IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE COUNTY COURT AT BRISTOL

Neutral Citation Number: [2021] EWHC 3811 (Admin)
Case No: D00BK338/10BS093C

2 Redcliff Street
Bristol
BS1 6GR

Thursday, 22 July 2021

Before:

THE HONOURABLE MRS JUSTICE FOSTER DBE

B E T W E E N:

MONOGRAM TECHNOLOGIES LIMITED

and

WATERLANE PROPERTIES LIMITED

MR J WEBB appeared on behalf of the Applicant
MR A MAGUIRE appeared on behalf of the Respondent

JUDGMENT
(Approved)

MRS JUSTICE FOSTER DBE:

Introduction

1. This is an appeal with permission of Henshaw J dated 17 May 2021, against an order of 8 April 2020, made by His Honour Judge Berkley. The order followed the trial of a two-day action in Winchester County Court in April 2019. It concerns the terms of a declaration made by the learned judge in respect of rights over a strip of land to the south of the High Street in Odiham, Hampshire, enjoyed by two neighbouring properties on the High Street.

2. The appellant, Waterlane Properties Ltd ("Waterlane"), is the registered proprietor of 59 High Street, Odiham in Hampshire, which is registered under title number HP391321. I shall refer to this property as number 59.

3. The respondent, Monogram Technologies Ltd ("Monogram"), is the registered proprietor of land at the rear of 57 High Street, Odiham in Hampshire, registered under title number HP587409. I shall refer to this property as number 57. It lies directly to the east of number 59.

4. A claim, begun by the current respondent's predecessor-in-title, had in essence been for a declaration that Waterlane had no right of way over Monogram's land and no right to park on three parking spaces situated on the south of Monogram's land behind number 57. The judge conducted a site visit on 10 April 2019. The case was heard on 11 and 12 April and judgment was delivered on 12 April.

5. The parties were directed to agree the terms of declaratory relief ordered by the judge in favour of the appellant. Waterlane had succeeded in establishing a right of way and a right to three parking places on Monogram's land. The judge had also recognised that a significant degree of proposed increased use of Monogram's parking would seriously infringe the right of way.

6. Regrettably, despite significant correspondence, the parties were unable to agree upon the terms of an order consequent on the 2019 judgment. There were significant delays. Unfortunately, they did not assist the parties to resolve the remaining issues.

7. By an order dated 17 April 2019, the parties had been required to attend a hearing to resolve any outstanding matters, but it proved impossible to list the matter. On 10 January 2020, the defendant made an application for an order and for declarations by the judge to reflect his judgment of 12 April 2019. Certain parts of the order not in issue here were not in contention, but there was disagreement as to the content of the clauses designed to reflect his findings as to the right of way and the respondent's obligation to refrain from causing a significant interference with it.

8. Following a telephone hearing on 25 March 2020, the judge rejected the appellant's request for a detailed order and made the declarations recorded in the order and gave reasons dated 8

April 2020. In short: the problems have continued and on the basis of new evidence, for which I gave permission to both sides at the hearing, appear to have intensified. This appeal is the result of a failure by the parties to agree the wording of an order accurately reflecting the terms of the judgment and challenges the judge's decision declining to descend into the detail and make a specific order in March 2020.

The land in question

9. The land in respect of which the dispute arose, is a narrow strip which is used principally as a car park. I shall refer to it here as "the car park strip". The car park strip runs from north to south from the High Street, Odiham in the north, running down the side of number 57 as a passageway and a roadway, then turns west and becomes a car parking area behind numbers 57 and 59, extending further south, containing a number of car parking spaces to either side. The car park strip belongs to number 57, save for a small area carved out of it lying against the western boundary which, there is no dispute, belongs to number 59.

10. Marked on that area are four or five parking bays at an angle to the boundary referred to as echelon style parking, which are used by number 59 and its visitors. Opposite those are about a dozen further parking bays on the eastern side which is banded by a wall. The right of way runs north to south down the passage and roadways described, over land owned by the respondent, and, it may be seen from the plan, overlaps the end of about 10 of the parking bays against the eastern wall.

11. The figure is approximate because it appears one bay is now covered by a tree. The outline of the right of way, shaded on the plan with north to the top, has the shape on paper of a tuning fork that is missing its left-hand fork. It appears (unsurprisingly) number 57 and number 59 were formerly in common ownership, and that number 59 sought to retain a right of way when the land, which is now number 57, was sold off.

12. The right of way was created in the conveyance of number 57 in 1979. Number 59 was bought and sold more than once. Waterlane purchased it in 1989, in which year an inadequately completed statutory declaration concerning the three parking spaces was made for the purchaser of number 59, and a small area was retained by number 59 as described.

13. The judge described the land retained by number 59 as a "dog leg". He was "clear that this is intended to be a parking area".

