

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE



SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2013/0053

BETWEEN

[1] OSPREY LIMITED

First Claimant

[2] RHINOCEROS COMPANY LIMITED

Second Claimant

and

MOONHOLE COMPANY LIMITED

Defendant

Appearances:

Mr. Grahame Ballers for the First Claimant

Mr. Richard O.F. Williams for the Second Claimant

Dr. Linton Lewis for the Defendant

2013: September 24;

October 7-8;

2014: July 3, 3f

2015: January 28.

JUDGMENT

[1] **THOM J**, Moonhole is a unique residential community on the Island of Bequia. It was developed by Thomas Johnston an American who had made Bequia his home.

[2] The land comprising Moonhole was purchased by Thomas Johnston in 1969 and vested in the defendant Moonhole Company Limited (Moonhole Company). Thomas Johnston was the Chairman of Moonhole Company until 2000 when he was replaced by a homeowner Amos Eno. Thomas Johnston held the controlling interest in Moonhole Company until his death on 19th September 2001.

- [31] In developing Moonhole Thomas Johnston subdivided the land into several lots and built houses on approximately 17 of the 13 lots. Many of the houses were sold. Moonhole Company retained about three of them. Moonhole was unique in that in constructing the houses Thomas Johnston took great care to preserve the natural beauty of the land. At Moonhole there are no roads only footpaths, no running water and no electricity. Around 1990 a road was constructed mainly by the Adams Bay Developers from Gelliza to Moonhole.
- [4] The First Claimant Osprey Limited (Osprey) is the owner of 4 parcels of land (the Osprey lands) at Moonhole, having acquired them by Deed of gift dated 16th August 2002 from its sole shareholder and Managing Director, John Corbett who had purchased the lands from the Moonhole Company in 1992 and 1997. In 1993 John Corbett purchased a house from the owner Mary Clarke.
- [5] The Second Claimant Rhinoceros Company Limited (Rhinoceros) is the owner of three parcels of land which it purchased from Moonhole Company. Rhinoceros Company is owned and controlled by Charles Brewer and his wife Cornelia Brewer.
- [6] Some time prior to 1992 Thomas Johnston's son Jim Johnston who resided on Bequia from time to time and who occasionally occupied one of the houses owned by Moonhole would park his vehicle on a vacant lot owned by Moonhole which is situated towards the entrance of Moonhole. He also built a makeshift garage on the lot. Other persons who visited Moonhole for business or pleasure would also park on that lot. John Corbett and Charles Brewer also built makeshift garages on the said lot in which they parked their vehicle. The lot measured approximately, 12,212 sq.ft. (the vacant lot).
- [7] In 2012, Moonhole Company being desirous of selling a portion of the vacant lot to Christopher Thompson subdivided the vacant lot into two lots, 1 and 2, with lot 2 being the larger lot measuring 9,731 sq.ft. The area where the garages are situated is now lot 2. Moonhole Company gave notice to the Claimants to remove their garage and to cease parking on lot 2 and instructed them to park on lot 1.

[8] The claimants' motion to set aside the order of summary judgment was granted. The claimants' motion to set aside the order of summary judgment was granted.

[9] Osprey's case is that Thomas Johnston represented to its predecessor John Corbett that the vacant lot was designated as a parking lot for homeowners of Moonhole. Acting on reliance on that representation, John Corbett purchased property at Moonhole and has parked on lot 2 from 1992 and built a garage there.

[10] Rhinoceros claims that during negotiations to purchase its property around 2000 Thomas Johnston represented to Charles Brewer that the vacant lot was designated as a parking lot for residents of Moonhole. Acting on that representation it purchased property at Moonhole in 2001; however the Deed was not registered until 2003. A garage was erected on lot 2 and the company exercised rights of parking from 2001 to present.

