JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 80/2005

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

BETWEEN	THE KINGSTON AND SAINT ANDREW CORPORATION	APPELLANT
AND	J & O OPERATORS LIMITED BEVERLEY WONG ELOISE MULLIGAN GRACE WONG	RESPONDENTS

SUPREME COURT CIVIL APPEAL NO. 82/2005

BETWEEN	J & O OPERATORS LIMITED BEVERLEY WONG ELOISE MULLIGAN GRACE WONG	APPELLANTS
AND	THE KINGSTON AND SAINT ANDREW CORPORATION	RESPONDENT

Miss Rose Bennett and Mrs. Crislyn Beecher-Bravo, instructed by Bennett and Beecher Bravo for the appellant Kingston & St. Andrew Corporation

Ransford Braham, instructed by Mrs. Suzanne Risden-Foster of Livingston Alexander & Levy for the respondents J & O Operations Ltd. and others

November 27, 28, 29, 30, 2006 and September 25, 2009

PANTON, P.

1. These appeals are from a judgment of Anderson, J. wherein he granted certain declarations as to the entitlement of J & O Operations Ltd., Beverley Wong, Eloise Mulligan and Grace Wong (hereinafter, the respondents) to access and to parking facilities in respect of a parcel of land known as Lot C, and barred the Kingston and St. Andrew Corporation (hereinafter, the appellant) from obstructing or impeding such access or from charging for same or for parking. Notwithstanding the granting of an injunction, the learned judge made provision in the order for the parties to negotiate fees to defray the cost of upkeep of Lot C. The hearing of the appeals was a good while ago, but up to April of this year we were receiving written submissions from the parties.

The claim

2. The respondent J & O Operations Ltd. (J & O) was formerly John R. Wong Ltd. In or about the year 1958, Knutsford Park was subdivided, creating New Kingston, with more than 300 lots in the subdivision. On or about October 2, 1958, the appellant granted subdivision approval, with conditions attached. Subsequent to this granting of approval, another plan was submitted to the Survey Department which approved it, and it was deposited with the Registrar of Titles on January 13, 1960. In the proceedings below this plan was referred to as "the deposited plan". On that plan are the over 300 lots, the proposed roadways, car parks and other common areas.

3. Lots 26 to 32 are owned by J & O, and are registered at Volume 957 Folios 47 to 53. Lots 33 and 34 are registered in the name Beverley Wong. Lot 33 is registered at Volume 957 Folio 54 while Lot 34 is registered at Volume 957 Folio 55. Lot C, the cause of this suit, is described as a car park, and is registered in the name of the appellant at Volume 1181 Folio 613.

4. According to the amended statement of claim, Lot C is paved and asphalted and intersects with St. Lucia Avenue, and is the only access to and from the lots that front on St. Lucia Way to the main road. This claim as to being the sole access is denied by the appellant. The statement of claim alleges that the respondents have for thirty years or more used Lot C as a right of way or access way to and from St. Lucia Avenue to their respective lots without let, hindrance and interruption.

5. Lots 22 to 25 registered at (Volume 957 Folios 43-46) are vacant lots owned by J & O and front on Lot C. Immediately behind lots 22 to 33 are lots 10 to 19 which front on Tobago Avenue On the opposite side of St. Lucia Way are vacant lots 42 and 43 (Volume 957 Folios 57 & 58) owned by Eloise Mulligan and Grace Wong respectively, and the only access to these lots is via Lot C, according to the claim.

6. The respondents claim for themselves, their servants, agents, licencees, visitors and tenants easements and/or rights of way and right to park motor

vehicles on Lot C, by virtue of the layout of the lots and the fact that Lot C is set out on the deposited plan as the only access to the respondents' lots.

7. The respondents' claim as to entitlement to an easement is multifaceted. Firstly, it is stated as being by implication, and or by reason of necessity. Further, they say that the right has been enjoyed from time immemorial without interruption; alternatively, the period of enjoyment has been for a period of twenty years and upwards before the filing of the action; the respondents and their predecessors in title having enjoyed the rights by virtue of a deed of grant.

8. In July or August, 1999, the appellant placed a barrier and/or guards at the entrance to Lot C, preventing the respondents from parking or having access without payment of a fee. The respondents regard the action of the appellant as unlawful and unconstitutional, and claim that they are entitled to easements and rights of way over Lot C "for the purpose of passing and re-passing by themselves, their servants, agents, licensees, visitors and tenants on foot and with horses, carriages, motor vehicles and other vehicles at all time and for all purposes". They claim declarations to that effect.

9. In summary, the respondents claim the following declarations:

(1) the existence of a right of way over Lot C to and from the respondents' lots to St. Lucia Avenue;

(2) the existence of a right of way over Lot C to and from the respondents' lots to Knutsford Boulevard;

(3) entitlement to park motor vehicles on Lot C without having to pay a fee;

(4) the appellant is not entitled to charge or impose a fee on the respondents for parking on Lot C; and

(5) the appellant is not entitled to obstruct the respondents in entering or exiting Lot C.

In addition, the respondents claim damages for trespass, nuisance and breach of constitutional rights.

9A. I have observed that whereas a foundation has been laid for the claim for a declaration of entitlement to a right of way as regards access to St. Lucia Avenue, not a word was said in the claim as to the basis for the claim to access to Knutsford Boulevard. The first mention of a right of way thereto is in paragraph 28 (ii) of the statement of claim where the right is simply asserted without any basis being stated.

The defence

10. The appellant denies that Lot C is the only access to and from the lots that front on Lot C, and state that there is access to and from Lots 22 to 34 from St. Lucia Ave and Tobago Ave. The appellant also denies that there has been user for more than thirty years by the respondents and their servants. The title to Lot C was issued to the appellant on March 13, 1984. Lots 10 to 21 provide parking and access to and from lots 22 to 34 and to and from the supermarket building via St. Lucia Avenue and also via Tobago Avenue.

