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PT-2019-000819

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2021

Before :

Deputy Master Arkush

Between :

THURLOE LODGE LIMITED	**Claimant**
- and -	
(1) AMBERWOOD DRIVE LIMITED	**Defendants**
(2) PRIME LONDON HOLDINGS 11 LIMITED	

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Mr de Waal QC and Mr Watkin (instructed by **Dentons UK and Middle East LLP**) for the **Defendants**
Mr Warwick QC (instructed by direct access) for the **Claimant**

Hearing dates: 27 and 28 April 2021
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JUDGMENT

(Approved)

DEPUTY MASTER ARKUSH :

1. This is my judgment on the Defendants' applications dated 4 December 2020 and 4 March 2021 for summary judgment on key aspects of the Claimant's claim.

2. The Claimant, Thurloe Lodge Limited, is represented by Mr Warwick QC. The Defendants, Amberwood Drive Limited and Prime London Holdings 11 Limited, are represented by Mr de Waal QC with Mr Watkin. I have been greatly assisted by their skeleton arguments and compact submissions, which have enabled the hearing which was listed for two days to be completed in just over a day.

3. At an earlier stage the Claimant applied for and was granted interim injunctive relief by Mr David Holland QC sitting as a Deputy High Court Judge. Mr Holland's judgment dated 17 October 2019 sets out the background to the claim at paragraphs 1-21 which I gratefully adopt:

"1. This is an application for an interim injunction made by the Claimant, Thurloe Lodge Limited, against the Defendants, Amberwood Drive Limited and Prime London Holdings 11 Limited. The Claimant has been represented by Mr Warwick QC with Mr Kynoch and the Defendants have been represented by Ms Holland QC with Mr Wills.

2. The application relates to a right of way which the Claimant admittedly has over a private roadway situated opposite the Victoria and Albert Museum in central London. The roadway runs in a roughly southerly direction off the public highway at Thurloe Place. It is some six metres wide and approximately 36

metres in length. It has a footway down its eastern side which extends most of the way down that side.

3. The Claimant is the freehold owner of a property known as Thurloe Lodge which is situated at roughly the south-eastern corner of the private road (which I shall hereafter call "the Road"). The Second Defendant is the owner of another substantial and adjacent residential property known as Amberwood House, the entrance to which forms the southern end of the Road. The Road is a dead end and it is, so far as I can see, the only means of access, certainly vehicular access, to both Thurloe Lodge and Amberwood House.

4. The history of the matter is briefly as follows.

5. Thurloe Lodge was a Victorian construction built in or about 1840. It was, so I am told, originally built as two dwellings, but subsequently knocked into one. Amberwood House itself was built in about 1928. In or around 1972, Thurloe Lodge became occupied by a tenant. All the properties, that is Amberwood House, Thurloe Lodge and the roadway, were at the relevant time owned by a trust. In 1972, the trust leased Thurloe Lodge to Mark Birley, who was famous, or infamous, as a socialite and inter alia the owner "Annabel's" nightclub.

6. On 23 March 1998, Mr Birley, in the exercise of his rights under the Leasehold Reform Act 1967, purchased the freehold of Thurloe Lodge. I have a copy in the bundles of the conveyance, which is by Bircham & Co Nominees (No. 2) and William Dolman to Mr Birley. It is a freehold transfer, and it includes the following right granted to the property owner: "A right of way with or without vehicles (in common with all others now or hereafter entitled to a like right) to pass and repass over and along the roadway subject to the

obligation to contribute 40 per cent of any costs properly incurred by the transferor in maintaining, repairing, renewing, cleansing and lighting the roadway."

7. It is the ambit of that particular right of way (which I shall call "the right of way") over the Road which is at the heart of this particular application. 8 Amberwood House was transferred out of the trust's estate on 18 September 2009 and, on 17 December 2010, it was transferred to the Second Defendant. On 26 April 2012 and, again, on January 2013, planning permissions were granted to the Second Defendant for a substantial reconstruction or refurbishment of Amberwood House.

9. On 27 September 2012, the freehold of Thurloe Lodge was transferred to the Claimant. In 2013, a construction traffic management plan was prepared on behalf of the Claimant in respect of a planning permission which it wished to obtain to allow it to carry out very substantial works to Thurloe Lodge. Planning permission was granted in or around the end of July 2013. The works which have been, and are in the course of being, carried out to Thurloe Lodge are very substantial indeed. The original Victorian house has been almost completely demolished and, in its place, albeit over the same footprint, a substantial modern dwelling with a substantially increased floor area has been erected or is in the course of being erected.