[11] The claimants' in their amended statement of claim based their claim on proprietary estoppel, implied easement and adverse possession. They sought the following reliefs:

- "(a) A declaration that the claimants are entitled at all times to the right to park their vehicles on the said parking lot.
- (b) A permanent injunction restraining the defendant, by its directors, officers, servants or agents or howsoever otherwise from selling or otherwise disposing of the said parking lot.
- (c) A permanent injunction restraining the defendant, by its directors, officers, servants or agents or howsoever otherwise from in any way preventing or hindering the claimants' directors, officers, shareholders, servants and licensees from having the full use of the said parking lot."

[12] Moonhole Company in its defence denied that the alleged representations were made by Thomas Johnston and contended that the claimants parked on the vacant lot with the defendant's consent. The defendant also contended that the rights which were conveyed to the claimants are contained in their deed. The claimants cannot now seek to vary or modify their deeds. The defendant further contends that the negotiations for the purchase of the Rhinoceros lands were

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between Charles Brown on behalf of Rllinocems and FlobEHi Rooth and Amos Eno on behalf of the Defendant. The terms of the a Jreement to purchase were not concluded until W03. No representation of parking was discussed.

[13] At the hHaring the claimants did not pursue their claim fmadversc,i possession, in my opinion rightly so since it was inconsistent with their other claims.

Issues

[14] The issufis to be determined are:

- (i) Whether there is an easement, of a right to park in favour of the Claimants. If yes, whether the proposed alteration of t11e vacant lot would result in a substantial interference or extinguishment of the easemf nt.
- (ii) Whether the doctrine of proprietary estoppel is applicable in this case.

Submissions

Easement

[15] Learned Counsel for the claimants submitted that the evidence shows that in the latH ·1980s there was vehicular access to Moonhole by a road from Gellizeau near the Bequia Airport through the Adams Bay Property, past lots I and 2 to the Palm Fence and property belonging to Christopher Thompson. The evidence of the claimants' use of the road and parking iot was not challenged at trial. There is no other place to park at Moonhole.

[16] The claimants contend that a right to park is capable of being an easement at common law and referred to the case of **Moncrieff v Jamieson (2007)** 1WLR p.2620, the judgment of Lord Hope at paragraph 26 and the judgment of Lord Neuberger at paragraphs 107, 128, and 134. They submit that his right to park was in existence at the time of the conveyance to the claimants and would have passed under their Deed. Clause 3 of Osprey's Deed provides that "easements of ingress and egress are hereby impressed over, and upon all paths, access ways

and delineated recreation area of land in favour of the Purchaser". The right to park would also pass as a right ancillary to the grant to pass and repass on the road since there was nowhere else to park at Moonhole.

learned Counsel referred to the following passage from Lord Neuberger at p.2656 of *Moncrieff v Jamieson* (2007):

"... it is a dear authority in English law for the proposition that the grant of an easement is prima facie also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment."

[17] The claimants further contend that the defendant is not excluded from possession of the land as the defendant continues to maintain control over the land.

[18] The claimants further contend that the defendant has no right to prevent the claimants from parking in the area and require them to park in another area as a subservient landowner has no right unilaterally to extinguish an easement over one area of land on provision of an equivalent easement over another. There is no basis upon which a unilateral right of variation can be implied. See the case of *Kettel v Broomfield* (2012) EWHC at para. 33. Further the area identified that is presently earmarked is not sufficient to provide parking for the Moonhole community and will destroy the claimants' financial investment.

Defendant's Submissions

[19] Learned Counsel submitted that the Deeds of the claimant make no mention of a right to park on the defendant's land. There is therefore no express easement of a right to park on the defendant's land.

[20] Learned Counsel also submitted that there was no implied grant of an easement. The rule in ***Wheeldon v Burrows*** is not applicable in circumstances of this case. The rule operates to imply quasi-easements in favour of the purchaser over the land retained by the vendor provided that the following requirements are satisfied:

- (a) The quasi-easements are necessary for the reasonable enjoyment of the land that was purchased.

(b) The quasi-easements must be used and were used at the time of sale by the vendor for the benefit of the land that was sold.

