Neutral Citation Number: [2023] EWCA Civ 1470

Case No: CA-2022-002102

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
CHANCERY APPEALS CLAIM NUMBER:
HC-2021-00029
Mr Justice Adam Johnson
[2022] EHWC 2489 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2023

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE BIRSS

- -

Between:

DUCHESS OF BEDFORD HOUSE RTM COMPANY LIMITED & ORS	**Appellants**
- and -	
CAMPDEN HILL GATE LIMITED	**Respondent**

- -
- -

Edward Francis (instructed by **Edwin Coe LLP**) for the **Appellant**
David Holland KC and **Camilla Lamont** (instructed by **Boodle Hatfield LLP**) for the **Respondent**

Hearing date: 22 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the proper interpretation of a reservation of rights clause in a head lease. The underlying dispute is about car parking.

2. The Appellants are the owners of long leases of flats at a property known as Duchess of Bedford House in Holland Park. Duchess of Bedford House is a 1930s mansion block which faces onto a private road known as Sheldrake Place East. Sheldrake Place East is part of a garden square known as Sheldrake Place. In the middle of Sheldrake Place are two other mansion blocks known as Campden Hill Gate. The Respondent, Campden Hill Gate Limited ("Campden Hill"), is the head lessee of Campden Hill Gate as well as other parts of Sheldrake Place, including the roads and central gardens.

3. The Appellants, Duchess of Bedford House RTM Company Limited and four individuals, Fouad Ibrahim, Nikos Kaloyeropoulos, Khosrow Moaveni and Daniela Toledo Hernandez, whom I shall refer to together as the "Appellants", sought a declaration as to their parking rights in Sheldrake Place. HHJ Gerald found in their favour in relation to parking on Sheldrake Place East. Where necessary, I shall refer to HHJ Gerald's judgment as "the first judgment".

4. Campden Hill appealed. Adam Johnson J allowed the appeal. Amongst other things, he made a declaration that the Appellants (Respondents before him), as flat owners in Duchess of Bedford House, have no right to park on any part of Sheldrake Place. The citation for his careful judgment is [2022] EWHC 2489 (Ch). Where necessary, I shall refer to the Judge's judgment, as "the judgment".

Relevant Background

5. The background to this matter is set out at [8]-[17] of the judgment. The essential details are as follows. At all material times, the freehold title to Duchess of Bedford House, Campden Hill Gate and Sheldrake Place has been held by the trustees of the Phillimore Kensington Estate (the "Phillimore Estate"). The Phillimore Estate had granted a long lease of Duchess of Bedford House in 1938 having executed an agreement for a lease in 1929. By 1969, most if not all of the individual flats in Duchess of Bedford House were let out under short, three-year, Rent Act protected tenancies.

6. In August 1969, the whole of Campden Hill Gate and the roads, garage block and central gardens of Sheldrake Place were demised by the Phillimore Estate to Campden Hill's predecessor in title, Keston Securities Limited, under a long headlease (with a term of 95 ½ years) dated 11 August 1969 ("the 1969 Headlease").

7. Under the 1969 Headlease certain rights were reserved to the Phillimore Estate, as lessor. The precise form of the reservation is central to the appeal and to the way in which this matter was put both before HHJ Gerald and before the Judge. I will set it out in full below.

8. In October 1973, an application was made for planning permission by the then owner of the 1969 Headlease, Courtfield Securities Limited, to carry out alterations to Sheldrake Place which involved the installation of lockable diagonal parking bays down the western side of Sheldrake Place East (on the side of the road opposite Duchess of Bedford House). The purpose was said to be to control the haphazard parking of cars

and a haphazard parking situation. The application was opposed and was refused in March 1974. A subsequent appeal was dismissed. The nature of what was proposed is said to be relevant when applying an iterative approach to the provisions which both HHJ Gerald and the Judge were required to construe.

9. Also in March 1974, the leasehold structure in relation to Duchess of Bedford House changed. The 1938 leases were surrendered, and the Phillimore Estate entered into a new long lease of Duchess of Bedford House dated 15 March 1974 with London Midland Associated Properties Limited as the headlessee (the "1974 Headlease"").

10. Over time, the short, Rent Act protected tenancies which had been granted in relation to the flats at Duchess of Bedford House were replaced by long underleases, entered into between about 1974 and 1979. The Appellants are lessees under such long underleases. It was common ground before the Judge that if, in fact, the right to park was passed down to the headlessee of Duchess of Bedford House by means of the 1974 Headlease, then it was further passed down to the individual flat owners on the grant of the long underleases to them over time.

The Clauses in question and section 62

11. Before turning to the judgment, the grounds of appeal and the Respondent's Notice, it is helpful to have both section 62 Law of Property Act 1925 and the terms of the relevant clauses in the 1969 and 1974 Headleases in mind. First, section 62(2) provides as follows:

> "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, 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, houses, or other buildings conveyed, or any of them, or any part thereof."

Section 62(4) provides that:

> "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."

It is accepted that clear words are necessary in order to express such a contrary intention.: *Wood v Waddington* [2015] EWCA Civ 538, 2 P&CR 11 and *Gale on Easements* 21st ed. para 3-50.

12. As I have already mentioned, the 1969 Headlease contained a reservation by which the Phillimore Estate reserved to itself, amongst other things:

> " (i) the free running of water and soil gas and electricity coming from any other buildings or land upon or forming part of the Phillimore Kensington Estate aforesaid in and through the sewers and drains pipes and cables or connections with sewers and drains pipes and cables made or to be made upon or under the demised premises or any adjoining roadway . . . (ii) full rights of way for the Lessors in common with all persons entitled to the same whether granted or acquired by prescription at all times and for all purposes over Sheldrake Place aforesaid, shown coloured brown on the said plan (iii) all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises."

It is the reservation at (iii) which is of particular significance. It is said that the settled practice of parking, to which I shall refer below, was an easement, a quasi-easement, or a right belonging to or enjoyed by Duchess of Bedford House (being an adjoining or neighbouring premises), its residents and their visitors and, therefore, was reserved to the freeholder, Phillimore Estate by the 1969 Headlease. As the Judge pointed out at [78] of the judgment, the parties were agreed that, if a right to park had been reserved under the 1969 Headlease, although it would otherwise have passed to London Midland Associated Properties upon the grant of the 1974 Headlease, whether automatically under the general law or by operation of section 62(2) LPA 1925, that would not be the case if it had been expressly excluded under the terms of the 1974 Headlease. It was necessary, therefore, to determine the proper interpretation of the exclusion or "carve-out" in the 1974 Headlease.

13. Before turning to the language of the "carve-out", it is important to note that the following was expressly included within the demise with which the 1974 Headlease was concerned, namely:

> "ALL THAT piece and parcel of ground forming part of the Phillimore Kensington Estate situate in the Duchess of Bedford's Walk in the Royal Borough of Kensington and Chelsea TOGETHER with the brick built buildings comprising flats and garages erected thereon or upon some part thereof and known as Duchess of Bedford House … TOGETHER with a right to pass and repass with or without vehicles (in common with the Lessors and all persons for the time being authorised by the Lessors or having similar rights) over that part of the roadway commonly and hereinafter called Sheldrake Place on to which the demised premises abut … ."