10. In or around the middle of 2015 (the exact dates do not matter), the separate building works began on both Thurloe Lodge and Amberwood House. In the course of those building works, disagreements arose between the Claimant and the Second Defendant, on the one hand, and the owners of the road, who were

then the trustees, on the other. This led to a decision being taken by the Claimant and the Second Defendant jointly to enter into negotiations with a view to purchasing the Road to facilitate their respective developments. These negotiations continued in 2016, 2017 and 2018. However, the Claimant eventually pulled out of the negotiations, leaving the Second Defendant, through the vehicle of the First Defendant (which is an associated company) to purchase the freehold of the Road for £4.5m on 9 October 2018.

11. Between that date and 2019, or towards the end of 2019, there were, and I have seen substantial evidence of this, negotiations between the Second Defendant and the First Defendant, on the one hand, and the Claimant, on the other. I say "negotiations" but that may not be an accurate description of what occurred. The thrust of what occurred was that the Defendants were in correspondence urging the Claimant to enter into a licence agreement to formalise what had been, and was, taking place on the Road.

12. What appears to have been taking place on the Road (which was, it transpires at all times gated) was that it was effectively being incorporated into a large building site. I have seen various photographs taken at various times, and the works being carried out are very substantial. There was scaffolding at some time on the roadway and, at some other times, there were building materials stored on it.

13. It appears that, until perhaps late July or September 2019, the Claimant, on the one hand, and the Defendants, on the other, worked together and cooperated. There does not appear on the evidence before me to have been any great dispute about, or any problems with, them both using the Road to remove debris and to

deliver building materials. It is quite clear from the photographs that, if the large commercial vehicles which are required to remove debris and deliver materials, are to access the Road, then these will take up virtually the whole width of the roadway and, therefore, cooperation is required between all occupiers.

14. Disputes appear to have arisen in or around July, August or September 2019. The genesis of the disputes appears to have been: the scaffolding which was placed (initially with permission) by the Second Defendant on the Claimant's land; and/or a planning application made by the Claimant which was opposed by the Second Defendant. In any event, I do not have to decide why the parties fell out, but fall out they did.

15. Matters came to a head on the weekend of 27/28 September. The Claimant was effectively shut out of the Road by the conscious actions of contractors on behalf of the Defendants. It is clear, and not in dispute, that this was a deliberate act taken by the Defendants to prevent any use of the Road, at least temporarily, by the Claimant. This was, Ms Holland told me, because the Defendants took the view that the Claimant had substantially abused its rights over the Road and used it in excess of those rights.

16. In any event, this dispute led to correspondence between solicitors instructed by both parties. The position taken by both parties ultimately can be explained in the following letters.

17. On 8 October 2019, Messrs Dentons acting on behalf of the Defendants wrote in response to a letter from the Claimant's solicitors, and they said this inter alia (and I read from the third paragraph on the first page of that letter): "For the record, our client is absolutely entitled to interpret the meaning of the

right of way [that is a reference to the right of way granted in the March 1998 conveyance] based on the natural meaning of the words used, and you have adduced no evidence whatsoever to suggest a contrary interpretation. Your client is simply scratching around to try and find a better meaning of those words because it suits your client to do so. A right to pass and repass does not include a right to park. Nor does it include a right to load and unload heavy construction traffic, which would not have been in the contemplation of the parties at the time when the right of way was granted, and indeed, if they were rights, they would have been drafted differently. You have provided no evidence whatsoever to support any claim based on either prescriptive rights or rights arising by implication. We reiterate that our client has no objection and has taken no steps to prevent your client exercising its lawful right to pass and repass over the roadway, but our client cannot allow usage in excess of this. Our client has effectively been excluded from using the roadway as a result of your client's obstructions."

18. That letter was sent in response to a letter from the Claimant's solicitors threatening injunctive proceedings and indeed including a draft Claim Form and order. In it, Messrs Dentons also said this on the second page: "In the meantime, our client will not be providing the undertakings as requested, as these are wholly inappropriate and unnecessary given the factual legal position already detailed in our letter of 3 October 2019. We consider that your client's application for injunctive relief is ill-judged and we draw your attention to the costs consequences of such action, particularly in circumstances where thus far the factual assertions made in correspondence have been shown to be wholly unfounded. If your client does proceed, we are instructed that our client will

vehemently defend such proceedings." That, in summary, was the position adopted by the Defendants through their solicitors.

19. The position of the Claimant is set out in the letter in response from Messrs Kennedys, which was dated 9 October. I quote from the third page of that letter: "Our clients will contend, therefore, that such user was ancillary to the express pass and repass rights as set out in the 1998 transfer. The basis of our claim is clearly set out, both in this letter and in the second paragraph of our letter sent on 7 October 2019. However, so that there is no doubt about the relief our client shall seek, we shall contend for the following rights, arising out of the express right (referred to above under the 1998 transfer) and by implication arising from long user as at the date of the 1998 transfer above: (1) a right of way with or without vehicles, at all times, (in common with all others entitled to a like right) to pass and repass over and along the roadway adjoining Thurloe Place, London SW7, as described in the transfer dated 23 March …; (2) a right for all such vehicles to stop upon the roadway, to load or unload all passengers and cargo of any description; (3) such rights arising by reason of the transfer and/or by implication therefrom, and/or by virtue of section 62 of the Law of Property Act 1925 and/or by prescription."

