Case No: 2000/3730

Neutral Citation Number: [2001] EWCA Civ 2011
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF
JUSTICE CHANCERY DIVISION (Mr. B. Livesey, Q.C.)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 20 December 2001

B e f o r e :

LORD JUSTICE AULD
LORD JUSTICE ROBERT WALKER
and
SIR CHRISTOPHER SLADE

- -

K-SULTANA SAEED	**Respondent**
- and -	
PLUSTRADE LIMITED	**Appellant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Jonathan Brock QC (instructed by Rochman Landau for the Appellant)
Mr Paul Morgan QC and Mr Alexander Hill-Smith (instructed by L Bingham & Co for the Respondent)

- -

Judgment
As Approved by the Court

Sir Christopher Slade:

Introduction

1. The defendants in these proceedings, Plustrade Limited, appeal from an Order of Mr. Bernard Livesey, QC, sitting as a Deputy High Court Judge, dated 28th November 2000. The claimant, Mrs. Saeed, is the lessee under a long lease of Flat No. 68 in a mansion block situate at and known as William Court, 6 Hall Road, St. John's Wood, London, NW8. I shall refer to this block as "William Court". The defendant is her lessor.

2. In the events which have happened, the principal issues on this appeal may in my judgment be conveniently summarised as follows:

   (A) Did the defendants infringe her legal rights in preventing her between May 1997 and 1st August 2000 from parking her car on an area of the forecourt of the premises previously specified as reserved for parking? ("Issue (A)")

   (B) Did the defendants infringe her legal rights in reducing that area as from 1st August 2000? ("Issue (B)")

   (C) If and so far as the defendants have infringed her legal rights, what should be the proper award of damages to the claimant? ("Issue (C)")

The Facts

3. I take the facts largely from the findings of the Deputy Judge which, save in one respect, are not disputed. William Court was constructed in the 1930's. At that time it comprised some 78 flats on four floors situated above a commercial garage in the basement, which was owned and run by others. In the 1960's a number of short-term tenancies of various flats were granted, and these came to be protected under the Rent Act 1977.

4. Between 1976 and 1987 Cabtell Investment Company Limited ("Cabtell"), which was then the freeholder, took possession of a number of the flats as they fell vacant, refurbished them and sold them. During that period a total of 18 long leases of the type held by the claimant were created for a term of 99 years at a premium with a nominal ground rent.

5. In 1985 a lease of Flat No. 68 ("the Lease"), which had been granted to her predecessor in title by Cabtell on 23rd September 1977, was assigned to the claimant. This was a lease for a term of 99 years from 24th June 1976 at a ground rent. The grant was expressed to be made "together with the rights set forth in the Second Schedule hereto and except and reserving unto the Lessor and its successors in title

..... and all other persons for the time being entitled thereto as set forth in the Third Schedule hereto".

6. Clause 1(G) of the Lease defined "Retained Property" as including "all such parts of the lessor's property not by this or any other lease or tenancy demised or let".

The Second Schedule (headed "Easements rights and privileges granted to the Lessee") included the following provisions:

> "1.(a) the right (subject to the provisions of sub-clause (19) of Clause 3 of this Lease) for the tenant at all times and for all purposes incidental to the occupation and enjoyment of the Demised Premises but not further or otherwise to go pass and repass over along and across any private roads or forecourt (with or without vehicles in the case of a road or forecourt suitable for the passage of vehicles) and on foot only over and along the paths leading to the Building forming part of the Lessor's Property in common with the Lessor and all others authorised by the Lessor to use the same"

> "7. the right for the Lessee in common with all other persons entitled to the like right to park his private motor car on such part of the Retained Property as may from time to time be specified by the Lessor as reserved for car parking when space is available and subject to such regulations as the Lessor may make from time to time"

Paragraph 7 is the crucially important provision for present purposes.