14. Number 57 also changed hands over the years. It was brought in 2017 by the predecessors-in-title to Monogram who were a company called Egretway Limited and an entity known as Location London Properties (I shall refer to them here as "Egretway"). In October 2017, Egretway began the original proceedings from which this is the appeal.

15. In April 2018 Monogram purchased number 57, together with the car park strip, excepting the reserved dog leg, and it was substituted as claimant in the County Court action. Attached to this judgment is a copy of a plan of the relevant area. It is a small portion shaded in blue which was in issue in the proceedings below. It was not in issue before me, and is of no relevance to the arguments made. The questions concerning the existence of a right of way

and the use of the parking spaces were answered by the judge in Waterlane's favour and are no longer in issue.

16. It appears that before proceedings were issued, the car park strip, although in the ownership of Egretway at number 57, had been used consensually for parking by both number 57 and number 59. Waterlane, at 59, had been using three parking spaces at the far south end of the car park strip utilising its claimed right of way which also gave it access to its own land with the echelon style bays. At some point, Egretway made a planning application for a change of use of number 57 into residential use and later Monogram, in order to maximise their own use of the car park strip, wished to establish that Waterlane were not entitled to use all three of the spaces, nor did they enjoy the right of way over Monogram's property.

17. Although Waterlane accepted at trial that the current use of the car park strip as laid out did not interfere with their right of way, given the modest volume of cars and use of the perpendicular western parking bays at that time, it was their case to the judge that the proposed use, which envisaged commercial exploitation of the parking, as reflected in the planning application pursued by Monogram, demonstrated increased intensity that would constitute a nuisance. This was essentially said to be on account of foreseen difficulties in accessing their own parking on the dog leg of land when the perpendicular bays were more heavily occupied.

18. Each side maintained a polarised position before the judge. Waterlane said no cars could be put in the eastern end parking area without infringing their right of way, save for three, possibly four, parallel parked cars. Monogram denied that parking perpendicular to the wall in all spaces could constitute a substantial interference with the right of way. They asserted their use should not be restrained at all as Waterlane still had adequate access to the dog leg parking.

The issues

19. The judgment which the order was designed to reflect was based in part on evidence given before the judge by the purchaser of number 57, Mrs Currie, as the alter ego of Monogram. She purchased the building of number 57 in 2018 and the company purchased the car park the same year. She could give no evidence concerning the years before she took possession, but she denied any problems in her time, even when the car park had been full, nor had she seen any difficulties.

20. The judge also heard from Mr Hogben from Waterlane, a director of the company, which provides serviced offices. He gave evidence of the layout and also to the effect that there had been no reason to complain hitherto about overparking, emphasising the concern was the intended utilisation of the spaces. The difficulty arose when numbers of cars were parked on the eastern flank he said, and those in the western bays could not manoeuvre, even if parked in echelon style. It was, however, straightforward to manoeuvre when there were sufficient gaps. Waterlane relied on the evidence of Mrs Currie to the effect that the company Monogram, apparently formed for the purpose, would let out as many spaces as possible and Waterlane feared that this was imminent. They advanced these facts and matters in support of the grant of an injunction, alternatively a declaration.

21. Monogram argued before the judge that the spaces had been marked out for the past 30 years and that configuration had worked without incident. The parties only had to exercise a bit of "give and take". There was no need or justification for the Court to interfere. This was a case of maintaining the status quo and there was insufficient evidence to support an injunction.

22. The judge recalled in his judgment the effect of a site visit. The evidence was that a Waterlane car parked, on the dog leg trying to manoeuvre out across, with an unbroken row of cars parked perpendicular on the eastern side, faced difficulty. The judge said himself, "There were some significant physical difficulties in attempting that manoeuvre." He himself attempted some of the manoeuvres and had formed a clear view.

23. As to the law, the learned judge set out the fundamental principles he was required to apply. He expressed it succinctly thus, beginning at paragraph 25 of his judgment, and I take it directly from his judgment with gratitude:

> "*25. In relation to the interference with the right of way, both parties agree that the leading case is B&Q plc v Liverpool and Lancashire Properties Limited [2000] All ER 1059. It is a decision of Blackburne J. That was the case in which there had been a reduction of the available turning circle available for lorries approaching a warehouse.*
>
> "*Blackburne J, when he was dealing with the actionable interference, started his conclusion with the words:*
>
> "*I confess that I approach with considerable scepticism the contention that a reduction in the overall area of the yard by 26% and the effective turning diameter from 28m to 21m will nevertheless leave B&Q and its delivery vehicle sufficient space to enable the right conferred by B&Q's lease to be exercised as conveniently as before. The reduction in space clearly involves an interference of B&Q's rights. The question is what the degree of that interference is likely to be.*
>
> "*At the end of day, however, the question is whether difficulties of this kind, i.e., movements made more difficult than they would otherwise have been if the area of the unit to service yard had not been reduced, are likely in practice to occur so infrequently and when they do occur can be overcome by the obstructed vehicle either awaiting or resorting to the turning area in the northern service yard or relying on driver cooperation, but they can, for practical purposes, be ignored. If they can then it cannot be said the effect is to prevent the right conferred on B&Q from being substantially and practically exercised as conveniently after the extension has been built as before.*"
>
> "*26. Then the principles that B&Q established have been analysed by Gale 20th ed at paragraph 13.07:*

