Neutral Citation Number: [2024] EWHC 127 (Ch)

CH-2023-000006, CH-2023-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (CH D)

26 January 2024

Before:

MR JUSTICE LEECH

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B E T W E E N:

(1) CENTAUR PROPERTY ESTATES LIMITED **(2) TERENCE FREDERICK BLACKMAN**	**Appellants/ Respondents**

-- and –

(1) LARRY THORNTON SCOTT **(2) BRIDGET JONES** **(in her capacity as executrix of the estate of ERNEST JOHN JONES Deceased)** **(3) ADVANCED VEHICLE ALARMS LIMITED**	**Respondents/ Appellants**

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MR RICHARD POWER (instructed by **Walker Rose Solicitors**) appeared on behalf of the Appellants in the First Appeal (as defined below) and the Respondents in the Second Appeal (as defined below).

MR MARC GLOVER and **MR HUGH ROWAN** (instructed by **Comptons Solicitors LLP**) appeared on behalf of the Respondents in the First Appeal and the Appellants in the Second Appeal.

Hearing date: 19 January 2023

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APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30 am on Friday 26 January 2024 by circulation by email to the parties or their legal representatives and by release to the National Archives..

Mr Justice Leech:

I. Introduction

1. In this judgment I adopt the defined terms and abbreviations which I used in the principal judgment which I handed down on 31 October 2023: see [2023] EWHC 2712 (Ch). I will refer to it as the "**Appeal Judgment**" to distinguish it from the First, Second and Third Judgments which the Judge gave in the course of these proceedings. Further, where I refer to paragraphs in this judgment in square brackets, I intend to refer to paragraphs in the Appeal Judgment unless I state otherwise.

2. This is an appeal in a neighbour dispute. It was listed for three days between 8 and 11 June 2001 before the Judge in the Central London County Court. It overran by a day and he completed the evidence and heard closing submissions on 16 February 2022. On 6 July 2022 the Judge handed down the First Judgment. The parties were not able to agree a form of order and on 12 October 2022 the Judge gave the Second Judgment in which he dealt with the form of relief and the Third Judgment on costs. The parties were still unable to agree the form of Order and put two competing orders before the Judge. On 15 December 2022 he finally made the December Order.

3. The Claimants appealed and the Defendants cross-appealed. On 5 and 6 October 2023 I heard those appeals and on 31 October 2023 (just over three weeks later) I handed down a reserved judgment. I reminded the parties about the Chancery Guide, §12.92 to §12.96 and invited the parties to agree a form of order on the basis of certain indications which I had given, failing which I stated that I would list a consequential hearing for further argument: see [103] and [104].

4. I have very considerable sympathy with the Judge because history repeated itself before me. The parties were not available for a consequential hearing until 10 weeks after I had handed down judgment despite the guidance in the Chancery Guide and they could not agree the form of order despite the time which I had given them to agree it. Indeed, they could not even agree a template and shortly before the hearing they filed lengthy Skeleton Arguments and competing orders just as they had done before the Judge. At the hearing both Claimants and Defendants complained about the unwillingness of the other side to make any concessions.

II. The Order

5. The outcomes of the appeal and their effect on the relief granted by the Judge can be stated succinctly. I allowed the Defendants' cross-appeal against the declaration in paragraph 1 of the December Order which now falls away. But I dismissed their appeal against paragraphs 2 and 3 and upheld the Judge's finding that Centaur was entitled to a right of way by estoppel: see [94]. However, I also allowed Centaur's appeal and held that the Judge had fallen into error in framing the relief which he granted and that he should have granted an unconditional right of way rather than a limited right conditional upon the Defendants enjoying the right set out in paragraph (xii) of the recitals. To give effect to that conclusion I formulated the relief which I intended to grant and I had assumed that the parties would simply adopt this formulation: see [98].

6. It is fair to say that I accepted that my formulation would not necessarily prevent retail tenants from permitting customers to park in the car park and I accepted that this was a matter of legitimate concern. I also floated the possibility that this issue might be resolved by the imposition of a restrictive covenant. Nevertheless, I hoped that the Defendants might take a pragmatic view and agree to the right as I had formulated it at [98] without further limitation. I did so because I took the view that they had overstated the risk of excessive user: see [94](7) and [103]. Finally, I made it clear that Centaur was entitled to extend the right of way to Mr Blackman: see [99].

