EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 208 of 2013

BETWEEN:

DAVID KARLSON

Claimant

And

BERNARD HOCHBERG

Defendant

Appearances: Ms. Nelcia St. Jean of Orion Law, Counsel for the Claimant
Ms. Hazel Hannaway – Boreland of Harneys, Counsel for Defendant

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2016: June 22

JUDGMENT

[1] Ellis J.: The Claimant is the registered proprietor of land registered at Parcel Nos. 1 and 2, Block 2235B, West End Registration Section. Both parcels of land have the benefit of a Right of Way from the Public Road over Parcels 9 and 4 Block 2235B, West End Registration Section.

[2] The Defendant is the registered proprietor of Parcel 4 Block 2235B, West End Registration Section.

[3] By way of Fixed Date Claim Form, the Claimant seeks the following declaratory relief against the Defendant:

i. a declaration that the Claimant be allowed to enjoy all the benefits of the 16ft Right of Way located on Parcel 4 of Block 2235B, West End Registration Section identified on survey plan CA-2235B-078-T prepared by Michael Potter a surveyor licensed…and approved by the Chief Surveyor on 21st December 2007 which has been declared a Right of Way by the court (the "Right of Way") including the right to park thereon and for his tenants, invitees, servants, agents or his successors in title or any future purchaser of the Properties and thereon tenants, invitees, servants, agents or his successors in title to also park thereon.

ii. the Defendant be enjoined and permanently restrained whether by himself, his servants, agents or otherwise from removing from the Right of Way any vehicles of the Claimant, his tenants, invitees, servants agents or his successors in title or any future purchaser of the Properties;

iii. the Defendant be enjoined and permanently restrained whether by himself, his servants, agents or otherwise from blocking or obstructing the Right of Way or placing or allowing to be placed in the Right of Way anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the Right of Way by the Claimant or his tenants, invitees, servants agents or his successors in title or any future purchaser of the Properties on foot or by motor vehicle at all time and for all purposes and from doing any act whereby the Claimant may be hindered in the free use thereof;

iv. an order that provisions be made for costs; and

v. such other order as the Court deems fit.

[4] The Defendant opposes the Claim primarily on the basis that the Claimant has no legal right to park on the Right of Way. He avers that such parking causes grave inconvenience to himself and his business' clientele thus constituting a public nuisance. Further, he seeks (in the alternative)

either an order prohibiting the Claimant from parking or causing vehicles to be parked on the Right of Way or that the Claimant be mandated to take steps for alternate parking, inclusive of making arrangements for parking in his own property. The Claimant also seeks an award of damages for the loss suffered by himself and his clients as a result of the obstruction.

The Claimant's Case

[5] At the trial, the Claimant gave evidence on his own behalf. In his witness statement filed on 17th January 2014, the Claimant stated that since 1957, all previous owners of the properties have parked on the Right of Way. He further stated that from the date when he purchased the properties in 1987, he has also had the right to park up to two vehicles on the Right of Way. When he purchased the properties there was a wide stone wall between his Property and the Defendant's which extended from the ocean across the Right of Way and which was imbedded in the cliff. His properties are located at the dead-end of the Right of Way and there is no other means of accessing his properties. There is also no other viable option reasonably close to his Properties for his guests, tenants or agents to park, so that in order to enjoy his Properties, it is necessary for him, his visitors and any subsequent owners of the Properties to be able to park on the Right of Way.

[6] The Claimant goes on to state that after the Defendant purchased Parcel 4 in 2003 he built a nine suite hotel on this Parcel. The Claimant alleges that during the construction of this unauthorized hotel, the Defendant cut into the Right of Way reducing its width to slightly less than 10 ft. However, notwithstanding that the Defendant cut into the Right of Way, the Claimant contended that it is still wide enough for vehicles to park to one side of the road and not obstruct the flow of foot traffic and the transportation of guests' luggage to and from the hotel. The Claimant indicated that whenever he parks on the Right of Way, he is extremely careful to give maximum space for the passage of hotel guests and luggage past his vehicles. In contrast, he contended that on a few

occasions the Defendant's guests had inadvertently blocked in his vehicle. However, after he phoned or visited their offices, they immediately and politely corrected the situation.

[7] The Claimant stated that for the past ten years, he has had a cordial and cooperative relationship with the Defendant and his hotel. According to him, the Defendant only threatened to revoke his parking privileges and that of his successors in title when the Defendant became aware of his intention to sell his properties. He asserts that at no time prior to this has he received any objection (whether orally or in writing) from the Defendant or his hotel manager about parking on the Right of Way. When this suddenly became an issue, he tried reasoning with Defendant regarding his need to park on the Right of Way but after over ten (10) years of silence the Defendant now insists that neither he, nor his visitors or tradesmen of any kind should park there.

[8] However, the Claimant later revised this unequivocal assertion when he stated that he had approximately two conversations with the Defendant over the past 10 years about this issue. According to him at no time did these conversations become acrimonious; instead, he consistently indicated to Defendant that all previous owners have had the right and need to park up to two vehicles on the Right of Way.

[9] The Claimant stated that he has been trying to sell his Properties but the Defendant's opposition has made it impossible for him to conclude a successful sale. His real estate agent, Pamela Romney, advised him that he had lost a May 2013 sale because of Defendant's attitude. The buyer was frightened away because of the parking issue since there is no other option for nearby parking available for the Properties.

[10] When he was cross examined, the Claimant testified that he ordinarily resides in Michigan, USA and could not recall being in the Territory in 2013 – 2014. When he was referred to paragraph 6 of his witness statement, he stated that in subsequent conversations with the Defendant, he (the Defendant) told him that as long as he (the Claimant) owns the property, he would have parking privileges but as long as he sold the property, the new owner would not. When he was questioned

about the timing of these conversations, the Claimant told the Court that it would have been in the spring, earlier than 2015; as soon as the Defendant became aware that he was trying to sell the property.

[11] As his cross examination progressed, the Claimant later told the Court that it would have been sometime in late 2014. When he was reminded that his witness statement in this action would have been signed in January 2014, the Claimant then stated that it would have to have been in 2013, when the Defendant learned that he was considering selling the property. He could not recall how these conversations took place but he stated that it would have been through his attorney.

