott said at [52]:

> "…it is obvious from the geography that the vehicular right of access cannot be enjoyed without the right to park on the servient land at or near the Da Store gate. It is not that it would be difficult to take a vehicle on to the Da Store land; it would simply not be possible."

21. Before I leave *Moncrieff*, I should set out one further passage from Lord Neuberger's speech, commenting on the two bases for acquiring an easement, which is at [113]:

> "In fact, it appears to me that these two types of case are no more than examples of the application of a general and well established principle which applies to contracts, whether relating to grants of land or other arrangements. That principle is that the law will imply a term into a contract, where, in the light of the terms of the contract and the facts known to the parties at the time of the contract, such a term would have been regarded as reasonably necessary or obvious to the parties."

22. Mr Cohen's starting point was that in the light of the Defendants' concessions that sub-paragraphs ii) and iii) were no longer pursued, sub-paragraph i) added nothing. The two bases set out in *Moncrieff* were (1) *Wheeldon v Burrows*, but now sub-paragraph iii) had gone, so had any claim based on that line of cases, and (2) *Jones v Pritchard*, but that also had to be unsustainable because sub-paragraph ii) had also gone.

23. In my view, whatever the reason for the concessions, the result is that the Defendants are now only relying on one point, as confirmed by Mr Wilcox, which is the second basis for implying an easement as explained in *Moncrieff*, relying on the *Jones v Pritchard* line of authorities.

24. The starting point is the 1971 Transfer.

25. It was made between Essex Plating Company Limited ("EPCL") as transferor and Brynite Limited ("BL") as transferee. It transferred the land to BL, being part of the title registered in the name of EPCL:

> "TOGETHER with a right of way at all times and for all purposes over and along the land coloured brown on the plan annexed hereto for the purpose of obtaining access to the land hereby transferred from Elm Grove aforesaid".

The land coloured brown is the roadway.

26. The Transfer also contains a covenant on the part of BL:

> "that it will not do or cause anything to be done on the land coloured brown on the said plan which will prevent the Transferors and the owners and occupiers of adjoining or neighbouring premises from having a right of way and other rights thereover".

27. There is no evidence about what use of the land generally, and the roadway in particular, may have been in the contemplation of EPCL and/or BL at the time of the

Transfer in 1971. However, it is common ground that BL's land included 3 car parking spaces.

28. The Defendants rely on the fact that this was an industrial estate, and it must have been contemplated that landowners of units on the estate would need to park on the roadway.

29. Mr Alan Stewart worked for Watson Diesel Limited from 1971, and that company moved to the estate in November 1984. Watson Diesel were later to sell its premises to the Defendants, so it is the Defendants' immediate predecessors in title. In his witness statement, Mr Stewart says that at that time there were a number of businesses on the estate: F G Curtis, a firm of printers; Binoray, a shipment company; EGD, an electronics company; Cobglen, a manufacturing company; and Avebury, a metal foundry. Mr Stewart recalls that the roadway was then a gated dirt/gravel road but the gate was taken down not long after November 1984. He says that Watson Diesel had 4 parking spaces, which was sufficient for the staff, but visitors used to park on the access road. Also, employees and visitors to Avebury used to park on the access road.

30. Mr Jason Sams is another former employee of Watson Diesel. He says in his statement that in 1990, all the businesses were parking on the access road, even though Watson Diesel had their own parking spaces within their land, as did Binoray; EGD also had 3 parking spaces, but regularly used only 2 of them; and Curtis had a large car park of their own (although lorry drivers would park overnight on the access road).

31. EGD had been the owner of the Defendants' land before it was sold to Watson Diesel.

32. Thus the position – at least in 1984, on the Defendants' evidence – is that the Defendants' land had 3 parking spaces, not all of which were being used.

33. In *Moncrieff*, Lord Hope said at [30]:

> "…while the express grant must be construed in the light of the circumstances that existed in 1973, it is not necessary for it to be shown that all the rights that are later claimed as necessary for the comfortable use and enjoyment of the servitude were actually in use at that date. It is sufficient that they may be considered to have been in contemplation at the time of the grant, having regard to what the dominant proprietor might reasonably be expected to do in the exercise of his right to convenient and comfortable use of the property. In *Pwllbach Colliery Company Ltd v Woodman* [1915] AC 634, 643 Lord Atkinson said that what must be implied is what is necessary for the use or enjoyment, in the way contemplated by the parties, of the thing or right granted. Activities that may reasonably be expected to take place in the future may be taken into account as well as those that were taking place at the time of the grant. So the fact that very little, if any, use was being made of the servient tenement at that time for the parking of vehicles cannot be taken as an indication that the need to park vehicles there when Da Store became habitable cannot have been in contemplation."

