IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. 1999/J - 116

BETWEEN	**J & O OPERATORS LIMITED**	**1ST PLAINTIFF**
AND	**BEVERLEY WONG**	**2ND PLAINTIFF**
AND	**ELOISE MULLIGAN**	**3RD PLAINTIFF**
AND	**GRACE WONG**	**4TH PLAINTIFF**
AND	**THE KINGSTON & SAINT ANDREW CORPORATION**	**DEFENDANT**

Ransford Braham, Esq., and Mrs. Suzanne Risden-Foster, instructed by Livingston Alexander & Levy for the Plaintiffs; Ms. Rose Bennett and Mrs. Crislin Beecher-Bravo, instructed by Bennett & Beecher-Bravo for the Defendants.

HEARD ON: May 1, 2, 3; June 11, 12, 13; July 22, 23, 24, 2002; and May 20, 2005.

ANDERSON J.

Up until the late 1950s, horse racing, "the sport of Kings", was carried on at Knutsford Park, a vast tract of land minutes away from Cross Roads and Half Way Tree in St. Andrew. The tremendous potential for the commercial development of this area if the race track could be re-located, was recognized by entrepreneurs who then planned and executed a major commercial development, subdividing the property into over three hundred (300) commercial lots for sale to the public. The genesis of this claim by the Plaintiffs in this matter is that subdivision and development of the area into the corporate area's modern financial/commercial centre, now known as New Kingston. In order to give a visual picture of the properties involved in this dispute, a plan of the area as the development was approved and as contained in the agreed bundle, is attached to this judgment as an Exhibit.

The Plaintiffs and the Defendant in this case are all registered proprietors of parcels of land in "New Kingston". The Plaintiffs' lots are contiguous to the lot owned by the Defendant. For ease of reference, this lot which is registered at Volume 1181 Folio 613 of the Register Book of Titles, is referred to herein variously as Lot C, parking lot C and St. Lucia Way. The Plaintiffs claim that by virtue of the history of the development, they have acquired certain rights of way and other rights over the

Defendant's lot (Lot C) in respect of which they seek declarations and injunctions. They allege that in *the recent past, the Defendant corporation has established a car park that is used by members of the* public for a fee. They allege further that, as a consequence of this development, the rights which they had acquired in respect of and over the land of the Defendant, are being denied in breach of the legal *rights and they accordingly seek redress from this court. Consequently, they seek against the* Defendant, Kingston and St. Andrew, the following reliefs as set out in their endorsement and statement of claim.

ENDORSEMENT

(a) A declaration that the First Plaintiff, J & O Operators Limited, as the registered proprietor of the lots registered at Volume 957 Folios 43-49 and volume 957 Folios 50 –53 of the Register Book of Titles, that the Second Plaintiff, Beverly Wong, as the registered proprietor of the lots registered at Volume 957 Folio 54 and 55 of the Register Book of Titles, and that the Third Plaintiff, Eloise Mulligan, as the registered proprietor of the lots registered at Volume 957 Folio 57 of the Register Book of Titles, and that the Fourth Plaintiff, Grace Wong, as the registered proprietor of the lots registered at Volume 957 Folio 58 of the Register Book of Titles, respectively, are entitled to a right of way over the land described as Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and now comprised in Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles to and from the Plaintiffs' lots to the main road known as St. Lucia Avenue for the purpose of passing and re-passing by themselves, their servants, agents, licencees, visitors and tenants on foot and with horses, carriages, motor vehicles and other vehicles at all times and for all purposes.

a.a. A declaration that the first Plaintiff, J & O Operators Limited, as the registered proprietor of the lots registered at Volume 957 Folios 43-49 and volume 957 Folios 50 –53 of the Register Book of Titles, that the Second Plaintiff, Beverly Wong, as the registered proprietor of the lots registered at Volume 957 Folio 54 and 55 of the Register Book of Titles, and that the Third Plaintiff, Eloise Mulligan, as the registered proprietor of the lots registered at Volume 957 Folio 57 of the Register Book of Titles, and that the Fourth Plaintiff, Grace Wong, as the registered proprietor of the lots registered at Volume 957 Folio 58 of the Register Book of Titles, respectively, are entitled to a right of way over the land described as Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and now comprised in Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles to and from the Plaintiffs' lots to the main road known as Knutsford Boulevard for the purpose of passing and re-passing by themselves, their servants, agents, licencees, visitors and tenants on foot and with horses, carriages, motor vehicles and other vehicles at all times and for all purposes.

(b) A declaration that the first Plaintiff, J & O Operators Limited, as the registered proprietor of the lots registered at Volume 957 Folios 43-49 and volume 957 Folios 50–53 of the Register Book of Titles, that the Second Plaintiff, Beverly Wong, as the registered proprietor of the lots registered at Volume 957 Folio 54 and 55 of the Register Book of Titles, and that the Third Plaintiff, Eloise Mulligan, as the registered proprietor of the lots registered at Volume 957 Folio 57 of the Register Book of Titles, and that the Fourth Plaintiff, Grace Wong, as the registered proprietor of the lots registered at Volume 957 Folio 58 of the Register Book of Titles, respectively, are entitled to park motor vehicles on the land described as Lot C on the

Plan deposited in the Office of Titles on the 13th January 1960 and comprised in the Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles.

(c) A declaration that the Defendant is not entitled to charge or impose a fee on the Plaintiffs, their servants, agents, licencees, tenants and/or visitors for access to Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and comprised in the Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles.

(d) A declaration that the Defendant is not entitled to charge or impose a fee on the Plaintiffs, their servants, agents, licencees, tenants and/or visitors for parking on Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and comprised in the Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles.

(e) A declaration that the Defendant is not entitled to prevent, obstruct and/or otherwise impede the Plaintiffs, their servants, agents, licencees, tenants and/or visitors entry or exit from the land described as Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and comprised in the Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles.

(f) An injunction to restrain the Defendant by itself, its servants and/or agents from
   a. Interfering with the Plaintiffs, their servants, agents, licencees, visitors or tenants rights of entry on the land described as Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 comprised in the Certificate of Title registered at Volume 1181 Folio 613.
   b. Imposing on or charging any fee, money or charge to the Plaintiffs, their servants, agents licencees, visitors and tenants for entering and exiting or parking motor vehicles upon the land described as Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and comprised in the Certificate of Title registered at Volume 1181 Folio 613 of the Register Book of Titles.

   c. Preventing, stopping, or obstructing the Plaintiffs, their servants agents, licencees visitors or tenants from entering or exiting the land described as Lot C on the Plan deposited in the Office of Titles on the 13th January 1960 and comprised in the Certificate of Title registered at Volume 1181 Folio 613.

(g) Damages for trespass, nuisance, breach of the Constitution of Jamaica, breach of prescriptive rights and/or breach of contract
(h) Interest thereon at such rate as this Honourable Court may determine.
(i) Costs.
(j) Any other reliefs.

In light of the pleadings raised herein, it seems that the issues which this court must decide are as follows.

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?

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 plaintiffs' 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*?

I shall seek to determine these issues in light of the evidence which was led by the parties herein as well as to the submissions made on their behalf by their counsel. Much of the history which has given rise to these claims is articulated in the pleadings, the Statement of Claim and the Defence, and the oral testimony of the witnesses who gave evidence at the trial. I do not intend to rehearse the total testimony of the witnesses who gave oral evidence except in those cases where the testimony if accepted assists the court in establishing or disproving the validity of any legal proposition or submission by the attorneys for the parties.

The Evidence

The following summary is derived from the agreed bundle of documents as well as from the oral testimony of five witnesses who testified for the Plaintiffs and the Defendant. In 1958, the area that formerly comprised Knutsford Park was, the subject of a subdivision creating a scheme of *development that has become "New Kingston". The original development contemplated more than* three hundred (300) lots. Subdivision approval, subject to certain conditions, was granted by the Defendant in its capacity as the local authority endowed with the duty to grant or refuse such approval. *a plan of the approved subdivision that included car parks and other common areas, was subsequently* submitted to and approved by the Department of Surveys, and that plan, as so approved, was deposited with the Registrar of Titles on January 13, 1960. (This is referred to as the "Deposited Plan"). The lots

on the deposited plan are numbered and were also assigned registration numbers (Volume and Folio Numbers) upon registration by the Registrar of Titles.

The First Plaintiff is the present registered owner of lots numbered 26 to 32 of the Deposited Plan and presently registered at Volume 957 Folios 47-53 of the Register Book. These lots are bordered on their Southern side by the Defendant's Lot C. The First Plaintiff is also the registered proprietor of presently vacant lots 22-25, and registered at Volume 957 Folios 43-46. The Second Plaintiff is the owner of Lots 33 and 34 registered at Volume 957 Folios 54 and 55 of the Register Book. These lots also border Lot C on their Southern boundary. To the North of the lots 22 to 33 and between those lots and the street, Tobago Avenue to the North, are lots 10-19. These lots front on to the said Tobago Avenue and the Plaintiffs allege that the only entrances to their lots are via Lot C. The third Plaintiff is the present owner of lot 42, registered at Volume 957 Folio 57 and the Fourth Plaintiff is the owner of lot 43, registered at Volume 957 Folio 58. These latter lots, both vacant, are on the opposite side of Lot C and again the Plaintiffs allege that the only access thereto is from Lot C.