11. In respect of lots 42 and 43, the appellant states that they are on the opposite side of Lot C, and that it is not true that the only access to them is via Lot C. Specifically, the appellant states that there is access via Grenada Crescent.

12. The appellant denies that the respondents are entitled to an easement and or rights of way and the right to park. Lot C was transferred to the appellant for it to be developed into parking lots for use by the general public. The appellant, at considerable expense to itself, has developed a car park on Lot C and has put in place the infrastructure necessary to regulate orderly use of parking facilities by the public. The appellant denies charging the respondents for access. The appellant says that if the respondents are entitled to access to Lot C, they have no right to possession of all of Lot C so as to deprive the appellant of its beneficial use and enjoyment.

13. The appellant says that it employs car park attendants to oversee collection of the fees between 6.30 a.m. and 6.30 p.m. on weekdays. No fees are charged outside those hours or on weekends. Further, no fees are charged to the respondents, their agents or servants for access to and from Lot C.

The deposited plan

14. The proposed plan for the subdivision of Knutsford Park indicated that the subdivision was for commerce, service industry, professions, housing, hotel and

entertainment. It provided for no fewer than nine car parks, with neighbouring piazzas as well as private park and recreation area and a clock tower. The Building Committee of the appellant passed a motion granting approval on October 2, 1958, as stated earlier. The deposited plan referred to in paragraph 2 above shows nine car parks and was deposited with the Registrar of Titles on January 13, 1960.

The evidence in support of the claim

15. On behalf of the respondents, evidence was given by Misses Beverley Wong and Ena Wong Sam and Mr. Ronald Haddad. Miss Beverley Wong, a daughter of Mr. John R. Wong, is a director and the secretary of J & O. She gave evidence as to the ownership of the lots. J & O owns lots 22 to 32 and 44; she owns lots 33 and 34, while Eloise Mulligan owns lot 42 and Grace Wong owns lot 43. These lots with the exception of those owned by J & O are "mostly empty used for parking". Lots 26 to 32 house a supermarket which has been operated by Grant Marketing Co. Ltd. since December, 1994. Prior to that, Miss Beverley Wong was co-manager of the supermarket. Lots 22 to 34 front on to Lot C. All the lots numbered 22 to 34 and 42 and 43 were empty in 1968. At that time, she said, the area was undeveloped, with maybe a few cars, people walking and driving. The supermarket was opened in March 1969. During construction of the supermarket, Lot C was used for the delivery of materials as the lots were not developed. When the supermarket opened, the main entrance to the supermarket was on Tobago Avenue or St. Lucia Avenue.

16. Miss Wong said that as of 1994 Lot C has not been used for vehicular access to lots 42 and 43 (owned by Eloise Mulligan and Grace Wong respectively), and there is a chain link fence between lots 42 and 43 on the one hand, and Lot C on the other. Since 2001, J & O, owner of lot 25, has erected a fence and gate between that lot and Lot C. Lot 25, she said, is used for trucks to go to the loading bay, and there is no designated parking space created by the appellant at lot 25. There is access to lot 25 from Tobago Avenue.

17. Lots 22, 23 and 24 are used by the respondents for parking, whereas lots 33 and 34 have been used for part of the parking for the supermarket since 1969. Lots 26 to 32, as said earlier, house the supermarket. The customer entrance to the supermarket faces Tobago Avenue whereas the warehouse is to the back of the supermarket. Customers of the supermarket would at times park on Lot C, and delivery trucks would also use Lot C, having entered from St. Lucia Avenue, to go to the back of the supermarket.

18. Pedestrians have access from Knutsford Boulevard to Lot C. Between 1968 and the time of the hearing, the witness observed vehicles other than those connected to lots 22 to 34 and 43 parked on Lot C. The witness has never thought that she had a greater right than other owners. As of 1999, the witness has never been prevented from driving unto Lot C, which has been used only for delivery to the supermarket. None of the respondents has been prevented from accessing, walking on, or walking across Lot C to get to Knutsford Boulevard, or

from driving unto Lot C. The witness has not been denied access to park, but says that the difficulty she has had with Lot C is not an inability to park or to get on to the lots, but only in relation to the manner in which the lots are used as supermarket. I interpret this statement to mean that she would appreciate more space for the supermarket and its customers, without incurring any expense for same.

19. Delivery vehicles drive through Lot C to get to the delivery area on lot 25, and that has been happening since 1999. Delivery trucks do not pay to access Lot C. On using Lot C to get to lot 25, the respondents are not charged a fee at the point of entry from the entrance to lot 25. The area in front of lot 25 is unmarked for parking. No fee is charged for the area in front of Lot C. This delivery area was put in place in 1995, and there is no other area in the supermarket that opens on to Lot C.

20. There are no doors, doorways or gateways for lots 33, 34, 42 or 43 that open on to Lot C, and one can get to these lots as well as to lots 22, 23, 24 and 25 without using Lot C. Since 1999, apart from two occasions, Lot C has not been used by the witness. Customers do not usually park on Lot C, and she does not usually park on Lot C. One is only able to get to lots 26 to 32 if one walks through the supermarket, through the warehouse then to the delivery area. Persons can get into the supermarket from Knutsford Boulevard and from Tobago Avenue without using Lot C. Customers would not walk from Lot C to the

supermarket, but the owner/landlord can. Lot 34 is beside St. Lucia Avenue, and one can get to that lot without going through Lot C.

21. The main thrust of the evidence of Ms. Ena Wong Sam was that a lot of people drive and park on Lot C, and that members of the public use Lot C to transact business with the supermarket, as well as business unconnected to the supermarket.