7. The Third Schedule to the Lease included the following provision:

> "3. the right for the Lessor or its authorised representatives at any time or times to rebuild reconstruct modify or alter the Building or any part thereof or any buildings adjoining or adjacent to the Building or to erect new buildings on any property so adjoining or so adjacent to such height elevation extent or otherwise as the Lessor shall think fit and so that the access of light and air to the Demised Premises shall until interrupted be deemed to be enjoyed by virtue of these presents which shall be deemed to constitute a consent or agreement in writing for that purpose within the meaning of Section 3 of the Prescription Act 1832 accordingly so that the enjoyment thereof shall not nor shall these presents prevent any such rebuilding alteration or erection as aforesaid"

8. By Clause 3(19) of the Lease the lessee covenanted with the lessor :

> "3(19). NOT to do or suffer to be done anything which might hinder or prevent free access with or without vehicles to the entrance doors of the Building and in particular will not park or allow the parking of any motor vehicle on any part of the

Lessor's Property except such parking places (if any) as shall be specified by the Lessor"

9. As the Deputy Judge found, by 1985, the year when the claimant took the assignment of the Lease, the forecourt to the premises ("the forecourt") had an area which had been designated by the lessor for parking, and could contain 13 carefully parked cars in unmarked bays. There is no dispute as the identification of this area and I shall henceforth refer to it as "the specified area".

10. Between 1987 and the present date, 46 further long leases of flats have been granted, but without parking rights. In 1989 Cabtell sold the freehold of William Court to Follett Property Holdings subject to a 999 year lease-back of the residential part of the premises. In 1994 Cabtell assigned the leasehold interest to the defendants, who in 1997 took a further lease of the forecourt.

11. As at 1994 some 52 of the flats were occupied by statutory tenants, many of whom were elderly. Since then, a number of them have died or gone into permanent residential care, so that the defendants have been able to take possession of their flats, re-furbish them and market them for sale. There is a dispute as to whether the statutory tenants did or did not have any right to park cars. The Deputy Judge found that they had no such right and this is the only point on which his findings of fact are challenged by the defendants. I will return to this point later in this judgment.

12. When the defendants purchased the premises, they were badly run down. They wished to improve the appearance and appeal of the block, so as to enhance the potential return which they would receive when the refurbished flats came to be sold. As a first step, in December 1996, they decided to refurbish the parking areas and define them. This work was completed by the end of May 1997. During the work of refurbishment no parking was possible and those with the alleged right to park on the specified area had to make alternative arrangements. As a result of the refurbishment the parking spaces were delineated by posts and their number was reduced to 12.

13. At about the same time, the defendants initiated a programme of substantial refurbishment of the building and flats comprising William Court. In 1997, they applied for planning permission to add to the structure of the premises a fifth floor, which was to contain two penthouses. In order to maximise their sale price, they wished to be in a position to sell each unit with the benefit of a reserved parking space, which they believed would have a capital value of about £25,000. They made arrangements for an additional 10 parking spaces to be made available at the side of the premises for the new units which they were creating or re-furbishing. They further took advice as to whether the Cabtell tenants had an established right to park on the forecourt. It appears that they were advised that they did not.

14. The defendants therefore put lockable posts in position in order to restrict parking. On 30th June 1997 in response to letter from the claimant's solicitors, the defendants' managing agent, Mr Garwood-Watkins, wrote stating:

> "The lease is quite clear on the matter of parking and refers to parking being available if the landlord makes such parking available. It has been decided that parking will no longer be available on the front forecourt for residents of the property and therefore the parking posts have been erected. We do not see where you have formed your opinion that there is an easement or right reserved for your clients to park on an area that the landlord decides is not going to be designated for parking for the block as a whole. Consequently we do not believe our client has breached the terms of the lease in any way."

15. On 16th December 1997 another agent of the defendants wrote to the claimant saying:

> "Please note that at present there is no parking allowed on the forecourt at any time. If you do so you are liable to be clamped. This also applies to guests and craftsmen who may be visiting."

16. From May 1997, until 1st August 2000, the forecourt could not in any event be used for car parking because the area was required by the defendants' contractors who were undertaking the refurbishment of the fourth floor flats and the construction and fitting out of the penthouse suites on the fifth floor.

17. In October 1999 the claimant issued proceedings seeking in effect an order that the defendants permit her to park in the specified area, in which she had been permitted to park up to 1997, and damages.

18. In a long letter dated 19th April 2000, Mr. Garwood-Watkins, informed the claimant that, with effect from 1st August 2000, the defendants, without prejudice to their contention that the Cabtell lessees did not have any legal right to park, would honour an informal agreement with the planning authority and provide 4 marked spaces, one of which was to be a "disabled space", for enjoyment of the Cabtell lessees on a "first come first served" basis, provided that they had first obtained from the defendants an annual permit at a cost of £50.00 per annum. The present position on the ground appears to be this. The latest refurbishment has reduced the spaces available to 11 of which the defendants either have sold or intend to sell the remaining 7 spaces to such other persons as may be interested.

