Case No: CH-2016-000167

Neutral Citation Number: [2017] EWHC 3783 (ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Wednesday, 12 April 2017

BEFORE:

MR JUSTICE NEWEY

BETWEEN:

(1) BERNADETTE DE LA CUONA
(2) DE LA CUONA DESIGNS LIMITED
(3) GRANT PEARSON

Appellants

- and -

BIG APPLE MARKETING LIMITED

Respondent

MR N HOOD (instructed by Thakrar & Co) appeared on behalf of the Respondent

MR J DE WAAL QC (instructed by WSL) appeared on behalf of the Appellants

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Judgment
(As Approved)

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No of words - 3745
of Folios - 52

MR JUSTICE NEWEY:

1. The question raised by this appeal is whether His Honour Judge Gerald, sitting in the County Court at Central London on 23 June of last year, was right to conclude that a deed dated 5 February 1998 granted an easement of parking.

2. The parties to the relevant deed were the then owners of 13 High Street, Windsor and of a neighbouring property, Mistress Page's House. The registered proprietors of 13 High Street and Mistress Page's House are now, respectively, the respondent, Big Apple Marketing Limited, and the first appellant, Ms Bernadette de la Cuona.

3. The deed relates to parking spaces in a car park comprised within Ms de la Cuona's land. It is common ground that the car park has capacity for some 14 to 16 parking spaces. The deed grants (or at any rate purports to grant) the owner of 13 High Street rights in respect of two spaces within the car park.

4. The lease is described on its front page as a "LEASE of parking rights in the car park at Mistress Page's House". Clause 2, which is headed "DEMISE", is in the following terms:

> "In consideration of the yearly rent hereinafter reserved and of the covenants on the part of the Tenant hereinafter contained the Landlord HEREBY DEMISES unto the Tenant exclusive full right and liberty for the Tenant its assigns and underlessees and their respective agents employees or licensees (as appurtenant only to the Tenant's freehold properties each and every one and any part of them and all of them the details of which are set out in the schedule hereto) to park up to two motor cars in such individual parking spaces as shall from time to time be designated by the Landlord (the 'Allocated Spaces') but so that no such space shall be of lesser dimensions than illustrated on the plan hereinafter mentioned in the car park situated at the rear of the Landlord's building known as Mistress Page's House 13/14 High Street, Windsor (the 'Building') which said car park is shown edged in red on the plan annexed hereto and is hereinafter referred to as the 'Premises' TOGETHER with the right for the Tenant in common with the Landlord and all others having the like right to use the access road leading from Madeira Walk serving the same (the 'Service Road') for the purpose only of access to and egress from the Premises and the common areas of the Premises EXCEPT AND RESERVED unto the Landlord the right at all times hereafter of the free passage of running of water steam soil gas electricity and other services to and from the Building through the drains pipes channels wires and mains under the Premises and of making connections with such drains pipes channels wires and mains or any of them for the purposes of exercising the said right of passage and the running of water steam soil gas electricity and other services and upon the exercise of such right of connection forthwith making good all damage caused to the Premises and otherwise causing as little inconvenience as possible TO HOLD the said right and liberty unto the Tenant from and including 14th February 1998 for a term just in excess of 114 years so as to expire on 24th March 2112 YIELDING AND PAYING therefor yearly and every year during the said term hereby granted the rent of ONE POUND (£1) (if demanded) to be paid without any deduction on 1 January in each year advance."

5. On this appeal there are essentially two issues. First, did the deed on its proper construction provide for the grant of an easement (as the respondent contends) or rather amount to a lease (as the appellant argues)? It is common ground that, if the appellant is right on this, the deed is void for non-registration. The second issue is whether, assuming that the deed purported to grant an easement, the grant was ineffective because the right could not constitute an easement. The judge decided both points in favour of the respondent.