22. Ronald Haddad gave evidence that he has been a commissioned land surveyor since 1973. He said that Lot C provides direct access to lots 22 to 34, 42 & 43. In the "early days", he said, Lot C was used without restriction, and people could move freely. Recently, he said, the appellant had erected a room and has been charging fees for access to park. He said also that the appellant would not normally have given approval for the subdivision if there was no proper public access available to each lot.

The evidence presented by the appellant

23. Anderson, J. heard evidence from Mr. Arnold White and Ms. Vinette Byfield. Mr. White was a consultant in the engineering department of the appellant, at the time he gave evidence. He first took up employment with the appellant in 1946. He started as a junior draftsman and rose through the ranks to Building Inspector in 1958, Deputy Building Surveyor in 1965, and between 1992 and 2002, he performed the duties of Chief Planning Officer and City Engineer. Mr. White expressed the view that the respondents, being lot owners,

have a right to use Lot C as access to the respective lots, and part of Lot C for parking. The respondents, he said, as lot owners have the right to access their lots by motor car, foot or otherwise, via Lot C commencing at the point where it intersects with St. Lucia Avenue. The respondents are also entitled to use sections of Lot C that connect with Knutsford Boulevard as a walkway. It seems to me that some of the questions posed to Mr. White ought not to have been allowed as they relate to matters that required judicial determination. Mr. White's views on such were therefore irrelevant.

24. Lot C, Mr. White said, was held for the use of all lot owners in New Kingston, the general public and visitors to New Kingston because in a subdivision they were considered public parking lots and approval was given as such. In 1958, he said, Lot C was open. There were no barriers and it was available for the use of any member of the public and adjoining lot owners. In 1998, he prepared plans for the purpose of regulating parking in an orderly fashion on Lot C. The plans called for the marking out of parking spaces to the required dimensions, regulating ingress and egress of motor vehicles, erection of guard house, and the location of drop gates. The appellant is the authority to regulate parking in Kingston, erecting stop signs and all other matters relating to the safety of motorists and pedestrians. There had never been motor vehicle access from Knutsford Boulevard to Lot C. The space in front of each lot is about 2.8 metres, and the parking spaces are a little over 3 metres.

25. Ms. Byfield is employed to the appellant as supervisor of parks in New Kingston. She said that the appellant maintains the car park, fixes potholes, and marks the spaces. There are attendants, sweepers and security personnel. The barriers to the car park are raised to facilitate the entry of persons. Fees are charged on a monthly, daily or hourly rate. Delivery vehicles come to the car park for the purpose of delivering goods to the supermarket. There are two delivery areas to the supermarket situated on the parking lot. Three spaces are allocated in front of the delivery area closest to the guardhouse. There are markings on the wall "Delivery Door –No Parking between these signs". No spaces are marked out on the bottom delivery area. In all, there are 79 parking spaces marked out on the lot, on both sides of the car park. Vehicles are permitted to park in the middle, but not on the entire middle. There are spaces in the middle where persons are not permitted to park.

26. Ms. Byfield said that the top and bottom areas of Lot C are kept open for vehicles to turn on entering or exiting the park, and there are two spaces kept open in the middle for delivery vehicles to the supermarket. There is a space in front of the delivery area at the bottom that is not marked out. This unmarked area is used for delivery to the supermarket, and vehicles are not permitted to park there. No one pays for this space. The only persons who access this area from the parking lot are delivery people. One is unable to access the supermarket from the parking lot because the doors and gates are kept locked.

A fee is charged for parking, not for walking. Finally, she said, delivery vehicles arrive at a rate of about 8 per hour.

The judge's decision

27. The learned judge did not see the respondents' claim as an attempt to derogate from the right of the appellant to exercise the rights and privileges of the fee simple owner. He said that it was axiomatic that even if an easement of way is established over the servient tenement, that did not mean that the owner of the servient tenement would be unable to exercise the rights and interests of ownership. He posed and answered questions that he thought were raised by the issues in the case. These were listed thus:

> "A. Have the plaintiffs established that they are entitled to an easement, being a right of way over the property of the Defendant, Lot C, both in order to allow the plaintiffs their servants, agents, licencees, visitors and tenants access to the plaintiffs' lots as well as access to Knutsford Boulevard to the West of Lot C?
>
> B. Can the right to park motor vehicles constitute an easement, and are the plaintiffs entitled to a declaration therefor?
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> C. Is the Defendant entitled to deny access to Lot C, or otherwise to impede or obstruct entry and exit to and from the said Lot, to the plaintiffs, their servants, agents, licencees, invitees, tenants, and/or visitors, by charging a fee for accessing the plaintiffs' lots over, or for the Plaintiffs' parking on Lot C?
>
> D. Are the plaintiffs entitled to the injunctions which they seek to restrain the defendant from preventing the plaintiffs, their servants, agents or invitees from using Lot C for the purpose of passing and re-passing over the said lot in order to access the plaintiff' lots?

> E. Has the Defendant committed a tort in nuisance or trespass against the plaintiffs or has there been a breach of any constitutional rights of the plaintiffs for which they are entitled to damages?"

28. In respect of the first issue set out above, the learned judge was very clear in finding that an easement of way had been established. He came to that conclusion by several routes. First, he found that the respondents were so entitled *by implication*. However, he was not enthusiastic in respect of the easement to park. In fact, he found it unsafe to hold that there was an easement to park on Lot C (see p. 20 of the judgment –p. 159a of the record). The learned judge also found that the respondents have a good claim to being entitled to an easement *by common intention*. He based this on his interpretation of the case ***Wong v Beaumont Property Trust Ltd.*** [1964] 2 All ER 119, as well as on Mr. Haddad's evidence (p. 24 judgment-- p. 161a of the record). He further held that an easement under *the Prescription Act* had been made out in that there had been user for upwards of twenty years without objection from the appellant, without force, open and without stealth (p. 25 judgment; p. 162 record).