20. Therefore, the parties' positions were clearly explained to each other in correspondence. On the one hand, the Defendants were asserting that the right given in the right of way to "pass and repass" was precisely that: it was limited to a right to walk and drive up and down the roadway or the road, but did not include a right to stop, park, load and unload. The Claimants, on the other hand, were asserting that the right of way included a right for vehicles to stop on the

Road to load or unload passengers and cargo of any description. Of course, the importance of this to the Claimant is, it is said, that it is necessary to stop, load and unload on the Road in order to complete the construction of its property.

21. These proceedings were issued shortly afterwards, and I have before me today this application for an injunction. The order sought is an order directing that the First and Second Defendants: "(a) Must not (at any time of the day or night, including weekends) substantially interfere with, or seek to substantially interfere, with: (i) the passage of any vehicles driven by the Claimant's servants, agents, workmen or invitees (including vehicles engaged upon building work relating to Thurloe Lodge) along any part of the roadway; (ii) the loading or unloading of the vehicles referred to in (i) above." The key issue, therefore, in the proceedings is whether, as it asserts, the Claimant has a right to park and to load and unload on the Road in excess of or in addition to the express right to pass and repass granted in the right of way."

4. In the event the Deputy High Court Judge granted injunctive relief until trial in the form of his order dated 17 October 2019. His intention was to maintain the status quo between the parties. The practical result was to permit the Claimant to continue its building works to Thurloe Lodge and these works are continuing. The Defendants' works to their property at Amberwood House are also ongoing. Counsel told me that when the building works are complete both properties will command exceptionally high values even by London standards and could be sold for £45 million each or even substantially more.

5. The key issue referred to by the Deputy High Court Judge in paragraph 21 of his judgment reproduced above is the subject of the Defendants' application for

summary judgment. The Defendants say that the Claimant cannot possibly succeed at trial on its assertions that it has rights to park and load and unload on the Road (adopting the same definition as the Deputy High Court Judge) and that the court should give judgment on that matter now.

6. At the outset of his submissions Mr de Waal QC frankly submitted to me that the Defendants' intentions in making the applications for summary judgment were first, that if the applications succeeded, the Defendants were not averse to the Claimants having rights to park, load and unload, but the Claimants would have to bargain for them. In other words (mine rather than Mr de Waal's), they would have to pay money for them at a price determined in negotiations in which the Defendants would be likely to have the upper hand. Secondly, if the applications succeeded, the Defendants would ask me to direct that the matter be referred back to a Judge for the injunction to be revisited, on the ground that the Deputy High Court Judge's conclusion that the claim raised a serious issue to be tried will have fallen away as the result of judgment against the Claimant on the key issue. I record this as it is part of the context in which the applications for summary judgment are brought, and not out of any criticism of the Defendants. It has not coloured my view on the applications since, if the grounds for summary judgment are well founded, the Defendants' motives in applying for it are irrelevant. Moreover, the Defendants are entitled to say that if the claim on the key issue is shown to be without substance, the interim injunction will have enabled and will continue to enable the Claimant to 'steal a march' on them and present them with a fait accompli at trial, with no legal entitlement.

7. Case management directions have been given which provide among other matters for trial to begin on 7 June 2022. That is still 14 months away. If summary judgment is given, it is likely to impact very significantly on both the injunction and the trial and the Claimant's right to continue with the works to Thurloe Lodge. There is therefore much at stake in this application.

8. It is therefore unsurprising that the skeleton arguments and submissions on these applications were detailed, albeit presented compactly. The bundles of documents and witness statements ran to close on 700 pages and there were some 564 pages of authorities. I have taken careful note of all the submissions and authorities to which I was referred even if they are not specifically mentioned in this judgment. I shall restrict myself to setting out what I consider to be the salient points for my decision.

The disputed rights claimed by the Claimant on which summary judgment is sought

9. The disputed rights are set out at paragraphs 14(2) to 14(6) of the Re-Re-Amended Particulars of Claim, the relevant part of which are as follows:

"14. *Prior to Mr Birley's said purchase, Thurloe Lodge enjoyed the following liberties, privileges, easements, rights and advantages over or in respect of the Roadway:*

(1) …

(2) A right for vehicles (of all types) to stop on the Roadway and to load and unload.

(3) …

(4) A right, whenever reasonably necessary (alternatively necessary), to use the Roadway for the purpose of carrying out work to the land and/or buildings at Thurloe Lodge, and to the services serving Thurloe Lodge.

(5) …

(6) The right to maintain or replace all sewers drains pipes wires cables channels or conduits upon giving reasonable notice to the First Defendant, or without notice in an emergency."