Pursuant to the terms of the original development approval granted in October 1958, the titles for the lots designated as car parks and plazas were to be "prepared in the name of the Kingston and St. Andrew Corporation from the deposited plan and handed over to the corporation". This condition was fulfilled in relation to Lot C which, as noted above, is now in the name of he Defendant. The First Plaintiff, (formerly known as John R. Wong Limited) operators of supermarkets, have constructed a supermarket on lots 26 to 32 with a small part thereof on lot 33.

Counsel for the Plaintiffs asserts that when one examines the plan, it is clear that the only access to the Plaintiffs' lots is through or over Lot C, and accordingly, they are entitled to an easement or right of way by implication or by reason of necessity. Further, it is asserted that "the Plaintiffs and their predecessors in title continuously, and/or from time immemorial, enjoyed and continue to enjoy openly, and as of right, the easements and/or rights set out in the Schedule contained in paragraph 28" of the Statement of Claim, "for themselves, their heirs, assigns and successors". It is claimed alternatively, that there has been unbroken enjoyment of the said rights for a period in excess of twenty (20) years before the commencement of the action by virtue of a "Lost Modern Grant" made to them by the Defendant's predecessors in title or by the Defendant. In the further alternative, the Plaintiffs claim that they have acquired the said easements and rights they now claim, by virtue of the Prescription Act.

The complaint of the Plaintiffs is that the Defendant in or around July or August 1999, purported to *construct a barrier across the entrance to Lot C where it faces on to St. Lucia Avenue, thereby* preventing access across the Defendants Lot C, by the Plaintiffs, their visitors, servants, agents, licencees and/or tenants, unless such persons paid a fee. Moreover, the said persons were prevented *from parking on the said Lot C unless they paid the fee now being demanded by the Defendant as a* condition of such parking.

The rights claimed by the Plaintiffs as set out in the schedule to the Statement of Claim are:-

1. *A right of way over the land described as Lot C on the Plan deposited in the Office of Titles* on the 13th of January 1960 and comprised in certificate of title registered at Volume 1181 Folio 613 of the Register Book of Titles to and from the Plaintiffs' lots to the main road known as St. Lucia Avenue for the purpose of passing and re-passing by themselves, their servants, agents, licencees, visitors and tenants on foot and with horses, carriages, motor vehicles and other vehicles at all times and for all purposes;
2. A right of way over the land described as Lot C on the Plan deposited in the Office of Titles on the 13th of January 1960 and comprised in certificate of title registered at Volume 1181 Folio 613 of the Register Book of Titles to and from the Plaintiffs' lots to the main road known as Knutsford Boulevard for the purpose of passing and re-passing by themselves, their servants, agents, licencees, visitors and tenants on foot or otherwise at all times and for all purposes;
3. A right for the Plaintiffs, their servants, agents licencees, visitors and/or tenants to park motor vehicles on the land described as Lot C on the Plan deposited in the Office of Titles on the 13th of January 1960 and comprised in certificate of title registered at Volume 1181 Folio 613 of the Register Book of Titles.

The rights being claimed are reflected in the nature of the declarations sought as set out above in this judgment.

The Defendant, for its part, admits or does not deny many of the historical facts asserted by the Plaintiffs, particularly as they relate to the origins of the development and how the Plaintiffs came to be in the position they now claim. They however, deny that Lot C is "the only access to and from the lots that front on car park C as alleged or at all", and the Defendant specifically avers that "there is access to and from lots 22 to 34 from St. Lucia Avenue and also from Tobago Avenue". The Defendant in paragraph 17 of its defence, further avers that "lots 10 to 21 have been paved, asphalted and marked out into parking lots and are utilized for the purpose of providing parking and access to and from lots 22-34 and to and from the supermarket building via St. Lucia Avenue and also via Tobago Avenue". With respect to the lots of the 3rd and 4th Plaintiffs, which lots are located on the side of Lot C opposite to lots 22 to 34, the Defendant states its view that there is alternative access via Grenada Crescent.

The Defendant also states that the areas designated as car parks or plazas were transferred to it by *virtue of the conditions expressed in the grant of development approval. As a consequence of the* aforesaid transfer conditions it took steps necessary to develop and erect a car park on Lot C. It pleads that: "This development included putting in place the infrastructure necessary to regulate and ensure *the orderly use by the public of the parking facilities provided by the Defendant". It is further denied* that a barrier and/or guards have been placed at the entrance to Car Park C or that the Plaintiffs, their servants and/or agents and/or visitors and/or licencees and/or tenants are denied access to and from the *Plaintiffs' lots or charged fees for such access. The Defendant concedes that it "employs car park* attendants who, on weekdays during the hours of 6:30 a.m. to 6:30 p.m. oversee the collection of the fees which the Defendant charges for the use of its parking facilities. Before and after those hours and *on weekends no fees are charged by the Defendant for parking in car park C". The defence also* posited that the Defendant as the registered proprietor of the lot known as Lot C is entitled to all "the rights and privileges of ownership including the beneficial use and enjoyment of the said Car Park C". *Let me state, en passant, that it does not seem to me that the Plaintiffs' claims attempt in any way to* derogate from the right of the Defendant "to exercise the rights and privileges" of the fee simple owner of real property. For it is axiomatic that even if the existence of an easement of way is established over *a servient tenement, this does not mean that the owner of that servient tenement is unable to exercise* the rights and interests of ownership. It merely means that those rights and interests are subject to such easement. Indeed, this is supported by the Defendant's written submission at page 24 which states: "*An easement does not confer proprietary rights in the land. (Page 518 Cheshire) It merely imposes a* particular restriction on the proprietary rights." Further, as the defendant's counsel has urged in their written submissions, this area of the law is replete with authorities that say that an easement cannot be *of such a nature as to absolutely deny the owner of the servient tenement the rights to beneficially* occupy his property.

For the same reason the Defendant's pleading in paragraph 28 of the Statement of Claim seems, with *respect, somewhat misconceived. The statement is to the effect that: "If, which is denied, the Plaintiffs* are entitled to access to and from the Plaintiffs' lots through parking lot C, the Defendant says that this would not give them a right to possession of all of car park C so as to deprive the Defendant of its *beneficial use and enjoyment of the said Car Park C". There is no claim in the pleadings to possession* on behalf of the plaintiffs for possession of all of car park C.

The Oral Evidence

The Plaintiffs called as witnesses, the 2nd Plaintiff who confirmed the ownership of the relevant lots, 22-34 and 42-43, as being in the names of the four plaintiffs, and gave the history of her involvement with the supermarket owned by her father, Mr. John R. Wong. She was also able to confirm from her own knowledge and involvement with the various transfers of the lots as well as the ownership of the supermarket, tracing that development to the present ownership by the first Plaintiff. According to her evidence, in the years after the opening of the supermarket, customers as well as members of the public would use St. Lucia Way, which was at all material times paved and asphalted, for parking. Her evidence was that based upon her observations, St. Lucia Way was for the use of the adjoining lot owners, including herself. She also testified of meetings between the lot owners and the Defendant's representatives at which she was present, to discuss traffic problems which had developed in the area.

The Plaintiffs also called Ena Wong Sam, a former accounting clerk who had worked with the supermarket from 1955 to 1971. She confirmed some of the earlier testimony. The Plaintiffs also called Mr. Ronald Haddad, a commissioned Land Surveyor who confirmed that it was legally necessary for each lot to have access to a public way as otherwise the lot owner would be required to trespass over the land of another proprietor. Based upon his examination, Lot C was the only access for lots 22-34 and 42 and 43. He also testified that he had had to pay when he used Car Park C within the last few days and that this was a departure from the practice he was aware of previously.

The Defendant for its part, called two witnesses. The first was Mr. Arnold Whyte, a draftsman by profession, and one who had formerly worked with the Defendant as Deputy Building Inspector, Chief Planning Officer and City Engineer. Mr. Whyte expressed the view that Car Park C was not "for the benefit of the adjoining lot owners". Though since this is the very point the judge is being asked to decide, it is not clear that the opinion is helpful. Mr. Whyte did acknowledge that since the completion of Car Park C would have been part of the infrastructure, it would have been complete, as a condition of the grant of approval by the Defendant, before the titles could have been issued to the individual purchasers. He also agreed to suggestions in cross-examination, that Lot C provided the access and seemed to give right to park to the adjoining lot owners.

The other witness called was Vinnette Byfield, a supervisor of 5 car parks operated by the Defendant in the New Kingston area, including Car Park C.

She was only able to testify as to how the car park operated and what work the Defendant did in *maintaining the property. I do not believe that this witness added anything in the context of the matters* which the court has to decide.

Let me now attempt to deal with the issues which I have suggested the court needs to answer in order *to resolve the claims being made herein.*

Have the Plaintiffs established that they are entitled to an easement being a right of way over the *Defendant's property at Lot C?*

It is by now regarded as trite law and is exemplified, inter alia, by the decision of the English Court of Appeal in ***Re Ellenborough Park (1955) 3 All E. R. 667***, that a right, in order to qualify as an easement, must have four (4) indispensable characteristics. These are:

a) There must be a dominant and a servient tenement;
b) An easement must accommodate the dominant tenement;
c) Dominant and servient owners must be different persons;
d) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

I do not need or intend go into a detailed exposition of the characteristics that define an easement, as there is no controversy between the parties as to what that animal is. For clarity and in the interest of certainty, however, I am prepared to adopt the definition proffered by Mr. Braham in his cite of Cheshire and Burns. Modern Law of Real Property, 14th Edition at page 490 and 491 thereof. This particular citation is of such seminal importance to the issue that I have to decide, that despite some reluctance, I believe that it would be useful to set it out here as a reference point for the discussion.