19. The offer of these 4 marked spaces did not suffice to persuade the claimant to withdraw her proceedings. She contended that she has a right, in the nature of an easement, to park on the forecourt, that from 1996 to 1st August 2000 the interference with her rights has been total, and that even the offer of 4 spaces at a price represented a substantial interference with her right, since it reduced the extent of her right and the defendants had no entitlement to charge. By the end of the argument before the Deputy Judge, however, it had been conceded that the defendants would not be entitled to charge for the annual permit, so that this was no longer an issue.

<u>The Deputy Judge's Order</u>

20. The Deputy Judge by his Order declared that

> "(1) on a true construction of paragraph 7 [of Schedule 2 of the Lease]..... the claimant has an easement to park her car in the car-parking spaces on the forecourt as presently laid out to the extent that space is available from time to time, subject to the right of the lessors to specify alternative spaces from time to time in accordance with paragraph 7 of Schedule 2 of the lease;
>
> (2) the scheme now sought to be instituted by the defendants whereby the claimant is restricted to parking on only four car-parking spaces on the forecourt as it is presently laid out constitutes a substantial interference with her right to park contained in her lease;
>
> (3) the sale by the defendants of the single car-parking space on the forecourt does not constitute a substantial interference with the claimant's right;
>
> (4) the defendants substantially interfered with the claimant's right by depriving her of the right to park from 1st June 1997 to date."

21. The Deputy Judge ordered that the defendants (among other things)

> (1) be restrained from disposing of any further car-parking spaces on the forecourt without further order of the court;
>
> (2) be restrained from implementing the said scheme without further order of the court;
>
> (3) pay the claimant damages in the sum of £6,300 together with £881 interest on account of the interference with the claimant's right to park from 1st June 1997 to date.

Issue (A).

22. There has in the past been some doubt as to whether a right to park in a car park can exist in law as an easement. More recent authorities of courts of first instance, cited by Judge Paul Baker QC in *London and Blenheim Estates Ltd v Ladbrook Retail Parks Ltd* [1994] 1 WLR 31 at p 36, and his own decision in that case appear to establish that it can, provided only that it does not amount to a claim to the entire beneficial user of the servient area, in which case the grant would not be that of an easement, though it might be of some larger or different grant; see also *Batchelor v Murphy* 11th May 2000 unreported. However the Court of Appeal in the first mentioned case identified, but did not answer, the question whether the right to park could exist as a valid easement and no other Court of Appeal decision relating to the question has been cited to us. In the circumstances and in the absence of full

argument, I would prefer to leave the question open, without intending in any way to suggest that Judge Paul Baker QC's decision was wrong.

23. Mr Jonathan Brock QC for the appellant defendants, realistically accepted that no useful purpose would be served in discussing whether the claimant's rights (if any) to park on the specified area are, on the one hand, rights in the nature of an easement or, on the other hand, are merely contractual rights which she assumed on taking an assignment of the Lease. For, on either footing, William Court and the forecourt being registered land, her rights (if any) would bind the defendants, as constituting an overriding interest within section 70(1)(g) of the Land Registration Act 1925. The crucial question thus is: What were the legal rights of parking (if any) granted to the lessee by the Lease on its true construction? It matters not whether they should be categorised as easements.

24. The principal submissions made on behalf of the defendants in this context may be summarised as follows. The only right given to the lessee by paragraph 7 of the Second Schedule to the Lease is the right to park one car, when spaces are left available by the other persons having the like right, "on such part of the Retained Property as may from time to time [emphasis added] be specified by the Lessor as reserved for car parking". It must follow from the use of the phrase "as may from time to time be specified" that the area set aside for parking is not fixed and immutable, but can be changed by the lessor when it sees fit. It must also follow, so the argument runs, that if the lessor sees fit, the area can be withdrawn altogether. The Lease, it is submitted, on its true construction does not require the lessor to specify any parking spaces for use by the lessee; the correctness of this construction is supported by the use of the phrase "on such parking spaces (if any)" in clause 3(19), quoted above. The Lease, it is said, thus contemplated that in the event no parking spaces might be specified by the lessor.

25. In support of this construction of the Lease, reliance is also placed by the defendants on the reference in paragraph 3 of the Third Schedule to the right for the lessor to "erect new buildings on any property so adjoining or adjacent [to the Building] to such height, elevation, extent or otherwise as the Lessor shall think fit". This provision, it is submitted, means that the lessor can erect a building on any part of the property previously designated for car-parking and would enable the lessor to construct a new building, such as offices or a garage storage depot, on the forecourt, without any redress to the claimant.