10. The legal and factual basis on which the Claimant says it enjoys these rights as freehold rights is set out in the Re-Re-Amended Particulars of Claim at paragraphs 18 and 21C, which are as follows:

"18. *Further or alternatively, by virtue of Section 62 of the Law of Property Act 1925, the 1998 Transfer operated to confer upon Mr Birley and his successors in title (including the Claimant) the rights, liberties, privileges, easements and advantages set out in paragraph 14 above.*

"21C. *Until about 27 September 2019 the Claimant and its predecessors in title of Thurloe Lodge, and the several occupiers of Thurloe Lodge, as of right and without interruption, for the full periods of 40 and 20 years respectively, enjoyed the rights set out in paragraph 14 above. By reason thereof the Claimant is entitled to continue to enjoy the said rights over the Roadway by reason of section 2 of the Prescription Act 1832 and/or by reason of lost modern grant.*"

11. The foundations of the Claimant's claim to the disputed rights are therefore (1) Section 62 of the Law of Property Act 1925 ("Section 62") and (2) prescription. The Claimant also relies on the right to stop and unload as being implied by the express words of the right of way but this did not feature to any great extent in this hearing.

12. The Defendants apply for summary judgment on the ground that the Claimant has no real prospect of succeeding on either Section 62 or prescription. The first summary judgment application therefore seeks "*summary judgment against the Claimant on the issues raised at paragraphs 14(2), 14(4), and consequentially in paragraphs 18 and 21C of the Re-Amended Particulars of Claim*" (the latter now comprising the Re-Re-Amended Particulars of Claim). The second summary judgment application seeks "*Summary judgment against the Claimant on the issues raised at paragraph 14(6) of the Re-Re Amended Particulars of Claim*" (that sub-paragraph having been added by the re-amendment).

The applicable principles to be applied on an application for summary judgment

13. These are not controversial. Mr de Waal QC and Mr Warwick QC agreed that the tests to be applied on a defendant's application for summary judgment are those set out in the following well-known citation from the judgment of Lewison J (as he then was) in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at paragraph 15:

"As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the

application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

14. Mr Warwick's skeleton argument also draws attention to the very recent judgment of Andrew Hochhauser QC sitting as a Deputy High Court Judge in ***Arani v Cordic Group*** [2021] EWHC 829 (Comm) at paragraph 25:

"I also remind myself of the following:

(1) the criterion "real" is not one of probability, it is the absence of reality: see Lord Hobhouse in Three Rivers District Council v Bank of England (Number 3) [2003] 2 AC 1 [158];

(2) an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence: see Apovdedo NV v Collins [2008] EWHC 775 (Ch);

(3) in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief.

15. Mr Warwick QC also drew attention to the judgment of Lord Collins at **Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd** [2012] 1 WLR 1804, at paragraph 84:

> "84. The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and

> not hypothetical facts: e.g. Lonrho Plc. v. Fayed [1992] 1 A.C. 448 , 469 (approving Dyson v Att-Gen [1911] 1 KB 410, 414: summary procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance ..."); X (Minors) v Bedfordshire County Council [1995] 2 AC 633 at 741 ("Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"); Barrett v Enfield London BC [2001] 2 AC 550, 557 (strike out cases); Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd. [1990] 1 WLR 153 (summary judgment)."

16. I intend to direct myself in accordance with these principles, in particular those set out in ***Easyair***.

Preliminary points taken by the Claimant

17. Mr Warwick QC took two preliminary points which I shall deal with at this stage.

18. The first is that in the judgment given when the interim injunction was granted, the Deputy High Court Judge held that there was a serious issue to be tried on the questions whether the Claimant had rights under Section 62, and whether the express right of way included an implied right to park, load and unload. There has been no appeal against that decision. Mr Warwick submitted that these findings gave rise to a res judicata. He cited in support the statements of principle in the judgment of Henry Carr J in ***Baxendale-Walker v APL Management Ltd*** [2018] EWHC 543 (Ch) at paragraph 32 onwards. He also referred me to ***Samara v MBI & Partners UK Ltd*** [[2016] EWHC 441 (QB). Mr Warwick submitted that in substance a finding that the Claimant's case

raised a serious issue to be tried is the same as a finding that the case could not be said to have no realistic prospect of success.

19. I am not persuaded by that submission. It does not seem to me that the tests are the same. It is understandable that at an early stage of the proceedings when an interim injunction is sought, it is a relatively low hurdle for an applicant to demonstrate that his claims raise a serious issue, in the sense that they are not fanciful or imaginary. The position may look very different when the claim has proceeded through statements of case and evidence, as this case has, and one party is able to assemble a more weighty application for summary judgment than would have been feasible at the injunction stage. It seems to me that it would be odd, to say the least, if that party was precluded from raising his application by a finding reached at a much earlier stage when the matter was in a more formative state. A court considering an interim injunction on the one hand, and an application for summary judgment on the other, may be looking at very different matters, and the application for summary judgment may well incorporate a host of evidence and law that did not exist at earlier stages of the litigation. That seems to me to be the case here. I would therefore not accede to Mr Warwick's first preliminary point.