> "An easement is a privilege without a profit, that is to say, it is a right attached to one particular piece of land which allows the owner of that land (the dominant owner) either to use the land of another person (the servient owner) in a particular manner, as by walking over or depositing rubbish on it, or to restrict its user by that other person to a particular extent, but which does not allow him to take any part of its natural produce or its soil.
>
> Thus an easement may be either positive or negative. It is positive if it consists of a right to do something upon the land of another, as, for example, to walk or to place erections such as signboards thereon.
>
> A negative easement, on the other hand, does not permit the execution of an act, but imposes a restriction upon the use which another person may make of his land. For instances, the easement of light signifies that the servient owner must not build so as

> unreasonably to obstruct the flow of light, and again an easement of support implies that the servient owner must not interfere with his own land or building so as to disturb his neighbour's."

The passage cited continues at page 491 as follows:

> "A question that not infrequently arises is whether some right exercisable over the land of another is an easement or a right of an inferior nature, and it is a question of crucial importance. An owner may grant a number of different rights over his land to X, but it will make a world of difference to the position of X whether they are easements or not. A legal easement is a jus in rem, not a mere jus in personam; it permanently binds the land over which it is exercisable and permanently avails the land for the advantage of which it exists. If X acquires an easement either in fee simple or for a term of years absolute, he becomes the owner of an actual legal interest in the land and can enforce it against anybody who comes to the land whether by way of purchase, lease, gift or as a squatter, and whether with or without notice of the easement.

There is sufficient evidence before me, on a balance of probabilities, to hold in respect of the *requirement that there must be a servient tenement, over which the purported rights are exercisable*, and a dominant tenement for the benefit of which the easement exists, that this has been established. Further, in the instant case, it appears that the Plaintiffs' lots and the Defendant's Lot C were *originally in the common ownership of one Horace Clinton Nunes or Suburban Developments* certainly up until 1980, considerably later than when the Plaintiffs had become owners. Further, the historical evolution of the development and the successive transfers by and from the original *developer, leads me conclusively to the view that the Defendant and the respective Plaintiffs are* different persons. That issue need not detain us here.

It is also the submission of counsel for the Plaintiffs that the claimed or alleged easements, (right of *way and parking), are connected with the normal enjoyment of the Plaintiffs' lots and accommodate* those lots since Lot C, the Defendant's property provides the connection between the Plaintiffs' lots and the main road, being St. Lucia Avenue. The criterion of accommodation is according to that *submission, also fulfilled. The fourth characteristic of an easement is that it must be capable of* forming the subject matter of a grant. It is clear that in order to fulfill this requirement, there are three (3) aspects that must be satisfied. These are:-

a) *There must be certainty of description;*
b) There must be a capable Grantee; and
c) There must be a capable Grantor.

In the view of the counsel for the Plaintiffs, that tripartite criterion is also fulfilled. I shall return to the *submissions of Plaintiffs' counsel later, but I believe that it will be convenient to deal here with* submissions of Defendant's counsel dealing with the very existence of an easement of any kind.

The first of the submissions of counsel for the KSAC is that the claimed easement only arises because *of the specific method of use of the lots for the purposes of a supermarket by the First and Second* Plaintiffs (Note that in any event this would not be applicable to the Third and Fourth Plaintiffs) and that "a claim cannot attach to the use of the premises in a particular way". In essence, this is a claim *that the easement "does not accommodate the dominant tenement". However, in my view, the case* cited in support of that proposition, **Hill v Tupper 1862-73 All E.R. 696** is, with respect not helpful in determining that question. As is apparent from the comment of Evershed, M.R. on **Hill v Tupper** in ***Re Ellenborough Park***, *that case really was an attempt to set up, under the guise of an easement, a* monopoly which had no normal connection with the ordinary use of the land, but which was *merely an independent business enterprise.* (Emphasis mine)

A second submission of its counsel in relation to the question of the existence of an easement is that the Defendant, as a creature of statute, had no power to grant an easement, and accordingly, was not a capable grantor. This is because a power to grant easements is not specifically conferred upon it by the statute, and secondly, because "as the parochial authority it holds parking Lot C in trust and therefore cannot dispose of the parking lot without central government's consent". It is not at all clear to me why there is any issue of the "*disposal of Lot C*", with or without "*the approval of central government*". What is at issue is not "disposal" but the existence of an interest in or over land. Nor is any authority cited for the fact that the KSAC holds the property "on trust" for anyone. It is interesting that Defendant's counsel purports to find support for this trust argument in the evidence of Arnold Whyte for the Defendant. Mr. Whyte, in answer to counsel's question as to whether, when areas are handed over to a parochial authority for parochial purposes, the local authority would hold it for its private use. The answer given was that such area is "held in trust, meaning that it cannot be disposed of by the KSAC without central government's consent and mainly for maintenance purposes". The answer is as unhelpful as the question for there is nothing which indicates for whose benefit the trust exists. Nor, with respect, is there any proposition of law that where property is held in trust, its disposal requires the approval of anyone other than such persons who are endowed with the authority to grant such approval under the terms of the trust. There is no evidence or any inference to be drawn from any evidence that central government had such authority.

A third submission is to the effect that not only is there no capable grantor, there is also no capable grantee. *The submission is that the purported grantee is a "wide and fluctuating body of persons" and* as such is not a capable grantee. The submission is in the following terms.

> It is therefore submitted that where a claim to an easement is made by one or several members of a group of persons from this wide and fluctuating body of persons, it cannot be found that each individual claimant is a capable grantee.
>
> It is further submitted that although this action has been filed by a defined group of individual Plaintiffs, what is in issue is an area used generally by the public for access and public parking. The Plaintiffs have failed to demonstrate to the Court that they have any greater privilege to park on parking lot C than which has been and is enjoyed generally by members of the public using New Kingston or other adjoining owners.

A fourth submission is that the right claimed must be sufficiently defined and must not be too vague. Thus the Defendant's counsel argues that a right to wander at large over a servient tenement is a mere *jus spatiandi*, which is too vague to be enforced as an easement. Gilbert Kodilinye's Commonwealth Caribbean Property Law is cited as authority for this proposition. The statement at page 177 of that work is cited as follows:

> The right to use a defined pathway across the servient tenement is recognized as an easement of way, but the right to wander at large for recreation has always been considered to be too vague and uncertain to be an easement.

The court, it seems, is being urged to hold that the nature of the right being claimed by the Plaintiffs *here is, in Kodilinye's words, "the right to wander at large for recreation". I can see no evidence to* support this submission.

A fifth submission on behalf of the Defendant is that an easement is essentially a right to do an act on *land in the occupation of another, but the exercise of that right must not substantially deprive the* owner of the servient tenement of the use and enjoyment of his property. Accordingly no easement will be recognized if the effect of the exercise of the right to it is essentially a claim to joint *possession.* ***Copeland v Greenhalf [1952] 1 Ch. 489; [1952] 1 All E.R. 809*** *is cited as authority for* this proposition. In that case, the court held that a claim of an easement was so extensive that it amounted to "claiming the whole beneficial user of the strip". The right claimed, in Upjohn J's view, *was of a "wide and undefined nature" and accordingly, could not be the subject of a proper easement.* The case **London & Blenheim Estates Limited v Ladbroke Retail Parks Limited [1993] 1 All E.R. 307** is cited with approval in support of this submission.

It may be instructive, however, that the passage cited from the headnote is to the following effect. "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 without any reasonable use of his land". As part

of this submission it was urged that the Plaintiffs could not acquire an easement to park in particular *spots on the defendant's land as that would "amount to a claim to possession of the whole of the* servient space". Finally, it was submitted: "The Plaintiffs cannot successfully claim an entitlement to a specific and private right which is and has been equally exercised and can be equally exercised by *any member of the public. Thus, according to this submission, the following would be the case. Let us* assume that A is the owner of Blackacre bounded on three sides, East, West and South, by the land of others. And let us assume further that the people of the village to the South of Blackacre had *historically used a path across the land to get to their village. A then purports to subdivide his property* selling the southern half to B, the only access to which is across the now Northern half of Blackacre. Can it be doubted that in the event that A now sought to build a wall across the path, both the villagers *and B could maintain separate actions in respect of their specific rights which are co-existent but not* coterminous? See for example, the following cases cited by the attorney for the Plaintiffs: **Walsh v Oates (1953) 1 All E.R. 963; Wells v London, Tilbury & Southend Railway Company (1877) V *Ch., 126; Brownlo v Tomlinson, Walker and Clayton (1840) 1 Man. & G., 423.***

In relation to the above submissions by Ms. Bennett, Mr. Braham adopts the submissions made in his *opening. In particular, in relation to the first submission of defendant's counsel, Mr. Braham accepts* that it is a principle of law that an easement must be connected with the normal enjoyment of the land, and in that way is said to accommodate the dominant tenement. He asserts that it is clear that this is the *case here. He cited Cheshire & Burns and, I apprehend, the particular section cited in his opening to* the following effect:

> "It *is* a fundamental principle that an easement must not only be appurtenant to a dominant tenement, but must also be connected with the normal enjoyment of the tenement. There must be a direct nexus between the enjoyment of the right and the user of the dominant tenement. This requirement has been stated in various ways.
>
> > An easement must be connected with the enjoyment of the dominant tenement and must be for its benefit. It must have some natural connection with the estate, as being for its benefit. The incident sought to be annexed, so that the *assignee* of the land may take advantage of it, must be beneficial to the land *in* respect of the ownership.
>
> To take a simple example, a right of way in order to rank as an easement need not lead right up to the dominant tenement, but it must at least have some natural connection with it.
> You cannot, remarked Byles, J. have a right of way over land in Kent appurtenant to an estate in Northumberland, for a right of way in Kent cannot possibly be advantageous to Northumberland land.
>
> We may expand the statement of the principle thus: a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the

> dominant tenement, and is reasonably necessary for the better enjoyment of the tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties.
>
> Whether the necessary nexus exists depends upon the nature of the dominant tenement and the nature of the right alleged. If, for example, the dominant tenement is a residential house and if there is annexed to it by express grant a right to use an adjoining garden for purposes of relaxation and pleasure, this is a clear case where the right is sufficiently connected with the normal enjoyment of the house to rank as an easement. The fact that the right enhances the value of the dominant tenement is a relevant, but not a decisive, consideration. ..."