[12] The Claimant was then referred to paragraph 10 of the affidavit filed on 17th October 2013, in which he denied ever obstructing the Right of Way and where he stated that there has never been a complaint made about his parking. The Claimant reiterated that in the past 20 years, the Defendant has never complained about his parking on the Right of Way until sometime in late 2013. He further denied that he ever received a letter from Harneys in 2000 or at any other time. He then went on to testify that until the time when the Defendant became aware that he intended to sell the property very early in 2000, (probably 2001, 2002, or 2003) this was the first time that he experienced any problems with the Defendant or Ushie (Ursula Mikoleiczik). He then stated that he did not try to sell the property in 2001, 2002 or 2003 that is when objections to the parking stopped. When it was pointed out to him that this was inconsistent with his earlier evidence, he stated unequivocally that somewhere in 2001- 2003 all discussions regarding his parking stopped and the Defendant learned that he was selling the properties he revoked his parking privileges. When he was further questioned on this issue he told the Court that the issues regarding parking stopped in the early 2000 and only remerged when he was intending to sell the property. He reiterated that the Defendant has never written to him or handed him a letter. He simply revoked the parking privileges when he discovered that he was going to sell.

[13] The Claimant denied that it was possible for him to park on his own property and instead affirmed that the Right of Way is the only place where he can park his car. He was able to demonstrate the

location where he parks his car in Exhibit DK4 a photo. He told the Court that he parks his car near the cliff face in that photo. When he was referred to the report of Systems Engineering (Exhibit DK4B) which posits that he could in fact park on his own property, the Claimant agreed that this is reflected in the report but he stated that the authors ignored the fact that rocks were falling every day in that area. When he was reexamined he told the Court that the rock falls occur daily and that in the last two weeks there were twenty fist-sized or basketball-sized rocks along the area where he could conceivably park. He was then referred to a revised report dated 26th August 2014, but he again denied that this new report provided for the rock falls. Instead, he maintained that there is no other place to park other that the Right of Way.

[14] The Claimant agreed that there is no deed of covenant giving him the right to park on the Right of Way but he denied that in doing so he obstructed the Defendant's use of their property. He denied that he prevented the Defendant's guest from getting their luggage into their rooms. He denied that Ushie (the Claimant's manager) ever complained to him about obstructing guest services. In fact he stated that he could not recall a single incident when he would have obstructed them.

[15] However this categorical denial quickly became equivocal when the Claimant went on to state that whenever he did cause an obstruction; he then solved the problem by moving. This equivocation was later compounded when he conceded that on a few occasions, utility vehicles had been temporarily obstructed by his parking.

[16] The Claimant also relied on the evidence of his witness, Pam Romney, a real estate agent employed by Island Real Estate BVI. In her witness statement, she stated that she has been a resident in the BVI since 1969 and that she has visited the residence located on Parcel 2 which was built in the 1970s on numerous occasions both when the previous owner was resident and now with the current owner. Ms. Romney indicated that she is acquainted with Eileen Hulse, the previous owner of Parcels 1 and 2 of Block 2335B. Her evidence is that the owners of the Properties including the Claimant have always parked on the Right of Way which is registered as a 16ft Right of Way on Parcel 4.

[17] Ms. Romney further stated that the Defendant was a frequent visitor to Little Bay and was well aware that the Claimant and his wife parked on the Right of Way because anyone passing in the area would see their cars at the end of the Right of Way. She further stated that there is nowhere else for the Claimant to park because when the Claimant bought the Properties in 1987 there were steps on the Properties which extended out to the end the Property to the Right of Way. The Properties are at the dead end and there is no other means of getting to the Properties.

[18] She went on to state that after the Defendant purchased Parcel 4 in 2003; he built suites as an extension to Sebastian's Hotel. According to Ms. Romney, during the building of the hotel, the Defendant cut into the Right of Way so that it is no longer 16 feet but instead, it is now approximately 10 – 12 feet wide. Despite this, she asserted that the Claimant is still able to park his car to the side of the road.

[19] Finally, Ms Romney evidence is that she has been commissioned to sell the Claimant's property but has thus far been unsuccessful. In May of 2013 she had a potential buyer who was extremely interested in purchasing the Property. However on viewing the Property, the buyer wanted confirmation he could park on the Right of Way to the Property. The Defendant said that he could not and because of this the buyer said that he did not want any trouble after he purchased the Property and so the transaction did not proceed.

[20] Ms. Romney was not cross examined by Counsel for the Claimant.

The Defendant's Case

[21] The Defendant also gave evidence on his own behalf. In his witness statement filed on 10th January 2014, the Defendant stated that since he was not in occupation in 1987, he cannot ascribe to the Claimant's contention that he (along with his visitors and tenants) has always parked on the Right of Way. However when he was cross-examined he told the Court that since 1994, he has constantly complained about the Claimant's parking. He later clarified that although he was aware

that the Claimant was parking on the Right of Way, initially this was not a problem because at the time it did not interfere with the hotel's operations.

[22] However, it appears that this situation soon changed. According to the Defendant, the Claimant's persistent parking on the Right of Way has caused a great inconvenience to him and his commercial and personal guests. In particular, the use of Right of Way for parking currently obstructs the entrance to his property to such an extent that it is difficult for persons to enter freely or to freely take or remove luggage or commercial goods without difficulty. The Defendant stated that on various occasions, the Claimant is parking has also obstructed owners of the other neighbouring parcels.

[23] The Defendant stated that since he acquired Parcel 4 in 1994, he has personally complained to Claimant about his obstruction of the Right of Way; persistently demanding that the Claimant not park on the Right of Way and that he also not allow anyone else to park there. The Defendant contends by letter dated 13th January 2000, he instructed his solicitors, Harney Westwood and Reigels to write to the Claimant indicating the inconvenience which his obstruction had been causing. This letter explained that the Right of Way serves lots 1, 2, 4, 5, 6, 7 and 8, but the obstruction made by the Claimant specifically blocks the units of Sebastian's Seaside Villas on Lot 4, which the Defendant owns. It has hindered access to the then occupied units of the establishment and also proved to be an obstruction which hindered the free passage of occupants, clients and service vehicles. The letter also explained that this impediment also posed a safety risk in the event of emergencies requiring assistance by fire, medical or police services.