"*1) The test of actionable interference is not whether the grantee is reasonable, but whether his insistence on being able to continue the use of the whole of what he contracted for is reasonable.*

"*2) It is not open to the grantor to deprive the grantee of his preferred modus operandi and then argue that someone would prefer to do things differently, unless the grantee's preference is unreasonable and perverse.*

"*3) The grantee contracted for the 'relative luxury' of an ample right is not to be deprived of that right in the absence of an express reservation of a right to build upon it, merely because it is a relative luxury, and a reduced non ample right would be all that was reasonably required.*

"*4) The test is one of convenience and not of necessity or reasonable necessity, providing that which the grantee is insisting upon is not unreasonable, and the question is can the right of way be substantially and practically exercised as conveniently as before?*

"*5) The fact that an interference with an easement is infrequent and, when it occurs, relatively fleeting does not mean the interference cannot be actionable.*"

24. I interpolate, still citing from the learned judge's judgment at his paragraph 27:

"*27. Then, the law in relation to quia timet injunctions is set out in Gale at 14.75-14.82. Essentially:*

"*There needs to be in this type of case a strong probability that the activity will cause injury to the claimant. Although it has sometimes been said that the apprehended injury must be irreparable, this is probably not so if it is necessary to show only that the actionable injury be apprehended.*

"*Then it goes on:*

"*Some of the authorities state that the claimant must show that the threatened injury was imminent. It was explained in [inaudible] that the use of the word 'imminent' was to indicate that the injunction must not be brought prematurely and [inaudible] probability of future injury was not an absolute standard and the Court must be concerned to do justice to the parties having regard to all the circumstances. In [Inaudible] v Transport for London, the quia timet injunction was refused on the grounds that there had not been an immediate threat if infringement for at least a further five years.*

"*Instead of granting the injunction, the Court can make a declaration the defendant cannot carry on its activity to its fulfilment and may give liberty to apply for an injunction. In [the same?] authorities… [I interpolate this was a reference to B&Q] it was held premature to grant any declaration where it would serve no useful purpose at that stage and there would be difficulty in finding the relevant issues in any event.*"

25. Importantly, the judge made a number of findings relevant to the nature of appropriate relief. The passages of the judgment on the issues of infringement of Waterlane's right of way were as follows:

"*83. …I had first-hand experience not only observing Mr Maguire's instructing solicitor manoeuvring his car, but I myself manoeuvring mine and standing there and looking at what would be the case. As an experienced driver, I can take judicial notice that manoeuvring a car in the circumstances of two fully utilised parking bays as marked on the ground would be incredibly difficult.*

"*84. Therefore, taking my first-hand experience of the site and the manoeuvring conditions created by it, the manoeuvres that were in fact undertaken, the photographs and a genuine scepticism of a marked reduction of availability, do I consider there is an interference in this case? I remind myself of the tests set out in B&Q and as set out at 13.07 of Gale, which I have read out, it seems to me that whichever way one looks at it, applying all five of the summarised positions, there would definitely be interference when all or even a good number of the spaces on the eastern flank were filled by cars, i.e. such that those using the western parking spaces couldn't freely use spaces opposite to manoeuvre into.*

"*85. Therefore, I am satisfied that in those circumstances there would be a significant interference and an increase in the inconvenience of the ability of the [A] to use their land to park their cars, which was the obvious intention. Yes, it is possible if you park in an echelon style to reverse all the way up and out to beyond what I call the hammerhead, but that would be a significant inconvenience compared to being able to reverse out, even if it is reversing around one or two cars on the other side. The full right of way gives a very much easier way for anybody, whichever way they are parked backwards or forwards, perpendicularly or in echelon style, to manoeuvre out of the parking space so they face the right direction to drive off towards the High Street.*

"*I then turn to the question of whether I should issue a quia timet injunction. Again, turning to what is set out in Gale, it seems to me it is difficult in the current circumstances for [A] to say there is an imminent*

> *threat [R] is going to proceed to let out the other spaces that are available to it, i.e., the seven that are not already there. Mrs Currie gave an indication of what [A] might do regarding the eastern flank car parking spaces were her personal planning permission for the building to be allowed. Mr Hogben was not complaining that currently there is any difficulty with the six spaces left, but that might change of course if they are always and fully occupied, but there does not seem to me at the moment to be sufficient need for the Court to grant a quia timet injunction in the current circumstances. I also bear in mind that as a discretionary remedy, I take into account the fact these parties, whatever the case, are at least at the moment neighbours and to impose an injunction with the possible effect of that, when there is no imminent threat, might simply inflame matters. I want to encourage a better relation between the parties rather than anything worse.*
>
> "*Therefore, what I am going to do is to hear counsel on the point. I have in mind what I might want to do but I think it would be sensible at this point to hear from counsel as to what declaration I should make given the findings of fact and the law that I have made.*"

I have used in square brackets the references to the parties which pertain to the current proceedings.