20. The second preliminary point was that the order giving the Claimant permission to re-amend the Particulars of Claim was made by consent. Mr Warwick submits that by giving their consent the Defendants were making the admission that the case put forward in the re-amendment had real prospects of success, such that it would be an abuse to allow this question to be re-litigated. I am unable to accept that submission. It seems to me to conflate the position with

an opposed application for permission to amend, when undoubtedly the party seeking permission must demonstrate that the case sought to be raised by amendment has a real prospect of success. However, consent to the amendment merely signifies the lack of objection to the issue raised on amendment. It does not signify any admission that the case raised by the amendment is correct or even that it has any force. It does no more than accept that the issue is in play, and is amenable to being justiciable at trial or at an earlier time such as on an application for summary judgment.

Prescription

21. I now turn to deal with the substantive matters on the applications for summary judgment. I shall do so by taking the first and third points in Mr de Waal's skeleton argument and submissions, as both go to prescription, and will then deal his second point which addresses Section 62.

22. The first issue is prescription.

23. On 10 February 1981 Mr Birley was granted a leasehold interest in Thurloe Lodge by way of assignment of the lease dated 18 February 1972, which was a lease for a term of 55 years. By a Transfer dated 23 March 1998 (the "1998 Transfer") Mr Birley acquired the freehold of Thurloe Lodge[1].

24. The Claimant's pleaded case relies (in part) on periods of use prior to the 1998 Transfer. Prior to the 1998 Transfer Mr Birley was the tenant of the Alexander

[1] About 124 years passed between the construction of the original cottages at Thurloe Lodge in about 1848 and the grant of the lease dated 18 February 1972. It appears that throughout this period both the Road and Thurloe Lodge were in the common ownership of the Alexander Estate (see Re-Re-Amended Particulars of Claim at paragraph 9) so that (as I assume but without making any finding) no prescriptive rights could arise over the Road in favour of Thurloe Lodge.

Estate and the Claimant's case on this point therefore involves a claim that a tenant can obtain an easement against his landlord by prescription. Mr de Waal submits that this is a hopeless point as it is trite law that a tenant cannot prescribe against his landlord. He cited in support ***Gale on Easements***, 21st edition at 1-47. This is doubtless a leading if not the leading text in this area, edited by the powerful team of Morgan J, a Judge of this court, and Jonathan Gaunt QC. The rationale given in the text is that a tenant can only prescribe in right of his landlord, and it is an impossible notion that Mr Birley's landlord could (through him) acquire a right against itself.

25. To this Mr Warwick had two answers. First, he cited the decision of the Court of Final Appeal of Hong Kong, delivered by Lord Millett, in ***China Field Ltd v Appeal Tribunal (Buildings)*** [2009] 5 HKC 231. The decision is considered in detail by ***Gale*** at 4-95 onwards and at 4-99 onwards reference is made to the question whether a prescriptive right can be obtained by a tenant against his landlord. At 4-101 ***Gale*** refers to the judgment of Lord Millett as powerful and stated that it

"*obviously opens up the possibility that easements may in future be acquired by tenants on their own behalf against tenants and against a tenant's landlord, thus restoring the position that Parke B said in Bright v Walker obtained before the Prescription Act albeit that nobody has ever been able to identify the authority for that proposition*"

26. However, in ***Metropolitan Housing Trust Ltd v RMC FH Co Ltd*** [2017] EWHC 2609 (Ch) Morgan J stated at paragraph 32 of his judgment that he was not able to disregard the established rules in English law, even though Lord

Millett stated that if the rules were to be examined by the Supreme Court (of the United Kingdom) he doubted that they would be upheld.

27. It seems to me that whatever the position in Hong Kong, I am bound by the law as it presently is in this jurisdiction and I must follow the approach of Morgan J. I might nonetheless be tempted to conclude either that this is not a "short point of law" such as referred to in Lewison J's principle (vii) in ***Easyair***, or that its resolution at final trial with more time available for analysis formed "some other compelling reason" for its disposal at trial within CPR Part 24.2(b). However, it seems to me that I need not go that far, in view of Mr Warwick's submission that the matter was academic, since more than 20 years had passed – in fact 21 years and 7 months – between the date of the 1998 Transfer and the issue of this claim in October 2019. This was the third point in Mr de Waal's skeleton argument and to that I shall now turn.