7. Again, I assumed that it would be relatively straightforward to give effect to these conclusions. First, the parties would replace paragraph 1 of the December Order with my formulation at [98]. Secondly, they would remove paragraph 2 and 3 of the December Order and replace them with two provisions: they would convert paragraph (xii) containing the Defendants' right of parking into a free-standing right and insert it in place of paragraph 2 in the body of the order and they would also replace paragraph 3 by expressly extending the unconditional right in paragraph 1 to Mr Blackman. Thirdly, neither party challenged paragraphs 4 to 8 of the December Order and I assumed that the parties would simply incorporate them in the order which they asked me to make with any necessary variations or amendments.

8. Instead, both parties put forward forms of order which gave them the widest possible rights whilst trying to limit the rights to be granted to the other side as far as possible.

The Appellants argued for the first time before me that a right in the form set out in paragraph (xii) of the December Order went much too far and that they had never intended to concede that the Respondents should have exclusive possession of the Defendants' car parking spaces or that they should be able to enjoy them except during office hours. They also submitted that the right in paragraph (xii) would in effect amount to a transfer of the land used for the "Defendants' Parking Spaces" and was not capable of being an easement at all: see *Copeland v Greenhalf* [1952] Ch 488 and *Gale on Easements* 21st ed (2020) at 9—123 to 9—132. These are not points which they took in the Appellant's Notice or in their Grounds of Appeal.

9. The Respondents joined battle with the Appellants on this issue citing *Moncrieff v Jamieson* [2007] UKHL 42 and *Emmett & Farrand on Title* (2023 ed) Vol 4, 17.050 to 17.054. They argued that the law had moved on from *Copeland v Greenhalf* and that I should decide that they were entitled to an unconditional right in the widest possible terms. However, without acknowledging any inconsistency they also argued that Centaur's right of way should be limited to access during business hours by the tenants and licensees of Centaur's commercial units (but excluding their customers or clients).

(1) The Right of Parking

10. The Order which I propose to make is the one which I had anticipated the parties would be able to agree subject to minor drafting points. I refuse to limit the Respondents' right of way on the basis of the argument advanced by Mr Power in his Skeleton Argument and at the consequential hearing because he should have applied for permission to amend the Grounds of Appeal and taken these points at the hearing of the substantive appeal. It is unnecessary for me to decide whether the right in paragraph (xii) of the December Order was capable of taking effect as an easement because there was no challenge to the scope of that right in the December Order. But whether or not the right set out in paragraph (xii) was capable of forming the subject matter of the grant of an easement, the Judge was entitled to insist that Centaur granted such a right as the price of granting the right of way and in satisfaction of the equity and, in my judgment, he should have done so given his findings of fact.

11. I make it clear, therefore, that the Defendants are to have the exclusive right to park on the Defendants' Parking Spaces. I am not satisfied that the Defendants' draft was

sufficiently clear on that issue and Mr Power declined to assist the Court by putting forward a form of words of his own. If Centaur or its tenants have the right to use the Defendants' Parking Spaces when they are not being used, I can foresee a dispute arising almost immediately and the Defendants applying to commit Centaur or its directors for a breach of my order.

(2) The Right of Parking

12. I also refuse to limit Centaur's right of way either to business hours or to business user. As Mr Glover himself pointed out in his Skeleton Argument, the Judge accepted Mr Fernback's evidence and found that Centaur would be permitted to use the accessway in exchange for 50% of the parking spaces on No 94: see the First Judgment, [70]. The Defendants appealed against that finding of fact. They did not advance an alternative case that there was a different agreement limited to a specific use. Moreover, as Mr Power pointed out, the Defendants' primary case at trial was that no estoppel arose because they had never parked on Centaur's land at all. Although Mr Glover persuaded the Judge to limit the right of way, I allowed Centaur's appeal against the form of relief which he granted for that very reason. In my judgment, the form of relief should reflect the agreement between the parties.

13. What concerned me in the Appeal Judgment at [94](7) was not any agreed limitation on the use of the right of way but excessive user. I was concerned that Centaur's tenants would take advantage of the right of way declared by the Court to offer public parking to their customers. I was just as concerned to prevent further litigation over the right of way as I am to prevent further litigation over the right of parking. On reflection, however, it seems to me that it is not appropriate to limit the form of relief either by inserting the words put forward by Mr Glover or by imposing a restrictive covenant not to use the right of way except for a limited purpose. In my judgment the more limitations or qualifications I add to the form of relief the more likely it is that a new dispute will arise. I will, therefore, make an order in the form which I proposed at [98]. If Centaur cannot be sensible and its use of its right of way results in further litigation, so be it. There is a limit to how much the Court can assist parties who are unwilling to compromise or to reach a pragmatic solution.