29. Having found the entitlement to an easement of way, the learned judge declared that all the respondents were entitled to access Lot C from St. Lucia Avenue by foot as well as by motor vehicle. The respondents J & O and Beverley Wong were also declared as entitled to have their suppliers, agents and tenants gain access to Lot C during normal working hours for the purpose of loading and

unloading supplies or otherwise transacting business. The learned judge added this:

> "No declaration of any easement with respect to any particular spot is granted. The logistics of how the (appellant) will identify those persons falling within this declaration is to be worked out between the (respondents) within one month from the date hereof."

The judge also declared that all the respondents have a right of way to use Lot C by foot from Knutsford Boulevard, for the purpose of passing and re-passing in order to gain access to their various lots. Here again, J & O and Beverley Wong were declared as entitled to have their agents, servants and suppliers gain access by foot. The declaration seeking to extend the access so as to accommodate horses, carriages and other motor vehicles from Knutsford Boulevard was not entertained as there was no evidence of such usage at any time.

30. The learned judge in answering the second question as to whether the right to park motor vehicles is capable of being an easement said that as a general proposition it may be answered in the affirmative. He took due note of some authorities and commentaries which affirm the right to park a motor vehicle as capable of being an easement; and that there can be no valid objection for a fee being charged. He granted a declaration that all the respondents and the suppliers of J & O and Beverley Wong are entitled to park on Lot C for the purpose of transacting business with J & O or Beverley Wong, their servants or agents. However, the learned judge declared that no fees may

be charged by the appellant in relation to any of the abovementioned declarations whether as to access or as to parking. It was also declared that there should be no obstruction or impediment to the lawful exercise of the various rights whether by the use of fees or charges or otherwise.

31. The learned judge referred to Condition H of the conditions of approval of the subdivision plan which called for the titles for the car parks and piazzas to be prepared in the name of the appellant from the deposited plan and to be handed over on completion. He said that that condition was explainable only on the basis that the appellant should be put in a position where it can regulate the flow of traffic, as well as provide for efficient and convenient parking. He added that there was no evidence of the promulgation of any traffic regulations or rules. In any event, he did not consider the charging of fees in relation to the entry upon the servient tenement as an act of expropriation. That being so, there was no question of the breach of any constitutional right so far as the taking of property was concerned. Assuming, he said, that there was an actionable breach of the respondents' right to an easement, such breach would not be actionable per se as it would not have been a trespass; and there had not been any evidence of loss suffered by the respondents.

The grounds of appeal

32. The claimants and the defendants are unhappy with the decision of Anderson, J. Consequently, two notices of appeal, and two sets of grounds of appeal were filed. It is appropriate to summarize them.

33. The appellant has challenged the following:

(a) the declaration that the respondents are entitled to an easement of way and an easement to park motor vehicles;

(b) the judge's alleged failure to take into consideration relevant factors and evidence;

(c) the judge's consideration of allegedly irrelevant factors and evidence;

(d) the alleged unreasonableness of the judgment, having regard to the evidence;

(e) the declaration that there should be no fee charged for parking; and

(f) the apparent inconsistency as regards the finding of the entitlement to park vis-à-vis the ownership of the fee simple.

34. The respondents are contending that:

(a) the learned judge erred in differentiating between J & O and Beverley Wong, on the one hand, and the other two respondents, on the other hand, as regards the extent of the easements declared;

(b) the learned judge erred in holding that the declaration sought by the respondents would, if granted in each case as prayed, deprive the appellant of the right to use its land and amount to joint possessions;

(c) the learned judge erred as a matter of fact and of law in holding that it would be "unsafe" to conclude that there was a right of easement for all the various classes of persons set out in the appellant's claim, having regard to his stated findings of facts;

(d) the learned judge erred in holding that only the first limb of the test laid down by Thesigner, L.J. in ***Wheeldon v Burrows*** had been satisfied, given the fact that on the evidence the respondents had also established the second limb of the Rule, namely, that the easements claimed in respect of the right of way and parking on Lot C are "necessary for the reasonable enjoyment of the property granted and which has been and are at the time of the grant used by the owner of the entirety for the benefit of that part granted".

(e) The learned judge failed to take into consideration the evidence of Mr. Arnold White.

35. The question for determination in these appeals is whether the learned judge was correct in finding that each respondent is entitled to an easement of way, and an easement to park motor vehicles. As I see it, the easements have to be considered separately, and the easement of way requires first consideration. A declaration of entitlement to an easement of way does not mean however that an easement to park would automatically follow. Further, the declaration of entitlement in favour of one respondent does not mean that each and every other respondent is automatically so entitled.

36. It is beyond debate that for there to be an easement, the following characteristics must be present:

(a) there must be a dominant and a servient tenement;

(b) the easement must accommodate the dominant tenement, in that it must be connected with its enjoyment and for its benefit;

(c) the dominant and servient owners must be different persons; and

(d) the right claimed must be capable of forming the subject matter of a grant.

(See ***Re Ellenborough Park*** [1955] 3 All E.R. 667 at 673 H-I as formulated *in* ***Dr. Cheshire's Modern Real Property*** 7th ed. P. 456 et seq.)