[24] However, when he was cross examined, the Defendant could not speak to whether the letter from his attorneys had in fact been mailed out or delivered to the Claimant; instead he expressed his hope that Harneys would have appropriate records and he told the Court that his general manager, Ushie could better speak to this because she would have been in daily contact with the Claimant.

[25] The Defendant stated that he has tried to reason with the Claimant but he has continually insisted that he has a right to park on the Right of Way on the basis of an alleged grandfathered right. After years of repeatedly trying to reason with the Claimant with no result, he again sought the assistance of his solicitors. On 17th May 2013, his solicitors prepared a letter for service upon both the Claimant and his realtors. This letter was not hand delivered to Pamela Romney but it was directed to Island Real Estate via mail. Multiple attempts were made to effect service on the Claimant personally but on each attempt the Claimant could not be found. He stated that due to the Claimant's residence abroad and constant absence from the Territory, it has been difficult to reach him for service of papers over the years. However, the Defendant maintains that not only has the Claimant received written complaints about obstructing his guests and the owners of the other adjacent Parcel 3, but he has also received verbal complaints.

[26] He referred the Court to a letter dated 4th October 2000, from Ushie Mikoeixzik which documents that on 23 August 2000 Ms. Mikoeixzik complained to the Claimant via telephone that he needed to move his car from the Right of Way to facilitate access to the building on his property. The Defendant contended that these letters and verbal complaints were given to the Claimant on the Defendant's behalf in 2000, in 2001 and beyond.

[27] The Defendant also relied on the public record of civil proceedings BVIHCV8/1998 in which Mr. Remar Sutton director and shareholder of Immersion Limited, then registered owner of the adjoining property served the Claimant with letters of 5th, 7th, 9th and 17th January 1998 all of which complained about his use of the Right of Way, which obstructed the access of Mr. Sutton. The existence of and the Claimant's knowledge of these letters are outlined by the Claimant himself by paragraphs 13 and 14 of his Affidavit sworn by him on 19 January 1999 in those proceedings. In particular, by paragraph 14 the Claimant concedes *inter alia* that:

> "I have recently received correspondence from Mr. Sutton, inter alia, challenging my right to occupy my patio and to park vehicles on the unpaved Right of Way…"

[28] The Defendant averred that there was enough room for the Claimant to park his vehicle on his own property without creating any inconvenience to him or his business. He contended that instead of

accepting this solution, the Claimant decided to extend his patio and build a set of stairs on the entrance of his property. In so doing the Claimant ignored a suitable solution to the problem and instead insisted on parking on the public Right of Way rather than use his own property frontage. However when he was cross examined, the Defendant agreed that if the Claimant were to park his car in the area which is proposed, he would have to build a covered portico or car port to deal with the rock falls, but he stated that he had provided parking on Lot 1 away from the rock face.

[29] He further stated that sometime around April 2013 he discovered that the Claimant was attempting to sell his property and was promoting the property as having a grandfathered right to park on the Right of Way. The Defendant asserts that not only is the Claimant's action of obstructing the Right of Way not permissible by any covenant or so called 'grandfathered right' but it is also an illegal act of public nuisance. The Defendant reiterated that the Claimant has caused continuous disruption to the proper running of his hotel and the obstruction of the Right of Way has interfered with the management of his clientele.

[30] During the course of the hearing, the Court granted leave to the Defendant to amplify his witness statement. He told the Court that the hotel was built with the full approval of Town and Country Planning. He testified that the hotel does not encroach on the Right of Way however, he later conceded that in some places along the Way, some of the steps that access the units do encroach,. He testified that at some points the Right of Way is more than 16 feet and at some points it is less because of a rock projection (Exhibit DK4). However, he stated that his hotel does provide safe turnaround for vehicles.

[31] The Defendant was then asked about attempts which he had made to solve the parking problem. He told the Court that he had recommended that the Claimant could park on his (the Defendant's) land behind Lot # 2 which he owns. The Defendant stated that initially he thought that this property belonged to the Claimant but he later discovered that the property belongs to him. He stated that the Claimant has in fact built on that area which forms part of Parcel 4. He told the Court that this only came to his attention the day before when it was clarified that the steps are actually on this

property. he stated that he was willing to transfer to the Claimant that portion of the property upon which he currently encroaches provided that he combines Lot 1 and 2 and makes the necessary arrangements in order to ensure that he does not have to park away on the Right of Way.

[32] When he was cross-examined, the Defendant told the Court that when he purchased the property in 1994, the Right of Way was 16 feet only at certain points. He testified that at certain points, the width varies from 121/2 – 15 feet to 22 feet. He contended that the Claimant parks his car ahead of the protruding rock at the point where the Right of Way is more than 14 feet but where two cars cannot operate. In doing so he would obstruct utility trucks and prevent guest from unloading their luggage. He noted that this has become a problem because while they have in the past opted not to lease the units in that area, access to these rooms is now becoming more necessary.

[33] The Defendant also relied on the evidence of his witness Ursula Mikoleiczik (Ushie). She has been the general manager of the Defendant's hotel since October 1st 1978. Her evidence is that the Claimant's infringement on the Right-of-Way has been constant. The purpose of her evidence is to demonstrate that the Defendant has repeatedly sought to address this contentious issue. She stated that as early as 15th October 1997, she instructed Harney Westwood and Riegels to write to Mr. Karlson. She produced a facsimile from a Mr. Kite which confirms that the letter was delivered to the Claimant's wife on 19th December 1997.

[34] She recounts that on 2nd November 1998 at 12:00 noon, during the construction of Sebastian's Seaside Villa, she had to call the police because the Claimant had blocked access to the construction site, had thrown rocks at the work-men and taken pictures of the work-crew without their consent. On 5th January 2000, she forwarded a letter of complaint and instruction to Harney Westwood and Riegels, copied to the Fire Department, Police Department and Public Health Services and on 13th January 2000, Harney Westwood and Riegels issued a further letter on their behalf.

