Parking rights: here to stay? Consent might be the surprising answer

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IN THE FIELD OF THE ACQUISITION OF easements by prescription, little has caused more consternation over the last decade or so than the question of whether a right to park cars can be acquired by twenty years user as of right. The types of property capable of being adversely affected range from individual residential units all the way up to major development sites. The establishment of such a right can have a devastating impact on the value of the burdened land.

An owner of land over which rights are claimed often tries to argue that the user on which the claim is based involves exclusive possession over the land and accordingly cannot be an easement. Before the new regime on adverse possession was introduced under the Land Registration Act 2002, this would have been a risky strategy, because it might have led to a claim by the party exercising the rights to have acquired title to the burdened land by adverse possession, rather than the more limited easement based on long user.

This fear has now largely been removed, since the acquisition of title by adverse possession is available only in very limited circumstances. For this reason the party alleging the right will want to claim that the right does not involve the wholesale ouster of the paper title owner from their land, and so is capable of forming the subject matter of an easement. Once established and registered, such a right is binding on all future purchasers of the burdened land. Moreover, the owner of the burdened land can do nothing with that land, whether by way of use or by way of development, which would interfere any more than minimally with the enjoyment of the right. The property owner stands to lose both practically and financially if such a right is established.

It has therefore become common for an owner to defend a claim to a right to park cars by saying that such user deprives the owner of any meaningful use of the land. The owner is in effect ousted, or dispossessed, by the use of the burdened land for the parking of cars. As any law student knows, a right which is tantamount to possession of land is not capable of forming the subject matter of an easement. It is well established, and uncontroversial, that a claimant can acquire a right to park a single car anywhere over a large piece of land capable of accommodating numerous parked cars. What remains controversial is where the rights being claimed involves the use of the entire surface of the burdened land, whether what is claimed is the right for one car to park on a single defined car parking space, or for several cars to park on a number of car parking spaces comprising the whole of the surface of the burdened land.

This was the situation in the leading case of *Batchelor v Marlow* [2001], a decision of the Court of Appeal which remains binding, notwithstanding the remarks made by their Lordships in *Moncrieff v Jamieson* [2007]. In *Batchelor,* the defendants ran a garage business near to land owned by Mr Batchelor. At first instance, Mr Nicholas Warren QC, sitting as a deputy judge of the Chancery Division, held that they had acquired an exclusive prescriptive right to park up to six cars on Mr Batchelor's land, between 8.30am and 6pm, Monday to Friday. It was common ground that only six cars could be parked on the burdened land. The question on appeal was whether such a right is capable of being a valid easement.

It was agreed between the parties, and expressly approved by the Court of Appeal, that the essential question in the case was as set out by Judge Baker QC in *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992]: whether the right alleged is such that it would leave the servient owner without any reasonable use of their land, whether for parking or anything else. If so, the right could not be an easement, though it might be some larger or different grant. Lord Justice Tuckey concluded that Mr Batchelor had no use at all during the whole of the time the parking space is likely to be needed, and, further, that his right to use the land was curtailed altogether for intermittent periods throughout the week. Such a restriction would make Mr Batchelor's ownership of the land illusory.

So in *Batchelor* the applicable law was not controversial, although its application has proved to be, not least because of the observations of their Lordships in *Moncrieff*. This case went to the House of Lords on appeal from Scotland, and concerned the question of whether a right to park a car in a single defined space was to be implied

as ancillary to an express grant of a right of way. However their Lordships took the opportunity to consider more broadly the status of car parking rights as easements. Their observations were *obiter*, and Lord Neuberger expressly qualified his *dicta* saying that he was making no decision on the broader question, not least because the more general principle had not been fully addressed in submissions.

Their Lordships did not suggest that the test applied in *Batchelor* was necessarily wrong, and certainly did not overrule *Batchelor*: accordingly, the correct test remains whether the user on which the claim is based effectively deprives the servient owner of any reasonable use of its land. But Lord Neuberger and Lord Scott did address the question whether parking a car on the entirety of the surface of the burdened land necessarily deprives the owner of any reasonable use. For example, the land could be built over above the height of the vehicle. Pipes could be run under the land. The land was available to be walked or driven over when the car was not parked there. In a case which involved the right of a specified number of cars to park over an area capable of accommodating no more than that number, it was likely that there would be strips of land surrounding and possibly between the car parking spaces which could be landscaped.

Lord Scott went further and queried whether the test should be recast in terms of the owner of the burdened land retaining legal possession of it, albeit subject to a right to park. One telling example is where the owner of a viaduct permits a third party to transport water along the length of the viaduct. Even though there is no obvious practical use which the servient owner can make of the part of the viaduct along which the water travels, nonetheless they retain effective legal possession of it. Such a right, it was suggested, does not amount to exclusive possession, and is therefore capable of forming the subject matter of an easement.