28. The Claimant has assembled witness statements dealing with the user of the Road and Mr Warwick told me in reply that there may well be more. At this stage the statements included the following among others to which I have added the dates they covered: (1) Andrew Langton 1981-2012, (2) Donald McColl 1987-October 2007, (3) Jacqueline Woolf 1990-2007, (4) Zahra Chahidi 2006 to the present day, (5) Chris De Marco 2010 onwards. The common theme running through these statements is that Thurloe Lodge was a much-used and busy house used for living in and entertaining and visitors, tradesmen and contractors routinely used the Road for parking, delivering, loading and unloading, often for substantial periods, with no objection or interference from the Alexander Estate. Mr McColl also referred to him carrying out patchwork

repairs to the Road and to an occasion in 1998 (although he could not give the date so it was possibly before the 1998 Transfer) when the Road was dug up by a digger so that a new pipe or cable could be laid along its length.

29. For the purposes of the summary judgment applications Mr de Waal accepts all the evidence tendered on behalf of the Claimant as being true. His answers to it are (1) there is no witness who can show continuous use of the Road consistent with the rights claimed for more than 20 years and (2) the Alexander Estate deliberately parked a burger van in the Road from September 2013 to June 2015.

30. I shall deal first with the burger van. It is a somewhat odd incident given the character of the locality. In the 5th statement of Jeremy Orpen-Palmer, the Claimant's solicitor, he describes the placing of the burger van on the Road as a tactic by the Alexander Estate for the purpose of interfering with the passage of wide bodied construction vehicles being used for the Claimant's building works "with a view to forcing through the sale" of the Road to the owners of either Thurloe Lodge or Amberwood House for a large sum which could be called a ransom amount. However, when the Claimant (and indeed the Defendants) needed to use the full width of the Road for their respective building works solicitors' letters were written to the Alexander Estate, which promptly removed the van. It also removed gates to the Road which were liable to cause some obstruction.

31. Mr Bindra, a director of the Claimant, refers to the matter in similar terms in his statement. The solicitors' letter from Kennedys on behalf of the Claimant to the solicitors for the Alexander Estate is dated 1 June 2015 and is at page 389 of the application bundle. It referred to an offer then being made by the Claimant and

Defendants together for £1 million. In the event the Defendants purchased the Road for the significant amount of £4.5 million, which affords some indication of what is at stake in these proceedings and of the value of the parties' respective properties. Thus the tactic of the Alexander Estate appears to have been successful.

32. However, I cannot discern in this or any other evidence any indication, or at least any clear indication, that the Alexander Estate was asserting any rights inconsistent with those claimed by the Claimant or that it was objecting to them. At the time it was parked the burger van did not interfere with those rights (although it might have done had it not been removed). The Claimant's visitors were able to access the Road, park, load and unload as they had been accustomed to do. Moreover, when asked to remove the van the Alexander Estate did so at once. None of this seems to me to point clearly to the Alexander Estate interrupting the activities said to give rise to the rights claimed by the Claimant. If anything they point to a contrary state of affairs confirming that the Estate had no objection to the use of the Road for large vehicles. The suggestion that might be made that this was merely consistent with the right of way is hardly straightforward (and as far as I can recall was not made at the hearing), as the use of large vehicles begs the question where they were going to park, given that there was not necessarily room for them within the boundary of Thurloe Lodge.

33. I turn to consider the evidence as to the use of the Road by the Claimant and its predecessors in title. **Gale** deals with the period of enjoyment and interruption

in the context of prescriptive rights at 4-70 onwards. At 4-71 it is stated as follows:

"*The actual user is only sufficient to satisfy the statute if during the whole of the statutory period (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised and if resistance to it is intended.* ***Whether the actual user is thus sufficient is a question of fact.***" [emphasis added]

34. In my judgment it is not open to me, nor is it appropriate, to hold against the Claimant under this head on an application for summary judgment. To do so would be to conduct a mini trial and to disregard the possibility of further evidence being reasonably obtainable at trial. If I made findings of fact in view of the totality of evidence obtained thus far – all of which the Defendants accept for the purposes of these summary judgment applications – I would be in danger of causing serious injustice to the Claimant. I decline to do so. In my view the question of what user occurred and over what period and whether there was any interruption by the Alexander Estate comprises an evidential and factual enquiry which can only properly take place at a trial. I therefore refuse the application for summary judgment on the first and third arguments put forward on behalf of the Defendants which go to prescriptive rights.

Section 62

35. Section 62 provides:

"*(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof*."

