



Neutral Citation Number: [2020] EWHC 582 (Ch)

Case No: CH-2019-000202

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 12/03/2020

Before:

MR JUSTICE MORGAN

Between:

POSTE HOTELS LIMITED

**Claimant/
Respondent**

- and -

TRACEY ANNE COUSINS

**Defendant/
Appellant**

Kerry Bretherton QC (instructed by **Chattertons Legal Services Ltd**) for the
Claimant/Respondent
Peter Petts (instructed by **Premier Solicitors LLP**) for the **Defendant/Appellant**

Hearing date: 11 February 2020

**Judgment Approved by the court
for handing down**

MR JUSTICE MORGAN:

Introduction

1. This is an appeal by the Defendant, Ms Cousins, and a cross-appeal by the Claimant, Poste Hotels Ltd against the order made on 22 July 2019 by His Honour Judge Yelton, sitting in the County Court at Cambridge, following judgments which he gave on 12 July 2019.
2. The principal questions which were dealt with in the County Court were whether the Defendant had an easement of parking, pursuant to which she had a right to park a car in Church Court, Stamford and whether parking by the Defendant in a particular part of Church Court resulted in an actionable interference by her with the Claimant's right of way over Church Court.
3. Mr Petts appeared on behalf of Ms Cousins in the County Court and again on the appeal and cross-appeal. Similarly, Ms Bretherton QC appeared on behalf of Poste Hotels Ltd both in the County Court and again on the appeal and the cross-appeal. I am grateful to them for their very helpful submissions.

Church Court and the surrounding properties

4. Church Court is a cul-de-sac leading from Church Street, Stamford. It is capable of being used as an accessway to land owned by the Claimant and to land owned by the Defendant.
5. The Claimant is the owner of a substantial site in the centre of Stamford on which stands the George Hotel. The site has a frontage to four streets, namely, Station Road, Wothorpe Road, Church Street and High Street, St Martins. The site is registered at the Land Registry under title number LL325291. The site also has a frontage to Church Court. The Claimant is also the owner of a property with a Church Court address, namely, 2 Church Court, Stamford, which is registered at the Land Registry under title number LL109216.
6. The Defendant is the owner of a residential property, 67 High Street, St Martins, Stamford. Church Court is capable of providing an access to the rear of the Defendant's property. It is possible to drive a car along Church Court until one reaches the rear of that property. It is then possible to enter the Defendant's property on foot but it is not possible to drive a car onto the Defendant's property.
7. It seems to have been accepted in the County Court that Church Court was not a highway. Although reference was made in the County Court to a presumption whereby an owner of land fronting on to a highway, or even on to a private road, is presumed to be the owner of the soil up to one half of the width of the highway or the private road, in the end no reliance was placed on this presumption. The case therefore proceeded in the County Court on the basis that Church Court was owned by a third party and not by either the Claimant or the Defendant.

The claim

8. In its claim, the Claimant asserted that it had a right of way, with or without vehicles, over Church Court to enable it to gain access to a part of its property which was used as a laundry in connection with the hotel on the main part of its site. No doubt, the Claimant would assert that it had a vehicular right of way for the benefit of other parts of its site, as well as for the benefit of the laundry, but it was only the use of the right of way in connection with its laundry which was the subject of its claim. In that regard, the Claimant claimed that the Defendant had committed an actionable interference with that right of way by parking her car in front of the doors to the laundry and thereby impeding the Claimant's access to the laundry from Church Court. In its Particulars of Claim, the Claimant sought an injunction to restrain this interference and damages for nuisance. In addition, the Claimant sought a declaration that the Defendant did not have an easement of parking on Church Court adjacent to the doors to the laundry.
9. The Defendant served a Defence and Counterclaim. In her Defence, the Defendant put the Claimant to proof of its claimed right of way. The Defendant also pleaded that even if the Claimant were to establish the claimed right of way, the Defendant had acquired a right to park in front of the doors to the laundry which prevailed over any such right of way enjoyed by the Claimant. By her Counterclaim, the Defendant claimed two declarations. The first was a declaration that 67 High Street enjoyed a general right to park in Church Court. The second was a negative declaration to the effect that the Claimant's employees, agents and visitors had no right to park in Church Court.

The judgments and the order

10. The claim and the counterclaim were tried in the County Court on 11 and 12 July 2019 and the judge gave a short ex tempore judgment on the second of those days. In this judgment, the judge:
 - (1) recorded that the parties agreed that Church Court was not a highway;
 - (2) recorded that the Claimant did not claim to own Church Court;
 - (3) described the use over the years of the part of the Claimant's property which was more recently used as a laundry;
 - (4) held that he could infer use of Church Court by the Claimant and its predecessors in title as a right of way to what had become the laundry for a sufficient period (at least since 1951) to support the finding that the Claimant had the benefit of a right of way, acquired by prescription, over Church Court and giving access to the laundry;
 - (5) appeared to find that the Claimant's right of way to the laundry was a right of way, with vehicles or on foot;
 - (6) described the Claimant's use of the laundry since 2018;
 - (7) held that when the Defendant parked her car in front of the doors to the laundry, this amounted to an actionable interference by her with the Claimant's enjoyment of its right of way to the laundry;