(c) The easements are continuous and appurtenant.

[21] Learned Counsel next submitted that there were no quasi-easements in existence at the time of the disposition of the property to John Corbett or to Fihinocoros. Moonhole company never owned a vehicle and thus never used the vacant lot as a parking lot

[22] Learned Counsel next submitted that even if there was a quasi-easement it was not necessary for the reasonable enjoyment of the property. Learned Counsel relied on the following passage in *re Eilenborough Park* (1956) 1 Ch.131:

"We may expand the statement of the principle thus; a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of land more reliable, it is not an easement at all, but a mere contractual right personal to the two contracting parties."

[23] Also the explanation of the phrase "reasonably necessary" as stated by Sterling LJ in *Union Lighterage Company v London Graving Dock Company* [1902] 2 Ch.557 at p.573

"In *Wheeldon v Burrows* the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendant's dock in its present condition; but the dock is capable of use without them and I think that there cannot be implied any reservation in respect of them."

Learned Counsel submitted that the parking lot is not necessary for the enjoyment of the claimants' properties. They do not need to use the Defendant's land to park to gain access to their properties. The original plan for Moonhole Development has always been that there would be no need for motorized vehicles but only footpaths

Learned Counsel further referred to 110 cases of *Bachelor v Mal'low* (2003) 4 MJ 1 p.18 and *Copeland v Grnenhaif* (19fi2) 1 Gh.48H at 495; and contended that the claimants claim that there is a right of easement of parking over the entire lot; and that an area of approximately 10,000 sq. ft of land is too extensive to constitute an easement.

[25] Learned Counsel further submitted that in the circumstances of this case the claimants not being assigned a specified parking area in the vacant lot the defendant is entitled to direct the claimants to park on lot 1. Learned Counsel relied on the following passage in the judgment of Lord Hope of Craig in *Moncrieff v Jamieson*, [2007] 1 WLR 1139 at para 12:

"The grant was silent as to the route by which access was to be obtained to the store from the Sandsound public road. As Cusine & Paisley v. Moncrieff, [1998] 1 WLR 1139, para 12. 131 point out, there is no institutional authority to the effect that where a grant of servitude is indefinite as to the exact route, the dominant proprietor may choose the route over which the servitude is exercisable "in any place most convenient for him, but not invidiously to the detriment of the servient tenement."

[26] And the following passage in *Bolton v Bolton* [1879] 11 Ch, p.968 where Fry J after referring to the cases of *Claik v Rugge* 2 Foll. Abr. 60 and *Packer v Westminster* 2 Sid, 111 stated:

"Both these cases were considered in a much more recent case *Pearson v Spencer*, [1891] 1 QB 564, delivering the considered judgment of the Court, after referring to the two authorities I have cited said: "In each case it seems to have been thought that the person by whose act the way was created was subject only to this, that it should be a convenient way."

Learned Counsel submitted that the case of **Kettel v Bloomfield** is distinguishable from the case at bar since in **Kettel's case** the defendant had granted a written lease which specifically defined a designated car parking space that was shown on a site plan. While in the case at bar the deeds make no mention of a designated parking area.

Proprietary Estoppel

- [27] Learned Counsel for the claimants submitted that the three main elements of proprietary estoppel are
- (a) a representation or assurance made to the claimant;
 - (b) reliance on it by the claimant; and
 - (c) detriment to the claimant in consequence of his (reasonable) reliance- see *Thorne v Major and Others* (2009) UKHL para. 29, and *Capron v Government of Turks & Caicos Islands* (2010) UKPC para. 35.
- [28] Learned Counsel further submitted that the defendant has not refuted the Claimant's evidence that the representations were made. The overwhelming evidence at the trial was that Thomas Johnston controlled the Defendant and did as he pleased.
- [29] Learned Counsel next submitted that the evidence shows that the claimants relied on the representation and in the case of Osprey expended \$190,052 in purchasing properties from the defendant and constructed a garage. In the case of Rhinoceros it expended US \$35,000 in purchasing its properties from the defendant. Neither the Defendant nor its agents or servants tried to stop John Corbett or Rhinoceros from constructing a garage on the lot.
- [30] Learned Counsel for the defendant submitted that the claimants have failed to establish all of the elements of proprietary estoppel.
- [31] While denying that Thomas Johnston made the representation alleged by the claimants, Learned Counsel submitted that the defendant is a company managed by a Board of Directors and the evidence shows that there was no Board minutes showing any representation by Thomas Johnston to the claimants. Further the Deeds make no mention of a right to park on the land. John Corbett and Charles Brewer are sophisticated businessmen who knew and understood their deeds were determinative of their interests in the property they acquired. Further the representations alleged were not clear in that no area was identified. The land referred to by the claimants measured 12,212 sq. ft.