Notwithstanding these ruminations, and in spite of practitioners' concerns as to the correctness of the decision in *Batchelor*, the test as set out and applied by Lord Justice Tuckey continues to be good law. Unless and until the question reaches the Supreme Court the test must continue to be applied. What seems to have happened is that although the courts are bound by the test in *Batchelor*, they answer the question it poses in a different way, even in circumstances where the considerations are similar to those in *Batchelor*.

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In *Kettel and Bloomfold Ltd* [2012], HHJ David Cooke, sitting as a deputy of the Chancery Division, considered whether the right of long lessee of a flat to park a car in a defined space left the freehold owner with no reasonable use of the land so as to make his ownership of it illusory. The deputy judge approached the question from the starting point that the freeholder could do anything, with the exception of anything which was inconsistent with the right to park a car. He could pass on foot or by vehicle across the space when there was no car parked on it, and authorise others to do the same; he could choose, change and repair the surface, keep it clean and remove obstructions; he could lay pipes or other service media under it; he may in principle build above it or run overhead projections such as wires. All of these rights were likely to be of importance and value to the freeholder. Accordingly the right to park a car in a single car parking space was capable of being an easement, even though the right was exclusive, and unlimited in time.

A similar approach to exclusivity was taken, albeit not involving car parking, in the case of *Eaton Bray Ltd v Leonine Holdings* Ltd [2011]. The lessee of a flat was granted an exclusive right to use part of the basement, retained by the landlord, as a loggia (the building was on a bank of the River Thames). The lessee constructed ceiling height walls around the loggia, which accordingly could only be accessed from the basement through a door to which the lessee kept the key. The lessee installed a shower and furniture, and a staircase through the ceiling of the loggia into the lessee's flat overhead. The judge held that this user did not amount to exclusive possession of the loggia, and did not deprive the freehold owner of any reasonable use of it, nor of retaining legal possession and ultimate control of it, It was therefore capable of being, and was, an easement. The freeholder owner could be given a key, and could make any use of the loggia not inconsistent with the rights of the lessee to enjoy it for relaxation and recreation. Such uses could include the installation of air conditioning or other plant and machinery to service the building, and taking deliveries from a riverboat through the loggia into the common parts of the basement. Thus even user which appears to involve exclusive occupation of the servient land may yet be an easement where uses remain to the servient landowner which in the context of the land in question are significant. Their ownership is not in such circumstances illusory.

Thus practitioners' and judicial concerns about the correctness of the result in *Batchelor* are being met by distinguishing it on the facts. However, the commendable technical purity of these decisions leaves landowners with a headache. If their ownership is properly regarded as significant, and not illusory, even when they can make no routine and normal use of the burdened land, their options for use and development of the land are heavily circumscribed, and its value will be diminished, sometimes significantly where the land has development value.

So what should a landowner do who notices a party making casual unlawful use of their land to park their cars? One approach would be to contest the user. For a claim based on prescription to succeed it must be shown that the user has been *nec vi*, that is to say, uncontentious. In order to prove that the user has been contentious, the landowner must show that they have done everything consistent with their means and proportionately to the user to contest and to endeavour to interrupt the user: *Smith v Brudenell-Bruce* [2002].

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A single protest will not suffice, and nor will protest which is not maintained and followed up by further action. While such action does not have to include either physical violence or the commencement of legal proceedings, nonetheless the landowner must continue to assert that the user is objected to and unlawful, and to take active steps to contest it. This course of action may not suit many landowners, who, particularly in the case of development land, may have very little involvement on the ground in any event. Moreover, for parties who live or work in close proximity to each other, the prospect of creating a contentious unfriendly relationship with one’s neighbours is, for obvious reasons, unattractive. On any view, contention will involve time, cost and worry.

A simpler route is simply to grant permission to the person who is parking the car. Just as user must not be contentious, it must also not be permissive (*nec precario*). Even unilateral granting of consent is sufficient to prevent the user being ‘as of right’, and therefore to prevent a claim based on prescription. A significant advantage of this approach is that permission given unilaterally can be withdrawn. So for example the freeholder owner of a block of offices, who notes that the neighbouring owners occasionally park in the office car park, can avoid conflict, solicitors’ letters and litigation simply by sending a letter confirming that the use has been noted and that for the time being the owner consents to it.

If ever the user becomes excessive, or the freeholder wishes to use the car park in a different way, permission can simply be withdrawn. Similarly, if the freehold is sold, express permission being no more than a licence will not bind the new owner. In the meantime friendly relations between neighbours can be maintained. Obviously neither contention nor consent will be relevant if twenty years’ user has already taken place; but in cases within the twenty years, or where the length of the user is not known, express permission may be the most effective means of preventing the acquisition of a right to park.

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