26. Thereafter, as explained, there was considerable delay to the order. The judge, after the further submissions of March 2020, granted a declaration in general terms; the totality of the material part of which stated:

> "*The claimant shall not substantially interfere with the defendant's right of way as shown hatched black on the attached plan.*"

27. It is the terms of that part of the order that is the subject of this appeal and there had been submissions as to the appropriate form of words. In written reasons given after argument, the judge said the following:

> "*The issue is whether the paragraph in the draft order relating to the express right of way, which restrains the claimants from substantially interfering with it, should also contain the sentence, 'For the avoidance of any doubt, the claimant or its invitees or lawful visitors are not permitted to park vehicles so as to encroach upon the said right of way'.*"

28. The judge's core reasoning for the order made was as follows:

> "*17. In my judgment, the counterclaim does not support a finding that <u>any</u> obstruction of the right of way would be a substantial interference with it, even if the evidence had been otherwise. To seek to persuade the Court to prevent any obstruction thereof by the claimant is an impermissible widening of the claim, which would mean that the claimant had been deprived of having adduced evidence, possibly expert evidence, had that been the counterclaim. There simply was no argument or discussion at trial about whether anything less than the proposed parking scheme would amount to a substantial interference with the right of way.*
>
> *"18. As Mr Maguire in fact stated in his submissions at this hearing, the pleadings define the relevant evidence. He referred me to the site visit and to the discussions about perpendicular and "echelon" parking, but that had been in relation to the defendant's parking patterns on its land. The fact is there is no evidence directed at current usage, save for that of Mr Hogben. That in itself demonstrates that the Defendant was right not to claim a substantial interferences as at the day of the pleadings. I made my decision based on the proposed parking scheme and that was what was tested at the site visit.*
>
> "*19. I was driven by the evidence to conclude that the proposed scheme would be a substantial interference with the right of way, but it would have been perverse to have found that there had been a substantial interference given Mr Hogben's evidence and the historic use.*
>
> "*20. For the reasons I have set out above, I have decided on balance that I prefer the submission of Mr Demachkie and I will not include the sentence in the order that the Defendant is asking me to. The claimant knows the defendant requires use of either the whole right of way or the ability to use a number of spaces on the western flank of the parking area to prevent any non-parallel parking from being a substantial interference. That is the effect of my judgment, and the order will be limited to reflecting the defendant's rights as found on the evidence before the Court.*"

29. The learned judge then concluded:

> "*21. In some ways this is regrettable, by which I mean the lack of certainty, but the counterclaim made by the defendant together with the evidence before the Court constrains the Court to dealing with it in that way.*"

30. At the March hearing, Waterlane had submitted that following the judgment, the claimant's behaviour through its directors and agents had required that the order be defined more closely

in order to avoid further litigation. They said that Monogram had acted, in their submission, as if they had not lost at trial and in the absence of a formal detailed order of the Court, appeared not to recognise the defendant's rights.

31. Waterlane pointed out that in a recent unsuccessful planning appeal brought by Mrs Currie, references were included to car parking at the rear of Monogram's property, but no reference was made to Waterlane's right to park the three vehicles or to Waterlane's right of way. Mention was also made of there being "at least 10 parking spaces" for perpendicular parking adjacent to the east wall. This caused Waterlane real concern as to Monogram's attempt to disrupt Waterlane's use of their car parking spaces, they had therefore encouraged the Court to be more prescriptive. It was their case that any perpendicular or echelon parking along the eastern edge would interfere with the right of way; three cars parallel parked would however permit unhindered use. Waterlane asked that any encroachment by parked vehicles onto or over the right of way be prohibited.

32. Monogram had contended that any such outcome went beyond any permissible order that could be made in light of the Court's findings of fact. The Court had held clearly there was not a sufficient need for a *quia timet* injunction and that should be an end of it in March 2020. Monogram maintained firmly that the existing interference did not merit an injunction and argued that they would wish to call further evidence of the actual impact of the current usage if the Court had wanted to be more particular about the relief it granted; their invited addition of the phrase, "*For the avoidance of any doubt, the claimant or its invitees or lawful visitors are not permitted to park vehicles so as to encroach upon the said right of way*" was not added by the Court.