In addition to the demise of the parcel of land and the buildings referred to, therefore, there was an express grant of a right of way over Sheldrake Place. It was this right of way which formed a significant part of HHJ Gerald's reasoning. The demise was followed by a number of reservations, including the following:

> "EXCEPT AND ALWAYS RESERVED unto the Lessors (i) the free running of water soil gas and electricity coming from any other buildings or land upon or forming part of the Phillimore Kensington Estate … (ii) all other easements quasi-easements

> and rights belonging to or enjoyed by any adjoining or neighbouring premises AND ALSO EXCEPT AND RESERVED unto the Lessors and without obtaining any consent from the Lessee or making any compensation to the Lessee the right at any time hereafter to build upon any adjoining or neighbouring land forming part of the Phillimore Kensington Estate aforesaid or to let the same to any person or persons for the purpose of building thereon according to such plans (whether as to height extent or otherwise) as shall be approved by the Lessors or their Surveyors notwithstanding any interference thereby occasioned to the access of light or air to the demised premises."

Further, as the Judge explained at [81] of the judgment, the undertaking described in the Habendum clause is "TO HOLD the demised premises unto the Lessee" for a period of 91 years:

> " … subject … to all rights and easements or reputed or quasi easements appertaining to any of the adjoining or neighbouring property of the Lessors."

14. The carve-out follows in the form of a declaration of matters which are not included in the demise. It is in these terms:

> "AND IT IS HEREBY DECLARED that the demise hereby made shall not be deemed to include and shall not operate to demise any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid except those now subsisting or which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property."

(The "Carve-Out Clause").

Judgments in outline

15. In outline, HHJ Gerald held that: (i) based upon the evidence of the parking habits of the residents of Duchess of Bedford House and the application of *Newman v Jones,* 22 March 1982 (unreported), a right to park on Sheldrake Place East, appurtenant to Duchess of Bedford House existed in 1969; (ii) that right had been reserved to the trustees of the Phillimore Estate as freehold owners of Duchess of Bedford House by the terms of the 1969 Headlease and the effect of the reservation was to convert a de facto right or quasi-easement into a legal easement in favour of the Phillimore Estate as freeholder; and (iii) that that right had passed to the headlessee of Duchess of Bedford House on the grant of the 1974 Headlease.

16. He went on to hold that the right was not excluded by the Carve-Out Clause. He held that, on its proper construction, the Carve-Out Clause applied to rights which were already subsisting where they "might restrict or prejudicially affect the future rebuilding

alteration or development or redevelopment of the Phillimore Estate or any other adjoining or neighbouring property". However, the right to park was not such a right because a right of way had been granted over the whole of Sheldrake Place East so that for all practical purposes it cannot be altered or developed. The right to park was granted, in effect, on top of the right of way and the right to park makes no difference because the effect of the right of way is that Sheldrake Place East cannot be altered or developed, in any event. Further, since it was common ground that the rights available to the headlessee passed down to the underlessees of individual flats within Duchess of Bedford House on the grant of the long underleases of those flats following the grant of the 1974 Headlease, it followed that the Appellants had the benefit of the right to park.

17. It was Campden Hill's appeal from that decision which was heard by the Judge. First, the Judge rejected the ground of appeal that HHJ Gerald's evaluation of the evidence in relation to parking by the residents of Duchess of Bedford House was wrong and was not open to him. He held that HHJ Gerald "was perfectly well able to find on the evidence that in 1969 a substantial number of Duchess of Bedford House residents who owned a car or vehicle parked it or them in Sheldrake Place East, as did their visitors" [28]-[31]. Although the judge went on to decide that it was likely that HHJ Gerald had fallen into error in assuming that the evidence enabled him to decide that as many as fifteen residents of the centre block of Duchess of Bedford House had cars and parked them in Sheldrake Place East, that did not invalidate his overall conclusion [38] and [43].

18. Secondly, in relation to the effect of the 1969 Headlease, the Judge held that: the principle in *Newman v Jones* was capable of existing as a communal right appurtenant to a block such as Duchess of Bedford House which was precisely how HHJ Gerald had approached the matter [57]. It was not necessary for there to have been evidence that all of the tenants parked on Sheldrake Place East [59], only evidence of a settled practice among the tenants [62].

19. Thirdly, the Judge held that the effect of the reservation in the 1969 Headlease was straightforward. It was common ground that Duchess of Bedford House qualified in 1969 as an "*adjoining or neighbouring premises*" to Campden Hill Gate and it seemed to him that it was "clear that the right to park, as a right appurtenant to Duchess of Bedford House, was a right "*belonging to or enjoyed by*" Duchess of Bedford House. Thus, he held that the right to park fell squarely within the express terms of the reservation" [70].

20. The Judge went on to deal with Mr Holland KC's point that the right to park could not be an easement because it is too diffuse and general in extent at [73]-[76]. He stated that he did not consider the right to be too vague or diffuse and that it fell within the statement of general principle in *Newman v Jones* at 27 D-E per Sir Robert Megarry V-C that:

> "In view of Wright v Macadam [1924] 2 KB 744 . . . I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area nearby is capable of acting as an easement."

The Judge stated that the "right was not a right to park exercisable come what may, but only a right exercisable in competition with others." He went on, also at [76], to state as follows:

> "The situation seems to me in principle no different to that in Newman v. Jones itself, although it arises on a larger scale and may be said to present a more acute problem given the numbers involved. But all the same, the result in Newman v. Jones was that the claimed right to park was held to exist, even though there was a lack of sufficient car parking space for every tenant in every flat to park a car (see above at [53]). I think the same basic logic applies here, and thus that HHJ Gerald was correct to conclude that the right to park which he found existed in 1969 had the character of a legal easement, once reserved to the Phillimore Estate under the 1969 Headlease."

21. Fourthly, in relation to the effect of the 1974 Headlease, the Judge described the question as whether the right to park, having been reserved in 1969 as a legal easement in favour of Duchess of Bedford House, was then included in the demise by the Phillimore Estate to the new headlessee of Duchess of Bedford House, London Midland Associated Properties Limited, in 1974. He noted at [78] that the parties were agreed that, although any right to park would otherwise have passed to London Midland Associated Properties upon the grant of the 1974 Headlease, whether under the general law or by operation of section 62(2) Law of Property Act 1925, that would not be the case if it was expressly excluded by the Carve Out Clause.

22. Fifthly, the Judge went on to consider the Carve Out Clause in detail. He stated that it was inelegantly expressed and confusingly, takes with one hand and, gives with the other by which he said that he meant that although the general effect of the language was to exclude a wide category of rights and interests from the overall demise, in the middle of the clause there is an exception from that general exclusion, covering "those now subsisting" [83].

23. He recorded HHJ Gerald's approach to the Carve Out Clause and distilled that approach as follows:

> "84. The approach of HHJ Gerald was to construe the clause as follows (Jgt at [84]-[91]):
>
> i) There is a wide exclusion from the demise of "*all liberties privileges easements rights or advantages whatsoever in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate*", and on the face of it that would *exclude* from the demise the right to park on Sheldrake Place East now recognised as a legal easement appurtenant to Duchess of Bedford House.
>
> However –

> ii) Included within the demise are all such "*liberties privileges easements*" etc., "*now subsisting*", as long as (following the language of the remainder of the clause), those subsisting liberties, privileges or easements would not compromise any possible future rebuilding, alteration or development works (as described).