- (8) held that the Defendant had acquired a right to park on the west side of Church Court (which is the same side as the laundry), by prescription;
 - (9) specifically rejected the contention for the Claimant that any user by the Defendant and her predecessors for parking had not been appurtenant to 67 High Street (it having being alleged that such user was by her and them as members of the general public);
 - (10) specifically rejected the contention for the Claimant that, when considering whether there had been a notional grant of a right to park, it was not possible for the owner of Church Court to grant a right to park to the Defendant and her predecessors because any such grant would necessarily have been incompatible with the Claimant's right of way;
 - (11) held that the Defendant's right to park was not a right to park in any particular place in Church Court and, in particular, was not a right to park in front of the doors to the laundry;
 - (12) held, on the facts, that the Defendant had not established a right to park in front of the doors to the laundry.
11. Following the giving of judgment, counsel for the Defendant asked the judge if his judgment dealt with the relief counterclaimed. The judge replied that the Defendant was not entitled to a declaration that the Claimant did not have a right to park in Church Court because that was not anything to do with the Defendant. He added that the Claimant had stated that it was not entitled to park in Church Court.
 12. The judge then heard submissions as to costs and gave a judgment giving his reasons for making no order as to costs.
 13. Following the hearing, the judge was provided with rival versions of a draft order and he settled the form of order. By that order, he adjourned generally the Claimant's application for an injunction with liberty to restore within six months of 12 July 2019; in the event, that application has not been restored. The order included a declaration that the Claimant as owner of its site had a right of way both pedestrian and vehicular over Church Court and into the laundry. As to the position of the Defendant, the order included declarations that, as the owner of 67 High Street, she had a right of way both pedestrian and vehicular over Church Court and a right to park on the west side of Church Court but no right to park outside the doors of the laundry.

The appeal and the cross-appeal

14. The judge refused permission to appeal but both the Defendant and the Claimant were given permission to appeal by Trower J on 8 October 2019.
15. In her appeal, the Defendant challenges various parts of the judge's order. In particular, she submits that:
 - (1) the order adjourning the application for an injunction should be deleted;
 - (2) the declaration in relation to the Claimants' right of way should be expressed to be subject to the Defendant's right to park in Church Court;

- (3) the declaration of the Defendant's rights should provide that the Defendant did have the right to park so as to interfere with the Claimant's right of way;
 - (4) the court ought to declare that the Claimant's employees, agents and visitors have no right to park in Church Court; and
 - (5) the Claimant should be ordered to pay all of the Defendant's costs.
16. In its cross-appeal, the Claimant seeks a declaration that the Defendant had no right to park in Church Court and an order that the Defendant pay the Claimant's costs.

The issues

17. The issues arising in the appeal and the cross-appeal are:
- (1) does the Defendant have any right to park in Church Court?
 - (2) if so, does the Defendant's right to park entitle her to park in front of the doors to the laundry?
 - (3) was the judge wrong to adjourn the Claimant's application for an injunction?
 - (4) should the appeal court declare that the Claimant's employees, agents and visitors had no right to park in Church Court?
 - (5) should the appeal court make a different order for costs from the order made by the judge?

Does the Defendant have any right to park in Church Court?

18. The Claimant makes two submissions as to the Defendant's claim to a right to park in front of the doors to the laundry. First, the Claimant says that the Defendant has not established any right to park in Church Court. Secondly, the Claimant says that even if the Defendant has established a right to park in Church Court, she has not established a right to park in front of the doors to the laundry, as such a right would interfere with the Claimant's right to gain access to those doors from Church Court.
19. Notwithstanding the first of these submissions, the Claimant says that it does not actually object to the Defendant parking in Church Court provided that she does not interfere with the Claimant's access to the doors to the laundry. The Claimant appears to accept that, as it is not the owner of Church Court, it cannot stop the Defendant parking in Church Court if such parking does not interfere with the Claimant's right of way over Church Court. Nonetheless, the first of these submissions is maintained and logically it needs to be considered before the second submission which is relied upon by the Claimant.
20. The first thing to notice is that the Claimant is claiming a declaration that the Defendant does not have a right to park anywhere in Church Court but it is not the owner of Church Court. The Defendant does not contend that the Claimant does not have locus standi to seek such a declaration. This appears to be a recognition of the fact that the Claimant is seeking such a declaration to assist it in establishing that the

Defendant does not have a right to park in a way which would interfere with the Claimant's right of way over Church Court.

21. The judge held that the Defendant had established a right to park in Church Court, acquired by prescription. Much of his reasoning is not in dispute on this appeal. As I understand it, the Claimant accepts that:
 - (1) the Defendant and her predecessors in title had parked in Church Court for the necessary period of 20 years;
 - (2) such parking was open, peaceful and not pursuant to a permission from the owner of Church Court;
 - (3) a right to park, of the kind claimed in the present case, can exist as an easement;
 - (4) in the case of an express grant of a right to park of that kind, it would be possible to make such a right appurtenant to the Defendant's property as a dominant tenement and such a right would accommodate that dominant tenement.
22. Before dealing with the principal submission made by the Claimant under this head, I will deal with what I regard as more subsidiary submissions.
23. The Claimant's first subsidiary submission, in relation to the claimed right to park, was to the effect that the owner of Church Court would not have been competent to grant such a right. The argument was that at the time of the notional grant, Church Court was already subject to an existing right of way in favour of the Claimant's land and that the grant of the claimed right to park would not have been possible and/or would have been inconsistent with that right of way. The Claimant went so far as to submit that the grant of a right to park in Church Court would extinguish the Claimant's right of way. In support of these submissions, the Claimant cited *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519 as authority for the proposition that it is not possible to presume a notional grant of an easement where the owner of the putative servient tenement is not competent to make such a grant.
24. I am not able to accept this submission. Assuming that Church Court was already subject to a right of way for the benefit of the Claimant's land at the time of the notional grant of a right to park for the benefit of the Defendant's land, the owner of Church Court was perfectly competent to grant a right to park which would take effect subject to the earlier right of way. If the owner had purported to grant a right to park which was inconsistent with the earlier right of way, then to the extent of the inconsistency, the right to park would not be effective as against the grantee of the right of way but to the extent that the right to park was not so inconsistent, then it would be an effective right. The Claimant accepts that it is perfectly possible for the Defendant to park in Church Court in a way which does not interfere with its right of way and so there would be no impediment to the owner of Church Court granting a right to park provided that such parking did not interfere with the Claimant's right of way. There is a different question as to whether the Defendant has acquired, as she claims, a specific right to park in front of the doors to the laundry. I will consider that different question later in this judgment but, at this stage, I can see no reason to hold

that the owner of Church Court was in some way unable to grant the owner of the Defendant's land a general right to park in Church Court, subject to any earlier right of way.