33. Materially, for the purposes of this appeal, it is clear that the recent order of March 2020 did not descend to any particulars as to the practical means of protecting the established rights of Waterlane. It did not state anywhere what actions were proscribed, nor what specific uses of Monogram's land, if any, were to be restricted or in what way, so as to safeguard Waterlane's right of way.

34. I shall return to analyse the judge's reasoning in his judgment in support of the form of his order, but first turn briefly to the legal framework.

35. It is trite that the Court will allow an appeal where the decision of the lower court was either wrong, CPR 52.21 (3)(a), or unjust because of the serious procedure or other irregularity in the proceedings of the lower court, CPR 52.21(3)(b). There was no disagreement as to the source or scope of the Court's power to intervene on appeal, nor indeed as to the nature and scope of the Court's powers to grant declaratory or injunctive relief.

36. The principles which the Court must apply when considering an appeal against the exercise of the discretion to grant or withhold declaratory relief was recently summarised in London *Borough of Brent v Malvern Mews Tenants Association Ltd* [2020] EWHC 1024 (Ch) when Miles J observed that at:

"*10. First, the decision to grant or withhold declaratory relief, including a negative declaration, is discretionary. An appellate Court will only interfere with the exercise of a discretion when a judge has exceeded the generous ambit within which reasonable disagreement is possible: see, for instance, G v G [1985] 1 WLR 647 at 652.*

"*11. Secondly, judges should be assumed to know their functions and the matters to be taken into account unless the contrary is proved; reasons for judgments are always capable of being better expressed; and an appellate Court should resist substituting its own discretion for that of a trial judge through a narrow textual analysis enabling it to conclude that the judge has misdirected himself: Piglowka v Piglowski [1999] 1 WLR 1360 at 1372.*

"*12. The third principle, stated in many cases, is that an appeal Court will only allow a challenge to a trial judge's finding of fact where it is unsupported by evidence or where the decision is one which no reasonable judge could have reached.*

"*13. Fourthly, the principles governing the exercise of the discretion to grant a declaration have been helpfully summarised, after a full review of the authorities, by Marcus Smith J in The Bank of New York Mellon v Essar Steel India Ltd [2018] EWHC 3177 (Ch) at [21].*"

37. Accordingly, it is well-settled law that the Court will only interfere with the judge's exercise of discretion when granting such relief in limited circumstances as Mr Demachkie reminded me, and an Appeal Court will not readily interfere with the terms of the declaration. As to the power to grant declaratory relief, the comprehensive findings of Neuberger J, as he then was, in the case of *Financial Services Authority v Rourke* [2002] CP Rep 14 set out the position. The following paragraphs at pages 9 to 10 emphasised the breadth of the power and the intense practical character of the remedy:

"*The Court's power to grant a declaration is to be found in CPR Part 40.20, which in these terms:*

"*The Court may make binding declarations whether or not any other remedy is claimed.'*

"*Accordingly, so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the Court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the Court's satisfaction. The Court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The Court has to consider whether, in all the circumstances, it is appropriate to make such an order.*

> "*In Patten v Burke Publishing Company Limited [1994] 1 WLR 541, Millett LJ stated that, in effect, it was the Court's duty 'to do the fullest justice to the plaintiff to which he is entitled', and he went on to hold that there was no rule of law which prevented a declaration of fraudulent conduct.*"

38. Further, at page 11:

> "*It seems to me that, when considering whether to grant a declaration or not, the Court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the Court should grant the declaration.*"

39. Mr Demachkie relied upon the dictum in *White v Richards* [1994] 68 P & CR 105 to illustrate both what he submitted was the comparative rarity of the detailed and specific declaration and also the breadth of judicial discretion. In that case, the Court of Appeal made observations on the unusually precise prohibitions placed by the judge on specific vehicular use. He had made a declaration in "an unusual, perhaps novel form". The Court of Appeal observed (at page 112):

> "*In my view, the form of relief to be granted was essentially a matter within the discretion of the judge. He no doubt thought that it was preferable to grant relief in a precise form so the parties would know where they stood and so that if it ever became necessary for observance of the injunction to be enforced, it would be that much easier to determine whether it had been breached or not. Another judge might have granted relief in more general terms, or he might have granted it in a precise form but with somewhat different limitations on dimensions and weight. Be that as it may, I am unable to say that the course which Judge Gareth Edwards took here was one that was not open to him. For these reasons, I would affirm his decision on the main question and the relief that he granted in respect of it.*" (per Nourse LJ)

40. Mr Demachkie relied upon the case to support the proposition that it is not always appropriate to grant a detailed order, and, more importantly, that an Appeal Court will rarely intervene with such an exercise of discretion.

