REF/ 2018/0667

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

TAMASINE LEAH MURPHY

APPLICANT

and

(1) LESLIE JAMES BECKLEY
(2) ELIZABETH MINA BECKLEY

RESPONDENTS

Property Address: 1 St Andrews, 23 Park View, Truro
Title Number: CL92347

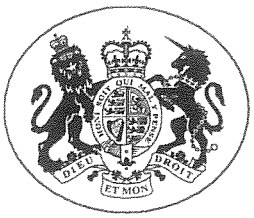
ORDER

The Tribunal orders that the Chief Land Registrar do give effect to the application of the Applicant, Tamasine Leah Murphy dated 12 December 2017 for registration of the benefit and noting of the burden of an easement, being a right to park on the land shown edged red and hatched red on the plan attached to the Applicant's statement of truth dated 27th November 2017 as if the objection of the Respondents, Mr and Mrs Beckley thereto had not been made.

Dated this 26th July 2019

Michael Michell

BY ORDER OF THE TRIBUNAL



[2019] UKFTT 0509 (PC)

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RESPONDENTS

Property Address:1 St Andrews, 23 Park View, Truro TR1 2BW
Title Number: CL92347

Before: Judge Michell

Sitting at: Truro Magistrates and Tribunal Hearing Centre

On: 15th May 2019

Applicant Representation: In person
Respondent Representation: In person

DECISON

PRESCRIPTIVE EASEMENT- RIGHT TO PARK-LOST MODERN GRANT-AREA BIG ENOUGH ONLY FOR ONE CAR -WHETHER RIGHT TO PARK EXISTED

Cases referred to
Patel v. WH Smith (Eziot) Ltd. [1987] 1 WLR 853
Batchelor v. Marlow [2001] EWCA Civ 1051
Central Midland Estates Ltd v. Leicester Dyers Ltd [2003] 2 P&CR DG1
Moncrieff v Jamieson [2007] UKHL 42

Virdi v. Chana [2008] EWHC 2901 (Ch)
Kettel v. Bloomfold Ltd. [2012] EWHC 1422 (Ch)
Welford v. Graham [2017] UKUT 0297 (TCC)

1. The Applicant, Mrs Murphy applied to HM Land Registry to register the benefit and note the burden of a right to park on land of which the Respondents, Mr and Mrs Beckley are the registered proprietors. The application relates only to a small triangular piece of land, which is only large enough to accommodate one car. Mr and Mrs Beckley objected to the application and the matter was referred to the Tribunal for determination.

2. Mrs Murphy is the registered proprietor of and lives at 1 St Andrews, being 23 Park View, Truro. Her title is registered under title number CL92347. 1 St Andrews is a semi-detached house. It and the adjoining house were built as a single dwelling in the 1920s. It was divided from the rest of the building in about 1966. Adjoining the north boundary of 1 St Andrews is an area of open land ("the Open Land"). That land falls within title number CL120796 as does the house known as 19A Park View. The Respondents are the registered proprietors of CL120796. I inspected the site in the presence of the parties on the afternoon before the hearing. The Open Land provides vehicular access to 17 Park View and to 21 Park View as well as to 19A Park View itself. It also provides pedestrian access through to Gwendroc Close. A garage door in the north-eastern corner of 1 St Andrews opens onto the open land. However, that door now provides access to a storage area and not to a garage. Adjoining the southern end of the eastern boundary of the open land is an electricity sub-station. Off the open area and on the opposite side from 1 St Andrews is a brick-paved area partly separated by a wall and providing parking for 19A and access to the garage of 19A. Mrs Murphy has the benefit of a pedestrian and vehicular right of way over the Open Land, which is noted in the property register of her title.

3. The Applicant, Mrs Murphy first moved to 1 St Andrews in February 1992. Mrs Murphy and her ex-husband were registered as proprietors on 11th October 1993. At that time, the Open Land and the remainder of the land in title number CL120796 and the land now occupied by 19 Park View were together one open area of land. 19A and 19 Park View were built during 1995 and1996 with 19A being first registered on 25th October 1996.