(3) Mr Blackman

14. Finally, there was a dispute about whether the right which Centaur may grant to Mr Blackman should be personal only. Mr Power showed me where Mr Blackman parks on the aerial photograph and there is barely room to park a single car across the boundary between the Claimants' land. I see no reason why Mr Blackman should not be able to permit the occupier for the time being of No 84 Lee High Road to use the right of way. This will not lead to excessive user.

(4) Other Issues

15. Paragraphs 8 to 12 of the order which I propose to make reflect paragraphs 4 to 6 of the December Order subject to certain very minor drafting changes. I have also made it clear that I have affirmed paragraphs 7 and 8 of the December Order and that the counterclaim and claim for indemnity remain dismissed. Mr Power provided me with a plan which he submitted should be treated as the Surveyor's Plan for the purposes of the Order. Mr Glover objected to it on the basis that it was not sufficiently detailed and did not include the Parking Spaces. There was no appeal by either party against the provisions of the December Order relating to the Surveyor's Plan and I am not in a position to determine whether they have complied with those provisions. The Plan to which I refer in the order which I now make is the Plan as defined in the Appeal Judgment. It is not, however, a substitute for the Surveyor's Plan which the parties are still required to obtain under paragraph 12 of my order.

III. Costs

16. CPR Part 44.2(6)(f) provides that I may make an order that a party must pay the costs relating to a distinct part of the proceedings. However, CPR Part 44.2(7) also provides that before I consider making an order under (6)(f) I must consider whether it is practicable to make an order under (6)(a) that one party should pay a proportion of the other party's costs or (6)(c) that one party should pay the costs until a certain date only. The editors of Civil Procedure (2023 ed) Vol 1 state the obvious reasons why an order under each of those provisions would be preferable (if at all possible): see 44.2.10 (p.1361).

17. Normally, I would try and make an order that the party who has won overall but lost on important issues should recover a percentage of their costs. Whilst this may result in rough justice, it will usually reduce the costs of a detailed assessment especially where

the common costs of a number issues may be substantial (as I suspect the position will be here). Regrettably, however, I do consider that it is practicable to make such an order in the present case. I say this for two reasons.

18. First, the Defendants succeeded on their appeal against the First Claimant, Mr Blackman, but lost their appeal against the Second Claimant, Centaur, and Centaur's cross-appeal. Although both Claimants were jointly represented, costs should follow the event so far as this is possible. Therefore, the Defendants ought to be entitled to their costs of defending the claim brought by Mr Blackman and their successful appeal against the Judge's decision in his favour. By the same token Centaur ought to be entitled to recover its costs of its successful claim against the Defendants and their unsuccessful appeal. Mr Power confirmed that there was some form of costs sharing agreement between the Claimants but at the end of the day the Court should not be concerned about this private arrangement.

19. Mr Power argued that no costs order should be made against Mr Blackman because he would not have brought a claim against the Defendants on his own and he did achieve limited success because I expressly extended the right of way to him. I reject that submission. Mr Blackman brought a claim asserting a legal right acquired by prescription and that claim failed. Moreover, as Mr Glover pointed out, I did not grant him a right of way to his own land merely to park on Centaur's land. In my judgment, Mr Blackman must take the normal costs consequences of a claim which fails at trial.

20. Secondly, I was in no position to form a clear picture the costs of each claim and how far they impacted on the overall costs. Mr Power told me that the Claimants had incurred £216,000 and Mr Glover told me that the Defendants had incurred about the same amount. But neither attempted to breakdown the figures in a way which would have enabled me to decide what proportion of their costs Centaur should recover from the Defendants or the Defendants from Mr Blackman. I did contemplate making no order as to costs and, in particular, no order as to costs in relation to the Appeals. It will be apparent from the views which I have expressed that I did not consider that the parties had approached this litigation with a sense of proportion. Nevertheless, I do not consider that this would be doing justice to the party who would have been entitled to recover a higher proportion of their costs.

21. For these reasons, therefore, I will make an issues-based costs order. I will also adopt the formulation of the issues and the incidence of the costs of those issues advanced by Mr Glover and Mr Rowan in their draft form of order. I offered Mr Power an opportunity to make submissions on the form of order but he chose not to do so and I am satisfied that Mr Glover's draft accurately reflects the outcome of the appeals. I have made minor changes of style but not of substance. Finally, I decline to make an order for the payment of costs on account to Centaur. It is not possible for me to be sure that Centaur is entitled to recover any costs at all and, if so, what figure would be appropriate.

V. Disposal

22. For these reasons, therefore, I make the sealed order which accompanies this judgment including the Plan (which has also been sealed). The declarations which I have made are primarily intended to reduce further friction between the parties (if at all possible) and I strongly encourage the parties to bring this unfortunate dispute to an end.