37. In these appeals, Miss Bennett for the appellant and Mr. Braham for the respondents were thorough and comprehensive in their presentations throughout. They gave a good deal of attention to the fourth characteristic set out above, that is, the capability of the right forming the subject matter of a grant. In this regard, there is acceptance that the law is that there must be a capable grantor, a capable grantee, and the right itself must be definite. The parties are at odds, however, as to whether the appellant is a capable grantor. The appellant contends that the instrument that transferred the title to Lot C stated that it was for "parochial purposes". The appellant being the local authority responsible for the management of the affairs of Kingston and Saint Andrew holds the property it is contended, on behalf of the public in the capacity of trustee. That being so, according to the appellant, the grant of a right of way or an easement as claimed by the respondents would be inconsistent with the powers of a trustee and would be a breach of that trust. Hence, the appellant is

not a capable grantor. The respondents counter by saying that the easements were not purported to have been granted by the appellant as they (the respondents) are entitled to the easements by way of a "grant by implication, a grant under the doctrine of ***Wheeldon v Burrowes***, and under the doctrine of Lost Modern Grant and by way of prescription" (para. 60 written submissions). The respondents submitted that the grant under each of these heads, except in the case of prescription, would have been before the date (1984) on which the appellant became the registered proprietor of Lot C.

38. The appellant submitted also that it is a statutory corporation and there is no provision in the Act creating it which permits the granting of easements. The respondents replied by saying that the granting of easements is an incident of land ownership, and there is no requirement for there to be a specific legislative provision on the point. In any event, the grant was, as said earlier, prior to its ownership of the lot.

39. In my view, there is no need for a special power to be given to the appellant to enable it to grant an easement. Osborn's Concise Law Dictionary (8th ed.) defines an easement as "a right enjoyed by an owner of land over land of another...". The claim by the respondents is that the easement existed before the appellant's ownership of Lot C commenced. The evidence on which the respondents rely is to the effect that as owners of their lots, they enjoyed the right over Lot C from before the appellant became owner of Lot C, and that the

enjoyment continued during the appellant's ownership. In that situation, there would be nothing for the appellant to do to confer any right on the respondents. Consideration of the legislation creating the appellant is therefore irrelevant. It is also of no moment to say that the granting of an easement would involve a breach of trust.

40. The final point to be made so far as the capability of the right forming the subject matter of a grant is concerned, is that there must be nothing in the exercise of the right which is inconsistent with the servient owner's proprietorship or possession of the servient tenement. There must be no substantial interference with, or deprivation of, the servient owner's possession of his tenement. This condition requires consideration later when the easement to park is being considered.

41. The respondents, as noted earlier, made a multifaceted claim of a right of way. It is now proposed to discuss the creation of easements as put forward by the parties to these appeals – by implication, of necessity, and by statute. The respondents, in paragraph 22 of the amended statement of claim assert their entitlement to easements of way, "by implication and/or by reason of necessity", and they base their claim by virtue of:

> (a) the description, layout and situation of their lots on the deposited plan and the subdivision plan and on the ground; and/or
>
> (b) the fact that Lot C is obviously set out on the deposited plan as the only access to their lots.

Intended easement

42. So far as implication is concerned, the respondents' position is that it is separate and apart from the easement of necessity. They say that the grant of a right of way (or of parking) may be made by implication even though there may be other ways of accessing the premises or other spaces for parking. Reliance is placed on the Australian text of Voumard: The Sale of Land in Victoria (4th ed.), pages 251-253. The emphasis is on this passage:

> "If in a contract of sale (or in a transfer or a conveyance) land is described, for example, as 'abutting' on or as 'bounded' by a 'street', a 'way' or a "road" the vendor will generally be regarded as having impliedly agreed to grant or (as the case may be) as having impliedly granted to the purchaser a right of way over the land forming the street, way or road. Such description does not in itself however imply that the 'street', 'road' or 'way' is of any particular width."

Reliance is also placed by the respondents on pages 111-113 of Gale on Easements (16th ed.) the introductory passage reading thus:

> "An easement may also arise if an intention to reserve it can properly be inferred, but the general rule is that a grantor who intends to reserve a right over the tenement granted must do so expressly, so that it is only in exceptional cases that an easement can be reserved by implication."

43. The respondents submitted that from the very first transfer to Pontayne Ltd., the easements of way and to park were in fact created by implication. They submitted that the reference in each transfer to the deposited plan strengthens their claim to an easement of way over Lot C. Frankly, my efforts to understand

and appreciate this particular submission and its significance have failed. I attach no blame to the respondents for this failure.

44. The submission of the appellant, on the other hand, was that an easement may only be implied in circumstances where one or more parcels of land owned by one person is subsequently splintered, subdivided or otherwise severed. A part or more than one part of that land is then transferred or otherwise granted to another person or persons. Dependent on the circumstances existing at the time of the severance and change of ownership, an easement may be implied. The principles and law pertaining to implied grant only become relevant at that time when ownership is severed by the grantor and a part of the land transferred to another person.

45. The contention of the appellant is that the lots were never at any stage in common ownership with Lot C at the time of transfer, for there to be an implied easement, save and except in the case of lots 20 & 21 and lots 33 & 34 which were in the common ownership of Patrick Wilkinson Chung in 1968, the time of the severance of common ownership. In that case, the appellant submitted, an easement by way of implication could be said to arise in respect of lots 33 & 34 over lots 20 & 21. This argument however, submitted the appellant, could not apply to Lot C, as at the time of the transfer it was not owned by Patrick Wilkinson Chung.

46. Sir Robert Megarry and Professor H. W. R. Wade, in their work, "The Law of Real Property" list the following methods by which easements may be acquired. They are:

(a) by statute;

(b) by express grant or reservation;

(c) by implied reservation or grant; and

(d) by presumed grant, or prescription.