4. Mrs Murphy's evidence is that she and members of her family have parked on the Open Land since 1992 and continued to do so up to the present day. When the Murphys first moved in there was a small single garage in the approximate position of the garage door now. This had wooden doors which opened outwards onto the open land. Until 1995, they parked generally close to where 19 and 19A Park View were built. From when building work on those houses began, they parked by the doors of the garage of 1 St Andrews. Mrs Murphy said that she would park in front of the garage doors, with the bonnet of the car facing the garage doors. She did not park in the garage because it was too small to be able to do so easily. The surface of the open land was covered in tarmac in 1996 when 19A and 19 were built.

5. Mr and Mrs Murphy separated in January 2001 and were divorced in September 2001. Mrs Murphy continued to live at 1 St Andrews with her two sons. In 2002 Mrs Murphy was granted planning permission to extend her house. The plans involved replacing the garage with a two-storey extension, having a larger integral garage with bedrooms above. The planning permission was granted on appeal. It was a condition of the planning permission that "the integral garage in the two-storey side extension hereby permitted shall not be converted to or used as additional living accommodation at any time without the express consent of the local planning authority". The works for which planning permission was granted were completed in February 2013. Mrs Murphy said that the works provided a new more usable garage and parking at the front of the house but that she continued to use the Open Land for parking. The new garage was only about 15 inches wider than the garage it replaced and occupied the site of the older garage and further land to the east.

6. On 17th February 2016 Mrs Murphy applied for planning permission to convert the garage to provide additional living accommodation. In her application she stated that the planning permission granted in 2002 provided for parking for two vehicles; one in the new garage and one on new hardstanding to the front of the property. Mrs Murphy stated in the planning application that she would submit evidence that the area in front of the property was sufficient to accommodate two vehicles and that "we daily park a large 4x4 and a five-door family car". Planning permission was granted on 23rd September 2016. In her oral evidence, Mrs Murphy said that although there was space for two cars at the front of

1 St Andrews, her son also had a car and so she or a member of her family continued to park on the Open Land near her garage.

7. Robert Dunn and Laura Rundle are the registered proprietors of 17 Park View. They signed witness statements but were not called to give oral evidence and so the contents of the witness statements could not be tested by cross-examination. In their witness statements they said that they purchased 17 Park View in the summer of 2015 and spent a year renovating it before moving in in 2016. They said that "during the six months or so when we viewed and subsequently purchased 17 and during the initial ownership phase we never encountered a car parked adjacent to 23 Park View i.e. on the private driveway". They stated that Mrs Murphy began to park a large Mercedes on the private road next to 19A and that this proved challenging during the refurbishment of their house in terms of access for builders' trucks. Mr Dunn stated that he spoke to Mrs Murphy about this. She said that she would move her car back to the front of the house once her son had gone back to university but that she would be happy to move her car out of the way as needed. They stated that Mrs Murphy converting her garage to living accommodation seemed to coincide with the beginning of her practice of parking on the open land.

8. Mrs Murphy's evidence was that Mr Dunn and Ms Rundle were mistaken. She and her sons had always parked on the open land. She had been parking facing north close to the electricity sub-station but had parked the Mercedes perpendicular to the side wall of 1 St Andrews. Mrs Murphy said that Mr Dunn asked her if she could move her car to enable a scaffolding lorry to access the drive of 17 Park View and she did so.