26. The defendants also pray in aid the definition of the "Retained Property" in clause 1(G) of the Lease which, it is said, shows that the property over which rights of parking are granted is not to be fixed and immutable but can be changed by subsequent events.

27. The submission summarised in paragraph 25 above postulates that the first limb of paragraph 3 of the Third Schedule to the Lease, ending with the words "as the Lessor shall think fit", has a force of its own, independent of the rest of the paragraph. I do not think that the first limb can properly be read as eliminating or restricting the right granted to the lessee by paragraph 7 of the Second Schedule to park a car on an area previously specified by the Lessor as reserved for car parking, or as entitling the lessor

to build on such area. The two limbs of paragraph 3 in my judgment fall to be read together; its purpose is to preclude the lessee from making any complaint about future activities by the lessor of the nature referred to at the beginning of the paragraph on the grounds that they will interfere with the lessee's enjoyment of light and air. Likewise in my judgment the definition of the "Retained Property" by itself lends no support to the suggestion that the lessor retains the right to eliminate or restrict the right granted to the lessee by paragraph 7 of the Second Schedule to park a car on an area previously specified by the lessor as reserved for car parking. I would therefore reject the submissions summarised in paragraphs 25 and 26 above.

28. On a literal reading of the Lease however, the principal submissions of the defendants summarised in paragraph 24 above have some force.. The phrase "as may from time to time be specified by the lessor" in paragraph 7 of the Second Schedule to the Lease makes it clear beyond doubt that the lessor has the power in some circumstances to vary the area specified by him as reserved for car parking. If he has the power to vary it, does he not have the power to reduce it? If he has the power to reduce it, does he not have the power to extinguish it altogether? If, on the other hand, he has no such power to extinguish it and some restrictions must be implied on his power to vary, what are those restrictions? Supposing that the lessor had never specified a part of the Retained Property as reserved for car parking, what remedy (if any) could and should the courts have given to the lessee?

29. Hypothetical questions such as these were canvassed in the course of argument. Some of them perhaps are not susceptible to an easy answer. However, we have to deal with this appeal on the basis of what has actually happened, and the following facts are, I believe, common ground:-

(1) Before the claimant took the assignment of the Lease in 1985, what I have defined as "the specified area" had been specified by the lessor as reserved for car parking; and the effectiveness of this specification for the purpose of paragraph 7 of the Second Schedule has not been questioned on this appeal.

(2) Whether or not her right should properly be categorised as an easement, the claimant by virtue of that paragraph 7 must have continued to have the contractual right to park her car on any available space on the specified area unless and until the defendants properly interrupted or determined such right.

(3) The claimant did in fact exercise this right until 1996.

(4) While no parking was possible during the refurbishment of the first specified area which took place between December 1996 and May 1997, the claimant makes no complaint about that interruption and the Deputy Judge awarded her no damages in respect of that period.

(5) Even after the expiration of that period however, the defendants between May 1997 and 1st August 2000, totally precluded the claimant from access to the specified area.

(6) As from 1st August 2000, the defendants, without prejudice to their contention that they could withdraw such rights altogether, reduced the area specified by them as reserved for car parking to 4 marked spaces (one of them a "disabled" space) to be enjoyed by all 13 Cabtell tenants.

30. On the basis of these facts, the claimants' case, which was upheld by the Deputy Judge, is in substance that she has at all material times had and continues to have the right to park her car on the specified area, but the defendants acted wrongly in precluding her from exercising such right between May 1997 and 1st August 2000 and they have substantially and wrongfully interfered with such right since 1st August 2000 by reducing the number of parking spaces offered to 3 or 4.

31. As Mr Brock QC accepted on behalf of the defendants, their defence to the claim relating to the period May 1997 to 1st August 2000 has to based entirely on the submission that they had the right, if they thought fit, wholly to determine the claimant's right to park. Though this submission was forcefully presented, I cannot in the end accept it.

32. The Deputy Judge gave his reasons for rejecting this submission as follows:-

> "The right to park is in the nature of an easement. It would be at the very least exceptional if it were to be determinable at the will of the lessor/grantor. It seems to me that if the lessor had wanted to retain the entitlement to determine at his option the right to park it was incumbent on him to say so explicitly and he could easily have done so. I agree with the submission of counsel for Dr Saeed that the words 'from time to time' indicate merely that the lessor could change the specified location of the parking spaces from one part of the forecourt to another (or even to the side of the premises) but not that he could extinguish them."

Whether or not the right to park constitutes an easement, I would reject the relevant submission on similar grounds.