6. So far as the first issue is concerned, it is undoubtedly the case that the deed uses language suggestive of a lease in a number of places. The deed is called a "Lease" on its front page and the parties are termed "Landlord" and "Tenant". Clause 2, as I have mentioned, is headed "Demise" and uses the words "Hereby demises". There is, moreover, provision for the payment of a yearly "rent" and "further or additional rent". Clause 3.3 (by which the grantee covenants "To use each of the allocated spaces for the purposes only of parking one motor car thereon"), clause 3.10 (by which the grantee covenants "To permit the Landlord to have all necessary access to the allocated spaces on previous notice to the Tenant wherever practicable for the purpose of carrying out any repairs or decorations to the Premises the Building or the service road"), clause 4.1 (which contains something that might be termed a covenant for quiet enjoyment by the grantor), and clause 5.1 (which allows the grantor to terminate for breach) might also be expected in a lease.

7. Mr John de Waal QC, who appears for Ms de la Cuona, argues that, in the circumstances, language and substance tally. The deed not only uses the terminology of leases, but provides for the grant to the grantee of exclusive possession of the relevant parking spaces. The deed should thus be seen as what it calls itself: a lease.

8. There are, however, pointers in the opposite direction. The judge attached particular importance to three: first, the fact that the deed does not simply demise parking spaces, but rather grants "exclusive full right and liberty" "to park up to two motor cars". Similarly, the front page of the deed, although using the word "Lease", refers to "parking rights" instead of "parking spaces." This language tends to indicate a grant of something less than the exclusive possession that a lease would require.

9. Secondly, the judge pointed out that clause 2 of the deed provides for the "exclusive right of liberty" to be "appurtenant" to the grantee's freehold properties. That again suggests easement, not lease.

10. Thirdly, the judge stressed the grantor's ability to change the designated parking spaces. Mr Nigel Hood, who appears for the respondent, laid some emphasis on this point, which means, he said, that there was no identifiable parcel of land in respect of which a lease could have been registered. It strikes me as possible, although I have not considered the point in any depth at all, that a lease with shifting subject matter, such as Mr de Waal postulates, could also face perpetuity issues.

11. I agree with the judge that these three factors are all of weight. I also agree with Mr Hood that none of the matters identified by Mr de Waal is necessarily *inconsistent* with the grant of an easement. So far as the terminology is concerned, what matters is

substance rather than mere form. Clause 3.3 might arguably be seen as redundant if the deed provides the grant of an easement, but it does not give rise to an inconsistency and might rather be seen as belt and braces. Clause 3.10 could be of use to the grantor even assuming that what is being granted is an easement (supposing, for example, that he wished to disrupt the grantee's parking while resurfacing). While, moreover, it may be unusual to grant an easement for an interest equivalent to a term of years, s.1(2) of the Law of Property Act 1925 shows that to be possible and, whether or not the term "rent" is apt, there can be no objection to periodic payments. In that regard, Mr Hood referred me to the decision of Judge Paul Baker QC, sitting as a judge of the High Court, in London & Blenheim Estates Ltd v. Ladbroke Retail Parks Ltd [1992] 1 WLR 1278, where (at 1288) the judge addressed the question of whether a right to park cars can exist as an easement and said this:

> "I would not regard it as a valid objection that charges are made, whether for the parking itself or for the general upkeep of the park."

12. In the end, the construction issue is quite a short one on which it is not helpful to elaborate at length. On balance, it seems to me that the preferable view is that the judge was right and that the deed on its true construction provided for the grant of an easement.

13. I turn then to the second issue. Here, Mr de Waal relied principally on the decision of the Court of Appeal in Batchelor v. Marlow [2001] EWCA Civ 1051; [2003] 1 WLR 764. In that case, the first instance judge had held that a right to park cars had been acquired by prescription. An appeal was allowed, the court taking the view that the right found to exist by the judge was not capable of subsisting as an easement. In arriving at its conclusions, the court endorsed another passage from the judgment of Judge Baker in the London and Blenheim case. Judge Baker had said this (at 1288):

> "If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant."

Applying that test to the facts of the case, the court considered that the right in question would leave the owner without any reasonable use of his land. Tuckey LJ said at paragraph 18:

> "If one asks the simple question: 'Would the plaintiff have any reasonable use of the land for parking?' the answer, I think, must be 'No'. He has no use at all during the whole of the time that parking space is likely to be needed. But if one asks the question whether the plaintiff has any reasonable use of the land for any other purpose, the answer is even clearer. His right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory."