9. Mr and Mrs Beckley purchased 19A Park View in 2017 and were registered as proprietors on 21st September 2017. They have no personal knowledge of the property or of the use of the open land from before then. Their evidence is that when the removal truck arrived at 19A on 16th August 2017, it had difficulty manoeuvring because Mrs Murphy's Mercedes was parked on the Open Land beside 1 St Andrews. In a letter to HM Land Registry dated 14th May 2018 Mr and Mrs Beckley said that there was no evidence of the claimed right to park when they inspected their property prior to purchase. Mrs Murphy first made her application to register a right to park by a form AP1 dated 27th November 2017. Mr and Mrs Beckley objected to the application and took steps to try to persuade Mrs Murphy to remove her car. On 29th March 2018 they placed a notice on the car being

expressed to be a notice under s. 12 of the Torts (Interference with Goods) Act 1977 requiring the car to be removed within 8 days and stating that failure to remove it, would result in the car being sold or destroyed. A further notice under that Act was sent to Mrs Murphy and dated 14th April 2018. Mr and Mrs Beckley put up a "No Parking" sign on the fence at the western end of the electricity sub-station site (being at the eastern end of the area on which Mrs Murphy claims the right to park).

Law

10. For Mrs Murphy to establish that she has the benefit of a prescriptive easement she has to show that she has been parking on the land for a period of at least twenty years and that the parking has been "as of right", that is it must be "*nec vi, nec clam, nec precario*", which means that it must be without force (i.e. not contentious), without secrecy and without permission. The period of twenty years should either by a period ending on the date of her application or a period of at least twenty years ending at an earlier date such that the law will presume that a grant of the right to park was made.

11. A right to park a vehicle can exist as an easement. The editors of Gale on Easements (20th ed.) at 9-119 state that a right to park a car somewhere in a defined area is capable of being an easement provided that the right is not so excessive so as to exclude the servient owner and leave him without any use of the area in question for parking or anything else and at 9-121 state

> "A right to park on a forecourt capable of taking two or three cars is, however, certainly capable of being an easement and falls on the easement side of what has been called the "ill defined line" between rights in the nature of an easement and rights in the nature of an exclusive right to possess or use. While there would thus appear to be no difficulty about a right to park at large anywhere in a defined area forming the subject-matter of the grant of an easement, a question might arise if the right were such as entirely to exclude the landowner from the area in question: for example, if the right were granted in respect of a single car space reserved for the grantee's sole use and protected by a chain or lockable post".

12. In *Batchelor v. Marlow* [2001] EWCA Civ 1051 the Court of Appeal held that an exclusive right to park cars on a strip of land during normal business hours was not

capable of being an easement because the owner would not have had any reasonable use of the land for parking or any other purpose.

13. In *Central Midland Estates Ltd v. Leicester Dyers Ltd* [2003] 2 P&CR DG1, the claim to a right to park an unlimited number of cars on a strip of wasteland was held not to be capable of being an easement because it would render the ownership of the servient owner illusory.

14. In *Virdi v. Chana* [2008] EWHC 2901 (Ch), the Claimant claimed to have acquired a car parking easement over land partly owned by the Respondent. The question was whether the claim was invalidated by the ouster principle, that is, whether it would have left the Respondent without any reasonable use of the land. Judge Purle QC held that the law remained as stated in *Batchelor v. Marlow,* notwithstanding that the case had been criticised by the UK Supreme Court in the Scottish case of *Moncrieff v Jamieson* [2007] UKHL 42. *Moncrieff* made 'control and possession' the test in Scottish law. Judge Purle QC noted, that *Moncrieff* had not overruled *Batchelor* as a statement of the law in England and Wales and he was bound to apply *Batchelor*. He held that the easement was valid even when the *Batchelor* test was applied for the following reasons:-.

    First, peculiar to the facts of this case, B did not own all of the servient land, only a part of it. It could not be said that the claimed easement prevented B from parking since B had no right to do so.

    Second, some uses of the land owned by B remained possible: planting trees or shrubs, erecting a trellis. These could be done so long as they did not prevent the parking of a car.

15. Judge Purle thought that even the right to resurface the land prevented the easement from infringing the ouster principle. When the land was next to domestic property, resurfacing might have aesthetic value. Such a right was not wholly insignificant and illusory.