[35] On 23rd August 2000, while checking in some guests of the hotel, it was impossible to squeeze by the Claimant's car with luggage to get to the steps to enter the apartment. When she phone the

Claimant about the difficulty he replied "Tell the guy above you, to have his cliff sorted out to make it safe." When she responded that this has nothing to do with her, the Defendant hung up on her. As the situation remained unresolved, she sent another letter to Harney Westwood and Riegels on 4th October 2000 seeking representation.

[36] On 7th February 2001 there was another incident in which the Claimant threatened one of their guests for parking along the road. Harney Westwood and Riegels issued another letter on the same date. Ms. Mikoleiczik stated that every time she asked the Claimant to stop blocking access to the building he would just ignore her, implying that he had the grand-fathered right to park.

[37] When she was cross examined she was asked to confirm that the Claimant was ever served with any of the letters. Her response was equivocal. She could only say that in one fax Mr. Kite stated that the letter was left with the Claimant's wife, Pat Landry on 19th December 1997. However she went to state that every time she asked the Claimant to stop blocking the Right of Way he would ignore her. She stated that this continued over the period 1994 - 2014. She stated that every time he would complain about the hotels guest parking she would warn the Claimant against parking there because his parking there would encourage the guests to park there as well. She further testified that every time the truck delivering the gas tanks would arrive, she would have to ask the Claimant to remove his vehicle.

COURT'S ANALYSIS AND CONCLUSION

[38] The issues in dispute in the case at bar center around the legal nature of and the rights associated to the Right of Way which exists over Parcel 4 of Block 2235B in favour of Parcel 1 and 2 of Block 2235B.

[39] The term "Right of Way**"** is used to describe the legal right, established by usage or grant, to pass along a specific route through grounds or property belonging to another. As with all easements, a Right of Way is said to "*lie in grant*". This means that they must be granted expressly, impliedly or by prescription. In the case of implied and prescriptive easements there is no express grant but the grant is nevertheless assumed or presumed.

[40] In the case at bar it has not been suggested that the right way was expressly created via deed or other written instrument. Moreover, neither Party addressed the Court on the geneses of the 16 foot Right of Way noted on the relevant registers. The Court can therefore only assume that this easement came into existence (whether by grant or reservation) upon the disposition of land without having been expressly created by the parties to that disposition.

[41] What is apparent is that the register for Block 2235B Parcel 4 reflects that the Right of Way is recorded in an entry made on 17th May 1974. It is therefore a registered easement and binding on all subsequent purchasers.[1]

[42] It is also not disputed that in an order dated 31st May 2002 in BVIHCV 4 of 1998, David Karlson and Patience Landry v Immersions Limited Matthew J., made *inter alia* the following order:

i. The Right of Way from the property registered as Parcel 2 Block 2235 B of the West End Registration Section to the Little Apple Bay public road extends in width 16 feet from the southern boundary of Parcels 2, 4, 5, 6, 7 and 8 to the base of the cliff further to the south as noted on the plan prepared by the Chief Surveyor on 29th January 1999.

This order has not been set aside or successfully appealed. It therefore remains in effect.

[43] There is however no other express recording of the nature, scope and terms of the Right of Way. Notwithstanding this, it appeared to be common ground between the Parties that this easement is in fact a vehicular Right of Way. At the core of the Claimant's claim is his contention that associated with this vehicular Right of Way is an ancillary right to park. The Claimant asks this Court to declare that he his servants agents assigns and Successors in title be allowed to enjoy all the benefits of the 16 foot Right of Way located on Parcel 4 including the right to park thereon.

[1] s.30 of the Virgin Islands Registered Land Act Cap 229

[44] It is now settled law that even an express grant of a vehicular Right of Way does not necessarily or indeed usually carry with it a right to park vehicles on the servient land or tenement. It is also settled law that the fact that a right to park has not been expressly granted does not of itself automatically prevent such a right being claimed by the owner of the dominant tenement. The case law indicates that at least in principle, the right to park could be claimed on two bases. These two bases were thoroughly examined in the judgment of Lord Neuberger in the case of Moncrieff and Another v Jamieson and Others.[2]

[45] At paragraph 108 of that judgment, the learned Judge noted that the first ground was explained in the case of Ewart v Cochrane 4 Macq 117 112 **–** 123 in the following terms: '*that where the grantor disposes of part of his property, there is to be implied for the benefit of the grantee "anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted." And in this connection, necessity is to be judged by reference to what is necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant*'.

[46] Lord Neuberger later went on to consider the second ground. At paragraph 110 of the judgment he noted that "there is clear authority in English law 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*".[3]. This principle of English law prescribes that there are cases where easements may be impliedly created because of the circumstances under which the grant was made.

[47] In highlighting the distinction, Lord Neuberger observed,

> "Thus, there are cases where a right is implied where it is necessary for the **comfortable enjoyment: or "the convenient and comfortable enjoyment" of the** hereditament which is severed (as in Ewart v Cochrane), and there are cases where a right is implied because **it is "reasonably necessary" for the "exercise or**

[2] [2007] 1 WLR 2620

[3] per Parker J in Jones v Pritchard [1908] 1 CH 630, 638

enjoyment" of an expressly granted right (as in Jones v Pritchard). In the latter type of cases, it seems to me important to focus on the dual nature of the requirement that the alleged implied right be "reasonably necessary." Without necessity, there would be the danger of imposing an uncovenanted burden on the servient owner, based on little more than sympathy for the dominant owner; without the reasonableness, there would be a danger of imposing an unrealistically high hurdle for the dominant owner. In the former type of case it seems to me that the test is affectively the same: the references to "comfortable enjoyment" and "convenient and comfortable enjoyment" being equivalent to the reasonableness in the latter type of case." Emphasis mine

[48] Moncrieff v Jamieson therefore established that for the purposes of Scots law (held to be the same as English law), a right to park was capable of being implied into a right of vehicular access if the right to park was reasonably necessary for the exercise or enjoyment of the right of access. On the unusual facts of that case, the land with the benefit of the Right of Way was situated at the bottom of a steep slope by the sea. It was accessible only on foot, by a gate and some steps, and from there over a driveway on the adjacent land to the main road. It is not surprising that in those circumstances, the House of Lords held that it was reasonably necessary for the right of access over the driveway to include a right to park vehicles on the adjacent land.