36. Sub-section 62(4) provides:

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

37. The Claimant's case is that Mr Birley acquired the rights to park, load and unload on the Roadway while he was the tenant of the Alexander Estate under the lease dated 18 February 1972. The lease granted the right of way which is not in controversy

"*with or without vehicles (in common with all others now or hereafter entitled to a like right) to pass and repass over and along the roadway which is coloured brown on the said plan subject to the obligation to contribute two-fifths of any costs properly incurred by the Lessor in maintaining repairing renewing cleansing and lighting the said roadway*"

38. The following passage is in ***Gale*** at 3-36:

"*The need for some diversity of ownership or occupation*

A relatively clear case where s.62 operates to grant an easement to a transferee of the dominant tenement is where the dominant tenement is occupied by a tenant to whom the freehold is then transferred. If such a tenant had rights over the servient tenement pursuant to the terms of his tenancy, then those rights are demised with the dominant tenement (for the purposes of that phrase in s.62) and after the transfer of the freehold to the tenant, the tenant continues to enjoy the rights previously enjoyed but now in the capacity of freeholder, rather than tenant. If such a tenant did not have rights over the servient tenement pursuant to the terms of his tenancy, but such advantages were actually enjoyed with the dominant tenement, then again on the tenant acquiring the freehold of the dominant tenement, the former advantages will be upgraded into rights pursuant to s.62 and enjoyed by the transferee of the freehold in the capacity of freeholder. In these cases, there is clear diversity of occupation of the dominant and the servient tenements and no particular difficulty under s.62 arises."

39. The Claimant's case is that Thurloe Lodge was the dominant tenement enjoying the easements claimed at the time it was occupied by Mr Birley either pursuant to the terms of his tenancy (the 1972 lease) or otherwise actually enjoyed. On acquiring the freehold by the 1998 Transfer the easements (or rights or advantages) will be upgraded into rights by the operation of Section 62 and will thereafter be enjoyed by the freeholder in that capacity. The case thus put forward seems to me to be entirely consistent with the passage in ***Gale*** cited above.

40. Alternatively, if that passage does not apply to a case where the dominant tenement is occupied by a tenant whose freeholder is the owner of the servient

tenement (as suggested in the witness statement of Bryan Johnston, the Defendants' solicitor, dated 2 December 2020), the Claimant relies on the decision of the Court of Appeal in ***Wood v Waddington*** [2015] EWCA Civ 538. In his judgment at paragraph 32, Lewison LJ approved the following statement of principle taken from a judgment of Fry LJ in ***Bayley v Great Western Railway*** [1884] 26 Ch.D. 434 at 456

"*…if one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either 'with all rights usually enjoyed with it' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre.*"

41. The Road is clearly a 'made and visible' road. I therefore agree with Mr Warwick's submission that the passage cited above is applicable to this case. I also note the comment in ***Gale*** at 3-38 that the issue as to the need for prior diversity or ownership or occupation has now been resolved by the decision in ***Wood v Waddington***. I further note that in order to determine the extent and period of the user of the rights of way along certain tracks which were in issue in ***Wood v Waddington***, the court of first instance found it necessary to embark on a detailed factual enquiry at a trial.

42. The Defendants' answer to this is that the right of way granted by the 1972 Lease was subject to an express qualification by the lessee's covenant in clause 2(17):

"*(17) To pay a fair proportion to be determined by the Surveyor for the time being of the Lessor (whose determination shall be binding upon the Lessee) of the expenses payable in respect of constructing repairing rebuilding or cleansing all party walls fences sewers drains roads pavements and other things the use of which is common to the demised premises and to other premises And in particular and without prejudice to the generality of the foregoing to pay to the Lessor on demand two-fifths of any expenditure or costs properly incurred by him of and incidental to the maintenance renewal repair cleansing and lighting of the roadway hereinbefore referred to and coloured brown on the said plan* ***And further not to obstruct the said roadway or the pavement thereof in any manner whatever***"

The Defendants rely upon the words at the end of the covenant that I have emphasised. I have cited the whole clause as it seems odd that a covenant against obstruction should be included as part of a covenant to pay a share of the expenses of maintenance. It is almost as if it was added as an afterthought.

43. Be that as it may, the Defendants place heavy reliance on it. Mr de Waal QC pressed the point with photographs of a car parked on the pavement, with the straightforward ordinary meaning of the words of the covenant and with the OED definition of 'obstruction'. He submitted that as a matter of language the parking of even a single car anywhere on the Roadway or the pavement for even a short time was necessarily an 'obstruction'.

44. The submission has force, but I am not persuaded by it, at any rate for the purposes of a summary judgment application. The reasons are as follows.

45. First, even as a matter of the ordinary use of language, and giving the admittedly emphatic term "in any manner whatsoever" its full weight, I am not satisfied that it is correct to characterise the parking of a car on the Roadway an 'obstruction'. The photographs to which Mr de Waal directed my attention show clearly that the parking of a car on the road does not cause an obstruction of the Roadway, as another vehicle is able to pass and repass freely. It is true that if the car was parked partly on the Road and partly on the pavement it would cause an obstruction of the pavement within the meaning of the covenant. However, this is a rather fine distinction and it does not appear to come anywhere close to the Defendants' real case, which does not seem to complain of parking using part of the pavement.