41. Mr Maguire, however, submits a judge must, in exercising his discretion lawfully, consider carefully the appropriateness of a discretionary remedy, including in cases of declaration. He relies upon Aikens LJ in the case of *Rolls Royce Plc v Unite the Union* [2010] 1 WLR 318 at paragraph 120, where the Court of Appeal enunciated a series of seven principles which

require to be satisfied for the grant of a declaration, of which the most resonant for this case is the last, which says:

> "*(7) In all cases, assuming that the other tests are satisfied, the Court must ask: is this the most effective way of resolving the issues raised. In answering that question, it must consider the other options of resolving this issue.*"

42. The parties accept, as do I, that the judge in the present case set out the law clearly and accurately and I adopt his interpretation which, as with his findings of fact, are not challenged before me.

43. The appellant's case is that the declaratory relief in the March and April 2020 Reasons and Order at paragraph five, does not adequately reflect the findings of fact made in the judgment handed down on 12 April 2019. I was assisted by full written skeletons as well as succinct oral arguments on both sides for which I am grateful. In encapsulating in short form here the main arguments of counsel, I intend to do no disservice to the more detailed material they put before me. I do not recite it into this judgment, but have carefully considered all of it, both oral and written.

The arguments

44. Mr Maguire submits firmly that in this case the declaration granted was so far from the most effective way of resolving the dispute as to be beyond the learned judge's discretion lawfully exercised. He argued it did not ensure the appellant's rights were adequately protected and stimulated dispute rather than brought it to a conclusion. It was insufficiently detailed to give effect to the judgment and evinced an error of law, alternatively it was an unlawful exercise of his discretion. The operative clause of the order did no more than state a legal position - and it is the case that Henshaw J gave permission on that basis.

45. The appellant produced here a form of words which was similar to that argued by him before the learned judge at the time of the making of the order but was, of course, rejected by the judge. He invited this Court to substitute this wording for that included in the 2020 order.

46. The respondent resisted the appeal on the ground the judge had a wide discretion which will not be interfered with, save where there has been an error of principle, or where his order is unsupported by the evidence, alternatively, the decision is one that no reasonable judge could have reached. None of those conditions obtained in the current case said Mr Demachkie. In this case, the judge had plainly declined the quia timet injunction. He suggested to the Court such was not supported by the evidence in any event - there should be no order of that nature, and the wide declaration should not be interfered with.

47. He pointed particularly to the absolute terms of Waterlane's earlier requirements as to Monogram's parking, accepting of course as he was constrained to, that his client had also adopted a similar position to opposite effect; their case being that full or significantly increased use would not materially interfere with the right of way at all. He argues the current

wording is sufficient, and lawful, and finds echoes in the case law. He submitted this Court should not, indeed cannot, interfere with the conclusion of the judge.

The resolution of the appeal

48. I have come to the clear conclusion that this appeal must be allowed. I am very mindful of the breadth of the judge's discretion when making a declaratory order, perhaps particularly in circumstances governing interests in land. Nonetheless, in my judgement, the learned judge was persuaded into errors of reasoning when considering the terms of the order following judgment, which disclose an error of approach. There is more than one limb to this conclusion.

(a) Changing situation

49. In the first place the situation had evolved. Judgment was given in April 2019 and aside from difficulties produced by the Covid pandemic, the case suffered from significant delays. The situation between the parties had developed and not in a positive manner. By the time of the judge's consequentials hearing in March 2020, there had been no workable solution reached.

50. For part of the time, the claimant put up notices concerning consequences to visitors who parked in the wrong spot, to which Waterlane strongly objected, and they were indeed removed. Gates and keys were proposed but were unacceptable to Waterlane on grounds of inconvenience and there was sworn evidence of mutual irritation and a perception on the part of Waterlane that Monogram refused to accept they had lost on the right of way issue. The newly admitted evidence does not suggest an improved situation.

51. There was, in my judgement, clear evidence to show by that stage in March 2020, the parties required more than a bare declaration of their respective rights or a statement of the legal position. Rather, they required relief that delineated the necessary steps in order for each party to give effect to its own rights to the maximum, whilst properly respecting the rights of the other.

52. At the time the judgment was delivered in April 2019, the learned judge might have been entitled to make an order in general rather than particular terms. At that point, it might perhaps have been a rational outcome to leave the position to the two neighbours to give effect to the judge's clear findings as to the existence of a right of way and the need for Monogram to accommodate it when in future seeking to utilise their parking to the maximum possible.

53. I make no finding on that issue, although in my view there were considerable risks even at that point to such a remedy, and it might not, even at that stage, have been rationally available. However, following the indications at the hearing in 2020, and given the nature of the problem, a declaration at that point that left all of the detail to the parties and did no more than declare the law was not, in my judgement, properly available to the judge. To conclude that it was, was an appealable error of law.