For the purposes of this case, the methods of acquisition that are relevant are those listed at (a) and (c) above. In respect of an implied grant, the authors list the following as the categories for consideration: easements of necessity, intended easements, and easements within the rule in ***Wheeldon v Burrows.*** The authors' classification of "intended easements" corresponds with the "implied easements" referred to by the parties and the learned judge in this case. I am of the view that the proper terminology is "intended easements" as used by Sir Robert Megarry and Professor Wade. My view gains some confirmation from Nourse, L.J. in ***Stafford v Lee*** (1993) 65 P. & C. R. 172 who commenced his judgment thus:

> "The question in this case is whether a right of way claimed by the plaintiffs as appurtenant to their land falls into the second class of **implied** easements described by Lord Parker of Waddington in ***Pwllbach Colliery Company Ltd. v Woodman*** and usually known as **intended** easements" (p. 173). (emphasis added)

47. So far as implied easements, as described in the instant case, are concerned, the idea is that the easement is required to carry out the common intention of the parties. The case ***Stafford v Lee*** (above) was one such case. There, it was held that an implied easement arose in favour of a grantee of land if the grantee could establish that the parties to the grant had a common intention that the land would be used in some definite and particular manner and that the easement claimed was necessary to give effect to that intention. At page 175 of the judgment, Nourse, L.J. in referring to Lord Parker's "statement of the relevant principles in ***Pwllbach Colliery Company Limited v Woodham***" , quoted thus from Lord Parker:

> "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See ***Jones v Pritchard*** and ***Lyttelton Times Co. v Warners.*** But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

48. In the instant appeals, there is no evidence that, at the time of the disposition of the lots now owned by the respondents, the parties had a common

intention that the lots would be used in a definite and particular manner, and that the easement claimed was necessary to give effect to that intention. Consequently, I am of the view that there is no foundation for a claim to an easement of way by implication on the basis of the intention of the parties.

Easement of necessity

49. The appellant submitted that following the principle laid down in ***Manjang v Drammeh*** (1991) 61 P. & C.R. 194, a right of way by necessity may not be found to exist in the factual circumstances surrounding these appeals. It was submitted that the ***Manjang*** case and the other cases on the point suggest that a right of way by necessity only arises in cases where land is absolutely landlocked and such a right arises upon severance of ownership.

50. Although the learned judge seems to have found that all the respondents were entitled to easements of necessity in respect of all lots (see p.24 of judgment - p. 161a record), the respondents concentrated their submissions on this aspect on lots 42 and 43, registered at Volume 957 Folios 57 and 58, owned by Eloise Mulligan and Grace Wong respectively. The respondents submitted that there was an entitlement in respect of those lots to a right of way over Lot C to and from St. Lucia Ave., and to and from Knutsford Boulevard. Those lots, they said, are surrounded by land not owned by either Miss Mulligan or Miss Wong, and they appear to be blocked in by lots 44 and 57. They referred to the evidence that lots 42 and 43 are leased to Jamaica Properties Ltd. which has

combined them with lots 44, 56 and 57 for use as a car park, thereby securing access to and from Grenada Crescent. The lease is a temporary arrangement, said the respondents, and does not affect the right of way which they said was created as of necessity over Lot C. According to the evidence of Miss Beverley Wong, however, Lot C has not been used for access to lots 42 and 43 since 1994, and there is a chain link fence between those lots and Lot C.

51. In ***Manjang v Drammeh*** (supra) a decision of the Privy Council, the essentials for an easement of necessity are set out thus at page 197:

> (a) there has to be found a common owner of a legal estate in two plots of land;
>
> (b) access between one of those plots and the public highway can be obtained only over the other plot; and
>
> (c) a disposition of one of the plots is made without any specific grant or reservation of a right of access.

In ***Espley v Wilkes*** (1872) L.R. 7 Exch. 298, at 303, Kelly, C.B. said:

> "...a way of necessity exists only where the land conveyed or demised is surrounded by other lands of the grantor, and cannot be approached but by a way over the grantor's land where no way exists, and which thus becomes a way of necessity."

The final reference that I'll make on this point is to ***Wong v. Beaumont Property Trust Ltd*** [1964] 2 All E.R. 119 a case referred to by Anderson, J. There, Lord Denning, M.R. quoted thus from Rolle's Abridgment:

> "If I have a field inclosed by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant."

52. The respondent J & O owns lots 22 to 32. The supermarket is on lots 26 to 32. J & O also owns lots 10 to 19. These latter lots border on lots 23 to 32 respectively, and they provide access to Tobago Avenue. Lots 12 to 19 and lots 25 to 32 were all transferred simultaneously from Horace Nunes to John R. Wong Limited which later changed its name to J & O.

53. So far as adjoining lots 33 and 34, owned by Beverley Wong, are concerned, the situation is the same as regards the lots owned by J & O, given the fact that lot 34 borders on St. Lucia Avenue. In respect of lots 42 and 43, they adjoin lots 55 and 56 respectively, with the latter two providing access to Grenada Crescent.

54. The evidence does not show that any of the lots qualifies for entitlement to an easement of way by virtue of necessity. Even if there may have been a common owner of the legal estate of Lot C and any of the respondents' lots at the time of the disposition to the respondents, it cannot be accurately stated that access between any of the lots and the public highway can be obtained only over Lot C. On the contrary, the evidence was that the respondents have access to the public highway over several other lots that are either owned or controlled by them. It is therefore somewhat ingenious of them to be claiming an entitlement

to a way of necessity over Lot C. This claim is fictitious, to say the least, given their ownership and control of the adjoining lots. The learned judge, in my view, was in error to have declared in favour of such entitlement.

Wheeldon v Burrows

55. The learned judge found that the "first test" in ***Wheeldon v Burrows*** [1874-1880] All E.R. Rep. 669 had been satisfied and that a grant of an easement of way had been established. He said that it appeared to him that "neither side fully appreciated the nature of the Rule in that case". As a reminder, it is perhaps appropriate to say that the test being referred to is one of the two propositions stated by Thesiger, L.J. at page 672. These propositions form the substance of the headnote which reads thus:

> "On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass by implication to the grantee all those continuous and apparent easements and quasi easements which are necessary to the reasonable enjoyment of the property granted and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, save in the case of an easement of necessity the reservation of which will be implied. Otherwise no implication can be made of the reservation of an easement."