The evidence which the Court accepts in relation to this point is that the respective tenements are sufficiently proximate and that the claimed right is "sufficiently connected with the use" of the Plaintiff's properties as to satisfy the question of accommodation.

In so far as it relates to the submission that the Defendant is not a proper grantor, because it holds the land on trust and also because it has no power under the statute creating it to grant easements, I have already indicated the Court's view about the evidence of Mr. Whyte not assisting the Court. Interestingly, there is no averment in the Defence of a trust. The Plaintiff also submits that the Defendant is not precluded under the KSAC Act from granting easements. Further, given the terms of the Registration of Titles Act, the Defendant is bound by the law relating to the grant of easements. The RTA makes it quite clear that the purchaser of land under the Act takes the property "subject to any easement acquired by enjoyment or user or subsisting over or upon or affecting the land". Even if it were relevant, and the submission was that it was not, the Defendant had not placed a caveat on the title before 1984 when Lot C was transferred to it to put other potential registered proprietors on notice concerning its alleged equitable interest. Finally, the court accepts the Plaintiffs' counsel's submission that in any event, the Defendant was never required to make a grant of any easement because at the time of the sale and transfer of the Plaintiffs' lots, Lot C was still owned by the registered proprietor of all the lands set out in the subdivision, at least up until September 1980. The KSAC did not get registered title until 1984. The easement therefore arose, if at all, (and certainly as it may be considered an easement of necessity), prior to the Defendant and the present Plaintiffs becoming registered proprietors. The grantor and grantees in this scenario are the predecessors in title to the Plaintiffs and the Defendant and I so hold.

The Defendant's counsel has also submitted that there was no capable grantee because the alleged *grantee consisted of a vague, fluctuating body of persons, although it is conceded by her, that this suit* is by the defined owners of the Plaintiffs' lots. I have already indicated that, with respect, I do not regard that as a correct position.

With respect to the Defendant's fourth and fifth submissions referred to above, the court accepts, firstly, that an easement must be definite/defined. This is not, however, a case where the owner of the dominant tenement is seeking a right to "wander at large for recreation" over a park or field, which is considered too vague (jus spatiandi). There is also clear authority for the proposition that the exercise of rights under an easement ought not to deprive the grantor of the rights to enjoy land. In **Copeland v Greenhalf [1952] 1Ch. 489** cited by the Defendant's counsel, it was held that a right exercised was too extensive to constitute an easement in law, as it amounted practically to a claim to the whole beneficial user of that part of the strip of land over which it had been exercised. Similarly, in a case dealing with parking, **London & Blenheim Estates Limited v Ladbroke Retail Parks Limited [1993] 1 All E.R. 307, affirmed [1993] 4 All E.R. 157**, it was 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*". (My emphasis) Defendant's counsel makes the point citing Halsbury's 4th Edition, Volume 14 para 18:

> "A right which amounts to a right of joint occupation or which substantially deprives the servient owner of proprietorship or possession cannot be an easement".

It is clear that in that case, the claim sought what was in effect joint-user of the servient tenement. While I accept that this is a correct statement of the law, it does not appear to be the case here, that the easement claimed would necessarily amount to a claim for joint possession or would substantially deprive the owner of the servient tenement of proprietorship or ownership of the servient tenement. There is, to be fair, no evidence that the effect of the exercise of the Plaintiffs' purported easement would lead to the appropriation of the whole of car park C. Accordingly, I have come to the view that on a balance of probabilities, neither of these principles is breached and would hold that neither submission is adequate to lead to a finding that there is no easement.

Ms. Bennett for the Defendant, submitted that notwithstanding that the characteristics required by an easement are found to exist, there are three situations where "it is unlikely that an easement will be found to exist". Cheshire & Burns (pages 526-528) is cited as authority for that proposition. The situations are:

1) The easement must not involve the servient owner in any expenditure. (Except for fencing and except where the parties have expressly agreed that the servient owner shall bear the burden.) Pages 526 &527

2) Where easement is negative. Where the easement is negative. (i.e. it gives the dominant owner a right to stop the servient owner from doing something on the servient owner's land) (Cheshire & Burns page 527)

3) Exclusive or joint user. "No right will be recognized as an easement which is in effect a claim to exclusive or joint user of the servient tenement." *[(Copeland v Greenhalf)* (1952) Ch 488 (Cheshire pages 526-528)

Defendant's counsel at this time is seeking to further challenge the Plaintiffs' rights to an easement on these bases. There is no authority cited in support of No.1 above. However with respect to Nos. 2 and 3, counsel, in written submissions, asserts:

Negativity

It is unlikely that an Easement will be found to exist where the servient owner is prevented from doing something on his own land. The easement being claimed by the plaintiffs herein will in effect deprive the Defendant KSAC from improving, maintaining and regulating the use of the Parking Lot by itself and by others and from recovering the costs associated with these activities.

Exclusive or Joint User

It is submitted that in the present instance it is unlikely that an easement will be found to exist as the Plaintiffs' claim is in effect a claim to exclusive or joint user of the premises. Such was the finding made in Copeland v Greenhalf referred to earlier, where it was stated inter alia:

"This claim really amounts to a claim to a joint user of the land by the defendant. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner, or, at any rate, to a joint user".

Ms. Bennett also found support for her position in two cases which she cited:

In **Thomas W Ward v Alexander Bruce (Grays) Ltd (1959) 2 Lloyds Rep 472 at page 477** the Court held that:

The right to ground ships on silt in defendant's dock in the course of plaintiff's business as shipbrokers was not an easement.

Harman LJ stated that "it involves an almost complete exclusion of the alleged servient owner." (Cheshire -page 528) (My emphasis)

In **Ross v Cable and Wireless (W.I.) Limited and Attorney General [1952-79] C.I.L.R. 240** Graham-Perkins, Ag. J stated:

> "I note, parenthetically that both the plaintiff and his legal advisers appear to have laboured under the serious misapprehension that the right of way enjoyed by the plaintiff gave him the exclusive use of that part of the servient land over which the right was exercised. This can never be so and have never been so. *No right to which attaches the characteristics of an easement of way and which would seek to prevent the servient owner, for example, from making ordinary use of his land can ever be acquired by prescription.*" [Page 248] (My emphasis)

The Defendant's submissions on this point conclude:

> It is our contention that the Plaintiffs are not entitled to an easement. And, further that even if it were to be found that a valid easement exists it is submitted that the authorities and the *law clearly show that the Defendant is entitled to impose a fee for both parking and/or for* the general upkeep of the parking lot.

In my judgment, these submissions add nothing to those previously made and it will be apparent on a *reading of this judgment, that I have already expressed my view in relation to these submissions and* these authorities, as they affect the instant case.

The Acquisition of Easements.

Before proceeding, I think it is appropriate to examine whether there has been a proper grant of any easement as is argued for by the Plaintiffs, or whether the claim must fail because the grant cannot be established. It will be recalled that a right over land cannot exist as an easement unless it is capable of *forming the subject matter of a grant. It is submitted by the Plaintiffs' counsel that:*

> "An easement for a right of way and parking may be granted by way of implication where the description of the land being sold or transferred makes it clear that it was the intention of the parties to the transaction to grant that particular easement".

The submission continues:

> If the land being described as abutting a particular piece of land or being bound by a street or a way, and this piece of land is owned by the transferor, it would be an implication of the law that the parties intended to permit the purchaser to access this land by the street or way so described.
>
> It is further submitted that where land is sold by description with reference to a plan and on an examination of that plan it is clear that access to the land sold is by way of land still retained by the vendor, the law will imply an easement of way or right of way over the land which is an apparent access to the land sold.
> Similarly if the land sold is described by way of plan and there is an area marked 'car park' the purchase would have acquired a right to park or an easement by implication. This grant of easement or right by way of implication has nothing to do with the doctrine of necessity and/or easement of necessity. A grant of right of way or parking may be made by implication even though there may be other places for parking or other means of accessing to the premises.