54. Mr Demachkie, however, drew a parallel with the case of *Jelbert v Davis* [1968] I WLR 589, another right of way dispute involving planning permission. There the Court of Appeal ordered a declaration that the party was entitled to use the land, "but not in such a manner as

to cause substantial interference with the use of the right of way by the defendants", per Danckwerts LJ at 597. Mr Demachkie submitted there was in that case and in its outcome a remarkable similarity with the clause under challenge here. In that case, the order could also be said to be merely restating the legal position and the judge may well have taken that case as a guide. The Court of Appeal, he said, made such an order in what were entirely like circumstances.

55. I do not accept that the position in this case as at March 2020 was at all comparable to Jelbert for the reasons I have given. In Jelbert, a right of way over a driveway off the main road had been granted in broad terms to the plaintiff, but five years later he sought to use it for caravan access with the potential for up to 200 to traverse. Restriction on the use of the right way was refused by the County Court. However, the Court of Appeal, on the evidence of the intended use of the road, held, on that evidence, that it would be a substantial interference with reasonable use of the road. They decided, however, to make an order in broad terms declaring the plaintiff could use the right of way, but not in such a manner etc., as previously set out. Liberty to apply for an injunction thereafter was given.

56. It is clear to me in the present case the time has passed well beyond the point reached in the Jelbert case. That point was reached before March 2020. I declined to accept the proposition, although persuasively advanced in common with the respondent's other submissions, that this case shows it is appropriate here not to make a particularised order. In my judgement, this case cried out for a particularised order in March 2020. In the events which had happened here, there was in truth no factual foundation for such a widely drawn clause; quite the contrary. In effect, the case had reached the stage of the later application for a more stringent order prefigured in the Jelbert case. To the extent the judge was influenced in his refusal to grant an order in precise terms by that case, which is cited in Gale, that was, in my judgement, an error of law.

(b) Judgment had not been reflected in the order

57. In the second place and in any event, in my judgement, the order of March 2020 did not fully reflect the judge's findings and the scope of his reasoning in April 2019. The passages of the judgment cited above showed the learned judge:

(a) Accepted there was a genuine fear of an imminent threat of use of all Monogram's perpendicular western parking slots.

(b) Accepted evidence that Monogram would do what it wanted to do regarding parking spaces and full utilisation.

(c) Agreed that full utilisation, or something approaching it, would be a substantial interference with the right of way and thus proscribed.

(d) Held that it was the perpendicular parking that would interfere and needed to be mitigated.

(e) Concluded that an order to regulate this was required.

(f) Had set out the law that recognised that 'imminent' might not mean the very near term; see the citation above.

In other words, he found that the proposed future action allowing occupation of the 12 parking places, or many of them, perpendicular to the wall, would constitute a significant interference with the rights of Waterlane. In my judgement, as his reasoning in the order shows, part of the problem may have been that the parties had adopted somewhat extreme positions before him, as I have set out above.

58. It had been argued there were no rights to the three parking spaces at the southern end of the parking strip. This latter position modified in the course of the case and Monogram had acknowledged, of course, Waterlane's right to at least one of those claimed spaces. For its part, Waterlane stated the only way to vindicate its right of way was the prohibition on parking on the eastern flank. The configuration allowed space only for three, possibly four cars, as opposed to accommodation for about a dozen as desired by Monogram. This polarisation may have distracted the judge from the requirement in this case to cut the Gordian knot. Although it is unhelpful to speculate, it may be this extremity that led the parties to fail to produce any evidence of a possible compromised position in the event that the judge decided both the defendant's right of way existed, and the claimant had rights to parking consistently with their right of way.

59. I have considerable sympathy with the learned judge who took the trouble to involve himself in the facts and investigate "on the ground", quite literally, during the site visit in 2019. He provided thereafter a full and very prompt judgment as to the respective rights of the parties, in effect deciding the rights could coexist, but the detail of their coexistence was to be worked out between the parties. He was, regrettably, over-optimistic.

60. Furthermore, in my judgement, the tenor of the judgment supports plainly the grant of relief, whether worded in injunctive terms in the form of a *quia timet* injunction or as a declaration, but he allowed himself to be persuaded that it was inappropriate to grant an unparticularised remedy. Accordingly, in the events which happened and on the basis of the facts found in his judgment, it was an error of principle to fail in this case to make the order containing specific requirements; that is to say giving the parties the tools to protect their rights whilst respecting the extent, insofar as is possible, and to do the best justice between the parties (to use the words of Neuberger J).

61. It could also be expressed that the learned judge reached a conclusion that was unreasonable in the required sense. This involves accepting logically that it was not reasonable to expect the parties to reach an accommodation without more guidance in March 2020. I am compelled, given the inability of the parties to agree over the course of that year, that that was the position. It does indeed remain the position.