[49] In considering whether right to park could be implied for the reasonable enjoyment of land, the Court therefore first consider the appropriate test for implying a right to park. In doing so this Court has considered the relevant judicial authorities culminating in the case of Waterman v Boyle.[4] Here, the Watermans lived in a property originally owned by Mr. Boyle and Ms Gwilt (the defendants). When the defendants sold the property, the conveyance provided for parking at the Watermans' property of two private vehicles on designated land over which both the Watermans and defendants had a common right of access. The issue which arose was whether other cars could be driven along and parked there by the Watermans' visitors. The Court held that the grant

[4] [2009] EWCA (Civ) 115

did not include such additional rights. Lady Justice Arden rendered the judgment and at paragraph 29 of the judgment she noted that:

> "The test to be applied is whether, having regard to the circumstances at the time of the transfer ... it would be a reasonable use, in the sense of a reasonably necessary use, of the green land to use it for stationing vehicles for the duration of the user's visit to the property: for this test see *Cannon v Villars at 422; Bulstrode v Lambert* [1953] 1 WLR 1064, where the right to pass and repass to get access to business premises included the right to stop to unload and *Moncrieff*, below especially at [112], [113]. It is not enough that the use is merely desirable (see *London and Suburban Land v Carey* (1991) 62 P &CR 480).
>
> The circumstances at the time of the transfer include the provisions in the transfer itself, particularly cl 5 of schedule 1 (above) and the fact that the transfer envisages that a garage will be constructed (without, however, prescribing its precise location). The circumstances also include the physical facts. At the time of the transfer there were four other parking spaces at the rear of 2, Hog Lane Farm (which was in fact then only a two bed-roomed house). The parties to the transfer had thus specifically considered parking rights and made what appears to be adequate provision for parking. The Right of Way to 2, Hog Lane Farm could be substantially enjoyed without any further parking right.
>
> In my judgment, if the parties had intended any further right of parking there would have been an indication to that effect in the transfer. Nothing in the surrounding circumstances at the time of the transfer supports the implication of any further right. I would indeed go further and hold that, where there is an express right attaching to the same property of a similar character to the right which is sought to be implied, it is most unlikely that the further right will arise by implication. The circumstances would have to be quite exceptional.
>
> I accept that there will sometimes be visitors with more cars than available parking spaces, but there is nothing to stop the Watermans asking Mr. Boyle and Ms. Gwilt for permission for their guests to park. Moreover, it would have been obvious to them when they bought the property that there were no rights for visitors to park on the appellants' land"

[50] In applying the test, it is clear that each case will have to be examined on its own facts. An examination of the particular circumstances will be critical and this is made clear at paragraph 34 of the Lady Justice Arden's judgment where she stated,

> *"Moncrieff* provides no support for the judge's conclusion. That case established that for the purposes of Scots law (which for this purpose was held to be the same as English law: see [29], [45] and [111]) a right to park was capable of being implied into a right of vehicular access if the right to park was reasonably necessary for the exercise or enjoyment of that right. On the facts of that case, the test for the implication of the right to park was met. But the facts were quite exceptional… The facts of *Moncrieff* are far removed from the present case, and the case turned on its special facts. The test applied in that case is that set out above but its application to the facts of this case leads to a very different result."

[51] The reasoning in the Moncreiff decision is critical because the learned judges took pains to analyze the position where there is an express grant, but they also considered the appropriate test where there is no express grant to consider. The analysis began with this passage from Lord Campbell LC's judgment in Ewart v Cochrane[5]:

> "My Lords, I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words in the conveyance….When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant."

[52] Lord Hope went on to state that;

> "… the issue as to what rights may be claimed as ancillary or accessory to the servitude right did not arise in *Ewart v Cochrane*. It requires only a slight modification to the words of Lord

[5] (1861) 4 Macq 117, 122-123

> Campbell LC to identify the test that is to be applied in the case of ancillary rights, where there is an express grant and the question is what ancillary rights are necessary for the convenient and comfortable use and enjoyment of the servitude. In *Jones v Pritchard* [1908] 1 Ch 630, 638 Parker J said that the grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise and enjoyment. Cusine and Paisley, *Servitudes and Rights of Way* (1998), para 12.124 accept this observation as a statement of the position in Scots law too. As they put it in the same paragraph, "Not only does a servitude permit activity falling squarely within its scope but also activities which are ancillary to the primary activity." In *Kennedy v Macdonald*, 14 November 1988, unreported (1988 GWD 40-1653) Sheriff Principal Caplan said that activities which are reasonably incidental to the enjoyment of the access may be incorporated in the right. It is preferable, however, not to risk diluting the test by expressing it in these terms. The question is whether the ancillary right is necessary for the comfortable use and enjoyment of the servitude. The use of the words "necessary" and "comfortable" strikes the right balance between the interests of the servient and the dominant proprietors."

[53] It is clear that the answer may differ from case to case.

[54] By way of legal submissions, the Claimant has also posited that he was also acquired the right to park by way of prescription by lost modern grant. This doctrine was articulated by the Court of Appeal in Tehidy Minerals Ltd v Norman [1971] 2 QB 528 (at 552):

> "where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made."

[55] Unlike prescription by statute, lost modern grant does not require the period of use to have been continuing up to the date proceedings are commenced. Twenty years uninterrupted user at any point in time will create a prescriptive right, even if the user ceased many years ago. The right can

be therefore be acquired at common law under the rules of lost modern grant provided the owner of the dominant tenement can prove 20 years continuous use.[6]

[56] The Claimant's case is that since he purchased the properties in 1987, he has always parked on the Right of Way and so have all his visitors, tenants and agents. He contends that the Defendant would have been well of aware of his use because he frequented the properties in question would have found him parked on the Right of Way. He goes further and states that all previous owners of the properties have also parked on the Right of Way since approximately 1957.