> 85. One might reflect the Judge's construction by expressing its sense as follows, that is to say, it operates to exclude from the demise:

> > *" ... any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever:*
>
> > *- in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid except those now subsisting [limb 1], or*
>
> > *- [even if they are subsisting] which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property [limb 2]."""*

The Judge noted at [86] that, having that view of the construction of the Carve Out Clause, HHJ Gerald went on to state:

> ". . . (1) that the right to park, being a legal easement since 1969, was a "subsisting" right in 1974 (under limb 1); and (2) since he was not persuaded it would in fact compromise any future rebuilding, alteration or development works (under limb 2), it was to be included within the overall demise."

24. He concluded that HHJ Gerald had been correct in his overall view of the way in which the Carve Out Clause was to be construed but was wrong to decide that the right to park was not captured by the second limb [93]. His reasoning in relation to the Carve Out Clause as a whole was as follows:

i) the natural and ordinary meaning of the words of the Carve Out Clause and the reference to rights "*now subsisting*", in particular, was that they refer to "rights which, at the date of the 1974 Headlease , already existed as easements at law or in equity appurtenant to any particular property" [96];

ii) the right to park appurtenant to Duchess of Bedford House was such a subsisting right over "*land of the lessors or forming part of the Phillimore Kensington Estate*" because it was a right over Sheldrake Place East which is part of the Phillimore Estate. Furthermore, it was a subsisting right having taken effect as a legal easement by means of the reservation in the 1969 Headlease [97];

iii) as to its purpose, he held as follows:

> "99. . . In my view, a primary purpose of the carve-out was to prevent the conversion into legal easements of any informal, de facto rights enjoyed by Duchess of Bedford House at the time of the conveyance but which did not then subsist as easements at law or in equity. Such a process of conversion is well-recognised as one of the effects of s.62(2) LPA 1925: see Wright v. MacAdam [1949] 2 KB 744 at p. 748. That being so, I consider that one effect of the carve-out in this case was to prevent that process of conversion occurring. The Phillimore Estate, as the ultimate freeholder of a number of plots of land forming the overall Estate, would no doubt have been concerned to avoid the risk of inadvertently creating new rights through the operation of the general language in s.62(2)."

iv) as regards the effect of "rights now subsisting" in the middle of the Carve Out Clause, the Judge reasoned as follows:

> "101. On the one hand, I consider it natural to think that London Midland Associated Properties, as the new leaseholder in 1974, would have wished to ensure that as far as possible, the new leasehold arrangements being entered into were not less advantageous than those in place under the previous arrangements which were being replaced. It would naturally have wished to ensure that any rights "*now subsisting*" were preserved.
>
> 102. On the other hand, that interest was in tension with a countervailing interest on the part of the Phillimore Estate. I think that interest finds expression in the second limb of the carve-out, and also in the reservation I have referred to above at [80]. Both provisions seem to me consistent with the idea that the Phillimore Estate wished to avoid, to the extent possible, ceding control to its lessees of any rights which might inhibit plans for the future development of the Estate, and indeed on the contrary, wished to reserve all such rights to itself as far as it possibly could.
>
> 103. In my view, having regard to these competing interests, the natural way in which to read the carve-out is as a compromise. I think that is effectively the way in which HHJ Gerald read it, and I consider he was correct to do so. . . .
>
> 104. The nature of the compromise was that although no new rights over other parts of the Phillimore Estate would be created by means of the 1974 Headlease, any subsisting rights would be conveyed, unless they might restrict or prejudicially affect any rebuilding or alteration, etc. works of the types described. The intention was that any such rights – which included rights over Sheldrake Place East – would remain in the hands of the Phillimore Estate and would not be passed on to the new headlessee. The Phillimore Estate would then have ultimate

> control over any rebuilding, alteration or redevelopment works which might impinge on those rights".

25. At [106], the Judge set out HHJ Gerald's reasoning in relation to the second limb of the Carve Out Clause which was at [88] of the first judgment. In answering the question of whether the right to park fell within the second limb of the Carve Out Clause, HHJ Gerald had stated as follows:

> ". . . the simple answer to that question is 'no', because a right of way had been granted over the whole of Sheldrake Place by virtue of which, for all practical purposes, Sheldrake Place East itself cannot be materially altered or developed. The fact that a right to park has been granted on top of the right of way, as it were, makes no difference because the existence of a dedication of that land as the right of way prevents it from being materially altered or developed."

As I have already mentioned, the right of way to which HHJ Gerald referred, was granted expressly as part of the demise under the 1974 Headlease. HHJ Gerald went on to refer to what he described as "some ingenious and perhaps extravagant suggestions" as to how parking rights might restrict or prejudicially affect future rebuilding, alteration, development or redevelopment of Sheldrake Place East or land immediately adjoining or neighbouring it, but concluded that they "must be grounded in reality such that a practical and realistic approach has to be adopted" [89]. He concluded that he "could see no basis for suggesting or finding that the existence of the parking rights would prevent any alteration or whatever to Sheldrake Place East".

26. HHJ Gerald also referred to the 1973 planning application to change the layout of Sheldrake Place and concluded that "the mere alteration of the layout of the servient land, provided it does not materially reduce the number of parking spaces, could not be prevented by the existence of the right to park" [90].

27. The Judge decided that HHJ Gerald had construed the second limb of the Carve Out Clause too restrictively and that if he had given the words their natural and ordinary meaning, he would have concluded that the right to park did fall within the carve out and accordingly, was excluded from the 1974 Headlease [109]. He held that the scope and reach of the second limb was:

> "111. . . intended to be sufficiently broad to capture any form of rebuilding or alteration etc., perhaps of a nature unforeseen in 1974, which might occur during the 99 year term of the 1974 Headlease. I think it natural to suppose the Phillimore Estate would have wished to protect its position in that way, and in any case, the intention is apparent from the breadth of the words used. In referring to "*future rebuilding alteration or development or redevelopment* ...", it seems to me the draftsman was intending to cast the net as widely as possible. The word "*alteration*", in particular, is apt to describe a very broad category of possible future changes. As Mr Holland KC pointed out, the wide scope is emphasised by the use of the word "*might*" in the immediately preceding phrase: " …*which might restrict or*

> *prejudicially affect …*". The contingent nature of the word "*might*" makes clear that, in marginal or doubtful cases, the doubt should be resolved in favour of the right in question falling within the carve-out and therefore outside the scope of the demise.
>
> . . .
>
> 114. Once you can say that the existence of a certain right (here, the right to park) "might" present a problem as regards any potential future rebuilding or alteration, etc., that is the end of the inquiry. Applying that test here, it seems to me obviously correct that the right to park was of such a character that it "might" present a problem to any future rebuilding, alteration, etc., of Sheldrake Place East, notwithstanding the existence of the right of way. That is because they are different rights and it is perfectly possible to envisage forms of rebuilding or alteration, etc., which might compromise one but not the other, as the examples given illustrate."

The Judge concluded, therefore, that the right to park was of such a type that it *might* restrict or prejudicially affect any future rebuilding or alteration, etc. of Sheldrake Place East and was therefore, excluded from the demise [115].

28. He went on to add at [116]:

> ". . . For what it is worth, however, I also consider the Judge was wrong in dismissing the particular example of the proposal for locked parking bays put forward in 1973 (see his Judgment at [90]). The Judge thought that the proposed alteration to Sheldrake Place East could not have been prevented by the right to park, because it would not have materially reduced the number of parking spaces available. However, the proposal was to reduce the number of parking spaces to only 12, from a prior total of at least 20 and perhaps (on the Claimants' case) as many as 27. Whether 20 or 27, it seems to me that the proposed reduction was in fact a material one, and that the Learned Judge was wrong to conclude otherwise."