25. The Claimant's second subsidiary submission was that the user for parking by the Defendant and her predecessors in title was subject to daily interruption by the Claimant in the course of exercising its right of way. That submission is contrary to the judge's finding of fact and is not supported by the evidence and I do not accept it.
26. The Claimant's third subsidiary submission was that the user relied upon by the Defendant and her predecessors in title could not have been "as of right" because it was subject to the Claimant's pre-existing right of way. I do not accept that submission either. It is perfectly possible for there to be a right to park in Church Court which is subject to the pre-existing right of way. There is therefore no barrier to holding that the user by the Defendant and her predecessors in title established such a right. It is not necessary for the Defendant to show that the right claimed had priority over all other rights in relation to Church Court.
27. The Claimant's last subsidiary submission was that, in more recent years, the Defendant had left her car in Church Court for lengthy periods so that her recent user was not "parking" but was "storing" or "abandoning" her car. The Claimant submitted that the claimed right to park did not extend to such storage of a car. The answer to that submission is that the right which is claimed is a right to park a car. There might be room for argument as to whether such a right extends to leaving a car stationary in one space for such a long period of time that the user goes beyond what could be understood by "parking". In the present case, all that I need to consider is whether the user by the Defendant and her predecessors in title establishes a right to park. I need not consider the dispute as to whether such a right has been exceeded in recent times by reference to the particular circumstances in which the Defendant has left her car in Church Court.
28. The main submission made by the Claimant under this head is that the relevant user was not "as of right" for a different reason to that considered above. It was submitted that such user should not be considered to be user which was appurtenant to the Defendant's property but instead was to be regarded as user by members of the public, parking in a local and convenient place. In other words, such user was by the Defendant and her predecessors in title in their capacity as members of the public and not as owners of the Defendant's property. The Claimant referred to the fact that there was evidence before the judge that members of the public did park in Church Court.
29. In support of the above submission, the Claimant relied on the decision of Luxmoore LJ, sitting at first instance, in *Le Strange v Pettefar* (1939) 161 LT 300. In that case, the court held that the facility of parking, which had been enjoyed by the tenant of the owner of the land, had been enjoyed by the tenant in his capacity as a member of the public so that the right was not a privilege which passed on a subsequent grant under section 62 of the Law of Property Act 1925.
30. The Claimant also submitted that it was relevant that, at this stage in the argument, the alleged right being considered is a right to park somewhere in Church Court rather than in a designated space in respect of which others do not have a similar right. It was submitted that right being claimed was a right to compete for a parking space

where the competition came from members of the public generally and was not confined to residents of nearby properties.

31. Before considering these submissions, and the decision in *Le Strange v Pettefar*, in greater detail, I need to consider the general legal principles which apply where it is claimed that, by reason of long user, an easement has been acquired by prescription. That is the basis of the Defendant's claim in this case.
32. The policy behind the legal principles as to prescription was explained in *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519 per Lord Scott at [27], as follows:

“27. The acquisition of easements by long uninterrupted user that has been open, free from force and not dependent upon any precatory permission from the servient owner serves a well recognised public policy. In *Davis v Whitby* [1974] Ch 186 Lord Denning MR said, at p 192, that "the long user as of right should by our law be given a lawful origin if that can be done", and Stamp LJ, agreeing with Lord Denning, commented: "if long enjoyment of a right is shown, the court will strive to uphold the right by presuming that it had a lawful origin." More recently Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 said, at p 349, that "Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment.””
33. The principles as to prescription involve the court finding a lawful origin for long continued user of a putative servient tenement in which user the owner of that tenement has acquiesced. Sometimes, the only alternative to finding a lawful origin is to find that the user was at all times unlawful. In such a case, as the above citation makes clear, the court should strive to find a lawful origin where that is possible. It was said in *Goodman v Mayor of Saltash* (1882) 7 App Cas 633 per Lord Selborne L.C. at 639-640 and 644 that the suggested lawful origin must be “reasonably possible”. Sometimes, the only reasonably possible lawful origin for the user is a notional grant of an easement.
34. In other cases, there might be alternative explanations as to the user and each explanation produces the result that the user was lawful but only one explanation involves a notional grant of an easement. In the present case, it was argued that the explanation for the user which is relied upon was not the notional grant of an easement of parking but instead was that members of the public parked in Church Court and the Defendant and her predecessors in title parked there in their capacity as members of the general public.
35. Where the court is asked to choose between two explanations for the user both explanations must produce the result that the user was lawful. Where there are said to be two explanations for the user, each of them involving a lawful origin for the user, one has to ask whether both explanations are reasonably possible. If there are two reasonably possible lawful origins then the position is as stated in *Gardner v Hodgson's Kingston Brewery Company* [1903] AC 229 per Lord Lindley at 239: “[i]f the enjoyment is equally consistent with two reasonable inferences, enjoyment as of

right is not established ...”. This approach was applied in *Odey v Barber* [2008] Ch 175 at [36].