[32] Learned Counsel next submitted that the evidence of representation is not admissible as parole evidence cannot be used to amend the deeds which conveyed the properties to the claimants. Learned Counsel referred to the following passage in *Bank of Australia v Palmer* (1897) AC 540:

"... parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties here deliberately agreed to record any part of their contract."

[33] Learned Counsel submitted that the conduct of the claimants showed that they did not rely on any representation by Thomas Johnston. In their letter dated 23rd February 2003 they claimed to have acquired the land by adverse possession.

[34] Further the negotiations for the purchase of the land by Rhinoceros who constructed between Charles Brewer and Robert Rooth and Amos Eno. At no time during those negotiations was any mention made of any representations. The terms were agreed and incorporated into the Deed. No mention is made in the Deed of any parking rights. Also Charles Brewer stated that he had permission from one Jean Poisson to park on the land.

[35] Learned Counsel next submitted that on the evidence the claimants have not suffered any detriment as their properties have increased significantly in value. The garages constructed by the claimants are makeshift garages which could be easily moved from one location to another.

Discussion

[36] The doctrine of proprietary is an equitable doctrine. The applicable principles have been stated very succinctly by Scarman LJ in **Crabb v Arun District Council** (1976) Ch.179 at 195 as follows:

"If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties, in such a case I think it is now well settled law that the court, having analysed and assessed the conduct and relationship of the parties has to answer three questions. First is there an equity established? Secondly what is the extent of the equity, if one is established and thirdly what is the relief appropriate to satisfy the equity?"

ran To f:lstabl,h th equity there am three main e!emonts which must bo safatiod these elements have been mferrod to by Counsel on both sides as

- (a) A roprasentation or assurance made to the claimant.
- (b) Fle!iance on it by thG claimant; and
- (c) Detriment to ihn claimant im:onsequenct of his {reasonable} reliance.

[38] Altllout1i1 there am three Hlemenls, tll o modern approaci1 is !hat these threE} eioments must be lrnaled as one. This modom approach was stated in the case of Gilbert v Holt (2001) ch p.210 at 255 by Waiker LJ as follows:

"... altliougii Hm judgment is for convenience dividerJ into several sections with headings which give a rou9h indication of the subject matter it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into tlree or tour watertight compartments ... in the course of thE! oral argument in this court it repeatedly became apparent trial thH quality of the relevant assurances may influence 1he issue of reliance, that reliance and detriment are often intertwined and that whether thern is a district need for a mutual understandinn may depend on how the otht-:lr elements are formulated and understood, Moreover th<:) fundamental principle that is concerned to prevent unconscionable conduct permeates al! the elements o! the doctrine. !n the end the court must look at the matter in the round."

[39J ! will apply these principles to the case at bar. The first question is, is there an equity established?

[40] \1'/hi!e I agree that Thomas Johnston was H1e ultimate environmentalist, and while tt1e original plan specifically states "only walking paths are planned- no roads for motorized vehicles or motorcycles" and the drawing shows the vacant lot as being part of an area described as "Park Orchard", the uncontroverted evidence is that the late 1980s Thomas Johnston's son Jim Johnson was in the habit of parking his vehicle on the vacant lot and persons who visited Moonhole usually for business mainly delivery also used the vacant lot to park their vehicles. Also the documentary evidence such as the Tenant Guidelines, House Rental Policies, Policies for Environmental Protection, Trustees Report and Recommendations all show that parking was permitted on the vacant lot

y .