46. Secondly, it is clear law that the meaning of terms used in a document must be governed by the context of the document as a whole, taking account of all the words used and having regard to the factual matrix in which the document came into existence. I remind myself that when the 1972 lease was granted, the Roadway had been the sole means of vehicular (and possibly any) access to Thurloe Lodge for about 124 years, during which time it carried the potential in terms of extent and convenience for extensive use. How that potential was in fact enjoyed is a matter of evidential and factual enquiry, which is a proper matter for trial and not a summary judgment application.

47. Thirdly, the Claimant's case is that the rights it claims in relation to the Roadway were actually enjoyed at the time of the 1998 Transfer, as they had

been during the currency of the 1972 lease, at any rate by Mr Birley. This raises a point of law as to whether the rights were upgraded by the operation of Section 62 on the 1998 Transfer and also a question of evidence as to the nature and extent of the rights or advantages enjoyed. I cannot and ought not to determine these issues on a summary judgment application.

48. Fourthly, even if the rights claimed by the Claimant constituted an obstruction, and therefore amounted to a 'wrong' which on the Defendants' case cannot be put right by Section 62, the Claimant's case is that the Alexander Estate did not enforce or waived its rights. In paragraph 12 of the Reply to the Re-Re-Amended Defence, it is pleaded in answer to the assertion of the covenant against obstruction simply that "the prohibition in the 1972 Lease was never enforced". Mr de Waal submits with some force that even after several rounds of amendment, the Claimant has failed to plead any case of waiver or acquiescence on the part of the Alexander Estate as landlord. This must be deliberate, says Mr de Waal, as the Claimant does not have the facts to make such a case.

49. I would be very reluctant to decide this issue on a pleading point, and in view of the conclusions I have reached on other issues it would be academic. However, the Claimant has pleaded the fact that on its case the covenant against obstruction was never enforced. It seems to me that if the Claimant proves its case on this issue at trial (which is where it must be proved if at all), it will be able to put forward arguments as to the legal consequences. I agree that the Reply as it stands is no more than a sparse pleading in relation to waiver or acquiescence, but to my mind it is enough. The arguments that the issue will

generate should be aired at trial when the judge will be in a position to consider the whole picture, including importantly the evidential background as well as more detailed submissions. I am not in that position now.

50. Fifthly, the Claimants take a further point that in all the circumstances the Alexander Estate abandoned the covenant, in the same way as the Crown was held to have done in ***AG of Hong Kong v Fairfax Ltd*** [1997] 1 WLR 149. In my view the Claimant is entitled to raise this as an issue, the determination of which necessarily involves a factual enquiry. In other words, this must be a matter for trial.

51. Sixthly, I note that by sub-section 62(4) cited above, the 1998 Transfer could have included words indicating a contrary intention to particular rights passing with the freehold, but did not do so. The circumstances must be explored, if they are to be, by reference to the evidential background, and that can only take place at a trial.

52. Seventhly, I observe that the summary judgment applications are specifically directed at the Claimant's case under paragraphs 14(2), (4) and (6) of the Re-Re-Amended Particulars of Claim. There is no application in respect of the right claimed in paragraph 14(3) which is in these terms:

"*(3) A right for motorcars, used by persons visiting or living at Thurloe Lodge, to be parked on the western or eastern side of the Roadway, for the duration of the visit or the stay of such persons.*"

As appears above, the Defendants' arguments based on the covenant against obstructing the Roadway ought logically to apply equally, indeed directly, to

the parking of cars on either side of the Roadway by visitors or residents of Thurloe Lodge. Mr de Waal's indeed submitted that the parking of a single car amounted to an obstruction within the meaning of the covenant. I have no explanation for the applications being drafted so as to exclude the claimed right to park on the Roadway. I assume it is deliberate and perhaps there is nothing in the point, but it contributes if only to a small extent my instinctive feeling of reluctance that the disputed claims at large in these applications should be decided by way of summary judgment.

53. Finally, I shall deal with the second summary judgment application. This is directed at the right claimed in paragraph 14(6) of the Re-Re-Amended Particulars of Claim

"*to maintain or replace all sewers drains pipes wires cables channels or conduits upon giving reasonable notice to the First Defendant, or without notice in an emergency*"

54. Mr de Waal QC did not spend much time on this at the hearing. In my view he was right not to do so. He did not take issue with the proposition to be found in ***Gale*** at 9-113, based upon ***Carter v Cole*** [2006] EWCA Civ 398 that

"*the dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way …*"

The Re-Re-Amended Defence indicates that the Defendants object not to repair but to replacement. This may be a fine distinction depending on the circumstances. For example, in some case the best means of repairing a pipe

might be to replace it. It is not appropriate to explore this on a summary judgment application and in view of my conclusions it would be academic.

55. For all these reasons these applications for summary judgment fall to be dismissed.