36. Accordingly, in the present case, I need to consider each suggested explanation for the user relied upon to see if it identifies a lawful origin for the user and, if so, whether both of the suggested lawful origins were reasonably possible.
37. A notional grant of an easement of parking, appurtenant to the Defendant’s property, is a reasonably possible explanation which provides a lawful origin for the user in this case. Although the Claimant has referred to the claimed right as a right to compete for parking, rather than a right to park in a designated space, such a right can exist as an easement. Further, the claimed right could be appurtenant to the Defendant’s property and could accommodate that property.
38. The Claimant contends that an alternative lawful origin lies in the practice of the public of parking in Church Court. As to that, the judge held that it had been agreed at the trial that Church Court was not a highway. That meant that there was no public right to pass and repass over Church Court. This remained the accepted position during the oral hearing of the appeal. After the hearing, the Claimant provided me with a written submission which referred to the possibility that Church Court might after all be a highway with the alleged result that the Defendant and her predecessors in title would always have had a right to park there. The submission considered what the position would be *if* the Claimant were to submit that Church Court were a highway. It was then suggested that *if* the Claimant were to submit that Church Court had been dedicated in accordance with section 31 of the Highways Act 1980, then the owner of Church Court would be unlikely to object and the Claimant would be able to show that Church Court was a highway.
39. I consider that it is not open to the Claimant to challenge the judge’s decision by relying on the suggestion that Church Court might after all be a highway. In the County Court it was accepted on both sides that Church Court was not a highway. There was no suggestion at the trial that the user of Church Court for repassing or repassing or for parking had resulted in Church Court being dedicated and accepted as a highway. The evidence was not directed to that question and the point now being raised was not investigated at the trial. In addition, this submission is not advanced in the Claimant’s Appellant’s Notice and I do not have any findings of the judge which would allow me to rule on whether Church Court was a highway.
40. Even if Church Court were a highway, there would be a separate question as to whether the Defendant and her predecessors in title had a right to park there. I note that in some circumstances, parking on a highway may amount to a nuisance: see Halsbury’s Laws, 5th ed., 2019 Reissue, vol. 55, Highways, at para. 358, citing *Dymond v Pearce* [1972] 1 QB 496; the position may be different in the case of parking by a frontager.
41. Accordingly, as was common ground in the County Court, I will proceed on the basis that Church Court was not a highway.
42. It was not suggested in the County Court that the user in question was with the permission of the owner of Church Court. Indeed, the judge made a finding to the contrary effect. In so far as it might be said that the owner of Church Court tolerated

the user, any such toleration does not confer a lawful right to continue the user and is not inconsistent with, but rather an example of, acquiescence by the owner of the putative servient tenement, which is the foundation of prescription, as explained in *Mills v Silver*.

43. The above reasoning means that parking by the public in Church Court was not lawful. Therefore, the Claimant's suggestion that the Defendant and her predecessors in title parked in Church Court in their capacity as members of the general public does not provide a lawful origin for the user relied on. Accordingly, on the analysis so far, the only identified lawful origin for the user relied upon is a notional grant of an easement of parking appurtenant to the Defendant's land.
44. I next need to consider the decision in *Le Strange v Pettefar*, which is the mainstay of the Claimant's submission under this head. The facts in that case can be summarised as follows:
 - (1) the Plaintiff was the owner of an estate in Norfolk which included the foreshore at Heacham and adjoining land;
 - (2) there were a number of bungalows and beach huts on the foreshore;
 - (3) the bungalows and beach huts had been let and sub-let to various persons;
 - (4) one of the bungalows had been sub-let to the Defendant;
 - (5) a road leading to the foreshore was used by various persons for the purpose of reaching the foreshore, the bungalows and the huts and for loading and unloading vessels in the Heacham River;
 - (6) persons occupying the bungalows and the huts and members of the public had been in the habit of leaving cars on the road without objection from the Plaintiff and his predecessors in title;
 - (7) in 1937, the Plaintiff created a car park and began to charge for parking in the car park;
 - (8) later in 1937, the Defendant objected to paying in order to park in the car park and the Plaintiff's solicitors wrote to the Defendant stating that he would not be allowed to park without paying;
 - (9) later still in 1937, on the expiry of a headlease, the Plaintiff granted a lease of the bungalow to the Defendant;
 - (10) in 1938, the Defendant again parked on the road;
 - (11) the Plaintiff brought proceedings to prevent the Defendant parking on the road;
 - (12) the Defendant asserted by way of defence that the road was a public highway and, further, that he had an easement of parking on the road, appurtenant to the bungalow and that such an easement had, by virtue of section 62 of the Law of Property Act 1925, been granted by the 1937 lease of the bungalow.

45. The case was tried by Luxmoore LJ sitting at first instance in the Chancery Division. His judgment therefore has the authority of a decision of the High Court.
46. The following appears from the judgment in that case:
 - (1) the judge stated that the defence that the road was a highway did not appear to assist the Defendant because he was using the road for a purpose which went beyond passing and re-passing;
 - (2) he explained that the case proceeded on the basis that there were no relevant public rights;
 - (3) leading counsel for the Defendant admitted that the right claimed was not an easement; this admission is not explained but it may have been based on the view that a right to park could not be an easement;
 - (4) the Defendant argued that the ability to park on the road was a “privilege” or “advantage” within section 62 and that the other requirements of section 62 were satisfied so that the privilege or advantage was granted by the 1937 lease;
 - (5) the judge considered the meaning of the word “liberties, privileges, easements, rights and advantages” in section 62;
 - (6) in relation to all of the words quoted from section 62, the judge distinguished between a liberty, privilege, easement, right or advantage (which had to be enjoyed by a person or a body of persons or by an individual or a group of individuals) and a right etc enjoyed by all and sundry;
 - (7) the judge added that something which by sufferance no one is preventing from doing or enjoying could not be properly described as a “liberty, privilege, easement, right or advantage”;
 - (8) the judge held that the evidence did not support a finding that the Defendant in common with the other bungalow owners (and the owners of the huts) had, as a class, enjoyed the right of leave cars on the road so long as they wished to do so;
 - (9) the Plaintiff accepted that the Defendant had the right to pass and re-pass over the road and to stop a vehicle on the road for the purpose of loading and unloading;
 - (10) the judge also said that the evidence was that before the grant of the 1937 lease, the road was little used and little or no inconvenience was caused thereby and no objection was made by the owner of the soil;
 - (11) the judge held that such user as there was not confined to user by the occupiers of the bungalows and huts; if any member of the public had stood his car on the road, no one would have objected to that;
 - (12) the judge held that the Defendant left his car on the road without any objection from the owner of the soil “not because he was the occupier of a bungalow, but

because the owner of the soil did not object to anyone, whether a bungalow owner or a member of the public, so doing”;