Grounds of Appeal and Respondent's Notice

29. The Appellants challenge the Judge's decision on three grounds. It is said that:

i) he erred in his construction of the Carve Out Clause in holding that it operated to exclude the transmission of the leasehold estate of any subsisting right appurtenant to Duchess of Bedford House which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment of any part of the Phillimore Estate or any other adjoining or neighbouring property. Instead, it is said that he should have held that the Carve Out Clause operates only to exclude the creation of new rights, not already subsisting in favour of the leasehold estate, by operation of section 62 of the Law of Property Act 1925

where such new rights might so restrict or prejudicially affect future rebuilding etc.;

ii) he erred in his construction of the second limb of the Carve Out Clause in holding that the exclusion was intended to have a broad scope so that it applies where there is a possibility of future rebuilding etc. during the term of the 99 year lease and so applied in marginal or doubtful cases; and

iii) he wrongly interfered with the findings and evaluative judgment of HHJ Gerald as to whether the right of parking would interfere with the future alteration or development of Sheldrake Place.

30. Campden Hill's primary position is that the Judge was right for the reasons he gave. Further, or in the alternative, it also contends that the appeal should be dismissed on additional grounds upon which it is said that the Judge should have allowed its appeal from the decision of HHJ Gerald. Those grounds are elaborated upon and refined in the skeleton argument filed on Campden Hill's behalf. I refer to those grounds in their refined form. They are:

i) that even if the words "except those now subsisting" are to be read as applying to both limbs of the Carve Out Clause, the Judge was wrong to hold that the "right to park" was a subsisting right within the language of the Carve Out Clause. He should have held that the reference to "ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever . . . now subsisting" was a reference to those rights which the tenant of Duchess of Bedford House had enjoyed under the lease of 18 March 1938 which was being surrendered in consideration for the grant of the 1974 Headlease or alternatively, that wording was a reference to the rights expressly granted in the 1974 Headlease; and

ii) the Judge was wrong to hold that the right to park was reserved as a legal easement to the Lessor under the terms of the 1969 Headlease because, in particular:

a) on the facts found by HHJ Gerald, there was insufficient activity by residents of Duchess of Bedford House as at the date of the 1969 Headlease to ground such a wide-ranging right as claimed for every flat in Duchess of Bedford House;

b) both HHJ Gerald and the Judge went wrong to hold that the case of *Newman v Jones* was authority to support the reservation of the right to park as claimed;

c) the Judge was wrong to hold that what was required of HHJ Gerald was a "qualitative rather than a quantitative assessment" of the activities on Sheldrake Place East in August 1969. In order to establish such an extravagant right both judges should have held that what was required was clear evidence that all or the vast majority of residents of Duchess of Bedford House, their families and invitees, were in the habit of regularly parking their vehicles on Sheldrake Place East in the period leading up to the grant of the 1969 Headlease; and

d) in any event, to fall within the reservation clause, the "settled practice" had to be a quasi-easement. As a matter of construction, the parties to the 1969 Headlease would not have regard to the practice as a quasi-easement because in 1969 they would not have regarded the right to park as an easement at all.

31. In the Respondent's Notice it is stated that it is understood that permission to appeal is not required in relation to the matters which go to the correct construction of the Carve Out Clause set out in [30i)] above. As to matters at [30ii)], it is accepted that they are not the subject of the Appellant's Notice. However, it is said that those grounds require the examination of *Newman v Jones* and the application of the principles in that case for the first time by this court and accordingly, these are much more compelling, significant and important points of principle than that for which the Appellants were granted permission to appeal.

32. If permission to appeal is necessary, the Appellants do not oppose the grant of permission in relation to the matters at [30i)] which go to the proper construction of the Carve Out Clause. They do oppose the matters at [30ii)], however. Mr Francis, on behalf of the Appellants, says that:

i) these grounds raise issues which are entirely discrete from the issues in relation to the proper construction of the Carve Out Clause upon which the appeal has been brought and for which permission was given for a second appeal. They expand the scope of the appeal and seek to re-open issues upon which Campden Hill has already failed twice;

ii) the argument based upon the assertion that the right to park does not fall within the reservation of rights because the right to park was not recognised as an easement at the time, has not been advanced before and does not raise an important point of principle; and

iii) whether the judge misinterpreted or misapplied the decision in *Newman v Jones*, does not raise any important point of principle as distinct from whether the judges below were correct in their application of the principle to the facts of this case.

33. We did not hear argument about whether, in fact, any element of the Respondent's Notice amounts to a cross appeal for which permission to appeal would be necessary or in relation to the test to be applied on a second appeal, in relation to such a cross appeal. Furthermore, the written argument in relation to these issues is very sparse. I note that the relevant issues were considered most recently by this court in *Braceurself Ltd v NHS England* [2023] EWCA Civ 837 and *Wolff v Trinity Logistics USA Inc* [2018] EWCA Civ 2765.

34. In the circumstances, it seems to me that this is not the right opportunity to address those issues further in any depth. Suffice it to say that even if the matters at [30i)] and [30ii)] amount to a true cross appeal, which I doubt, I consider that permission to appeal ought to be granted. They have a real as opposed to a fanciful prospect of success and, if and to the extent that it is necessary, I also consider that they raise important points of principle.

35. In coming to this conclusion, I take into account the fact that the argument about whether the right to park falls within the reservation of rights because it is said that such a right was not recognised as an easement at the time, is new. Essentially, it is a point of law and there is no suggestion that the Appellants are not in a position to deal with it or that they have acted to their detriment on the faith of an earlier omission to raise it. There is no suggestion that the trial before HHJ Gerald would have taken a different shape if it had. Furthermore, if necessary, the Appellants can be adequately protected in costs. It seems to me that the criteria in *Singh v Dass* [2019] EWCA Civ 360 per Haddon-Cave LJ at [16]-[18] are satisfied, therefore.

Application to adduce fresh evidence

36. Before turning to the central issues in this appeal, I should mention that the Appellants made an application to rely upon further documents for the purposes of the appeal. We heard short oral submissions and decided that we would not allow the application and would give our reasons in our judgments.

37. The Appellants sought to rely upon:

    i) a plan supplied by UK Power Networks showing the position of underground electricity cables under Sheldrake Place East to and from an electricity sub-station and an accompanying booklet containing guidance and a key;

    ii) a plan supplied by Thames Water plc pursuant to a standard residential conveyancing search showing the position of mains sewers and mains water supply pipes running under Sheldrake Place East, together, in the latter case, with the points of connection to private supply pipes servicing Duchess of Bedford House;

    and

    iii) plans obtained from London Borough of Kensington's archives dating from 1936 relating to the construction of Duchess of Bedford House and Sheldrake Place, being: a plan showing the position of sewers under Sheldrake Place; a block plan for Duchess of Bedford House showing the position of surface water drainage pipes and their connection to the public sewer; and a construction plan for the ground floor of Duchess of Bedford House showing further details of drainage pipes.