The first sentence of the headnote is the first of the propositions, referred to by the learned judge as the "first test".

56. In my opinion, there was a lack of evidential support for the judge's finding that the first proposition had been established. I say so because there was no evidence that at the time of the grant there was any easement or quasi easement being used by the owner of the entirety for the benefit of the part granted.

The Prescription Act – The St. Lucia Avenue access

57. Section 2 of the Prescription Act reads thus:

> "When ... any way or easement ... shall have been actually enjoyed ... over ... any land ... of any person, or of any body corporate, by any person claiming right thereto, without interruption for the full period of twenty years, the right thereto shall, subject to the provisos hereinafter contained be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

58. The evidence of Miss Beverley Wong was that during the period of construction of the supermarket, Lot C was used for the purpose of delivery of materials. That by itself, I daresay, would not have given rise to a right of way. However, after construction had ended, and the supermarket was opened for business, a delivery area was opened to the back of the supermarket in the vicinity of lot 25. Since then, notwithstanding changes in the operations of the supermarket, that area has been consistently used without interruption for the purpose of making deliveries to the supermarket. That continued for approximately thirty years up to the time of the filing of this suit. Given this

unchallenged factual situation, I am of the view that the provisions of section 2 of the Prescription Act have been satisfied and the respondent J & O is therefore entitled to a declaration of entitlement to an easement of way for the purpose of making deliveries via lot 25.

The Knutsford Boulevard access

59. The evidence of Mr. Arnold White, the appellant's witness, was that for over forty years there had been access (non-vehicular) from Knutsford Boulevard to Lot C. This access has been to all who wish to have access, that is, to all members of the public. There is nothing to indicate that the respondents have exercised any special right of access by virtue of their ownership of lots bordering on Lot C. If they or any of them used that access, it was done in the role of an ordinary member of the public. That being the position, it seems that both the claim to a declaration and the granting of such in respect of access to and from Knutsford Boulevard were misconceived.

Easement to park

60. As stated earlier, a right of way does not automatically give rise to a right to park. However, it is accepted and agreed that the right to park can exist as a valid easement. In ***London & Blenheim Estates Ltd. v. Ladbroke Retail Parks Ltd.*** [1992] 1 W.L.R. 1278, Judge Paul Baker, Q.C. sitting as a High Court Judge, held that the right to park cars can exist as an easement provided that, in

relation to the area over which it is granted, it is not such that it would leave the servient owner without any reasonable use of his land. He added:

> "I would not regard it as a valid objection that charges are made, whether for the parking itself or for the general upkeep of the park. The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant."

The decision in this case was affirmed by the English Court of Appeal [1993] 4 All E.R. 157, without discussing this point.

61. The learned judge in the instant case granted a declaration that the respondents as well as the suppliers of J & O and Beverley Wong are entitled to park on Lot C for the purpose of transacting business with J & O and Beverley Wong, their servants or agents. As I see it, this declaration bears no relationship with the evidence in the case. There is no evidence that any of the respondents was in the habit of parking on Lot C. The evidence as recorded indicates that Lot C was used for the purpose of gaining access to lot 25 for the purpose of making deliveries to the supermarket which occupies lots 26 to 32. There is no question of suppliers parking on Lot C; the vehicles pass on Lot C to get to the supermarket to deliver their load. Miss Beverley Wong was away from the country for nineteen and a half years, so there can be no question of her being entitled to an easement to park. Her prolonged absence afforded her no opportunity to establish any easement in respect of her lots. The impugned

declaration gives an entitlement to "the suppliers of the first and second claimants" to park on Lot C. The first claimant is J & O and the second claimant is Miss Beverley Wong. I can understand, in principle, the reference to the suppliers of the first claimant, but I am unable to grasp the idea of the reference to the suppliers of the second claimant. This is so because Miss Wong gave no evidence of being connected with any business other than that of J & O. So, the question arises: to what "suppliers" does this easement extend so far as it relates to Miss Wong? In any event, the supermarket is being operated by Grant Marketing. Co. Ltd. Further, there is no evidence that either Miss Eloise Mulligan or Miss Grace Wong (the other respondents) or any agent of theirs has ever driven a motor vehicle on Lot C, or done anything thereon to give rise to even the thought of an easement to park; yet, a declaration was made entitling them to park. Taking everything into consideration, I am of the view that the easement to park was granted in error.

62. In dealing with the respondents' submission that they were entitled to an easement to park, the learned judge said that while he "was prepared to hold, on a balance of probabilities", that the respondents were "entitled to an easement of way by implication", it seemed to him that the cases cited by the respondents would have been "an unsafe basis on which to conclude that there was an easement, being a right (for all the various classes of persons set out in the plaintiffs' claim) to park on Lot C". Notwithstanding this warning that he administered to himself, the learned judge proceeded to grant the declaration in

the terms stated earlier. I have not been able to discern the basis for the safety he subsequently felt, emboldening him to make the declaration. On the contrary, I support the caution that he first embraced. The respondents, the suppliers, servants and agents of the first two respondents amount to an indeterminate number. The granting of an easement to park to each of such persons could easily, it seems, result in the seventy-nine parking spaces on Lot C being overrun by them to the total exclusion of the proprietor of the lot.

63. In ***Copeland v Greenhalf*** [1952] 1 All E.R. 809, a wheelwright's dwelling-house and workshop adjoined a road and in part confronted a strip of land on the opposite side of the road in Winchcomb, Gloucestershire. The strip gave access from the road to an orchard. The wheelwright and his father before him had operated this business for more than fifty years during which period they had placed vehicles, wheels and other articles on the strip of land to await repair or removal. They had always left a way to permit access to and from the orchard, as well as to and from the road. The owner of the orchard and the strip of land claimed an injunction to prevent the continuation of the practice of placing articles on the land, and the wheelwright contended that he was entitled to an easement to so use the land by virtue of the Prescription Act.