Plaintiffs' counsel cites in support of the submissions above, the Australian text, **Voumard, The sale of Land in Victoria, 4th Edition, by P.N. Wikrama-Nayake, pages 251-254,** *which is quoted* extensively. In particular, counsel cites the following 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 a description does not in itself however imply that the 'street', 'road' or 'way' *is* of any particular width.
>
> The right here referred to arises either by implication from the words used to describe the land, for example, as 'abutting on' or 'bounded by' or 'having a frontage to' a 'street', 'road' or 'lane', or else by reason of an estoppel arising upon the construction of the contract which prevents a vendor, as against his purchaser, from denying that land which *is* described as a 'street' 'road' or 'lane' *is* in fact such. This principle has been applied by the High Court to a case under the New South Wales Real Property Act 1900 (corresponding to the Transfer of Land Act in Victoria). The land comprised in the transfer and in the certificate of title was shown by the plan on the instrument of transfer as abutting on certain other land belonging to the transferor marked with the words '20 ft lane', and it was described as 'All that piece of land ...as shown on the plan hereon...'. It was held that, although there was no mention of an easement either in the transfer or in the certificate of title which was subsequently issued, the purchaser became entitled to a right of way over the land marked as a 'lane' on the ground that the grant of a right of way was inherent in the very words on the description of the land.

Plaintiffs' counsel finds further support for the submission in **Gale on Easements, 16th Edition by Jonathan Gaunt, Q.C. and Paul Morgan, Q.C.,** *and in so doing also purports to distinguish the* grant by way of implication from that by way of necessity The learned authors cited the case of **Espley v Wilkes [1872] Vol. 8 L.R. Ex., at page 298,** in which there was a demise by lease of certain property bounded by "newly-made streets". Although there was another way of accessing the demised premises, the court held per **Kelly, C.B.** that:

> "The lessor is estopped from denying that there are streets which are in fact ways, and which run along the North and the West front of the houses to be built on the demised lands, including the defendant's house, and of which the streets or ways claimed in the plea to this action is a part".

Mr. Braham also cited **Rudd v Bowles [1912] 2 Ch., page 660**, where a strip of land, while reflected in a plan of an area demised to the Plaintiff for the purpose of constructing houses under a building agreement, was not contained in the leases. Nor was the strip described as a road or way on the plan. The court held that it could imply an intention to grant a way by looking at the plan. Neville J., in giving the decision of the Court said:

> "I have no doubt, and I do not think anyone capable of reading a plan at all would have any doubt, that it was intended to denote a way or passage, either made or intended to be made, along the northern boundary of the plots upon which the houses had been built".

Finally, counsel cited the Australian case of **Dabbs v Seaman [1925] 36 C.L.R. 538** which was to a *similar effect with respect to a description of a strip of land as being a "twenty-foot lane".* A subsequent purchaser of the lot adjoining the lane was entitled to enforce a claim that, based upon the description, a right of way was to be implied against the original vendor of the block of land which *was thereafter subdivided and the relevant portion transferred without any mention of the existence of* any easement.

Counsel then reviewed the evidence of Beverley Wong, Ronald Haddad and Ena Wong Sang on the *issues of the properties being inspected before the purchase by John R. Wong and the description on* the plans and the transfers, which adopt the descriptions in the plans, both as approved and deposited at the Office of the Registrar of Titles and concluded that by virtue of the descriptions, the Plaintiffs *are entitled to a right of way over, and an easement to park motor vehicles on, Lot C. He then invites* the court to find the following as facts.

1. That the Defendant's lot is known as Lot C or St. Lucia Way.
2. *The Plaintiffs' lots from Lots 22 -34, 42 and 43 all front on Lot C or St. Lucia Way.*
3. On a perusal of the sub-division plan and particularly the deposited plan, Lot C clearly is marked and referred to as car park.
4. *On the sub-division plan and particularly the deposited plan, it is clear and obvious that* Lot C provided a means of access to and from St. Lucia Avenue via Lot C to the Plaintiffs' respective lots and the other lots which similarly fronts on the said lot C.
5. *The access from St. Lucia Avenue, from the plan, is wide enough to accommodate both* motor vehicles and pedestrian and indeed the width of lot C is 80 feet.
6. That there was access for at least pedestrians from Knutsford Boulevard via, lot C to and *from the Plaintiffs' respective lots and for the other lots which front on lot C.*
7. That in 1961 when the First Plaintiffs' predecessor in title first purchased lots 20, 21, 33 and 34 and 1968 when the First Plaintiff first purchased its lots, lot C was asphalted and *formed an obvious roadway providing access for vehicular and pedestrian traffic from St.* Lucia Avenue via lot C to and from the lots, including the Plaintiffs' lots, that front on Lot C.
8. *That as from 1968, at least pedestrian traffic, access was permissible from Knutsford* Boulevard via lot C to and from the Plaintiffs' lots and the other lots that lot C.

9. That by virtue of its obvious size and width as compared with the other main roads, such as *Tobago Avenue, St. Lucia Avenue, lot C was obviously designed to be a car park in* addition to an access way.

In opposition to this, counsel for the Defendant submits that an easement by way of implied grant can *only occur where there was a prior common owner of two or more pieces of land, and the land is* subsequently splintered, sub-divided or otherwise severed. She further submitted, *inter alia*, that Rudd v Bowles was distinguishable and that, in any event, none of the Plaintiffs acquired any of their lots *from the Defendant. This last submission is misconceived in that it is trite law that easements run with* the land and would be enforceable by or against subsequent owners of the dominant and servient tenements. Another submission from the written submissions, was to the following effect:

> "*On each occasion when the Plaintiffs acquired their respective lots, whoever held the* legal title would not have been a capable grantor, as Parking Lot C would have been held on behalf of the K.S.A.C. Nor could a common intention to create an implied easement in favour of each or any of these lots be said to arise in respect of parking (on) Lot C, on *these facts. It is clear on the evidence before the court that K.S.A.C. (who was the* equitable owner of Parking Lot C prior to transfer in 1983) was not a party to any of the transactions which resulted in transfer of ownership of any of the lots to the Plaintiffs".

This double submission not only seems to repeat the misconception referred to above but is, with respect, inconsistent with the principles of the Torrens System of registration which is reflected in our Registration of Titles Act.

I accept the submission by Plaintiffs' counsel that there is evidence to support the findings of fact suggested by him at 1-9 immediately above. I also accept, in particular, that based upon the agreed documents and the oral evidence, that the original owner of the Plaintiffs' lots was one Horace Clinton Nunes and that the transfers were done from him to various other persons including the Plaintiffs, at the direction of Suburban who had acquired an equitable ownership of the development. Nevertheless, it must be obvious on an examination of all the cases cited that they relate only to rights of way and not to anything else. While I am prepared to hold, on a balance of probabilities that the Plaintiffs are entitled to an easement of way by implication, it seems to me that the cases cited would be 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. Let me add further, that the submission that because the car park is described as a "car park" and the witness Beverley Wong *thought it meant* that the adjacent lot owners would have a right to park thereon, somehow elevates that fact to an easement, is fanciful. The question may well be asked: What if the description of the lot had said "Church" or

"Club" or "School"? Could it be argued that some right would have arisen thereby to have the *described institution placed there and be maintained by the Defendant or its successor in title*? I think not, and Ms. Bennett properly submits that mere notice "does not equate common intention".

If I am wrong in my holding above, I move to the second basis of the claim for a right of way by the *Plaintiffs. Plaintiffs' attorney says, in the alternative, that the Plaintiffs are entitled to rely upon the* rule in **Wheeldon v Burrows [1878] 12 Ch. D. 31**, to establish the grant of an easement of way. The principles underlying this rule were set out in the dicta of Thesiger L.J. at page 49 of the judgment.

> On the grant by the owner of a tenement of a part of that tenement as it is often used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easement) or in other words all those easements which are necessary to 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.

The second part of Thesiger L.J.'s dicta which is important in understanding the rule is found at pages *58-59 of the judgment. After a review of cases, he states:*

> These cases.... support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land".

It seems clear that the doctrine of Wheeldon v Burrows may have application to the instant matter *before me. However, I am a little confused by the Plaintiffs' counsel's submission on the point which* is in the following terms.

> "It is submitted that where it is apparent at the time of sale that certain lands retained by the vendor formed apparent and continuous easements, the court ought to imply that such easements were in fact granted to the purchaser as in the case of the Plaintiffs".

It is not clear to me what is meant by the phrase, "certain lands retained by the vendor formed *apparent and continuous easements". In an article* ***"Problems postponed: The Rule in Wheeldon v Burrows and Wheeler v Saunders (copyright 1996, first published in Web Journal of Current Legal Issues in association with Blackstone Press Ltd.),*** Graham Ferris, lecturer in Law at Sheffield *University makes the point that there are two tests in Thesiger L.J.'s dicta. The first is the "continuous* and apparent" test, and the second is the "necessary to the reasonable enjoyment" test. He is of the view that while the first test requires some physical signs of the existence of the easement, the second

test requires a quasi-easement to be necessary to the reasonable enjoyment of the property granted. ***Wheeler v Saunders, [1995] 2 All E.R. 697*** *in which the court denied the claim for an implied grant* of an easement on the basis that it failed to satisfy the second test, that is, it was reasonably necessary for the enjoyment of the granted property, is cited by Ms. Bennett as supporting her submission that no *easement is available to the Plaintiffs here under* ***Wheeldon v Burrows***.

In Wheeler v Saunders, the facts were as follows:

> The plaintiffs bought a farmhouse on land adjacent to a pig farm operated by the first two defendants. Both the plaintiffs' property and the farmland were formerly in common ownership. There were two means of access to the plaintiffs' property, one of which could only be reached by crossing a part of the defendants' land. However, there was no express right of way across that land in the conveyance, and the defendants took the view that the plaintiffs were not entitled to use it and blocked it off with a wall.
>
> HELD: The class of easements implied in favour of a grantee included easements necessary to the reasonable enjoyment of the property granted and which had been and were at the time of the grant used by the owners of the entirety for the benefit of the part granted. On the facts, the south entrance to the plaintiffs' property was not necessary for its reasonable enjoyment since the east entrance would do just as well. It followed that the plaintiffs acquired no right of way through the south entrance by necessary implication.