33. The Lease in terms conferred on the lessee "the right to park his private motor car.....". The parties clearly contemplated that this was a right which would be capable of being exercised. As Mr Paul Morgan QC pointed out on behalf of the claimant, the function of specifying a part of the Retained Property for parking purposes was equally clearly conferred on the lessor for the purpose of giving effect to that right and not for the purpose of enabling him to extinguish it. The subject matter of the grant of a right to park was not, on the true construction of paragraph 7 of the Second Schedule to the Lease, a right wholly determinable at the whim of the lessor.

34. The attitude of the defendants as revealed in past correspondence appears to have been.... "since we have the power to specify a parking area, it logically follows that we have the power to withdraw a specification or not to specify at all". In my judgment this attitude represents a breach of the well-known and well-established principle that

a grantor shall not derogate from his grant. Though this principle is of general application, it has particular relevance on the sale or letting of land. Its rationale was explained by Nicholls LJ in *Johnston & Sons Ltd v Holland* [1998] 1 EGLR 264 at p 267 as follows:

> "The expression 'derogation from grant' conjures up images of parchment and sealing wax, of copperplate handwriting and fusty title deeds. But the principle is not based on some ancient technicality of real property. As Younger LJ observed in *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at pp 225, 226, it is a principle which merely embodies in a legal maxim a rule of common honesty. It was imposed in the interest of fair dealing:
>
> 'A grantor having given a thing with one hand,' as Bowen LJ put it in *Birmingham, Dudley & District Banking Co v Ross,* 'is not to take away the means of enjoying it with the other'. 'If A lets a plot of land to B,' as Lord Loreburn phrases it in *Lyttelton Times Co v Warners*, 'he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired.' The rule is clear but the difficulty is, as always, in its application.
>
> As one would expect, the principle applies to all forms of grants. It was applied recently by the House of Lords to the sale of a car by the manufacturer: see *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577. The principle operates to restrict the future activities of a grantor"

A little later Nicholls LJ said:

> "In *Megarry and Wade on the Law of Real Property*, 5th ed, p 849, the view is expressed that in truth the doctrine is an independent rule of law. This approach was approved by Lord Denning MR in *Molton Builders Ltd v City of Westminster* (1975) 30 P&CR 182, at p 186. He stated the broad principle thus:
>
> .....if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other."

35. Following the same line of reasoning, in *William Hill (Southern) Ltd v Cabras Ltd* (1986) 54 P&CR 42 at p 48, Nourse LJ (with whose judgment Kerr LJ and Stocker LJ agreed) accepted a submission in regard to the construction of express rights that "the court will not construe a general provision in a lease so as to take away with the other hand that which has already been granted with one hand in the dispositive provisions of the lease".

36. The purported complete determination by the defendants of the claimant's right to park which took effect between May 1997 and 1st August 2000 was in my judgment a clear derogation from the right to park to which the claimant was entitled under the lease. It entirely frustrated the purpose for which the right to park had been given to the lessee by paragraph 7 of the Second Schedule had been granted and which must have been in the contemplation of both the parties to the lease at the time of the original grant. It thus infringed the claimant's rights.

37. The claimant has thus in my judgment established her right to damages in respect of the period May 1997 to 1st August 2000. I turn to consider whether the defendants have infringed her rights in reducing the specified area as from the latter date.

Issue (B)

38. In considering this issue, I start from the premise, already explained, that at least up to 1st August 2000, the claimant had the right to park her car on the specified area in accordance with paragraph 7 of Schedule 2, because that right had never been effectively varied or determined. The defendants have undeniably interfered with the exercise of that right, by purporting to specify a new and much reduced specified area as from 1st August 2000 and by indicating their intention to restrict further use of the forecourt by the claimant for parking accordingly. To succeed in her claim under this head, however, she has to show that the interference with the exercise of her right has been substantial.

39. It is well established that the owner of an easement cannot complain of an interference with the exercise of such right unless it is both unjustified and "substantial". (see *Petty v Parsons* [1914] 2 Ch 653 and *Overcom Properties v Stockleigh Hall Residents Management Ltd* (1988) 58 P&CR 1). Even if the claimant's right to park does not qualify as an easement, she can in my judgment complain of the present interference on the ground of derogation from grant if, though only if, the interference is substantial. So the test is the same.