- (13) the above reasoning meant that the Defendant failed to establish the grant of a privilege or advantage by virtue of section 62;
 - (14) the judge then made the assumption that the above reasoning was wrong and held, in the alternative, that any permission to park on the road in existence before the grant of the 1937 lease had been revoked before that grant and so section 62 had not application.
47. In *Le Strange v Pettefar*, it was clearly held that, on the true construction of section 62, a “privilege” was something enjoyed by a person or a body of persons, as distinct from all and sundry. The same reasoning was applied to the word “easement” in section 62. Insofar as the case deals with the meaning of “easement” in section 62, it is plainly right and perhaps ought to go further because, in order to be an easement, the right claimed must be appurtenant to a particular dominant tenement.
 48. *Le Strange v Pettefar* was not, of course, a case which considered the acquisition of easements by prescription. The Defendant (in that case) did not claim an easement acquired by prescription and indeed accepted that the right claimed was not in the nature of an easement. Accordingly, there is nothing in that case which discusses the principles to be applied in the present case.
 49. The Claimant submits that I ought to take the view, assisted by the approach taken in *Le Strange v Pettefar*, that when the Defendant and her predecessors in title parked in Church Court they were doing so in their capacity as members of the general public and not on account of any connection with the ownership of 67 High Street. However, as explained, that suggestion does not produce the result that their parking in Church Court had a lawful origin. The fact remains that the only lawful origin for the user relied upon is a notional grant of an easement of parking.
 50. In any event, I do not consider that that is reasonable to hold that the Defendant and her predecessors in title parked in Church Court merely as members of the public and not for the benefit of their property at 67 High Street. I bear in mind that the Claimant accepts that the Defendant has a right of way, acquired by prescription, to pass and repass over Church Court; the judge so declared and there is no appeal against that part of his decision. This means that when the Defendant drives her car into Church Court, she is doing so in her capacity as someone asserting a right in the nature of an easement for the benefit of her property at 67 High Street. Pursuant to her right of way, she has a right to stop in Church Court for the purpose of loading and unloading; that also would be a right for the benefit of her ownership of 67 High Street. However, the Claimant’s suggestion involves holding that when the Defendant locks her car and leaves it there for a period of time and walks to 67 High Street, she is no longer asserting a right for the benefit of 67 High Street but is simply acting as member of the public would act. The first objection to that is that it is completely unrealistic to distinguish between the Defendant’s actions when passing and repassing and loading and unloading on the one hand and parking on the other. The other objection is that the parking by members of the public is not for a purpose connected with 67 High Street whereas parking by the Defendant is for that purpose.

51. I have considered, in relation to Church Court, what the legal position would be if there were members of the public who could demonstrate that they had continuously parked in Church Court for a period of 20 years or more at the same time as the Defendant and her predecessors in title parked there. In the case of the members of the public, it would not be open to them to claim they had acquired an easement of parking, by prescription. It would not be possible to say that their parking had a lawful origin by reason of a notional grant of an easement appurtenant to a particular dominant tenement. Those members of the public would not be able to show that they were parking in a way which accommodated a particular dominant tenement because the reason for their parking there would be, for example, that Church Court was near to the centre of Stamford and the shops and various premises which they wished to visit. However, I do not see how the fact that members of the public would not be able to claim an easement of parking, because of the lack of a dominant tenement, should defeat the claim of someone like the Defendant who is able to show that the claimed right to park does, and in an obvious way, accommodate a particular dominant tenement.
52. Having considered *Le Strange v Pettefar*, I find that it does not assist me in applying the legal principles as to prescription to the facts of this case. It is abundantly clear in this case that, when the Defendant and her predecessors in title parked in Church Court, they were doing so in the assertion of a right for the benefit of 67 High Street and in a way which was different from members of the public parking in Church Court in order to gain access to the centre of Stamford.
53. For the sake of completeness, I should say that both counsel conducted very considerable research in order to see if the decision in *Le Strange v Pettefar* had been referred to in any later case in a way which might be helpful in the present case. They have referred me to the result of that research and I am grateful to them for their industry in this respect. Although, in the event, none of the later references to *Le Strange v Pettefar* are of any real help in the present context, I will briefly refer to the results of the research, principally out of deference to the efforts of counsel.
54. In *London & Blenheim Ltd v Ladbroke Parks Ltd* [1992] 1 WLR 1278, it was said, obiter, at first instance that a right to park could be an easement and that *Le Strange v Pettefar* was not an authority to the contrary as the claim in that case had failed on the facts: see at 1286D-G. *London & Blenheim* went to the Court of Appeal (the decision on the appeal is reported at [1994] 1 WLR 31) but the Court of Appeal did not consider the question whether a right to park could be an easement and *Le Strange v Pettefar* was not mentioned.
55. In Australia and New Zealand, *Le Strange v Pettefar* had been cited with approval in connection with what had been said as to the meaning of “privilege”: see *Rees v Sinclair* (1973) [1955-1995] PNLR 56 and *Lewenberg v Victoria Legal Aid* [2005] VSC 28. The relevant passage in *Rees v Sinclair* was cited in *Sun Po Lai v Chamberlains*, Court of Appeal of New Zealand, 20 March 2005.
56. *Le Strange v Pettefar* was also referred to by the Court of Appeal in Hong Kong in *Kung Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd* [[2007] 3 HKC 206. In the Court of Appeal in Hong Kong, the court considered an express assignment of rights (which referred to “privileges”) and to a section of the relevant Ordinance which was modelled on section 62 of the Law of Property Act 1925. The Court of Appeal applied

what was said in *Le Strange v Pettefar* as to the meaning of “privilege”. The decision of the Court of Appeal was reversed by the Court of Final Appeal of Hong Kong ([2008] 6 HKC 42) but without considering the meaning of “privilege”.

57. In these circumstances, based on my earlier reasoning, I dismiss the Claimant’s appeal against the judge’s finding that the Defendant had established by prescription a general right to park in Church Court, appurtenant to her property.

Does the Defendant have a right to park in front of the doors to the laundry?