[57] In responding to these contentions, the Defendant merely stated that he had no knowledge of any matters which predated his entry into occupation of Parcel 4. But he stated that he has personally complained about the Claimant's parking his vehicle since he acquired Parcel 4 in 1994.

[58] Within the Eastern Caribbean, the question of a right to park has been considered on alternative grounds in the judgment of Blenman J (as she then was). In case of Elizabeth Cordice Mapp v Cammie Mathews.[7] The learned Judge in that case had to consider whether Mr. Matthews had obtained any rights to the Right of Way "over and above" the right "to pass and repass" by both vehicle and foot where the Claimant advanced his claim on several grounds including: (1) necessity; (2) estoppel by record; (3) prescription/limitation.

[59] The learned Judge was persuaded that on the facts of the case that the Defendant had failed to meet the threshold required to establish that he has acquired prescriptive rights to the Right of Way. Instead, the Court was satisfied that a 1981 court order authorized the defendant's predecessors, through whom he claims, to use the Right of Way "to pass and repass". The Court held that this court order did not confer on Mr. Matthews' predecessor, the right to park vehicles on the Right of Way for an indefinite period of time.

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[6] Dalton v Angus (1881) 6 App. Cas 740.

[7] St. Vincent and the Grenadines - Claim No. 560 of 2002

[60] Blenman J. also concluded that Mr. Matthews' prolonged parking of his motor car on the Right of Way was an excessive and impermissible user of the Right of Way. He was therefore not permitted to park his vehicle on the Right of Way in such a manner to infringe with Mrs. Cordice Mapp's user of it. Before arriving at this conclusion the learned Judge made several findings of fact. At paragraph 59 of the judgment the court noted.

> "The Right of Way is Mrs. Cordice Mapp's only entry to her two-storey dwelling house erected on Lot 9. The Right of Way can accommodate three vehicles parked one behind the other. Any vehicle parked on the Right of Way would be parked wholly on Mrs. Cordice Mapp's land in her yard. There is no room on the Right of Way for two vehicles to be parked alongside each other. Mrs. Cordice Mapp's vehicle can only gain access to her house by driving over the Right of Way. If more than one vehicle is parked on the Right of Way, Mrs. Mapp's vehicle would have no access to her house. If one vehicle is parked on the Right of Way right up to Mr. Matthews' property Mrs. Cordice Mapp cannot turn her vehicle around to drive out from her yard, but would have to reverse the distance out to the main road."

[61] It is therefore not surprising that the learned Judge came to the conclusion that while Mr. Matthews had the right to use the Right of Way in order to get to and from his house, he had no similar right to park his vehicle on the Right of Way for "an unlimited time". He was only allowed to park his vehicle for the sole purpose of embarking and disembarking.

[62] Turning to the evidence in the case at bar, this Court makes the following findings of fact:

i. This Right of Way is registered as an appurtenance and encumbrance respectively on the Claimant's and Defendant's properties. It is and has been recorded and entered on the register for Parcel 4 since 1974.

ii. Although the Right of Way is prescribed as measuring 16 feet in width, at certain points the actual dimension varies from that prescribed dimension.

iii. That Defendant's hotel development does in fact encroach on the Right of Way at certain points.

iv. The Claimant has historically and persistently parked on the Right of Way since he purchased his properties in 1987.

v. At the point on the Right of Way where the Claimant parks it is impossible for two cars to park in that location. In parking in that area on the Right of Way, the Defendant has obstructed the entrance of the Defendant's property to such an extent that it is difficult for persons to enter freely or to take or remove luggage or commercial goods without some difficulty. That the Claimant specifically obstructs the units of the Defendant's Hotel hindering the free passage of occupants, clients and service vehicles.

vi. That the Claimant's properties at located at a cul-de-sac where there is no other reasonable means of ingress or egress save via the existing Right of Way over the Defendant's property. There is no appropriate alternative location available to the Claimant on his own property to park. Further that the alternative solution advanced in the Systems Engineering Report does not adequately address issues of personal and property safety.

vii. That although there was evidence that the Defendant may have instructed their attorneys to write to the Claimant about his parking, there is no evidence that these letters were actually brought to the attention of the Claimant. There is however evidence adjoining land owners (Immersion Ltd owner of Parcel 3) wrote to the Claimant challenging his right to park on the Right of Way.

viii. That the Defendant however made repeated oral complaints to the Claimant about his parking on the Right of Way which intensified after the Defendant had completed construction of the hotel suites.

[63] Having made these findings of fact the Court will now consider the two grounds advanced by the Claimant.

Right of Park - Prescription by Lost Modern Grant

[64] In Williams v State Transit Authority of NSW [2004] NSWCA 179 the Court of Appeal was asked to consider whether the doctrine of lost modern grant applied to claim for rights of way over land. The Court concluded that

> "At common law an easement may be created by twenty years uninterrupted enjoyment of the right claimed. This doctrine of "lost modern grant" requires the court to presume, even if contrary to the truth, the existence of an express grant which has been lost. The presumed grantor must have the legal capacity to have executed the grant."

[65] In order to prove that he had a prescribed right to park on the Right of Way, the Claimant would have to prove that his use has been as of right; that the use has been continuous for a period of twenty years and that the use has been "*nec vi, nec clam, nec precario*" that is not by force, nor stealth, nor the licence of the owner. Mills v. Colchester Corporation (1867) L.R. 2 C.P. 476, 486).

[66] The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right--in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. Regina v. Oxfordshire County Council and Others Ex Parte Sunningwell Parish Council [1999] 3 ALL ER 385.