38. It was said that the Appellants wished to rely upon the documents to show that there are utilities serving Duchess of Bedford House beneath Sheldrake Place East. The existence of that infrastructure was said to be relevant to the construction of the Carve Out Clause because the question is whether it operates to prevent the transmission with the leasehold term of subsisting rights. Subsisting rights which were expressly reserved to the Phillimore Estate by the 1969 Headlease included the free running of water, soil, gas and electricity etc. It is said that if Campden Hill's argument about the proper construction of the Carve Out Clause is correct, it would have operated to prevent the transmission of utilities easements on the grant of the 1974 Headlease. That, it is said, would make no commercial sense.

39. It is said that this point was made both before HHJ Gerald and the Judge and it was not until receipt of Mr Holland and Ms Lamont's skeleton argument, on behalf of Campden Hill, that it was contended that all utilities serving Duchess of Bedford House were routed directly from the public highway and did not pass under Sheldrake Place East.

40. There was no dispute about the test to be applied in relation to the admission of fresh evidence on appeal pursuant to CPR 52.21.(2). In *Terluk v Berezovsky* [2011] EWCA Civ 1534 (CA) at [31]-[33], Laws LJ (with whom Rafferty LJ and the Chancellor of the High Court agreed) summarised the principles to be applied when determining such applications. He held that the authorities show that the primary rule is given by the discretion in CPR 52.21(2), coupled with the duty to exercise it in accordance with the overriding objective. Consequently the *Ladd v Marshall* criteria are no longer the primary rule in relation to the court's power. Those criteria, however, effectively occupy the entire field of relevant considerations, to which the appeal court must have regard when deciding in any given case, whether to exercise the discretion.

41. As we stated during the hearing of the appeal, we do not consider that the discretion should be exercised to allow the Appellants to adduce this fresh evidence. First, it is accepted that, with reasonable diligence, these documents could have been obtained for use at trial. It is said that they have only become necessary now because the assertion made in Campden Hill's skeleton argument. It seems to me, in fact, that nothing has changed. The argument presented below appears to have been based upon supposition and surmise and all that Campden Hill now says is that it is its "view" that utilities take a particular route. That is no more than further speculation which is of no assistance to the court one way or another. The position remains that utilities may or may not run under Sheldrake Place East and that possibility is part of the relevant factual matrix when seeking to construe the Carve Out Clause. Secondly, it is not clear that the documents would have an important influence on the issues which we have to decide. On the contrary, the plans may well raise more questions than they answer. Thirdly, although there is no question about the validity of the documents, and therefore, as to their "credibility" in the widest sense, questions may well arise as to their accuracy. Those questions go both to "credibility" and to whether they would have an important influence on the issues in this case. Having taken these matters into consideration, in addition to the lateness of the application, it seems to me that it is not appropriate to exercise our discretion to admit the fresh evidence.

Proper interpretation of the Carve Out Clause as a whole

42. Unless Mr Holland's submissions are correct, but for the Carve Out Clause, the demise created by the 1974 Headlease would have passed on the benefit of subsisting rights and easements appurtenant to Duchess of Bedford House whether under the general law or by virtue of section 62(2) Law of Property Act 1925 ("section 62(2) LPA") and elevated them into easements, rights, privileges or advantages enjoyed by the occupiers of Duchess of Bedford House over any retained parts of the Phillimore Estate at the time of the demise.

43. As the judge observed, the Carve Out Clause is not elegantly drafted. As he also noted, when seeking to interpret the clause it is necessary to apply the well-known principles which are set out in a series of cases including *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. It is settled law that the court's task is to ascertain the objective meaning of the language which the parties have chosen

to express their agreement and to do so in the context of the agreement as a whole and the relevant admissible background.

44. Reliance on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed: *Arnold v Britton* per Lord Neuberger at [17]. As Lord Hodge explained at [11] in *Wood v Capita*, interpretation is a unitary exercise "and where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense". But:

> " . . . in striking a balance between the indications given by the language and the indications of the competing constructions the court must consider the quality of drafting of the clause . . . and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interests; the *Arnold* case, para 20,77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

Lord Hodge went on at [13], as follows:

> ". . . Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. . ."

45. The difficulty with the Carve Out Clause stems for the fact that "except those now subsisting" appears in its midst. Mr Francis, on behalf of the Appellants, says that the placing of that phrase should be treated as a drafting infelicity which leaves the meaning of the Carve Out Clause unclear and ambiguous and in order to resolve that ambiguity it should be interpreted as if the phrase had been placed at the end. Mr Francis says that a textual analysis of the Carve Out Clause leaves one uneasy and that it is necessary to turn to the context, the commercial background and the effect of the clause.

46. In this regard, he drew attention to the similar clause in the 1969 Headlease which he says that the reasonable reader would have in mind. That contained a similar provision,

described by Mr Francis as "boiler-plate", in which the reference to easements, rights and advantages enjoyed by the occupiers or owners of the premises at the date of the deed, is placed at the beginning of the clause. It is as follows:

> "AND IT IS HEREBY DECLARED without prejudice to all easements rights and advantages (if any) enjoyed by the occupiers or owners of the demised premises at the date hereof that the demise hereby made shall not be deemed to include and shall not operate to demise any ways (other than Sheldrake Place aforesaid) watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever in through over or upon any land of the Lessors or forming part or the Phillimore Kensington Estate aforesaid or which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property."

47. He also submitted that it was difficult to think of a right which would fall within the exception to the first limb of the Carve Out Clause which would not be caught by the second limb and that is not what can have been intended. He illustrated this by reference to the utilities easements which were reserved to the freeholder, Phillimore Estate, by the 1969 Headlease. He submitted that it is obvious that the headlessee of Duchess of Bedford House would expect to take the benefit of those easements and rights. On Campden Hill's construction, however, he says that such subsisting rights for the benefit of Duchess of Bedford House would be caught by the Carve Out Clause which cannot have been intended. He says that the Judge did not give sufficient consideration to this nugatory effect when considering commercial common sense.

- *Discussion and conclusion*

48. Bearing all of the relevant principles in mind, it seems to me that the Judge was right to construe the Carve Out Clause as a whole in the way he did. He adopted the formula used by HHJ Gerald. One must begin the process of interpretation by considering the natural and ordinary meaning of the words used as they appear in the clause in question. The fact that the phrase "except those now subsisting" is placed in the middle of the clause must be taken into account. It seems to me that to place the phrase at the end or at the beginning of the clause creates an entirely different meaning. Further, rather than support Mr Francis' construction, I consider that the fact that the clause in the 1969 Headlease places the reference to existing rights at the beginning militates against a similar construction here. The reasonable reader with the "boiler plate" clause from the 1969 Headlease in mind would consider that the wording adopted in the Carve Out Clause means something different. Had the draftsperson wished to replicate the meaning contained in the 1969 Headlease, they could have done so.

49. It must also be borne in mind that the 1974 Headlease was made between sophisticated, commercial parties who, no doubt, were advised by experienced professionals and it can be assumed that the Carve Out Clause was the product of negotiation. Furthermore, the two limbs of the Carve Out Clause are not disjunctive. They are different in nature from each other. It seems to me that the reasonable reader, therefore, would not conclude that the liberties, privileges, easements, rights or advantages then subsisting were excepted from both limbs of the clause.

50. As the Judge pointed out at [103] and [104] of the judgment, the Carve Out Clause appears to be an attempt at a compromise between the competing interests of the freeholder and the headlessee. No new rights would be created by a combination of the 1974 Headlease, the general law and section 62(2) LPA 1925 as a result of a contrary intention and clear words, and subsisting rights would be conveyed unless they might restrict or prejudicially affect any rebuilding or alteration, etc. Such rights would remain in the hands of the Phillimore Estate.