Ferris, in his article, noted that there was an ambiguity in the dicta in the two tests Thesiger L.J. had *articulated, and the courts and academic writers had long been involved in controversy over the* relationship between them. Despite this awareness, the court, however in Wheeler had:

> "treated the matter as if it were de novo. Neither judge referred to the case law or academic comment beyond a reference to Megarry and Wade (1984) by Gibson L.J. and the only cases cited in argument were **Wheeldon v Burrows,** and **Sovmots v Secretary of State for the Environment, Brompton Securities Ltd v Secretary of State for the Environment [1979] AC 144 (HL)".**

Ferris continued:

> "The majority judgment in Wheeler v Saunders is important because it is the first English decision since Goldberg v Edwards [1959] 1 Ch 247 in which the Second Test has *operated independently to prevent the implication of the right of way. There have been few* cases in which the courts have felt that the application of the two tests produced different results, and the ambiguity in Thesiger L.J.'s dictum only becomes vital when the two tests do not produce the same result".

Ferris suggested that there are three possible readings or interpretations of the two tests. One is that they are synonymous; secondly, that they may be applied disjunctively and so in the alternative, and thirdly that they are to be read "conjunctively" and therefore must both be satisfied. He adds that:

> "In considering the meaning of the second test judges since Wheeldon v Burrows have often found Thesiger L.J's formulation unclear, and its application difficult. **Goulding J.** remarked in **Horn v Hiscock [1972] EGD 663 at page 667**: [it is] always a question of difficulty whether a right of way that was not absolutely necessary and yet afforded more convenience was necessary for reasonable or reasonable and convenient enjoyment". As a result, the second test has often, as in **Horn v Hiscock,** been glossed. One influential gloss is that coined by **Lord Campbell** in **Ewart v Cochrane [1861] 7 Jur NS 925, 4 Macq 117, 10 WR 3** and adopted by Cozens-Hardy in **Schwann v Cotton [1916] 2 Ch 459.** This requires a quasi-easement to provide "convenient and comfortable enjoyment of the property"".

Without necessarily adopting one reading over another, Ferris forms the view that the Second Test "has not normally been stressed in cases involving rights of way". It is a view with which I agree and accordingly adopt. In those circumstances, it would seem that once it was established that there had been unity of ownership of the now severed tenements and that the quasi-easement had been continuous and apparent in the sense that there was some physical manifestation of the quasi-easement, the first of Thesiger LJ's tests would have been satisfied and the grant of the easement should be implied. I have elsewhere indicated my finding of the prior unity of ownership of the lands subject of the approval and the deposit at the Office of the Registrar. There was also evidence from at least the Defendant's witness, Mr. Wyhte, that there is a length of sidewalk approximately ten feet wide running along the side of lot C between St. Lucia Avenue and Knutsford Boulevard. I believe that it is open to the court to take the view that a "sidewalk" is for persons to walk upon. I hold that this would be a sufficient "physical indication" for the purposes of the first test in Wheeldon, and I hold that the grant under Wheeldon v Burrows, as far as it relates to a right of way, has been established. I note, *en passant*, that while it was not strictly necessary for the purposes of this judgment to go into details about Wheeldon, I have done so because it appears to me that neither side fully appreciated the nature of the Rule in that case.

Scheme of Development

Plaintiffs' counsel also asks the court to find that the development as approved and as the plan was deposited, represented a scheme of development pursuant to which the developer and the development had proceeded along with the conditions imposed by the Defendant as the local authority. He invited *the court to apply by analogy, the law relating to restrictive covenants and to apply similar rules to* easement and to hold that the parties are now bound in a way similar to that which it would be in relation to restrictive covenants under schemes of development. I respectfully decline to pursue that *submission, as I do not believe that it adds anything to the other submissions in this case.*

Easement By Way of Necessity

It is submitted by Plaintiffs' counsel that with respect to Lots 42 and 43, being the lots on the Southern border of Lot C, that those lots are surrounded by land which is not owned by the 3rd and 4th Plaintiffs'. Thus, in the absence of permission to use the adjoining lots for access to those two lots, the *only access is via Lot C. Counsel therefore submits that those lots are entitled to an easement of* necessity. The more common view of the easement of necessity is that it arises where the grantor disposes of land to a grantee and the grantee's land is land-locked by the grantor's land. The law will *imply an easement of necessity or otherwise the grant would be frustrated. My own view is that in this* context, the Plaintiffs may claim that they are entitled to an easement by common intention. See **Wong v Beaumont Property Trust Ltd.,[1965] 1 Q.B173; [1964] 2 All E.R. 119.** I am strengthened in this *view when I recall the evidence of Ronald Haddad, Commissioned Land Surveyor that in a* subdivision, each lot must have access to a public way, since if this was not the case, it would require the lot owner to trespass over the land of another. The developer in seeking approval to subdivide the *property and secure registered titles, must have been of the intention that exit from the Plaintiffs' lots* must necessarily be over Lot C, as in all other directions, they would cross onto lands of other registered proprietors or potentially so owned. It is instructive to note that Defendant's counsel *submitted that Lot C is a public roadway or public parking lot. If this view is correct, it would have the* effect, at Common Law, of affording the Plaintiffs a right to access the highway at any point at which his land touches the highway as well as a right of passage freely and at their will to pass and repass. If *that view is not correct, then there must have been the intention that the proprietors of lots adjoining* Lot C would have rights of ingress and egress over the said lot. For while it may be true that some of the lots (12-19) between the Plaintiffs' lots 25-32 and Tobago Avenue are in the common ownership *of the owners of the latter lots, there would be nothing to prevent alienation of lots 12-19, fronting on* Tobago Avenue to persons who would have every right to deny access across their lots.

I note the cases of **MRA Engineering Ltd., v Trimster C [1987] 56 P & CR 1; Manjang v *Drammeh [1990] 61 P & CR 194*, and *Boisson v Letrean [1989] High Court of Trinidad & Tobago No 4435 of 1985 (unreported)*** cited by Defendant's counsel. I have no difficulty with any of them. Counsel, however, makes a submission that "if the land purchased can be accessed by land *owned by a third party, or can be accessed by other land purchased by the claimant, an easement of* necessity **over the defendant's** (emphasis supplied) land cannot be said to arise". This is a submission with which I profoundly disagree. Defendant's counsel invites the court to accept the following *proposition:*

> A grant of easement by way of necessity (as with all implied easements) arises at the time of acquisition of the (landlocked) lot. This court would therefore have to consider whether at the time when each plaintiff purchased his respective lot, an easement of necessity attached only over Parking Lot C or whether it attached to any other lot or lots adjoining each of the Plaintiffs' allegedly landlocked lots. As such it is submitted that an easement of necessity would have to be implied against each and every lot which could possibly provide access to each of the Plaintiffs' alleged landlocked lot.

This submission makes clear that the concepts of grant, unity of ownership in the grantor and quasi-easement in the implication of easements, have not been appreciated.

Easement By Prescription

Plaintiffs submit that they, their tenants, licencees and invitees, have used Lot C as the access to and from St. Lucia Avenue and Knutsford Boulevard for upwards of twenty (20) years without objection from the Defendant. Their user has been without force, (nec vi) open and without stealth (nec clam), and without the permission of the owner of Lot C (nec precario). They accordingly claim an easement under the Prescription Act. In fact, the evidence is that when the supermarket was being constructed in 1968 and 1969, it was over Lot C that entry was gained to deposit construction materials onto the lots on which it was being built. Further, that while the supermarket was operated between 1969 and 1975 by John R. Wong, and even after that time when it was operated by J & O Operatins Ltd., Lot C was used for access by trucks and other vehicles. I accept Ms. Beverly Wong's evidence in this regard that even when she was away from the supermarket she would visit maybe three or four times a year. She saw user of Lot C being effected by persons walking or driving on or parking thereon. I hold that even if she herself was not able to say from her personal knowledge that user was everyday, her evidence is credible and on a balance of probabilities, I hold that user in this way was continuous. I would hold that an easement under the Prescription Act has been made out.

The Plaintiffs' counsel advised that he was not pursuing the claim based upon immemorial user. Nor do I think that there would be any purpose served by an examination of the possibility of the easement having come into existence by Lost Modern Grant. It will be clear that I have found sufficient evidence to indicate that the Plaintiffs are entitled to easements of rights of way over Lot C. The extent of those easements will be considered in the "**Argument**", below.

Can a "right to park motor vehicles" be capable of being an easement?