[67] The first requirement of "without force" means that the user must not be contentious. The word force has a wide meaning and can include actual physical violence or damage to property. Force can even be a clear protest by the servient owner; the protest may take the form of physical, material or legal action. The second condition is "without secrecy". Prescriptive easements can be generated only if the use has been 'open' – that is to say, 'of such character that an ordinary owner of land, diligent in the protection of his interests, would have, or must be taken to have, a

reasonable opportunity of becoming aware of the use. Any secret performance prevents the servient owner from protesting and objecting the acquisition of the right. Also, even if the act is not performed in secret, the servient owner must have knowledge of the act. The third condition is "without permission". One obvious case is where the servient owner receives an annual sum from the claimant; this shows a continuing element of permission. If permission is asked or consent given then the servient owner would be acknowledging that no right exists and would go against prescription. Providing the servient owner knows of the act and tolerates such act, the user is 'as of right'.

[68] In considering the Claim the Court noted that the first ground was not expressly pleaded in the Fixed Date Claim Form or in his statement of case. Instead, the extent of the address is set out at paragraphs 4, 6 and 7 of his Affidavit where he states:

i. That since he purchased his properties in 1987, he has always parked on the Right of Way and so have all his visitors, tenants and assigns.
ii. That prior to his occupation, his predecessors in title have also always parked on the Right of Way.
iii. That for the past 20 years he had a cordial relationship with the Defendant. He could recall only two conversations with the Defendant which involved the issue of parking. These conversations were not acrimonious.
iv. At no time did he ever receive an objection from the Defendant or his manager about his parking on the Right of Way or his obstructing the Defendant's (or his guest) access to his property.

[69] Part 8.7 of the CPR reinforces this position:

(1) "The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.
(2) The statement must be as short as practicable.

(3) The claim form or the statement of claim must identify or have annexed thereto a copy of any document which the claimant considers is necessary to his or her case."[8]

[70] This provision reinforces that litigation proceeds on the basis that the court is a court of pleadings. A litigant's pleadings must give fair notice of the case that has to be met, so that the opposing party may direct its evidence to the issues disclosed. Thus, every pleading must contain a concise statement of the material facts on which a party relies for his or her claim. Material facts must be stated clearly and definitely in a summary way. They should not need to be inferred from vague or ambiguous expressions, or from statements of circumstances consistent with different conclusions.

[71] The Court does not accept that in these circumstances, it is appropriate for the Claimant to ignore the requirements set out under the CPR and to seek to litigate an issue which has not been raised in his pleadings, thus taking the opposite party completely by surprise. In light of the way that the Claimant has chosen to plead his case, the Court is satisfied that the Claimant cannot in legal submissions purport to advance a claim which he deliberately chose not to advance in his written pleadings and evidence.

[72] Nevertheless, having reviewed the totality of the evidence led, the Court finds that the Defendant has failed to meet the threshold required to establish that he has acquired prescriptive right to park on the Right of Way via a lost modern grant. The Court found that the Claimant failed to properly particularize his Claim as it concerns the circumstances and quality of the user of his predecessors in title consistent with the elements of prescription by lost modern grant.

[73] Further, the Court found that the Claimant's evidence as to his own user in particular his interaction with the Defendant and his neighboring landowners was inconsistent and unreliable. His vacillating

[8] In the same way, a defendant must plead to any matter on which he or she intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise, or raise an issue that has not been raised in the opposite party's pleading.

contradictions posed a great difficulty for the Court. The Court was forced to conclude his user of the Right of Way has been contentious and maintained under protest.[9] While he may have not have directly received any of the numerous letters from the Claimant's solicitors, having had the opportunity to observe the witnesses, the Court accepts the credible evidence of the Defendant and his manager that they repeatedly opposed such user. The Court finds that such protests would have been unmistakable and fully understood by the Claimant. In addition, it became clear to the Court that the Defendant was not alone in this and that other adjoining owners have in the past raised similar challenges. These challenges were detailed in Cause No. 4 of 1998 and at paragraphs 14 of the Claimant's affidavit and exhibited to the Defendant's witness statement.

[74] It follows that there was no user *as of right* established and so the Claimant's case fails on that ground.

Right to Park Ancillary to vehicular Right of Way

[75] At paragraph 10 of his affidavit/statement of case, he claims that in order to exercise or enjoy the Right of Way and the properties, it is necessary for him, any visitors and any subsequent owners to be able to park on the Right of Way. Accordingly he seeks a declaration that he be allowed to enjoy all the benefits of the 16 foot Right of Way located on Block 2235B Parcel 4 including the right to park thereon.

[76] The critical issue to be determined in this case is whether the Claimant's admitted right of vehicular access to over the Right of Way entitles him and his licensees to park thereon. In considering this issue, the Court must consider whether such a right would have been necessary for the convenient and comfortable enjoyment of the Right of Way. The Court accepts that the terms "necessary" and "comfortable" strikes the right balance between the interest of the dominant (Parcels 1 and 2) and servient (Parcel 4) tenements.

[9] Dalton v Angus at page 786

[77] Neither party has advanced evidence of the circumstances surrounding the initial grant of the Right of Way. As such, the Court is unable to construe the assumed grant in light of the circumstances which existed then. However, it seems to the Court that the anticipated intended use of Parcels 1 and 2 would have been residential. It follows that the owner of Parcels 1 and 2 (the dominant tenement) would have required vehicular access to these properties over the Right of Way.

[78] It is also clear that the Claimant's properties are located at a dead end and that the only land based access to the Claimant's property is over the Right of Way. The Court also accepts that the nearest location where vehicles used to gain access to the dominant tenement could park would be on the Public Road; that is further from the dominant tenement in Long Bay. It follows that for anyone wishing to spend more than a brief time at the Claimant's property, the vehicular access along the Right of Way would be immaterial as the vehicle would have to park on or near the public road. For such an individual, access to the Claimant's property would have had to be achieved by foot along the Right of Way. This has significant implications for the comfortable or convenient enjoyment of the dominant tenement or the Right of Way, where access may well be would be sought at night or during inclement weather.

[79] The Defendant has contended that parking on the Right of Way is wholly unnecessary because there is ample means by which the Claimant can park on his own property. In that regard, while the Claimant may have carried out repairs over the years, the Court accepts the evidence of Pam Romney that the residence on Parcel 2 was built in the 1970s and that when the Claimant purchased the properties in 1987, there were steps on the property which extended to the end of the property to the Right of Way. The Court considered the photograph at Exhibit "DK4" which verifies this present configuration.