58. The judge held that the Defendant did not have a right to park in front of the doors to the laundry. The Defendant now appeals.
59. On the judge’s findings, the Claimant’s prescriptive right of way to the building which is currently used as a laundry was based on user which began in 1951 at the latest. Accordingly, the notional grant of that right of way was made in 1951 at the latest. There is no appeal by the Defendant against this finding. It is not said, for example, that parking by the Defendant or her predecessors in title had the effect that the Claimant and its predecessors in title could not show continuous use of the claimed right of way at all times after 1951.
60. On the judge’s findings, the Defendant’s prescriptive right to park somewhere in Church Court was based on user which began in 1976. Accordingly, the notional grant of that right to park was made in 1976.
61. The Claimant’s right of way was granted, notionally, before the Defendant’s notional right to park. Following the grant of a right of way to the Claimant, the owner of Church Court would not have been able to interfere with that right of way. Equally, the owner of Church Court could not grant a right to the Defendant or her predecessors in title which would have allowed them to interfere with the Claimant’s right of way.
62. The judge held that parking by the Defendant in recent years in front of the doors to the laundry is an actionable interference with the Claimant’s right of way. The Defendant asserts, on this appeal, that she has a right to park in front of the doors with the result that such parking is not an actionable interference with the Claimant’s right of way. The Defendant puts her case in three ways. First, she says:
- (1) it is possible to acquire, by prescription, a right to commit a nuisance;
 - (2) a substantial interference with a right of way is a nuisance;
 - (3) she and her predecessors in title must have been committing a nuisance by interfering with the right of way to the doors (to what is now the laundry) for the requisite period of 20 years;
 - (4) the result is that she has now acquired, by prescription, a right to interfere with the Claimant’s right of way by parking in front of the doors to the laundry.
63. The Defendant’s second submission is that the Claimant and its predecessors in title are estopped by acquiescence from complaining about an interference with the right of way which is caused by the Defendant parking in front of the doors to the laundry.

64. The Defendant's third submission is that the Claimant has been guilty of inordinate delay in seeking to enforce its rights to prevent parking in front of the doors to the laundry so that its ability to obtain an injunction to prevent such parking is barred by laches.
65. In order to consider these three submissions by the Defendant, it is not necessary to consider in any detail the legal principles which apply to the acquisition, by prescription, of a right to commit a nuisance, nor the law as to estoppel by acquiescence nor as to laches. These three submissions simply fail on the facts of this case.
66. In order for the Defendant to make good her first submission, she must demonstrate that she and her predecessors in title committed a nuisance to the Claimant and its predecessors for a period of 20 years. The judge did not find this to be the case. Indeed, he found that there was no interference with the Claimant's right of way to the doors to what is now the laundry until comparatively recent times, leading to the present litigation. There are various possible explanations as to how it came about that there was no interference with the Claimant's right of way until recent times. One explanation, supported by the judge's findings, is that for a lengthy period the Claimant and its predecessors did not require to have vehicular access up to the relevant doors. Another explanation is that the Defendant's predecessors in title parked in different places in Church Court and did not park so as to block the relevant doors. The Defendant's evidence as to parking by her predecessors in title was not specific as to where that parking was although some of the time the parking might have been in front of what is now the laundry. On this appeal, I was not shown any evidence which would undermine the judge's findings to which I have referred.
67. Similar reasoning applies to the alleged estoppel by acquiescence and to the alleged laches. On the judge's findings, it is only in recent times, since late 2018, that the Claimant has had a problem with obtaining access to the doors to the laundry and nothing has happened since then to give rise to an estoppel or a defence of laches.
68. I dismiss the Defendant's appeal against the judge's finding that she does not have a right to interfere with the Claimant's right of way to the doors to the laundry.

The adjournment of the claim to an injunction

69. In his judgment, in relation to costs, the judge referred to the Claimant's claim to an injunction and said that the Claimant had abandoned the application for an injunction.
70. Following the hearing, counsel for the parties prepared rival draft orders which they invited the judge to make. The Claimant's counsel sent a note to the judge explaining that it was not the case that the Claimant was not proceeding with the application for an injunction and the application ought to be adjourned or stayed. Counsel referred to the way in which she had explained the matter at the trial.
71. Counsel for the Defendant then sent a note to the judge saying that at the hearing the judge had said that the application for an injunction was not being proceeded with and counsel for the Claimant had not then objected. Counsel for the Defendant said that if the Claimant had then asked for the application to be adjourned or stayed he would have objected and that it would be oppressive to leave the matter hanging over the

Defendant's head. He also referred to the difficulty of hearing such an application a significant period after the trial and the further expense and uncertainty involved.

72. Counsel for the Claimant then sent a further note to the judge making the point that if the application for an injunction were not adjourned or stayed the result would simply be that the Claimant would be put to the expense of bringing fresh proceedings seeking an injunction.
73. The judge then settled an order in which he ordered that the application for an injunction would be adjourned for six months. In this way, the judge ruled on the issue as to the adjournment, having had the benefit of written submissions from the parties.
74. On her appeal against this order, the Defendant says that it was unfair of the judge to make such an order without hearing the parties. As to that, the judge did have the benefit of short written submissions from both parties.
75. The Defendant also says that the judge did not give reasons for his decision. That is true although it should also be borne in mind that his order showed that he did not accept the arguments to the contrary on behalf of the Defendant.
76. The Defendant also submitted that the appeal court should take the view that an injunction in this case would be inappropriate and the Defendant should not be restrained from interfering with the Claimant's right of way. It was said that the Claimant had brought the difficulty on itself, that the harm to the Claimant was minimal and that the grant of an injunction would be pointless because others could park in front of the doors to the laundry if the Defendant did not park there. It was also said that the Defendant had believed she was in the right in parking in front of the doors, that parking elsewhere would cause friction with her neighbours, the grant of an injunction would be oppressive and adjourning the application for an injunction would also be oppressive.
77. In view of the fact that the judge did not give reasons for his conclusion I will myself consider what order is appropriate. On that basis, I take the view that the judge was right to do what he did.
78. On my reading of the papers, the Claimant is right that it had not abandoned its claim to an injunction. It had, for what I think were good reasons, asked the court to determine the parties' rights in the hope that if it were held that the Defendant could not interfere with the Claimant's right of way, it would not be necessary to go to the length of obtaining an injunction against her but that she would give effect to the ruling of the court. Accordingly, the Claimant had throughout adopted the position that the court would only be asked to consider its application for an injunction if that really became necessary in due course.
79. The judge obviously thought that if it became necessary for the Claimant to ask the court to grant an injunction, that would be the time when the Defendant could put forward the arguments which she wished to put forward as to why there should not be an injunction. I take the same view. As to the submission that an adjournment of the application would result in continuing uncertainty and a sword of Damocles hanging over the head of the Defendant, the same situation could arise if the court refused an

injunction on the incorrect basis that the Claimant had abandoned such a claim and the Claimant later chose to seek an injunction.