62. There are passages in the reasoning supporting the March order that sit unhappily with the conclusions of the judge in his ex tempore judgment, which may of course not have been available to him in its full form by March 2020. As I have stated, the learned judge may have become distracted by the manner in which the case was put to him. It seems to me the manner

in which he deals with aspects of the case concerning the inappropriateness of an injunction in the "present" circumstances have been read over into inappropriateness as to the question of whether there should be an injunction as to the future, or at least a specific declaration as to the future. This may have led the judge into not giving effect to the logic of his factual findings. In my judgement, as Mr Maguire argues, there was a clear basis as of April 2019 after the judgment for a *quia timet* injunction to issue. The facts could have supported the *quia timet* injunction, but that is not impugned in this appeal, save to the extent that such was not ordered after the March hearing. In my judgement, an appeal court must approach this with caution as an exercise of discretion and judgment as to what was or was not imminent at the time that the judgment was given. That was a matter for the judge, and I am unable to find that he was compelled to make a *quia timet* injunction in respect of what he found in April 2019.

The Consequences

63. I have considered very carefully whether I am in a position to substitute the judge's order in this appeal with a sufficiently precise and particular order of my own and the detail to which I am properly able to descend. Regrettably, although given an indication of what my likely train of thought in this judgment might be and given a proper opportunity to canvas options for resolution, the parties were not able, the day before yesterday at the hearing before me, and despite the sterling efforts of counsel, to agree a practical solution.

64. In brief, the position reached between the parties, which it is important to commit to paper, is that Monogram realised they must forgo the use of certain of their perpendicular western parking spaces to allow Waterlane to have an effective right of way to their eastern echelon parking. They say that the foregone places to be blanked out or withdrawn from use in some form, should be those numbered two and four, counting from the north down on the plan of their spaces against the wall to the west.

65. Waterlane, however, say this is inadequate and propose the loss of numbers two and three and four and five. It is a matter of considerable regret, with substantial cost consequences, that there was no further movement by the end of the hearing.

66. I am very clear that the form of words used, but also the form of words sought by the appellant, will be insufficient to achieve what Millett LJ and Neuberger J indicate is the fullest justice to the parties. As Mr Demachkie urges and Mr Maguire reluctantly accepts, there is no evidence before me on the basis of which I may decide what configuration of parking best reflects the outcome; in short, whether the appellant or the respondent is correct as to the nature of the future accommodation of the right way. I am clear, however, the Court must dictate the appropriate detail of the curtailment of the parking, to use the old phrase, ut sit finis litium.

67. Again, regrettably, although new evidence has been produced, it was not sufficient to make a decision on those points of detail. Therefore, this Court has not been equipped to deal with the nub of the issue which is a geographical resolution of the problem. It is, in my judgement, almost certain that one or other of the proposals before the Court is the answer, if not some minor variation of one or the other.

68. However, I cannot decide that. The parties must gather the evidence and if necessary, return to the judge of first instance for a decision. Therefore, as to disposal, I have come reluctantly to the conclusion I have no option but to remit an issue to the learned judge below but with directions.

69. As I have said, the effect of the judge's judgment in April 2019 is that full occupation of the car parking spaces on the eastern wall would constitute a significant interference with Waterlane's rights. Accordingly, clear delineation, on the ground, of the areas against the eastern wall where parking is to be permitted, and those where it is not, must take place. There must be clarity as to the number and location of those of Monogram's eastern parking spaces that must be relinquished in order to ensure the effective right of way of Waterlane.

70. In my judgement, given the evidence available, including planning permission, the maintenance of the right, quite understandably, to utilise as many spaces as lawfully possible by Monogram, and in light of the findings of the learned judge and the failure of resolution, I must make an order in the following terms, or very similar. I pause to say that I shall invite submissions of the form of the order. However, this is what I propose to make at present:

Order

(a) The appeal is allowed.

(b) Paragraph five of the order dated to 26 March 2020, is to be replaced by an order in the following terms:

> The respondent shall no later than 1 November 2021, cause to be removed by means of visible markings as usable parking such spaces perpendicular to the eastern wall (as are marked are on the attached plan) and as shall be decided by His Honour Judge Berkley or another judge of the Western circuit upon remission to them for decision upon that issue ('the remitted issue').
>
> The following directions for the remitted issue apply:
>
> (1) No later than 31 August 2021, the appellant is to file and serve such written evidence as its wishes to rely upon for the determination of the remitted issue.
>
> (2) No later than 15 September 2021, the respondent is to file and serve such evidence as it wishes to rely upon for the determination of the remitted issue.
>
> (3) No later than 30 September 2021, the parties are to seek to fix a case management conference with a view to considering the utility and if so, the date of a site visit and the date for the hearing of the remitted issue with liberty to reply in 48 hours' notice on the usual terms and with costs reserved to the judge who hears the remitted issue.

End of Judgment

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Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This transcript has been approved by the judge.