16. In *Kettel v. Bloomfold Ltd.* [2012] EWHC 1422 (Ch) the claimants were long leaseholders of flats in a development. Their leases granted them the right to park in the car parking space identified in the lease. The developers wanted to allocate them new spaces and build on the existing spaces. The developers fenced off the area that they wanted to build on and

enclosed the spaces. The flat owners sought an injunction to restrain this interference with their car parking rights.

17. The owners argued that they had either a lease or an easement of the space. It was agreed on all sides that, if there was no lease, they had an easement. The judge (HHJ David Cooke) found that there was no lease. Despite the fact that the parties agreed that there was an easement, he considered whether the ouster principle prevented the flat owners from having an easement.

18. *Moncrieff* had not overruled *Batchelor v Marlow* and the learned judge accepted that *Batchelor v.Marlow.* was binding on him: the test was whether the exercise of the car parking right left the developer with no reasonable use of the car parking space. It was a question of fact in each case whether the right granted made ownership of the servient land illusory. In this case, the developer could pass over the space on foot when there was no car parked there and could authorise others to do so: it had granted such rights to pass over the spaces to other tenants in the leases to them. It could change or repair the surface, arrange for service media to pass under, or wires to pass over, the space. It could build over the space (and had made plans to do so). These rights had importance and value to the developer in managing the estate. The ouster principle was not infringed.

19. A right of way over land in the title acquired by Mr and Mrs Beckley would be binding on them even though the burden of the right was not registered on their title if either Mrs Murphy had exercised the right to park in the period of one year ending with the date of the transfer of the property to Mr and Mrs Beckley or if the right to park would have been obvious on a reasonably careful inspection of the land on which the right to park is claimed – Land Registration Act 2002 Schedule 3 paragraph 3.

Decision

20. I am satisfied on the evidence that Mrs Murphy and members of her family have parked on part of the Open Land which adjoins the northern boundary of 1 St Andrews since 1995. That was Mrs Murphy's evidence. Her evidence is credible. It is entirely likely that an owner of 1 St Andrews would have parked from time to time on the Open Land outside or near the garage of 1 St Andrews. The land was open and available for parking. Having inspected the land, it is apparent to me that parking on the land would not significantly affect or impede access to any other property. It would have been convenient for residents at 1 St Andrews to have parked beside the house on the Open Land.

21. I do not reject Mrs Murphy's evidence that she parked on the Open Land because of what she said in the planning application she made in 2016. Mrs Murphy's son had a car and he would have needed somewhere to park when the parking area at the front of 1 St Andrews was occupied by Mrs Murphy's two cars.

22. The only evidence that might cast doubt on Mrs Murphy's evidence is the written evidence of Mr Dunn and Mrs Rundle. Mr Dunn and Mrs Rundle were not called to give oral evidence at the hearing and so their evidence could not be tested by cross-examination or explored by questions from the Tribunal. Their evidence that there was a time when Mrs Murphy and her family did not park on the Open Land was flatly contradicted by Mrs Murphy in her oral evidence. I prefer the evidence of Mrs Murphy.

23. The legal burden of proof that the parking was a user "as of right" is on Mrs Murphy (see *Patel v. WH Smith (Eziot) Ltd.* [1987] 1 WLR 853). However, in this case Mrs Murphy has established that she and members of her family have parked on the land for the necessary period. The parking would have been obvious to the owner for the time being of the Open Land and thus it would have been apparent to the owners of the Open Land from time to time that Mrs Murphy was asserting a right to park. Hence, it is to be presumed that the user was as of right and it is for Mr and Mrs Beckley to rebut the presumption by calling evidence that the user was by permission or contentious – see *Welford v. Graham* [2017] UKUT 0297 (TCC). There is no such evidence in this case.