51. In my judgment, that construction is not undermined by what is said to be commercial or practical reality. Mr Francis said that there may be "utilities easements" under Sheldrake Place which would be excluded from the grant if the Judge were correct. As Lord Neuberger stated in *Arnold v Britton* at [17], commercial common sense and surrounding circumstances should not be used to undermine and undervalue the importance of the language used. Furthermore, whether such "utilities easements" would be excluded is dependent upon the proper construction and application of the second limb of the Carve Out Clause to which I refer below.

Meaning of "except those now subsisting"

52. Both the Judge and HHJ Gerald interpreted the phrase "except those now subsisting" which is applied to "liberties, privileges easements, rights or advantages whatsoever" in the Carve Out Clause, to mean rights which already existed in law or in equity appurtenant to any particular property in 1974. (See the judgment at [96]).

53. Mr Holland submits that, in fact, "now subsisting" has a more restricted meaning. He says that it is a reference to rights (etc) which were expressly granted and enjoyed under the 1938 Headlease. He also says that the right to park, if it existed in 1974, was at most, a settled and perhaps, tolerated practice. It was not permitted and therefore, could not form the basis for a subsisting right.

54. I agree with Mr Francis in relation to Mr Holland's submission about the 1938 Headlease. If Mr Holland were correct, only the express right of way granted in 1938 would be caught by the expression. That right of way was also expressly granted in 1974. In such circumstances, there is no basis for the restrictive meaning.

55. Mr Holland's submission in relation to the nature of the settled practice and whether parking was permitted is best dealt with in the context of his wider submissions about the reservation of rights in 1969 and the nature of those rights, to which I turn below.

Interpretation of the second limb of the Carve Out Clause

56. Turning to the second limb of the Carve Out Clause, Mr Francis says that the judge was wrong to place a broad interpretation upon it and placed too much emphasis upon the use of the word "might" in that second limb. He submits that the restrictive interpretation adopted by HHJ Gerald was consistent with the general principle that clear words are required to exclude the operation of section 62(2) LPA. Moreover, he says that the broader interpretation adopted by the judge would mean that subsisting rights of passage of water and electricity, and rights of drainage, through pipes, cable and sewers below Sheldrake Place, essential to the use of Duchess of Bedford House, might be caught by the second limb of the Carve Out Clause based upon potential future

developments. In fact, Mr Francis says that it is difficult to see what rights would not be caught by the second limb if it is to be construed as the Judge would have it.

57. Mr Holland, on behalf of Campden Hill, says that there is no doubt that Campden Hill Gate and Sheldrake Place fall within the definition of "land of the Lessors or forming part of the Phillimore Kensington Estate" and/or "any other adjoining or neighbouring property". He also notes that the second limb of the Carve Out Clause is widely expressed and, in particular, that it uses the word "might" rather than "would" or "will".

- *Discussion and Conclusions*

58. What is the breadth of the second limb? As I have already mentioned, HHJ Gerald held that for the second limb to be engaged any future alteration or development must be one which was "grounded in reality such that a practical and realistic approach has to be adopted" (first judgment at [89]). The Judge, however, held that the second limb was intended to have a broad scope "capturing any form of rebuilding or alteration etc., perhaps of a nature unforeseen in 1974, which might occur during the 99 year term of the 1974 Headlease." At [114] (set out at [27] above) he concluded that it was enough if one is able to say that the existence of a right "might" present a problem to a potential future rebuilding or alteration etc. and that was the case here, despite the right of way.

59. Although I agree with the Judge that the emphasis of the second limb of the Carve Out Clause is upon the right in question rather than the proposed redevelopment or alteration, in my judgment, his interpretation places too much weight upon the use of the word "might" and does not accord with its natural and ordinary meaning, considered in the light of the context and commercial common sense. If the Judge were correct, it is difficult to see that any right (etc) would ever survive it. It renders the exception all but otiose.

60. It seems to me that if the second limb is read in the context of the Carve Out Clause and the 1974 Headlease, taking into account commercial common sense and the need for clear words to exclude the effect of section 62(2) LPA 1925, its meaning must be approached in the way in which HHJ Gerald held to be the case at [89] of the first judgment. Although the focus is on the right itself, it is tested by reference to whether it might restrict or prejudicially affect "the future rebuilding alteration or development or redevelopment" of the demise or any adjoining or neighbouring property. As HHJ Gerald pointed out, it is always possible to find ways in which the servient land, or land immediately adjoining or neighbouring it can be altered or developed in a way which might be restricted or prejudicially affected by a subsisting right. Instead of taking "might" at its highest, a practical and realistic approach must be adopted and the alteration or development against which the exclusion is tested for the purposes of the second limb of the Carve Out Clause must be grounded in reality. If that were not the case, the second limb has the potential to engulf the remainder of the clause, to create uncertainty and to render the exclusion meaningless. It seems to me, therefore, that HHJ Gerald's approach to the second limb is to be preferred.

61. I also agree with Mr Francis that an aspect of the need for any proposal under the second limb of the Carve Out Clause to be ground in reality is that it could not be a proposal which would be contrary to the express grant of the right of way. As Mr Francis also pointed out, such a proposal would be subject to clause 2(9) of the 1969 Headlease which provided that no alteration could take place without the consent of the Phillimore

Estate, such consent not to be unreasonably withheld. When determining whether to give consent, the Phillimore Estate would be entitled to take into account its own property interests and the interests of the residents of the Duchess of Bedford House: *Iqbal & Ors v Thakrar* [2004] 4 ELGR 21 and *Hicks v 89 Holland Part (Management) Ltd* [2021] Ch 105.

Practical application of the second limb of the Carve Out Clause

62. Next, it is said that the Judge was wrong to interfere with what are described as the findings and evaluative judgment of the HHJ Gerald on the question of whether the right of parking would interfere with the future alteration or development of Sheldrake Place. At [87]-[90] of the first judgment, HHJ Gerald dealt with the matter as follows:

    i) he formulated the question as whether or not the right to park on either side of Sheldrake Place East, which itself had been dedicated by virtue of the express grant of a right of way thereover, could in any practical or sensible sense, be free of prejudicial effect to future rebuilding (etc) of any other property adjoining or neighbouring Sheldrake Place East [87];

    ii) he answered that question in the negative "because a right of way has been granted over the whole of Sheldrake Place East" which as a result could not for all practical purposes be materially altered or developed [88];

    iii) he noted the examples which had been given by Mr Holland of ways in which the parking rights might restrict or prejudicially affect future rebuilding (etc) and, as I have already mentioned, he stated that such proposals must be grounded in reality and concluded that he could "see no basis for suggesting or finding that the existence of the parking rights would prevent any alteration or whatever to Sheldrake Place East" [89]; and

    iv) he noted the emphasis which had been placed on the 1973 proposed parking scheme. He went on: "the mere alteration of the layout of the servient land, provided it does not materially reduce the number of parking spaces, could not be prevented by the existence of the right to park. Another example was development of the gardens behind Campden Hill Gate "which, in reality, could not and cannot be developed in a way inconsistent with being an open space for residents' recreation" [90].

63. As I have already mentioned, the Judge held at [114] that the right to park might present a problem to any future rebuilding etc., notwithstanding the existence of the right of way and, accordingly, it was excluded from the demise [115]. He noted that he had reached a different view from HHJ Gerald "as a matter of principle". As an aside, at [116], he noted HHJ Gerald's reasoning at [90] and went on to state that the 1973 proposal was to reduce the parking bays from 20 or perhaps 27 to 12 and concluded that the reduction was a material one and that the judge was wrong to conclude otherwise.