34. As I have indicated, aside from the Transfer itself, there is no evidence about the circumstances that existed in 1971. However, I agree with Mr Cohen that if one looks at the grant of the right of way in the Transfer and the covenant by BL not to do anything which would prevent the use of the right of way by other landowners, it is

plain that the intention of the transferor and transferee was that the use of the roadway was intended to be limited to access to and from the land only. This is not a case where there is any evidence, nor any evidence from which a court could draw an inference, that it was within either party's contemplation, at the time of the Transfer, that there would also be a right to park on the roadway. It seems to me that this would be contrary to the grant and the covenant in the Transfer itself. It is a long way removed from the facts of *Moncrieff*, where there was nowhere else for vehicles to go.

35. Further, as the evidence in the present case shows, at least from 1984 (and possibly a little earlier – in the hearsay evidence I adverted to earlier on, Mr Stewart recalls that he was told that parking on the roadway had been going on before Watson Diesel moved to the estate) there was parking available on land owned by the various landowners. It may well be that as the estate got busier, particularly (as Mr Sams explains) when more of the businesses there were motor vehicle-related, the need for more parking space became acute. However, in my judgment it is not possible to take the usage from 1984, or shortly before then, and the usage since 1984, in order to show that it must therefore have been contemplated in 1971 that there would have to be parking on the roadway.

36. In my judgment, and taking the Defendants' evidence at its highest, there is no evidence that it could have been contemplated, in 1971 at the time of the transfer and grant of the right of way, that there would be a need to park on the roadway. It is I think instructive to look again at *Moncrieff*, and the speech of Lord Hope, at [32-33] to see how the point was phrased in that case:

> "32. The defenders accept that some ancillary rights have to be implied, having regard to the use that might reasonably have expected to be made of the servitude right of access for the convenient and comfortable use of the property. Rights to stop and turn a vehicle and to load and unload goods and passengers from it on the servient tenement are all conceded as being obviously necessary. But the defenders insist that the driver has no right to park his vehicle on the servient tenement. This is unlikely to cause any problems for tradesmen or other visitors who have no intention of remaining for any length of time on the dominant tenement. The position is otherwise in the case of drivers of a vehicle who happen also to be owners of the dominant tenement. If the defenders are right, they must leave the servient tenement after dropping off any goods or passengers and park their vehicle elsewhere. They must then walk down to Da Store from its parking place and back up again when they want to resume use of the vehicle.
>
> 33. Could this have been what was contemplated in 1973 when the right of vehicular access was granted? There was no question then, any more than it is now, of it being possible to park a vehicle anywhere on the dominant tenement. It is this highly unusual feature that has created the difficulty. The nearest point where a vehicle could be parked, then as now, was on the Sandsound public road at its junction with the lower branch public road. The effect of the defenders' argument is that, in the circumstances as they were known to be at the time of the grant, the right of vehicular access could be enjoyed by tradesmen and other persons who were invited by its owners to visit the dominant tenement, but not by the owners of the dominant tenement themselves in right of the servitude access to their property when using their own vehicles."

37. Again, that is very different from the present case, where the land transferred to BL, which was then owned by Watson Diesel and now by the Defendants, had its own parking spaces in 1971 as it did in 1984 when Watson Diesel moved in.

38. I therefore do not accept Mr Wilcox's submission that because this was an industrial estate – even one with a relatively low number of private parking spaces available – it should thus be inferred that owners and occupiers must have needed to park on the roadway.

39. Nor do I accept the submission that because there was regular parking on the roadway from 1984 (and possibly for some time before that, according to Mr Stewart's understanding), one can infer anything about what might have been contemplated in 1971 – particularly because of the wording of the grant and the covenant in the Transfer.

40. I also reject the submission that even if it was reasonably necessary for vehicles to turn on the roadway, or to park for a short period whilst loading or unloading, that meant that it was contemplated there should be an easement to park on the roadway.

41. I regard these submissions, in the light both of the Defendants' evidence taken at its highest and of the law, to be without any prospect of success.

42. In my judgment, there is no realistic prospect of the Defendants being able to establish that there is a right to park on the roadway under the second of the bases in *Moncrieff*, and there is no other compelling reason why that issue should go to trial (Mr Wilcox did not submit that there was). Since all of the other ways in which the Defendants had at one point asserted the existence of such a right are now disavowed, it seems to me plain that the Claimants are entitled to summary judgment in relation to paragraph 12 i) of the Amended Defence and Counterclaim, and that the whole of paragraph 12 should be struck out.

43. I invite counsel to agree an order reflecting this decision, as well as the other matters which we dealt with at the hearing but which are not the subject of this judgment.

(End of judgment)