[41] Thomas Johnston having died in September 2001 there was no evidence to contradict the evidence of the claimants that the alleged representation was made to them. John Corbett and Thomas Johnston were very close in the early .90s Thomas , Johnston's wife having passed away. During his visits to Thomas Johnston at Moonhole prior to purchasing property at Moonhole John Corbett like all other visitors parked on the vacant lot. After he purchased property at Moonhole in 1992 he continued to park on the vacant lot. There is no evidence of interruption or objection by Thomas Johnston or the Board of Moonhole.

[42] While I agree that in relation to Rhinoceros, the terms of the sale and purchase of the Rhinoceros lands were discussed and finalized by Charles Brewer for Rhinoceros and Robert Rooth and Amos Eno for Moonhole, however the documentary evidence also show that there were discussions between Thomas Johnston and Charles Brewer on the purchase of the Rhinoceros lands. When the evidence is considered as a whole parking on the vacant lot was not contrary to the views of Thomas Johnston as the vacant lot while it is Moonhole's property is situated at the entrance to the community, it is not inside the community where Thomas Johnston was keen to have free from motor vehicles.

[43] I also do not agree with the submission made on behalf of the Defendant that any representation made by Thomas Johnston was not a representation of Moonhole Company. The uncontroverted evidence is that Thomas Johnston was the controlling mind of Moonhole Co. He held the controlling interest in Moonhole at the material time. The development of Moonhole as a unique community was his idea. Thomas Johnston was the chairman of Moonhole until 2000. Decisions in relation to Moonhole were made to a large extent by Thomas Johnston. Where Board members did not agree with his decisions they simply went along with it. The fact that there is no record of the representations in the minutes of Moonhole Board meetings is not determinative of the issue.

[44] I also find that the evidence of the claimants that John Corbett and Charles Brewer relied on this representation and purchased property at Moonhole and they

each built a garage was not contradicted. I also find that the garages were makeshift garages in keeping with the unique concept of Moonhole. This leads to the next question whether their reliance was detrimental.

[45] The detriment pleaded by the claimants is to be found in paragraphs 13, 19, 20 and 21 of the Amended Statement of claim. The detriment pleaded is that they bought properties at Moonhole and that each built a garage, if lot 2 is sold their property would be devalued, lot 1 is too small to provide sufficient parking space for all of the homeowners, and potential purchasers would not wish to purchase property at Moonhole.

[46] In considering detriment the Court is required to weigh the disadvantages suffered by reason of the reliance on the representation against the countervailing advantages which the claimants have enjoyed as a result of the reliance e.g. see *Henry v Henry* (2010) UK PC 3 an appeal from the Court of Appeal of St. Lucia.

[47] The claimants have proffered no evidence in support of their contention that potential purchasers would not wish to purchase property at Moonhole. The evidence shows that the value of property at Moonhole has appreciated significantly over the years. Indeed Charles Brewer testified that at Rhinoceros, purchased the property at Moonhole for \$35,000.00 and now property at Moonhole costs approximately \$700,000.00. On the other hand, the garages are makeshift garages which would have caused the claimants an insignificant sum to construct. Throughout the decades that Moonhole has been in existence the only two homeowners apart from Thomas Johnston's son Jim Johnston now deceased, who parked on the vacant lot, are John Corbett and Charles Brewer. This is unsurprising having regard to the unique features of Moonhole. Presently they are the only two persons who park on the lot. The court is required to consider detrimental reliance at the time when the person who has given the promise seeks to go back on it. The Court is not required to speculate into the future that some persons may not wish to purchase or rent homes at Moonhole because of the size of the parking lot.