Although the Plaintiffs are claiming the right to park as an easement to which they are entitled, much of the Plaintiffs' counsel's argument turns on the acquisition of an easement by implication and refer to the wording of the various transfers which gave rise to ownership of the respective lands by the Plaintiffs. Ironically, many of the references to this issue are found in the Defendant's counsel's submissions. Thus the following, taken from those submissions, seems to provide a powerful argument in favour of answering the question in the affirmative. The submissions state:

> **Newman v Jones (22 March 1982, unreported)** addressed the question of whether the right to park (in circumstances where charges are made by the servient owner) was capable of existing as an easement. It was held that
>
> "A right for a landowner to park a car anywhere in a defined area nearby was capable of existing as an easement. **Nor may it be an objection that charges are made by the servient owner, whether for the parking itself or for the general upkeep of the park**." (Emphasis supplied) (Cheshire page 528)
>
> In this case, Megarry V.C. held that a right to park on the forecourt of an apartment block passed as an easement under section 62 (of the UK Law of Property Act) and said: In view of **Wright v Macadam [1949] 2 All E.R. 565**, I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area nearby is capable of existing as an easement".
>
> Also in ***London & Blenheim Estates Limited v. Ladbroke Retail Parks Limited***; Judge Paul Baker Q.C. stated:
>
> "That leaves the main point under this head whether the right to park cars can exist at all as an easement. **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." [Emphasis mine]

Ms.Bennett also called in aid Professor Kodilinye's text Commonwealth Caribbean Property Law in which it was noted that in the re Ellenborough Park case, the Court also upheld imposition of a charge for use of the park, notwithstanding that there was a valid easement.

Ms. Bennett pointed out, however, that in London & Blenheim Estates Limited v Ladbroke Retail Parks Limited [1993] 1 All E.R. 307, affirmed [1993] 4 All E.R. 157, it was 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". "A right which amounts to a right of joint occupation or which substantially deprives the servient owner of proprietorship or possession cannot be an easement".

That formulation appears to have imposed an important limitation on the right to an easement to park *on someone else's property, by insisting that the user must not be such as to deprive the owner of the* servient tenement of the right to use and enjoy his land. This is one of the findings that this court must and will make in this case, based upon the evidence provided to it. In any event it seems clear that the *question posed at the commencement of this section may, as a general proposition, be answered in the* affirmative.

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 C, 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?

I wish to deal with this issue which, while raised in the pleadings is, in my view, not central to the *main issues of this case, but on which a disproportionate amount of time was spent in the evidence of* witnesses as well as in the submissions. This is the issue of parking and the charging of fees therefor. I am not here adverting to the issue of whether there can be an easement to park on a servient tenement, *to which I have referred above. Rather, counsel for the defence as well as for the plaintiff, seemed to* consider it necessary to spend large portions of their written submissions on it; the former on the basis that establishing a control point and charging a fee is consistent with ownership of Lot C and perhaps *not inconsistent with an easement in favour of the Plaintiffs' lots, if such does exist, and the latter on* the basis that any impediment or obstruction *must* per se, be an interference with the Plaintiffs' purported right to the easement.

Since no fee is charged for mere access by foot, then the real question is: Does the imposition of a fee or charge to use Lot C for parking, contravene the rights of the Plaintiffs to the easement? It will be recalled that the Second Plaintiff admitted that she had not been charged to drive onto Lot C. Nor, as far as she was aware, was any other lot owner. And the submission on behalf of the Defendant was to the effect that no charge was imposed on such persons. If that is correct, and for these purposes I am prepared to hold that it is (despite my reference to the contradictions earlier) I would be prepared to hold that the decision to impose a fee for parking to other members of the public would not contravene necessarily the Plaintiffs' rights to their easement. It may be that such might derogate from a right which the public may have acquired, bearing in mind my earlier expressed view that public and private rights could co-exist over the same premises.

In the statement of claim, the Plaintiffs allege that from in or around July or August 1999, the *Defendant had placed barriers and/or guards at the entrance of St. Lucia Way where it meets St. Lucia* Avenue, thus preventing access to the Plaintiffs and others named in the statement of claim "from using St. Lucia Way to access the Plaintiffs' lots without the payment of a fee". In the next paragraph *of the statement of claim, the same averment is repeated in relation to the same persons being* prevented from parking on the said Lot C. Now, it may very well be just loose drafting of the statement of claim, but there was certainly no evidence led by the Plaintiffs to support the suggestion *in the statement of claim, that all persons so named, including pedestrians, were denied entry to St.* Lucia Way. Such a claim, in light of the evidence in the case, could only be sustainable if the averment about "using St. Lucia Way to access the Plaintiffs' lots", referred to vehicular traffic only. Indeed, the *second Plaintiff in her evidence confirmed that neither she nor any of the other plaintiffs had ever been* barred from entering, driving or walking on Lot C since 1999. Nor, according to that evidence were delivery trucks asked to pay parking fees. From the Plaintiffs' point of view, this allegation seems to *have been included in order to found its right to redress for breach of constitutional rights to "land", as* widely defined under the Registration of Titles Act, (the issue being expropriation rather than the issue of the right to the easement per se).

For its part, the Defendant denies that it has put a barrier or guards at the entrance to Car park C. It acknowledges that there are "car park attendants" who "oversee the collection of fees which the Defendant charges for the use of its parking facilities", between the hours of 6:30 a.m. and 6:30 p.m. on weekdays. This blanket denial with explanation seems to be a matter of semantics. The Defendant's counsel also says that the Plaintiffs cannot claim an easement over "specific parking spaces" as this would be a claim for possession of land and inconsistent with an easement. However, the evidence which I accept, is that pursuant to discussions between the Plaintiffs, particularly the first and second Plaintiffs, and the Defendant, three specific spaces were allocated to the Plaintiffs to facilitate the delivery of supplies to the supermarket run by the first Plaintiff. These spaces were marked "No Parking: Delivery Area" and were paid for by the supermarket operator, the present tenant of the first Plaintiff. If this allocation arises out of an agreement which required the tenant of the first Plaintiff to pay for the use of those spaces, it escapes me what that has to do with the question of an earlier acquisition of a right of way over the Defendant's Lot C.

At the same time, Defendant's counsel insists that the Defendant has a statutory right to impose fees for the use by the public of the parking lot and to offset the cost of maintenance. Nevertheless, she said, it had not charged fees to the Plaintiffs or its agents who deliver goods to the supermarket. And

yet, parenthetically, we find the following in the defendant's written submission, which seems to be at *variance with that denial.*

> Payment of Fees
> In the present case, while it is being denied that the Plaintiffs could be entitled to an easement to park or otherwise, the evidence is that the Plaintiffs continue to enjoy the same permitted use they have enjoyed as of the time each of their respective lots were acquired. The only change which has occurred in respect of their ability to use the parking lot is the imposition of a fee. The Plaintiffs claim that they are not only entitled to an easement to park but also that the Defendant KSAC is not entitled to charge a fee.

The Road Traffic Act was cited as being the authority for the KSAC to charge fees. As Mr. Braham *pointed out however, section 54 of that Act to which Ms. Bennett had referred, requires that the* Defendant may make rules "at the request of the Island Traffic Authority, prohibiting, restricting or regulating the parking of motor vehicles in any road, street or public place and, with the approval of *the Minister, such rules may provide for the imposition of charges for vehicles left on such road, street* or public place". Mr. Braham points out that there was no evidence led that the Island Traffic Authority made any such request of the Defendant. This would have been, in his submission, a *condition precedent to the making of such charges. Further, he submits, there is no evidence of the* Minister of Local Government having approved the purported rules nor that the rules have been published in the Jamaica Gazette, as required by the statute. In those circumstances he argues, the *court has no basis for accepting the submission as to the Defendant's right to impose charges for* parking at Lot C. Indeed, in the absence of the fulfillment of the prerequisite conditions, the rules would themselves be illegal and void. In any event, it seems to me that this aspect of the case is a *secondary issue that should be placed in that context and be dealt with supplementary to the* substantive issues.

Argument and Reliefs

One of the topics addressed by Plaintiffs' counsel in his closing submissions is captioned, "The Nature and Extent of the Easement Claimed". I would suggest that in exploring this topic, we should find an answer to the questions about the legitimacy of charges for use of Lot C.

It will have emerged from the analysis above, of whether an easement does exist and has been the subject of a proper grant that I hold that the Plaintiffs have established their rights to an easement of way over Lot C. The evidence supports the grant of an implied easement by the developer or at the very least, Suburban Developments, (in either case a capable grantor; the Plaintiffs are capable grantees), or an easement of necessity or of common intention. I also hold that the Plaintiffs have

established the grant of the easement under the first rule in Wheeldon v Burrows and also clearly *established a right acquired under the Prescription Act which only requires the enjoyment of the right,* nec vi, nec clam, nec precario for the relevant period of twenty years. Since, in my view, the user of Car Park C, both as a way and as a place for parking started, in the case of the succeeding registered *owners from at least 1968 on the evidence of the Second Plaintiff, (See the transfers from Patrick* Chung to B. Wong, 1968; H.C. Nunes to John R. Wong 1968; and transfers from Nunes to D. and D. Blake 1969 and on to John R. Wong 1970), the period of prescription commencing not less than *twenty years prior to the filing of this action, is well satisfied. Specifically, I also hold that since in a* development it is clear that every lot has to have access to a public road or way without crossing the property of another, it must be a reasonable inference that it was intended that St. Lucia Way was to be *a public way in relation to the lots surrounding it, and which lots were themselves hemmed in on three* sides by other lots with registered titles which could be transferred to other third party owners, with no connection to the Plaintiffs.