    (i) There is no evidence that there was any objection to Mrs Murphy and her family parking on the Open Land from the owner of the Open Land until Mr and Mrs Beckley purchased 19A Park View. The use prior to Mr and Mrs Beckley purchasing 19A Park View was not contentious or "*vi*". Mrs Murphy had been using the Open Land for over 20 years before Mr and Mrs Beckley objected.

    (ii) There is no evidence that the owners of the Open Land for the time being ever gave Mrs Murphy and her family members permission to park.

24. As Mrs Murphy has claimed a right to park on a part only of the Open Land being an area bound by the electricity substation to the east and the boundary of 1A St Andrews to the south and being beside the garage door of 1A St Andrews, I have to consider whether the right claimed can amount to an easement, applying the test set out in *Batchelor v. Marlow*. I consider that the right claimed by Mrs Murphy would not leave Mr and Mrs Beckley

without any reasonable user of the land. In so doing, I take into account the fact that it cannot really be doubted that Mrs Murphy has a right of way over the Open Land and over that part adjoining 1A St Andrews in particular, to the garden gate at the eastern end of the northern boundary of 1A St Andrews and to the garage door since the gate and some garage door has been in those locations for many years and will have been used. That right of way places restrictions on what use Mr and Mrs Beckley can make of the land on which Mrs Murphy claims the right to park. The right of way would prevent Mr and Mrs Beckley from being able to park on the land themselves because if they parked on it, Mrs Murphy would not be able to exercise a vehicular right of way to her garage. Thus Mrs Murphy having the additional right to park on the land would not deprive Mr and Mrs Beckley of the ability to park on it themselves. As in *Virdi v. Chana*, Mr and Mrs Beckley could resurface the land if they wished, provided that the new surface did not prevent parking e.g. by laying down some paving in place of the existing concrete. They could plant shrubs or other plants along the boundary with the sub-station or erect a trellis there. They could plant pots on the area by the boundary with the sub-station without obstructing parking on the land. They could erect signs on the land provided that those signs did not prevent Mrs Murphy from parking. They could also run service pipes or cables under the land or above it, provided that there was enough vertical height remaining for a car to be parked and for the driver to get in and out of it.

25. Mrs Murphy's evidence was that her parking on the part of the Open Land in question continued from 1995 up to the present day. It is therefore her evidence that she did park on the land at least at some time during the twelve months before the transfer of that land with 19A Park View to Mr and Mrs Beckley in September 2017. Mrs Murphy would have been parking on that land for a period of 20 years by 2015 and so would have acquired the right to park in about 2015. That right was binding on Mr and Mrs Beckley under Schedule 3 to the Land Registration Act 2002 when they took the transfer of 19A Park View in September 2017.

26. In the skeleton argument prepared on behalf of Mr and Mrs Beckley, it was argued that Mrs Murphy could not have acquired a right to park because she had a right of way and to park on land the subject of the right of way would have been an excessive user of or in breach of the right of way. That argument is misconceived. The fact that Mrs Murphy had a right of way and that such right would not without more give her a right to park

does not prevent Mrs Murphy from acquiring a separate right to park by long user under the doctrines of prescription or lost modern grant.

Conclusions

27. Mrs Murphy has established that she has a right to park on the part of the Open Land that is the subject of her application. I shall direct the Chief Land Registrar to give effect to the application as if the objection of Mr and Mrs Bentley had not been made.

28. My preliminary view is that Mr and Mrs Bentley should be ordered to pay the costs of Mrs Murphy. Those costs are the costs recoverable by a litigant in person under the Litigants in Person (Costs and Expenses) Act 1975. They cannot include any costs incurred prior to the date of the reference of the matter to the Tribunal, being 7th August 2018. If any party wishes to object to the making of an order that Mr and Mrs Bentley pay Mrs Murphy's costs to be assessed then they should file written submissions and serve them on the other party by 5pm on 12th August 2019.

DATED this 26th July 2019

Michael Michell

BY ORDER OF THE TRIBUNAL