80. The period of the adjournment has now expired without an application for an injunction being made. That is not a reason for allowing the Defendant's appeal on this point. If anything, it is a further reason for dismissing the appeal. I recognise that the Claimant might make an application to extend the time for it to make an application for an injunction in the present proceedings instead of bringing fresh proceeding but that is not a matter which is before me and I will say nothing further as to that possibility.

Should the appeal court declare that the Claimant does not have a right to park in Church Court?

81. The Defendant counterclaimed a declaration that the Claimant's employees, agents and visitors had no right to park in Church Court. Despite this precise formulation, referring to employees, agents and visitors, it is the Defendant's case that the Claimant does not have a right to park in Church Court and because the Claimant does not have such a right, it is not able to authorise its employees, its agents or its visitors to park.
82. The Claimant served a Defence to the Counterclaim in which it pleaded that members of the Claimant's staff reside in a property in Church Court and "in so far as there is any right to park, none being admitted, that they have the right to park along with other residents".
83. In his witness statement, Mr Hoskins, a director of the Claimant, stated that "none of us has rights to park in Church Court" thereby appearing to accept that the Claimant did not have a right to park in Church Court. Prima facie, Mr Hoskins was accepting that the position was as stated by the Defendant in her Counterclaim.
84. In her skeleton argument in the County Court, counsel for the Claimant questioned whether it would be right to grant the negative declaration sought by the Defendant when she was not the owner of Church Court. It was also said that the Claimant did not understand the basis of the negative declaration. It was said that if the general public could park in Church Court then so could the Claimant and its employees and agents. It was said that there was no possible basis on which the Defendant, being an owner of a property fronting the High Street could park and the Claimant could not.
85. In the course of the evidence, Mr Hoskins appeared to maintain his position that nobody had a right to park in Church Court but nonetheless there was considerable parking there. The evidence called on behalf of the Claimant did not set out to establish that the Claimant had acquired a right to park by prescription in reliance on twenty years user appurtenant to an identified dominant tenement. However, in the course of the evidence there were many references to the fact that the Claimant and its staff did park in Church Court. In particular, there was reference to the fact that some of the Claimant's staff lived in a property in Church Court, which I believe to be 2 Church Court.
86. At the trial, the Claimant maintained its position, relying on *Le Strange v Pettefar*, that it was not possible for the Defendant, nor seemingly for the Claimant, to acquire

an easement of parking in Church Court by prescription. The Claimant did not advance a case in the alternative to this legal submission that, if the judge rejected this submission, then the evidence justified a finding that the Claimant had acquired an easement of parking appurtenant to an identified dominant tenement.

87. The judge did not deal with the Counterclaim for a negative declaration in his ex tempore judgment. The question of the Counterclaim was raised by counsel for the Defendant immediately following that judgment and the judge said that the Claimant's right to park in Church Court had nothing to do with the Defendant and, anyway, the Claimant had said that it did not have a right to park.
88. The Defendant now appeals the judge's refusal to make the negative declaration sought by her Counterclaim. She submits:
 - (1) the Counterclaim was clearly pleaded and required to be dealt with;
 - (2) the Defence to the Counterclaim did not assert that the Claimant had a right to park;
 - (3) Mr Hoskins appeared to accept that the Claimant did not have a right to park;
 - (4) the Claimant's skeleton at the trial did not assert an easement of parking;
 - (5) the Claimant could have put forward a case, supported by the necessary evidence, in the alternative to its legal submission based on *Le Strange v Pettefar*, but did not do so;
 - (6) in effect, the Claimant elected not to try to establish an easement of parking acquired by prescription in response to the declaration counterclaimed;
 - (7) a negative declaration in this case would be of considerable assistance to the parties in defining their rights;
 - (8) as there is competition for parking in Church Court, it would be of assistance to the Defendant, who has now established a right to park there, to establish that the Claimant does not have a right to park there;
 - (9) the Defendant has locus standi to seek the negative declaration because if the Claimant asserts a right to park in Church Court in competition with the Defendant, that may result in the Claimant committing a nuisance to the Defendant by interfering with her right to park.
89. The Claimant submits that the Defendant's appeal in this respect should be dismissed and makes the following points:
 - (1) the Defendant does not have locus standi to seek a negative declaration that the Claimant has no right to park;
 - (2) in so far as the Defendant relies on the finding that she has an easement of parking that finding does not bind the owner of Church Court and that owner may be able to challenge that finding in due course;