64. We heard quite lengthy submissions about the nature of the 1973 scheme and the possible effect on parking availability. They were mostly based upon supposition and surmise from the plans which were submitted with the planning application. There was no witness evidence either before HHJ Gerald or before the Judge about the precise

effect of the 12 planned parking bays on the overall availability of parking in Sheldrake Place East.

65. It seems to me that the Judge was not in a position to decide that the overall availability of parking would be reduced to 12 locked bays and that, therefore, the proposed reduction was material. The Judge appears to have come to this conclusion about the full effect of the proposed 1973 Scheme merely by looking at the plan. In the circumstances, I agree with Mr Francis that the Judge was wrong to interfere with HHJ Gerald's conclusion in this regard. He had heard all the evidence and had a better understanding of the dynamics of the parking situation in Sheldrake Place East. In any event, the second limb of the Carve Out Clause is not restricted to Sheldrake Place East. It is concerned with rights which might prejudicially affect the demise "or any other adjoining or neighbouring property".

66. Furthermore, it seems to me that this a case of "double obiter". HHJ Gerald had already decided that the right to park could not fall within the second limb of the Carve Out Clause because it was overlayed by the right of way when he commented on the 1973 scheme at [90] of the first judgment and the Judge had already decided that the second limb should be widely construed and was not affected by the right of way and did not need to comment on the example of the proposed 1973 parking scheme.

Reservation of right in 1969 and nature of that right

67. Lastly, I should add that I do not consider that there is anything in Mr Holland's points about the reservation in the 1969 Headlease. The 1969 Headlease reserved various rights in favour of the lessor, Phillimore Estate. Sub-paragraph (iii) of the reservation was "all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises". Both the Judge, and HHJ Gerald before him, held that on its proper construction, sub-clause (iii) was effective to reserve the right for the residents or occupiers of flats within Duchess of Bedford House to park on Sheldrake Place East. This was based on the settled practice of such residents in the period prior to the grant of the 1969 Headlease.

68. Mr Holland submits that: the "right" to park could not be a right because, at best, in this case, the practice was only tolerated; that it was not recognised as an easement at the time; and that it could not be a quasi-easement in 1969 because in order to establish such a right, it would have been necessary to have had evidence that each and every flat owner and their respective visitors parked their car in Sheldrake Place East before 1969. There was no such evidence. Mr Holland also submits that, in any event, the principle in *Newman v Jones* cannot be used to create a right in each of the long leaseholders of flats in Duchess of Bedford House.

69. I will address his points in relation to the application of the principle in *Newman v Jones* first. As Mr Holland submits that the principle, if it is one at all, is limited to the particular circumstances of that case, it is important to consider it in some detail. Mr and Mrs Newman were the lessees of a ground floor flat in a block in Torquay. In 1978, they acquired the lease by assignment from the original lessees, Mr and Mrs Morris. Mr and Mrs Morris's lease was dated 1 November 1973 and the term ran from June 1971. The lease had been granted by a company named Park Hill House Limited which had owned the block of flats since about 1925. It conveyed the freehold of the block of flats to an associated company, Scot Rown Limited in March 1974. Scot Rown Limited

assigned the freehold reversion of the block to Mr Jones in December 1977. Amongst other things, a dispute arose about whether Mr and Mrs Newman were entitled to park a car on the forecourt of the block.

70. Sir Robert Megarry V-C was not persuaded that a right to park had been granted by the express terms of the 1971 lease (25B-D). He was satisfied, however, that it had been granted as a result of the effect of section 62(2) LPA 1925. He noted that the sub-section grants "all . . . privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land . . . or at the time of the conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land . . ." and that "conveyance" includes a lease (section 205(1)(ii) LPA 1925) (25E-F). Having considered the evidence, he held that " . . . at the time of the grant of the lease to Mr and Mrs Morris there was a settled practice of tenants parking their cars on the forecourt" (26C).

71. The settled practice was based upon evidence from Mr Morris who said that after moving in, having enquired of his solicitors about parking, he had been told that he could park anywhere and that he and all the other residents parked their cars outside their flats. Each tenant parked on the forecourt as near to his flat as he could. Mr Brown gave similar evidence. He had been the director and had been in control of Park Hill House Limited and Scot Rown Limited, which had owned the freehold reversion until 1997, and also occupied one of the flats. He stated that: residents were allowed to park their cars near the entrances to their flats; that there was room for 10-12 cars; and that although from time to time there were minor difficulties about parking, some residents had no cars, and there was usually enough room for those who did.

72. Despite noting that there was no "superabundance" of evidence, Sir Robert Megarry V-C held that the evidence was sufficient to "justify holding that at the time of the grant of the lease to Mr and Mrs Morris, there was a settled practice of tenants parking their cars on the forecourt" (26C). The Vice- Chancellor went on to note that when the lease to Mr and Mrs Morris was granted in 1973 most of the other flats in the block had been leased for two years or more and that Flat 1 (Mr and Mrs Newman's/Mr and Mrs Morris' flat) had been occupied by a Mrs Clarke under a life tenancy until she died in April 1973. There was some doubt about whether she had had a car, or if she did, whether it was parked on the forecourt. Sir Robert Megarry V-C concluded, however, that: "That, . . . does not seem to me to matter much. The main question is what appertained or was reputed to appertain to Flat No. 1 when the lease was granted in November 1973" (26E).

73. As to the legal effect of the "settled practice" Sir Robert Megarry V-C held as follows at 26E- 27A:

> "In my opinion, where there is a block of flats, and the tenants in general regularly park their cars within the curtilage of the block, the liberty, privilege, easement, right or advantage of being allowed to do this will rapidly become regarded as being something which appertains or is reputed to appertain to each of the flats in the block, and as being reputed appurtenant to each of those flats. Accordingly, on the grant of a lease of one of the flats, I think that section 62(2) of the Law of Property Act 1925 will operate to give the lessee an easement of car parking

> appurtenant to his leasehold. I do not think that it matters whether the previous occupant of the particular flat did or did not park their car within the curtilage of the block, or, indeed, whether they had any car. In all ordinary cases the reputation will be that of a right of parking which goes with each of the flats, for there will be no reason for one lessee to have greater rights than another in this respect. The question, 'can the tenants park their cars round the block?' would receive a simple yes, and not an answer which distinguished between one flat and another on the basis of whether previous occupants of the flat in question had been accustomed to park their cars round the block."

He went on at 28C-D to make clear that it made no difference that there were only 10-12 parking spaces and 14 flats. He stated that " . . . an easement may take effect subject to the right of others with a like right, without any guarantee that there will be no competition."

74. I agree with the Judge, and with HHJ Gerald before him, that the approach adopted in *Newman v Jones* was equally applicable here. Although Sir Robert Megarry V-C was concerned with a claim by a tenant of an individual flat in a block against his immediate landlord, he did not confine himself to the circumstances of Flat 1 alone. In the passage I have quoted above, he makes clear that "where there is a block of flats, and the tenants in general regularly park their cars within the curtilage of the block, the liberty, privilege, easement, right or advantage of being allowed to do this will rapidly become regarded as being something which appertains or is reputed to appertain to each of the flats in the block, and as being reputed appurtenant to each of those flats." As the Judge pointed out there is little or no difference between saying that the right becomes appurtenant to "each" of the flats in a block and that it is appurtenant to the block as a whole. Such an approach is consistent with the fact that the evidence of the settled practice was not limited to the evidence in relation to parking relating to Flat 1. It was of communal parking. It is also consistent with the fact that it was unclear that Mr and Mrs Morris' predecessor in title, Mrs Clarke, had had a car at all and if she had whether she had parked on the forecourt.