14. Batchelor v. Marlow has since been the subject of criticism, not least from the House of Lords in a Scottish case, Moncrieff v. Jamieson [2007] UKHL 42; [2007] 1 WLR 2620. As, however, has been recognised by judges in other cases, Batchelor v. Marlow

must remain binding on English first instance judges. I therefore proceed on basis that the test approved by the Court of Appeal in Batchelor v. Marlow is that to be applied in the present case.

15. Batchelor v. Marlow has not, however, prevented the validity of rights to park being upheld in several cases in recent years. Judge Purle QC, sitting as a judge of the High Court, came to such a conclusion in Virdi v. Chana & Others **[**2008**]** EWHC 2901 (Ch), and Ms Amanda Tipples QC, sitting as a Deputy High Court Judge, took a similar view in the more recent case of Begley v. Taylor [2014] EWHC 1180 (Ch).

16. The point was also addressed, and in some detail, by Judge David Cooke, sitting as a judge of the High Court, in Kettle v. Bloomfold Ltd [2012] EWHC 1422 (Ch); [2012] L&TR 30. That case concerned a lease, a clause of which provided for the demise of premises together with rights specified in a schedule, which included:

> "the sole right to use the Car Parking Space for the purpose of parking a taxed car or motorbike."

Judge Cooke held that the grant was effective. He commented on the implications of Batchelor v Marlow in, for example, paragraph 18 of his judgment where he said this:

> "Mr Edwards next submits that the grant of 'sole use' at a rent is equivalent to exclusive occupation, that the landlord cannot do anything else with the car parking space and cannot even cross it when no car is on it unless a right to do so is reserved. The situation is on all fours with Batchelor v Marlow. This submission does not bear scrutiny.
>
> (i) the tenant is not granted 'sole use' of a car parking space, he is granted the sole right to use it for parking a car or motorbike. This is not the language of exclusive possession, although no doubt a lease could be granted of a car parking space containing covenants restricting its use to parking a car;
>
> (ii) the submission that the landlord cannot do anything with or on the car parking space unless a right is specifically reserved to do so assumes what is required to be proved, i.e. that the grant constitutes a demise. The words of the right themselves do not prevent the landlord from doing anything else with the car parking space, except to the extent that that would be inconsistent with the ability to park a car on it;
>
> (iii) it was plainly not the intention that the right granted excluded the ability of others to pass across the car park space because they were expressly granted the right to do so. One could only come to the conclusion that the purported grant of such rights was ineffective by starting from the assumption that the car parking space has been demised, i.e. again assuming what is required to be proved.
>
> (iv) Batchelor v Marlow did not decide that the right to park a car on a piece of land which is only big enough to accommodate one car amounts to exclusive possession, but only that the prescriptive right claimed in that case was so extensive, on the facts, that it could not subsist as an easement. It is a question of fact in each case whether the right granted

(or exercised, in the case of a claim by prescription) is such that it makes the freeholder's ownership illusory, in which case, Batchelor holds, it cannot be an easement and the next question is what other form of right it may be."

17. Going on, Judge Cooke said this:

"23. I approach this from the starting point that the defendant may do anything that a freeholder could normally do, except to the extent that it is excluded by the terms of the right granted in the lease, ie except to the extent that it would be inconsistent with the express right to park a car, together with any terms to be implied as a normal matter of construction. Thus the defendant may pass on foot or by vehicle across the space freely if there is no vehicle parked on it for the time being or avoiding one that is. He may authorise others to do likewise (and has done so in the other estate leases). He may choose, change and repair the surface, keep it clean and remove obstructions (and is obliged to do so in providing the Services). He may lay pipes or other service media under it, as he may wish to do for the benefit of the estate buildings. He may in principle build above it (as is proposed under the crash deck scheme) or provide overhead projections such as wires.

24. The point was made that these matters would not necessarily be precluded by a finding of a demise, but for present purposes the question is whether the ability to undertake them can be said to be so negligible as to make ownership illusory. No doubt other examples could be given, but in my judgment these suffice-all of these rights are likely to be of importance and value to the freeholder in the context of this land, in managing the estate for his benefit and the benefit of its leaseholders. Far from being illusory, these rights may be regarded as important, even necessary."