- (3) the Defendant has the burden of proving that the Claimant does not have a right to park;
 - (4) the Claimant may be able to establish that Church Court has been dedicated as a highway and that it has a right to park there;
 - (5) the Claimant could bring proceedings against the owner of Church Court and establish that it has an easement of parking;
 - (6) it was not necessary for the Claimant to go to the trouble and expense of establishing that it had an easement of parking at a time when parking by the Claimant had not interfered with the Defendant's easement so that there was no matter in respect of which the Defendant had any claim against the Claimant;
 - (7) the Defendant did not identify any occasion in the past when parking by the Claimant had interfered with the Defendant's right to park;
 - (8) the judge did not make any finding that parking by the Claimant had, interfered, or would interfere, with the Defendant's right to park;
 - (9) the making of a negative declaration in advance of difficulties arising might be unwise and cause problems if and when later difficulties do arise.
90. The judge had two reasons for refusing to make the negative declaration sought by the Defendant. The first was that the Claimant's rights had nothing to do with her. The second reason was that the Claimant accepted that it did not have a right to park in Church Court. As to the second reason, it is now apparent from the way the matter has been argued on this appeal that the Claimant may wish to contend that it has acquired an easement of parking for the benefit of an identified dominant tenement. Thus, that second reason is no longer valid.
91. As to the first reason, it is not clear what the judge had in mind. He might have thought that the Defendant had no locus to seek the declaration because she was not the owner of Church Court. Alternatively, he may have thought that there was no evidence of any threat by the Claimant to park in Church Court in such a way as to interfere with her easement of parking and so what the Claimant did, short of interfering with her easement, had nothing to do with her.
92. It is fair to say that the judge did not have the benefit of the much more wide-ranging submissions which were made to me. In view of the lack of clarity as to the first reason he gave for refusing to grant a negative declaration, I consider that I ought to reach my own conclusion as to the right result on this point.
93. I do not accept the Claimant's submission that the burden of proving a negative lay on the Defendant. On the contrary, if the Claimant wished to defeat the Counterclaim on the merits then the burden was on it to establish a right to park.
94. As to locus, the Defendant argues that she has locus because she is entitled to obtain relief in support of her easement of parking. If there were an actual or a threatened interference by the Claimant with the Defendant's easement of parking, then I would

be inclined to agree that the Defendant had locus to seek a declaration that the Claimant's conduct was an interference with her rights. In seeking that relief, it might be appropriate for the court to determine whether the Claimant did have a right to park and, if so, whether one right to park had priority over the other (and, if so, which had priority) or whether all persons with a right to park had to share the available parking (as to that possibility, see *Jelbert v Davis* [1968] 1 WLR 589 and *Owen v Blathwayt* [2003] 1 P&CR 28, discussing when a right is non-exclusive and is to be used in common with others).

95. However, on the evidence before the judge, there had not been an actual interference by the Claimant with the Defendant's right to park nor was there any evidence of a threat of such interference.
96. I consider that there is force in the Claimant's submission that it ought not to be put to the trouble and expense of investigating and, if possible, establishing an easement of parking, if the existence or non-existence of such an easement was irrelevant to the relations between the parties. Conversely, it would have been open to the Claimant to have set out to establish such a right and it is not the role of the appeal court to rescue the Claimant from its failure to take that course.
97. I give no weight to the submission that the Claimant might be able to establish that it has a right to park in Church Court because it is already a highway. The parties fought the case in the County Court on the basis that it was not already a highway. Equally, I give no weight to the possibility that the owner of Church Court might bring proceedings in which he establishes that the Defendant does not have an easement of parking. Between the present parties, the court has held otherwise. The Claimant is bound by that finding.
98. The legal principles as to the grant of a declaration were considered in *Rolls-Royce plc v Unite the Union* [2010] 1 WLR 318 at [120] by Aikens LJ. He explained that the power of the court to grant declaratory relief is discretionary and that, in general, there must be a real and present dispute between the parties who are before the court as to the existence or extent of a legal right between them; however, the party seeking the declaration does not have to have a present cause of action against the other party. He added that, in general, each party must be affected by the court's determination of the issues concerning the legal right in question.
99. The relevant principles as to declarations were also reviewed by David Richards J in *Pavledes v Hadjisavva* [2013] 2 EGLR 123. In particular, the judge considered the earlier case of *CIP Property (AIPT) Ltd v Transport for London* [2012] EWHC 259 (Ch). David Richards J explained that in the *CIP* case the court had refused a declaration on the ground that a claim for a declaration was premature and a declaration would serve no useful purpose at that stage. David Richards J went on to hold that there was no rule of law to the effect that there had to be an actual or imminent infringement of a legal right before a declaration was made. He said that the court was concerned to see whether a declaration would serve a useful purpose and whether there were special reasons for or against the grant of a declaration.
100. I was also referred to *Well Barn Shoot Ltd v Shackleton* [2003] EWCA Civ 2 where the Court of Appeal considered an application for a negative declaration that certain

future action would not amount to an infringement of a right. The Court of Appeal upheld such a declaration on the grounds of practicality and utility.

101. In the present case, the Defendant is not the owner of Church Court and is claiming a declaration that the Claimant does not have a right to park in Church Court. Nonetheless, the Defendant is able to show that she has an easement of parking in Church Court. However, she is not able to show that the Claimant has interfered with the easement in the past or that there is a threat to interfere with that easement in the future. If the court were to make the declaration sought by the Defendant, that would not necessarily stop the Claimant from parking in Church Court. Indeed, it is likely that the Claimant will continue to park in Church Court.
102. If in the future, the Defendant were to assert that parking by the Claimant had resulted in an interference with her easement of parking, and if it was then relevant to inquire into whether the Claimant has established by prescription its own easement of parking, then the period of time which might be relevant for that purpose might include a period of time after the present time. This might produce the result that a declaration that the Claimant has not established an easement of parking up to today's date would not be conclusive as to whether the Claimant had established an easement of parking by a later date.
103. In the result, I am not satisfied that the grant of the negative declaration sought by the Defendant would be a practical or useful step for the court now to take. If, in the future, there is an issue between the parties as to an alleged interference by the Claimant with the Defendant's right to park in Church Court and the Claimant then asserts that it has acquired a right to park in Church Court which gives it a defence to such an allegation, then the court can consider all of the evidence as to the Claimant's parking in Church Court up to that time.

The costs in the county court

104. Both the Claimant and the Defendant wish to make submissions in relation to the judge's ruling that there should be no order for costs in the County Court.
105. At the end of the end of the hearing of the appeal and cross-appeal, I indicated that I would reserve my judgment and it was then agreed that the parties would make their submissions as to the costs in the County Court after the hand down of this judgment and taking it into account. Accordingly, at an appropriate point following hand down of this judgment I will hear those submissions and also deal with any other matters consequential on this judgment.