Upjohn, J., in rejecting the wheelwright's contention, said:

> "... in my judgment the right claimed here goes wholly outside any normal idea of an easement, that is, a right of the occupier of a dominant tenement over a servient tenement. This claim really amounts to a claim to a joint user of the land by the defendant.

> Practically, he is claiming the whole beneficial user of the strip of land on the south-east side of the track so that he can leave there as many or as few lorries as he likes for any time that he likes and enter on it by himself, his servants and agents, to do repair work. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession, if necessary to the exclusion of the owner, or, at any rate, to a joint user, and no authority has been cited to me which would justify me in coming to the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that for this claim to succeed it must really amount to a right of possession by long adverse possession. I say nothing, of course, as to the creation of such rights by grant or covenant. I am dealing solely with the question of a claim arising by prescription."

64. In the instant appeals, the real purpose of Lot C should not be ignored. Lot C was not designed, as the respondents seem to think, for the purpose of enhancing the business operations of the respondents particularly. According to Mr. White, there has been a problem in New Kingston as regards the availability of adequate parking space for the members of the public. There have been consultations between the appellant on the one hand, and the business community on the other, with a view to finding agreeable solutions to traffic problems generally in New Kingston. As the undisputed proprietor of Lot C, the appellant has the power and authority to:

(a) regulate the manner in which it is used; and

(b) make it available, at a fee, for members of the public to park thereon.

65. The grant of an easement to park in the terms set out in the order of Anderson, J. runs counter to the rights of proprietorship of the appellant. The grant is to sundry classes of persons whose true number is indeterminate. The evidence shows that the respondents own at least 25 lots in the subdivision, and they have extended their control of the subdivision by entering into lease arrangements with other lot owners. Their enterprising spirit is to be commended and copied. However, the declaration of entitlement to easements, as sought by them, would result in an unwarranted extension of their control and dominance of proprietorship in the area, to the great detriment of the general public who have been allowed the well-needed facility of parking for a fee during normal daytime business hours. The respondents, in my view, are entitled to no greater right in this regard than such as belongs to an ordinary member of the public.

66. Subsequent to the conclusion of the hearing of these appeals, the attorneys for the respondents submitted for our consideration the decision of the House of Lords in the Scottish case ***Moncrieff v Jamieson*** [2008] 4 All E.R. 752. Written submissions by both sides were received and considered. In that case it was held as follows:

> "(i) A right to park was capable of being constituted as ancillary to a servitude of vehicular access in Scottish law. The essence of a servitude was that it existed for the reasonable and comfortable enjoyment of the dominant tenement; the test to be applied was whether the ancillary right was necessary for the comfortable use and enjoyment of the servitude. In the instant case, the highly unusual feature was that it was not possible to park a vehicle

> anywhere on the dominant tenement and without the right to park the proprietor's right of vehicular access would effectively be defeated. Accordingly, in view of its particular and unusual circumstances, the rights ancillary to the express grant of a right of access in favour of the dominant tenement included a right to park vehicles on the servient tenement, in so far as that was reasonably incidental to the enjoyment of the dominant tenement.
>
> (ii) (Per Lord Rodger) The express grant of a servitude of access could carry with it an implied right to park on the servient land if that was essential to make the servitude of access effective or to carry out the purpose for which the servitude of access was granted or was a means of obtaining an effective right of access. While the test the sheriff had applied was not well formulated, he would equally have considered that an implied right to park on the servient land was necessary to make the express grant of vehicular access effectual.
>
> (iii) (Per Lord Scott) There is no difference relevant to any issue arising in the instant case between the common law in England and Wales relating to easements and the common law in Scotland relating to servitudes."

67. The facts of ***Moncrieff v Jamieson*** (supra) were wholly different from those in the instant appeals. There are two vital points that highlight the difference. First, there was an express grant of an easement of way from a public road some 150 yards away across from Jamieson's land. Second, Moncrieff's house was next to the sea, and the land was bordered on the west by the sea and on the east by a cliff. The only access or egress that could be obtained by land to the house was via a stairway that led to a gate at the top of

the cliff. In the instant appeals, it has already been shown that there was no easement of way, apart from that to lot 25; and there is no question of an easement to park being implied as necessary for the enjoyment of the lots.

68. In summary, the evidence shows that the respondents are not entitled to any of the easements claimed by them, and granted by the learned judge except for the easement of way granted to J & O. In that regard, the easement of way arose under the Prescription Act and entitles J & O to have deliveries made via lot 25 where it meets Lot C. No charges are to be imposed on J & O while exercising their rights under this easement. So far as parking on Lot C is concerned, the respondents are all subject to being charged just like any other member of the public. The appeal of the Kingston and St. Andrew Corporation is allowed in part, accordingly, and the appeal by J & O and the other respondents fails.

HARRISON, J.A.

I agree fully with the reasoning and conclusions arrived at by Panton, P., and have nothing to add.

MARSH, J.A. (Ag.)

I too agree.

ORDER

PANTON, P.

SUPREME COURT CIVIL APPEAL NO. 80/2005

1. Appeal allowed in part.

2. The order granting easements of way and parking to the respondents is hereby set aside, save that it is declared that J and O is entitled to an easement of way to facilitate the making and taking of deliveries via Lot 25 where it meets Lot C.

3. It is declared that the appellant is not entitled to impose any charge or fee on J and O or its suppliers while exercising the rights under this easement.

SUPREME COURT CIVIL APPEAL NO. 82/2005

1. Appeal dismissed except so far as declared in favour of J and O in Appeal No. 80/2005.

2. The parties are invited to make written submissions in respect of costs, such submissions to reach the Registrar of the Court of Appeal by October 16, 2009.