[48] The claimants' only complaint with lot 1 is that it is too small. Lot 1 measures approximately 2,475 sq. ft. The evidence of the claimant's witness Lawn Leslie is that Lot 1 would not be able to accommodate more than six cars. He explained that adequate space would have to be provided for the vehicles to turn. Lawn Leslie also testified that he experienced difficulties parking at Moonhole during the winter months when several persons rented villas and used the parking lot. The claimants have not testified of any such experience using their garage. The evidence on behalf of the Defendant witness Robert Rooth is that in addition to lot 1 there is an additional 555 sq. ft. south of M1 and M22, a further 1,340 sq. ft. in the area of the proposed new access which could be used for turning vehicles. Thus a total of 4,500 sq. ft. is available for turning and parking vehicles which could accommodate approximately twenty vehicles. I accept this testimony of Robert Rooth. I found him to be a truthful witness whose testimony is not contradicted. Assuming that the claimants are correct and that lot 1 could only accommodate six cars, the additional space of approximately 2,000 sq. ft. would accommodate another five cars bringing the total to eleven cars. However, what is critical assuming that there is place for eleven or ten cars that would provide adequate space for the claimants to place their garage. Having regard to the nature of the garages and the close proximity of lots 1 and 2, it would cost an insignificant sum to move the garages.

[49] The doctrine of proprietary estoppel only applies where when the matter is looked at in the round it would be unconscionable for the person making the promise to go back on it. In this case I do not find that it is unconscionable for Moonhole Company to request the claimants to move their garage from one area of the vacant lot to another.

Easement

[50] It is common ground that the right to park is capable of being an easement see **Moncrieff v Jamieson** (2007-) 1 WLR 2620.

[51] The claimants pleaded a case of an easement in their favour is outlined in paragraphs 11, 12, 15 and 16 of their Amended statement of claim. They claim that they were granted a right of way to pass and repass with a vehicle along the Adams Bay Road and a right to park on the vacant lot. Also there is an implied easement under the rule in *Wheeldon v Burrows*.

[52] In their written submissions the claimants contended that the right of way to pass and repass by vehicle from Adams Bay to the Palm Fence existed at the time of conveyance of their properties and would have passed under their Deed and the right to park which is ancillary to the right to pass and repass would also have passed under their Deed.

[53] I agree that having regard to the circumstances of this case, if there is an easement of right of way by vehicle over an access way that there would be an ancillary right to park as submitted on behalf of the claimants- see **Moncrieff v Jamieson** para. 52.

[54] It is appropriate to set out the provisions of the Deeds and the evidence on which the claim of an easement is based. The first plot of land purchased by John Corbett at Moonhole was conveyed by Deed No. 2089 of 1992. The relevant provisions are the First Schedule and clauses 3 and 9. They provide as follows:

"First Schedule

... Together with all buildings and erections thereon all ways water watercourses rights lights liberties privileges easement and all other appurtenances thereto belonging or usually held used occupied or enjoyed therewith or reputed to belong or be appurtenant thereto..."

3. The vendors shall maintain and manage all paths and access ways and certain recreation areas and facilities built within the land of Moonhole Company Limited at the pro rata/expense of the Purchaser and other owners of improved building sites and easements of ingress and egress are hereby impressed over through and upon all paths, access ways and designated recreation areas of land in favour of the purchaser.

9. The Purchaser agrees that he will not use any motorised vehicle or machines or engines that will disturb the peace and make objectionable noises, smoke or odours within the Moonhole area or on their buildings

site. The Vendors agree to make and enforce such rules and regulations as will carry out this objective."

[55] The second property was conveyed to John Corbett by Deed No. 2899 of 1993 when he purchased land at Moonhole from Mary Clarke. The relevant provision is the schedule, it reads

"... Together with a right of way over the land of the said T.G. Johnston to the said parcel of land and all ways water watercourses rights lights liberties privileges and all other easements thereto belonging or usually held used occupied or engaged therewith or reputed to belong or be appurtenant thereto."