It will be remembered that Condition H of the conditions of approval of the subdivision plan as approved by the Defendant stated: "That the titles for the car parks and piazzas shall be prepared in the name of the KSAC from the deposited plan and handed over on completion". I would be loath to hold that such a condition was not intended to give, not just title, but also control, over those areas so identified. Nor does it seem to be explainable any basis other than that the local authority should be put in a position where it can regulate the flow of traffic, as well as the efficient and convenient parking thereof. Now as noted above, the Plaintiffs' counsel raised the question as to whether the Defendant did in fact receive any request from the Island Traffic Authority to promulgate rules in relation to Lot C and also whether, if such rules had been promulgated, whether they had had the approval of the Minister of Local Government and been published in the Jamaica Gazette, as to which there was no evidence. For, it was submitted, if these "prerequisites" had not been observed, then any rules pursuant to which the Defendant purported to act, would be illegal and void. If this submission is correct, it may very well be that no valid impediment exists at all to the exercise of the rights claimed by the Plaintiffs. In fact, far from having a right to sue for breach of constitutional rights (expropriation of "land"), the Plaintiffs would have a common law right to sue for money had and received, if indeed they could show that they had made payments to use the park. Let me say at once that, notwithstanding the Registration of Titles Act definition of "land" to include easements, I do not consider that the charging of fees in relation to entry upon a servient tenement, in respect of which one claims a right of way, can properly be called expropriation. Nor, in any event, assuming that there had

been an actionable breach of the Plaintiffs' right to the easement, would such be actionable *per se*, as it would not be a trespass. Nor has any evidence been led as to any damage suffered by the Plaintiffs.

It will be recalled that the reliefs sought by the Plaintiffs in the various paragraphs of its claim may be summarized as follows:

(a) Unlimited access for the Plaintiffs and named classes of persons, by foot and otherwise, to Lot C from St. Lucia Avenue

(aa) Similar access from Knutsford Boulevard

(b) Similar parking access

(c) Declaration that defendant could not charge fee to said classes for access

(d) Declaration that defendant could not in any way obstruct or impede access of said persons

(e) Injunctions to restrain Defendant from doing certain things on or with Lot C.

I am constrained to observe here that the implications of this way are different for the First and Second Plaintiff as opposed to the Third and Fourth Plaintiffs. There is evidence of the First Plaintiff being involved in a supermarket and requiring certain services which demand the exercise of the rights under the easement. I would be prepared to hold that the Second Plaintiff is in an analogous position since part of the supermarket is on part of one of her lots. There is authority for the proposition that the nature of the easement is dependent upon the nature of the activity carried out, or the use made of, the dominant tenement. In these circumstances, it is relevant to note that the use to which lots 42 and 43 are put, is different than that to which lots 25-33 are put. It should also be observed that there has been no evidence in relation to the Third and Fourth Plaintiffs, that they had any agents, licencees, tenants, and/or visitors who had exercised any rights in relation to driving on to Lot C. Indeed, the evidence of Miss Beverley Wong was that the persons using Lot C were connected with the construction and/or operation of the supermarket. Further, lots 42 and 43 are rented out for use as car parks, joined on to lots which front on Grenada Crescent. Further, as I understand the evidence, the pedestrian sidewalk on that side of Car park C would presently prevent vehicular traffic from going onto those lots from Car Park C. There is no evidence of any agents, tenants or licencees of the registered proprietors of lots 42 and 43 ever using St Lucia Way by vehicular traffic to access those lots. All the evidence of vehicular traffic is in relation to the lots upon which the supermarket is constructed or has its car park.

I should just mention en passant, that it will be recalled that the court made a visit to the locus in quo and had a chance to observe the physical layout of the various properties. It was also able to observe the position of the new main delivery area and the spaces marked "No Parking: Delivery Area". It was

apparent at the time of that visit, that there were other offices including the Office of the Contractor General, who had assigned spaces within the car park. Plaintiffs' counsel submitted that since the development was a "commercial development" then "if a right of easement of way or of parking is held by this Court to have been created, the Court ought to find that the easement and/or right created permit the Plaintiffs access to and from their lots via Lot C for all purposes by pedestrians on foot or vehicular traffic, for tradesmen, visitors, licencees, and all other usages that a commercial usage would permit. Further, at the intersection of Knutsford Boulevard and Lot C, that similar usages ought to be permitted save that this would be for pedestrian traffic only".

In order to determine whether and to what extent the Plaintiffs may be entitled to reliefs, let us assume that these declarations and injunctions were to be granted as prayed. It would be possible that at any given point in time, Lot C in its entirety could be totally occupied by the Plaintiffs and the classes of persons named in the prayer. Is it conceivable that such a state of affairs could be said <u>not</u> to be a joint-possession of the said lot with the Defendant? And could it be said that such use would not be depriving the Defendant as fee simple owner of the lot, of all of its right as such? The authorities are clear that an easement cannot be such as to deprive the fee simple owner of enjoying the normal incidents of proprietorship. I go further. It would seem to me that such unbridled user by the Plaintiffs might militate against any rights which the general public may have acquired to use Lot C as a public way. I merely make the observation here, for that is not before me and I do not purport to pronounce upon that issue.

The existence of an easement of a right of way for the Plaintiffs is, as I have indicated above, not necessarily inconsistent with the general public having acquired some right to use the said land. The question to be determined is: what is the extent of this easement? I accept the proposition implicit in the preceding paragraph that, if the extent of the easement is to give a right of joint possession to the claimant of the easement or to so encroach upon the servient tenement owner's right to use his land, then it cannot be a proper easement. The declarations sought by the Plaintiffs set out above would, in my view, if granted in each case as prayed, deprive the Defendant of the right to use its land as a fee simple owner thereof. An easement imposes limitations upon use. It does not deny use.

In relation to the extent of the relief available, a second question: assuming that the Plaintiffs and the named classes are entitled to the right of access and parking as claimed, as a practical matter, how would the Defendant be able to distinguish between those persons who properly fall within the permitted classes, without having some control at its entrance? I hold that the imposition of a fee

which is not payable by those entitled to the easement, is not a limitation of the rights of the easement holder. Nor, for the same reason, is the setting up of a barrier across the entrance, if it does not restrict the easement holder from exercising his right of way. It is clear therefore that the Plaintiffs while entitled to some declarations may not be entitled to those declarations in all the broad terms in which relief has been sought.

Let me outline where the foregoing has led me.

In regard to declaration (a), a declaration is given that all Plaintiffs are entitled to access Lot C from St. Lucia Avenue by foot as well as by motor vehicle. The First and Second Plaintiffs are also entitled to have their suppliers, agents and tenants, access the said Lot C from St. Lucia Avenue for the purpose of loading and unloading supplies or otherwise transacting business with those Plaintiffs, at any time during normal working hours. No declaration of any easement with respect to any particular spot is granted. The logistics of how the Defendant will identify those persons falling within this declaration is to be worked out between the Plaintiffs within One Month of the Date hereof.

In terms of the declaration sought at (a.a), I hold that all the Plaintiffs have a right to access over Lot C by foot from Knutsford Boulevard. I do not see how in light of the evidence the Defendant can resist this. Mr. Whyte's evidence is clear that there was always a pedestrian walkway from that roadway to the Plaintiffs' lots. I believe that it is appropriate that all the Plaintiffs be granted a declaration of a right of way for themselves, to use Lot C for the purpose of passing and re-passing in order to access the Plaintiffs' various lots by foot from the road known as Knutsford Boulevard. The First and Second Plaintiffs are also entitled to a declaration that their agents and servants or suppliers on foot, have a right of access over Lot C from Knutsford Boulevard. In truth, since there is no access or way from that road by vehicular traffic to Lot C, nor has there ever been such, the declaration sought in respect of access by horse drawn carriages and motor vehicles cannot be sustained. No such easement can be said to have ever existed.

In relation to (b) I would grant a declaration limited in terms of the following: A declaration is granted that the Plaintiffs as well as the suppliers of the First and Second Plaintiffs to park on Lot C for the purpose of transacting business with the First or Second Plaintiffs, their servants or agents.

In relation to paragraphs c and d, a declaration is granted that no fees may be charged by the Defendant in relation to the user allowed under declarations a, aa, b, and c, above, whether as to access or to parking.

Re paragraph e, a declaration is granted that the Defendant is not entitled to obstruct or impede the *lawful exercise of the rights set forth in the above declarations, whether by use of charges, fees or* otherwise.

Finally, an injunction is granted prohibiting the Defendant its servants or agents from interfering with *the rights conferred by the declarations above whether by the imposition of fees or charges or* otherwise, save that the Defendant and the Plaintiffs may negotiate and agree reasonable fees to defray the cost of the upkeep of the said Lot C to the extent that a benefit enures to the Plaintiffs or their *successors in title.*

I wish to complement counsel on both sides for their industry, and if I carp a little about the volume, and in one or two cases the inscrutability, of the submissions, or if I fail to discuss every authority which was cited, it is not out of any disrespect to that industry and scholarship. It is not because in some cases, a one line submission on a small point invites the Court to look at no less than eight (8) authorities without any help as to limiting the area of search and interest by pointing out the passages on which counsel specifically relies. Rather it is out of a profound feeling that the significant jurisprudential energy and resources obviously expended hereon, in my view, significantly outweigh the commercial benefits to be derived by both sides from this exercise.

It seems that some amount of discussions had taken place between the parties to arrive at a solution, hence, for example, the decision to block off spaces which would have compromised the ability to facilitate delivery of supplies. I regret that those discussions did not produce wider agreement. My sense is that if the great effort that has been put into the trial had been directed at finding some common ground, this matter might have been resolved long ago to the general satisfaction of everyone. I feel that if these circumstances arose in a jurisdiction where there was mandatory mediation, this would have been a prime, perhaps sure, candidate for that procedure. Notwithstanding these comments, in light of my findings and decisions above, and the submissions heard from counsel today on the question of costs, I have decided, somewhat hesitantly, that costs are to be to the Plaintiffs to be agreed or taxed.