[80] During the course of the Defendant's case, much reliance was placed on the report from Systems Engineering which provided proposals by which the Claimant would park on his own property. Unfortunately, the author of this report was not examined under oath and so the Report and its

methodology were not tested on cross examination. This factor was critical in determining the weight to be attached to the conclusions drawn in the report. This is particularly so given that the Claimant generally disputes the findings and points to very real shortcomings which were not satisfactorily traversed by the Defendant. What is clear is that Defendant's proposals call for significant expenditure and restructuring of features which would have predated the Claimant's purchase in 1987 and which may well have been in existence as at the date of the grant of the Right of Way.

[81] The Court is therefore unable to conclude that there are in fact any reasonable means by which the Claimant could park on his own property. The Court has no hesitation in finding that the proposals may be impractical because the presence of the steps and the relatively narrow width of the way and because of the potential for injury, loss and damage resulting from the rock falls along the cliff face.

[82] In applying the relevant test identified in Moncrieff v Jamieson to the facts of this case, the Court finds that the right to park was a necessary ancillary to the vehicular Right of Way because it was reasonably necessary to the enjoyment of the Claimant's dominant tenement and his vehicular right of access that there should be a right to park at some point along the Right of Way. When the Court has regard to the geography and the topography of the surrounding area, the Court also finds that the vehicular right of access cannot be enjoyed without the right to park on the Right of Way.

[83] Having stated this, the Court also accepts the Defendant's evidence that the way in which the Claimant's exercises the right to park on the Right of Way obstructs access to his property.[10] In that regard, the Court has considered whether the accessory right to park on the Right of Way would result in an unacceptable or undue burden on the servient tenement. In doing so, the Court has considered the Defendant's evidence and that of his manager. The totality of this evidence demonstrates that the essence of the dispute between the Parties is the manner in which the right

[10] Paragraph 10 and 13 of the witness statement of Bernard Hochberg

to park is being exercised. The relevant legal principle was set out at paragraph 39 of the judgment of Lord Hope in Moncrieff.

> "The second reason for discounting the possibility of abuse is to be found in the principle that, in Bankton's words, the servitude right must not be used "invidiously to the other's detriment": II, VII, 18. As Lord Marnoch said in the Extra Division, par a 24, questions of how and precisely where the right to park is to be exercised are questions that ought to be capable of being resolved by the parties acting sensibly but can, if necessary, be decided under reference to the rule that the servitude right must be used civiliter. This point has been recognised by the terms of the declarator, which refers to the right to park "such vehicles as are reasonably incidental to the enjoyment of said access to the dominant tenement." The right is not to store or warehouse vehicles on the servient tenement. It is a right which is ancillary to the right of access to the dominant tenement." Emphasis mine

[84] In the Court's judgment, a core issue in this case is whether the Claimant exercised his rights under the servitude, *civiliter modo*. This common law principle prescribes that the holder of the Right of Way is "obliged to exercise his right in a reasonable manner that is, with due regard to the interests of the servient property and its owner".[11] It must be exercised with as much consideration as possible towards the servient property, with the least damage or inconvenience to the servient property.

[85] Having assessed the witnesses and the evidence in this case, the Court is satisfied that the difficulties between the Parties may have well worsened after the Defendant's hotel was expanded with the addition of villas/suites which faced the area where the Claimant would have parked. And in that regard, the Court has considered the Defendant's concession that there are areas where the

[11] Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467, Innes CJ and see Bloemfontein Town Council v Richter supra 195; Kakamas Bestuursraad v Louw 1960 (2) SA 202 (A) 217F; CG van der Merwe Sakereg 2nd ed 483)

steps would have encroached at certain points of the Right of Way. Nevertheless, having considered the written evidence in this case and having observed witnesses in cross examination, it is clear to the Court that the way in which the Claimant has exercised his right to park is inconsistent with the *civilter* principle. In fact, on this issue, the evidence of the Defendant and Ms. Mikoleiczik was particularly convincing.

[86] The Court finds that this issue has led to a long standing, contentious and hostile dispute which would not have been assisted by the Parties' belligerent posture and by the Claimant's inconsideration. In circumstances where parties have been long time neighbours, questions of how and precisely where the right to park is to be exercised are questions that ought to be capable of being resolved by the parties acting rationally and reasonably. Unfortunately, this has not been the case here.

[87] For that reason, this Court to obliged to order and declare that while there is an ancillary right to park on the 16 foot Right of Way over Parcel 4, in exercising this, the Claimant, his visitors and licensees and successors in title are obliged to park in a location and in a manner which does not bar or obstruct access to the Defendant's property in any way.

[88] The Court notes also that the legal arguments submitted by Counsel for the Defendant in this case, sought to equate the Right of Way with a public highway. As a consequence, in resisting the Claim, Counsel placed much reliance on the doctrine of dedication and acceptance. For the avoidance of doubt, the Court was not persuaded that these legal principles have any real application in the case at bar and so this analysis and the authorities advanced did not assist the Defendant.

[89] Finally, during the course of these proceedings, it became clear that there was no evidence to support the relief claimed at paragraphs 2 and 3 of the Fixed Date Claim Form and so these claims were not considered by the Court.

[90] **The Court's therefore orders and d**eclares that:

i. Ancillary to the 16 foot Right of Way located on Parcel 4 of Block 2235B, West End Registration Section identified on survey plan CA-2235B-078 – T prepared by Michael Potter a surveyor and approved by the Chief Surveyor on 21st December 2007 which has been declared a Right of Way by the court is the right to park.

ii. The Claimant be allowed to enjoy all the benefits of the 16ft Right of Way including the right to park thereon and for his tenants, invitees, servants, agents or his successors in title.

iii. In exercising the right to park, the Claimant, his visitors and licensees and successors in title are obliged to park at a location and in a manner which does not bar or obstruct access to the Defendant's property in any way.

iv. The Defendant is to pay the Claimant's costs in the sum of $3,500.00.

Vicki Ann Ellis
High Court Judge