18. It is also relevant to refer to a paragraph from the judgment of Lord Neuberger in Moncrieff v. Jamieson to which both counsel took me. In the paragraph in question, paragraph 139, Lord Neuberger, having referred to Batchelor v. Marlow, said this:

"Accordingly, it seems to me that, on the pursuers' case, a right to park could only be prevented from being a servitude or an easement if it resulted in the servient owner either being effectively excluded from the whole of the land in question or being left without any reasonable use of that land. If the right to park a vehicle in an area that can hold 20 vehicles is capable of being a servitude or an easement, then it would logically follow that the same conclusion should apply to an area that can hold two vehicles. On that basis, it can be said to be somewhat contrary to common sense that the arrangement is debarred from being a servitude or an easement simply because the parties have chosen to identify a precise space in the area, over which the right is to be exercised, and the space is just big enough to hold the vehicle. Also, presumably on the pursuers' case, such a right would indeed be capable of being a servitude or an easement if the servient owner had the right to change the location of the precise space within the area from time to time."

19. Mr Hood sought to draw support from that last sentence in particular. Relying on it, he suggested that I should ask myself whether the grant of the easement, for which (on the view I take) the deed provided, precluded reasonable use by the grantor, not merely of the two designated parking spaces, but of the car park as a whole. The relevant servient tenement, he submitted, is to be seen as the whole of the car park rather than just the two parking spaces.

20. My present feeling is that that may be to over-simplify matters. Supposing that it were impossible for the grantor to make any use at all of the two parking spaces designated for the time being, I would not necessarily see it as an answer to the Batchelor v. Marlow point that the grantor was still free to use the balance of the car park. Even, however, if that is right, it seems to me that the ability of the grantor to change parking spaces has to be taken into account when considering the application of Batchelor v. Marlow. So much indeed seems me to be indicated by the last sentence of paragraph 139 of Lord Neuberger's judgment in Moncrieff v. Jamieson.

21. I come then to whether the judge was right to take the view on the facts of this case that the easement purportedly granted by the deed was effective. In that connection, the judge said this:

> "The question here, in my judgment, boils down to a very narrow question, which is that once the car parking spaces have been designated and become albeit temporarily Allocated Spaces - which can be re-designated at any time even during the day - does the grantor retain reasonable use of the Allocated Space such that it is not illusory?"

The judge went on:

> "In my judgment the answer to this question is that the grantor retains reasonable use of the Allocated Spaces once designated and his right to use them is not illusory. Whilst the grantor does covenant not to interfere with the grantee's right to park and so on, that does not mean that the grantor cannot use them when the grantee is not there, cannot walk over them when the grantee is not there, cannot perhaps allow other people to do so."

22. In the end, I take the view, like the judge, that the deed was effective to grant an easement, notwithstanding Batchelor v. Marlow. Asking myself the question endorsed by the Court of Appeal in Batchelor v. Marlow, I answer that the rights granted to the grantee were not such as to leave the grantor without any reasonable use of the relevant land. The grantor can both change the allocated spaces as he chooses (with, it would seem, little notice, if any is required at all) and make use of the spaces for the time being designated. When, for example, there is no car in a space, it is possible for the grantor to walk across it or - and this may be of practical significance - for a car to be backed into it when seeking to come out of another parking space in the car park. In principle, the grantor could, as I see it, renew or change the surfacing or indeed, should he so wish, erect an advertising hoarding on the fence. Provided that what he is doing does not interfere with the grantee's ability to park in the two spaces, the grantor can do as he wishes with them. There is here a parallel in particular with Kettle v. Bloomfold.

23. In short, it seems to me that what I am bound by is the test approved in Batchelor v. Marlow. Applying that test on the facts of this case, the correct conclusion is, as the judge held it to be, that the grant of the parking rights does not render the grantor's ownership of the land illusory.

24. In all the circumstances, I agree with the judge's conclusions and must accordingly dismiss the appeal.