[56] This Deed for the third property No. 1023 of 1997, Deed No. 2848 of 2002 conveying the properties from John Corbett to Osprey and Deed No. 62H of 2003 which conveyed the Rhinoceros lands from Moonhole Company to Rhinoceros all contains a promise similar to First Schedule of Deed No. 2089 of 1992.

[57] I accept the evidence of Robert Routh which evidence was not contradicted that he frequently spent time at Moonhole from 1975. At that time and for many years thereafter there was no access to Moonhole by road. The nearest road ended in Gellizeau.

[58] Sometime in the early 1990s a road was constructed from Gellizeau through the Adams Bay Property and it passed along the vacant lot and along the property owned by Christopher Thompson which is adjacent to the vacant lot and ends outside the Palm Fence of the Moonhole compound. This road was constructed mainly by the Adams Bay Developers. Prior to this Moonhole was accessible by foot along the beach or by boat.

[59] As stated earlier the Claimants' evidence is that Thomas Johnston represented to John Corbett and Charles Brewer that they could park at the vacant lot. John Corbett's evidence is at paragraph 8 of his witness statement:

"8. I negotiated with Mr. Johnston to purchase a property and did in fact purchase the Recovery property in 1992 from the Defendant. Prior to purchasing the Recovery Property, I advised Mr. Johnston that I lived permanently on Bequia and I owned a vehicle and that it would be a

problem for me to purchase land at Moonhole as I couldn't park my vehicle within the development. I was advised by Mr. Johnston that a parcel of land adjoining approximately 10,000 sq. ft more particularly lying outside the Moonhole compound was designated by the Defendant as a parking area for the use of the property owners of Moonhole, their relatives and licensees and that all vehicles would have to park there as there were no motor vehicular roads within the development. He said he had done this because there was a vehicular road leading to Moonhole since the construction of the Bequia airport in the late 1980s and visitors and house tenants needed somewhere to park. This said parcel of land which was designated as a parking lot, was recently surveyed and is now described as Lot 2, and on a plan G 1267."

[60] The evidence of Charles Brewer is at paragraph 9 of his witness statement:

"9.... it was Mr. Johnston who represented to me that the said parking lot which now more particularly described as Lot 1 & 2 on Plan G 1267 had been designated by the Defendant as a parking lot for the Moonhole community and it was acting on this representation by Mr Johnston that I paid the Defendant the sum of US \$35,000 on the 3rd day of January 2001 for the Brewer property and took possession of the same."

[61] While in the Deed to John Corbett clause 9 specifically excluded vehicles from the Moonhole area this reference must be interpreted to mean the area beyond the fence as the evidence shows that visitors to Moonhole both for business -- delivery of goods etc. and visitors parked on the vacant lot.

[62] The evidence shows and it is not disputed by the Defendant that by 1992 when the said Deed was made to John Corbett there was access to Moonhole by the Adams Bay Road. It is also not disputed that prior to 1992 the road was used by all persons visiting Moonhole and persons who went by vehicle parked on the vacant lot which is situated outside of the Moonhole compound beyond the Palm Fence.

[63] Having reviewed the evidence I find that the provisions in the Deeds have the effect of a grant of an easement of a right of way over the Adams Bay Road on the Moonhole property and an ancillary right to park in the vacant lot as contended by the Claimants. It is not disputed that John Corbett and Charles Brewer have

parked on vacant lot from 1992 and 2002 respectively without any interference or
objection

((14] I agree that the grant of a right to park a vehicle on a defined area of land which is
capable of accommodating several vehicles is capable of benefiting an easement. See
Moncrieff v Jamieson,

[65] While I find that there is an easement of a right to park on the vacant lot, any
alteration of the vacant lot so as to restrict parking on a part only of the lot would
not amount to an extinguishment of the easement as contemplated by the claimants.
The claimants relied on the following passage in **Kettel v Bloomfield** at paragraph
33 where Cooke J said:

"... In general a servient landowner has no right unilaterally to extinguish
an easement over one area of land on provision of an equivalent
easement over another- see *Greenwich NHS Trust v London &
Wandsworth Housing Association* ("1998) 1749 and I held in *Heslop v
Bishton* (2009) EWHC 607 that obstruction of the easement originally
granted did not cease to be actionable in principle because of the
availability of an alternative easement, even if equally convenient. An
easement may of course be granted in terms which expressly or by
implication permit variation of the servient land, as recognised by
Uthmaniyah J in the **Greenwich case**, and no doubt it may have been
commercially sensible for the landlord if it had drafted the parking rights in
such terms in this case, but there is no right of variation expressly set out
and no basis, in my judgment, for such a right to be implied."

[66] In **Kettel's case** the leases had specifically identified the particular parking space
for each lessee's car. On the specific circumstances the learned Judge found that
there was no basis to imply a right of variation. The Learned Judge in **Kettel's
case** acknowledged that a variation of an easement may be implied in a grant.

[67] In the case at bar, I find that the defendant is not seeking to extinguish the
easement but, only, to alter the size of the servient tenement. The question is
whether there is an implied right to do so. Having regard to the circumstances of
this case I am of the opinion that such a right is implied. The vacant lot measured
approximately 12,212 sq. ft. This is an extremely large area. No specific area
was identified for the claimants to park. The vast majority of homeowners at

Moonl1ole do not mside at Moonl1ole the entire year including John Cort1ot! and Charles Bmwer. Over tlm yHars tile only homeowners who have vohiclos are John Corbo!! and Cliarlo iBrewer.

- [68] Even wllern lhen::J is no implied right lo vary !h(j oasEim,.mt, vHriation may bt pormissible whor(1 thern is no major inconvonience to tho nran!etJ see Cheshire and Bums Moc:fom Law of Flea! Property i8 ll <1d. P:700 wll(3re thH LHamod Authors stated:

"Alterations to servient tenement

/J.1 S(!l"Vi<:mt ownHr has no right to alter the rout(of an easement ot way unlf::SS such a ri9ht is an express or implied term of thr nrant of the easement or k; subsequently conferred on him. However even if he has no such right, nevertheless such realignment will not be actionable interference with the easement if the realigned right is equally convenient, especially where there is no reasonable objection to the realignment. it has been held tha.1 when the dominant owner had notice of the proposal and did not object and where the realignment achieved an object of substantial public importance, the dominant owner's rc:::medy to an award of damages."

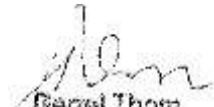
- [69] Havin9 regard to the circurnstances outlirn:1d at paragrapl1 67 and Hie evidence of Robert Hooth which I accept, that the proposod parking area consist of lot ·1 which measures 2,609 sq. ft., tile area to Hie souU1 of M·1 and 22 whicr1 is an additional S55 sq. ft and the additional area as shown on the survey plan Gr!267 bonded by points 27, 16, 21 and 22 whict1 contains an additional 1,340 sq. ft., the total area for parking and tuning vehicles being 4,500 sq. ft., I find that the realigned right is equally convenient to the claimants. The proposed area is a mere few feet from where they currently park. As stated earlier the garages are makeshift garages which will cost an insignificant sum to relocate. There is no extinguishrment or substantial interference of the easement. in view of the above, I find that this not an appropriate case for thf;) grant of an injunction but rather the appropriate relief is one of damages, such damages being the cost of removing the garages to lot 1.

- [70] In conclusion I find that there is an easement of right to park on the defendant's land. I also find that the alteration of the size of the servient tenement would not

amount to a extinguishment or substantial interference of the franchise. I also find that the doctrine of estoppel is not applicable.

[7] It is hereby ordered that:

- (i) Judgment is entered for the claimants.
- (ii) The defendant shall bear the costs for removing the garages to lot 1.
- (iii) The defendant shall pay the claimants costs in the sum of \$7,500.00.


Gerald Thomas
High Court Judge