75. Mr Holland also sought to distinguish *Newman v Jones* on the basis that it was concerned with a right transferred as a result of section 62(2) LPA 1925 whereas, in this case, we are concerned with whether a right to park in relation to Duchess of Bedford House was reserved by the terms of the reservation at (iii) in the 1969 Headlease. The Vice-Chancellor focused on whether the liberty, privilege, easement, right or advantage "appertained" or was "reputed to appertain" to the flats in the block, and as being "reputed appurtenant" to each of those flats. Mr Holland says that that is different from the enquiry which must be made in relation to an "easement", "quasi-easement", or "right belonging to or enjoyed by" adjoining or neighbouring premises. Although the inquiry is not identical, I agree with the Judge that there is no real difference in approach. A settled practice which led to the conclusion that the right to park was appurtenant or reputed to be appurtenant to the flats in *Newman v Jones* can equally be used to establish a "right or quasi-easement belonging to or enjoyed by" the flats for the purposes of paragraph (iii) in the reservation in the 1969 Headlease.

76. It follows that I disagree with Mr Holland's submission that it is necessary to establish that each and every individual tenant parked in Sheldrake Place East in order to

establish that a quasi-easement or right to do so existed in 1969 when the reservation was made. Both in this case and in *Newman v Jones*, the right was communal. It related to the block as a whole. It was not even clear that Mr and Mrs Newman's predecessor in title had exercised the right at all and the Vice-Chancellor commented that there was not a "superabundance" of evidence. It seems to me that the position is the same here. In order to establish a right belonging to or enjoyed by Duchess of Bedford House, it is unnecessary to establish that each and every leaseholder exercised the right. As the Judge explained, HHJ Gerald was entitled to proceed on the basis that there was evidence of a settled practice by a substantial number of tenants or a substantial number of tenants who owned cars.

77. As to the "right" itself, it follows from what I have already said that I agree with both the Judge and HHJ Gerald that the wording of paragraph (iii) of the reservation in the 1969 Headlease is wide enough to include a *de facto* right in the sense of a settled practice which was converted into a legal right on the reservation. Analogous circumstances were considered in *Pitt v Buxton* [1970] 21 P&CR 127. That was a case in which the court was required to consider whether it was possible to constitute an express regrant of an easement over land conveyed to another in favour of land retained by the use of general words in the conveyance. Russell LJ stated as follows at 133:

> "I do not see, in principle, that it is not possible to constitute an express regrant of an easement over land conveyed in favour of land retained by the use of general words referring to current de facto accommodation of the latter by the former. Whether there is a grant must be a question of the intention of the parties to be gathered from the language of the instrument in the circumstances in which that language was used. If land was conveyed subject to 'rights' of way hitherto enjoyed, it may well be that mere accommodations or quasi-easements are not by such language elevated to the status of an easement… If, however, express reference is made to all quasi-easements and methods of user hitherto enjoyed, it seems to me that the proper conclusion is that a grant by the purchaser is intended, the nature and extent of the easement being determined (if at all) by the facts of user which obtained, though it must be for the vendor (or his successor) to establish with some precision what were the facts and, consequently, what was the rights that it created…"

It is unnecessary to decide, therefore, whether the same would be true if one were relying solely on the use of the term "quasi-easement" in the reservation, although in my judgment, the position would be the same: *Bayley v Great Western Railway Co* [1884] LR 24 Ch 434.

78. Further, in my judgment, there is nothing in Mr Holland's point that parking in *Newman v Jones* had been permitted whereas, he says that, at best, it was only tolerated at Duchess of Bedford House. I am not sure about the basis for his submission about toleration. It does not appear that there was evidence that parking was refused. To the contrary, at [57] of the first judgment, HHJ Gerald recorded that neither Ms Loverdos nor Mr Wolmar, who gave evidence on behalf of the Appellants, accepted that in 1969 and before that the head porter at Campden Hill Gate had challenged the residents of

Duchess of Bedford House who parked on Sheldrake Place East. He went on to consider further evidence and concluded:

> "59. It is safe to say that Mr Rob was apparently a somewhat severe head porter, and Mrs Delmar understood that at some stage he kept a list of car registration plates, from which it was attempted to infer that he must have been doing so back in 1969 and, therefore, he must have been challenging the residents of Duchess of Bedford House, who parked in Sheldrake Place East. That, in my judgment, is an insufficient basis upon which any finding could be made.
>
> 60 It follows from this finding, that there is no basis to the defendant's arguments that the parking was subject to protest and therefore, could not form the basis of a quasi-easement or, indeed, right as per Le strange v Pettefar [1939] LTR 300 and also Millharbour v Westgroup, a case in the County Court, which I have already referred to."

There was no appeal against that finding.

79. There is no basis for Mr Holland's submission, therefore. Even if there were, it seems to me that he was making a distinction without a difference. In *Newman v Jones*, Mr and Mrs Newman were told by their solicitors that they could park on the forecourt and at Duchess of Bedford House there is no evidence that the tenants and their visitors were prevented from doing so. There appears to have been no evidence here that parking was under protest: *Le Strange v Pettefar* [1939] LTR 300.

80. The last submission which I should address, albeit briefly, is whether the reasonable reader in 1969 would have understood the reservation to extend to an easement to park. This is put on the basis that such a right was not recognised as an easement at the time. It seems to me that, given the breadth of the reservation at (iii), it is unnecessary to decide whether the reasonable reader would have understood a right to park to fall within the reservation of easements. It also referred to "rights belonging to and enjoyed by any adjoining or neighbouring premises" (emphasis added). Even if the reasonable reader would have doubt about whether such a right was an easement, I consider that such a reader would have had no doubt as to the natural and ordinary meaning of "rights belonging to and enjoyed by" and would not have hesitated to say that the right to park on the forecourt in competition with others fell within it. The natural and ordinary meaning of those words as understood in 1969 would have extended to the right to park.

81. In any event, it is clear from the helpful analysis of the case law conducted by Judge Paul Baker QC, sitting as a High Court Judge in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, at 1284H-1288D, that rights to store goods on another's land had been recognised since at least 1915 (*Attorney-General of Southern Nigeria v John Hold & Co (Liverpool) Ltd* [1915] AC 599 per Lord Shaw at 617) and that rights to park were considered in cases in 1939 and 1952 and thereafter, (see *Le Strange v Pettefar* (1939) 161 LT 300 and *Copeland v Greenhalf* [1952] Ch 488) albeit that they were rejected on their facts. The right was recognised as being capable of being an easement by the House of Lords in *Moncrieff v Jamieson* [2007] 1 WLR 2620. It is not necessarily clear, therefore, that the reasonable reader of the 1969

Headlease reading paragraph (iii) of the reservation in 1969 would not have considered that it included a parking easement, if one existed.

Conclusion

82. For all the reasons referred to above, I would allow the appeal.

Lord Justice Birss:

83. I agree.

Lady Justice King:

84. I also agree.