40. Mr Brock QC, who did not appear in the court below, has told us of his understanding that the whole trial proceeded on the basis that the 4 spaces offered by the defendants would be reserved to the 13 Cabtell lessees. In this court, on instructions, he offered an undertaking to this effect on behalf of the defendants. On the footing that the claimant is now no longer faced with former potential competition from statutory tenants, he gave a number of reasons for submitting that, under new arrangements, she is in a much better position regarding parking than she would have been in 1985, when she took over the Lease.

41. In my judgment, however, Mr Morgan QC was right when he pointed out that the relevant date for determining whether or not there has been substantial interference is not 1985, but the date of the interference. His submissions in this context were very simple. Before the interference, the claimant was able to park on some 12 or 13 spaces in competition with a number of other persons. At that point she was

restricted to parking on 3 or 4 spaces in competition with the same number of persons. This must constitute substantial interference with the enjoyment of her right.

42. I see no answer to this contention unless it is to be found in two points made by Mr. Brock QC. First, he submitted that, before the recent offer made by the defendants, they would have been free very substantially to increase the number of the claimant's competitors, by granting new leases or tenancies conferring parking rights to other persons. This factor seems to me irrelevant in considering whether there has been a substantial interference with the present enjoyment of her parking rights. Secondly, it is said, at all material times until that offer was made the statutory tenants would have had the right to park on the first specified area in competition with the claimant. Furthermore the Deputy Judge found that before 1997 three or four cars were in fact parked on the specified area by statutory tenants and, in the case of two of them, permanently.

43. This issue followed a rather odd course, before the Deputy Judge. At the start of the trial, the defendants' case was that the statutory tenants had no right to park on the specified area; and indeed Mr Garwood Watkins had so stated in a report and witness statement which were in evidence. However, when he came to give his oral evidence, he told the Deputy Judge that he had changed his view, having seen a copy of a Tenancy Agreement dated 1st February 1976 made between Cabtell and one of the statutory tenants, to which a schedule of Rules and Regulations was attached. One of these Rules and Regulations provided that "the Tenant shall not permit to be parked any vehicle other than a motor car in the grounds of the said building and shall ensure that any motor car so parked does not obstruct any driveway, path, thoroughfare to the said building".

44. It was contended on behalf of the defendants that this Agreement gave the statutory tenant a right to park, but the Deputy Judge rejected this contention saying: "Nothing in the Agreement itself provides for the Tenant to have the right to park; it is not established that the "rules and regulations" were attached to every statutory tenancy. Even if they were, it seems to me that Rules and Regulations are for the regulation of tenants' behaviour and not the extension to them of rights which their agreement does not otherwise provide".

45. Mr Brock QC criticised the Deputy Judge's decision on this point, in particular because he had made no reference to a provision in clause 1 of the Agreement itself, which conferred on the tenant the right to occupy the relevant flat "together with the use of the forecourt". It was suggested that the latter phrase, at least if read in conjunction with the schedule, was wide enough to confer on the tenant the right to park his car and that this conslusion was supported b the decision of this court in *Snell & Prideaux Ltd v Dutton Mirrors Ltd* (1995) 1 EGLR 259. I intend no disrespect to the argument if I say shortly that in my judgment this construction of the Tenancy Agreement in question is unsustainable, with or without reference to the last mentioned decision and with or without reference to the schedule. The fact that prior to 1997 two of the statutory tenants in practice had parked cars on the specified area in my judgment carries the matter no further.

46. It follows in my judgment that the position in regard to substantial interference is as contended by Mr Morgan QC and as set out in paragraph 41 above. In my judgment the defendants accordingly infringed the claimant's rights in reducing the specified area as from 1st August 2000 .

Issue (C)

47. Having agreed with the Deputy Judge's conclusion on Issues (A) and (B), I follow him in considering the final question, which concerns the amount of damages. In this context he said this:

> "I am told and accept that the capital value of one of the 11 parking spaces if reserved is in the region of £25,000. The annual rental value of a reserved space is agreed in the sum of £2,000. On the basis, as here, that the space is not reserved but is enjoyed on a 'first come first served' basis, the rental value of the space must be discounted to reflect the competition for the space and the chance that the car owner will not get a space when he or she returns home with the car. In this case I have found the claimant is entitled at today's date to be regarded as one of only 13 long leaseholders who are entitled to compete for the 11 spaces specified. In these circumstances she should have enjoyed an extremely good prospect of being able to park in a specified space on the forecourt whenever she wanted and accordingly on a small discount in the region of about 10% is appropriate to be applied to the annual reserved rental value."

48. Having rejected a submission by the defendants' counsel that the claimant either had mitigated her loss or was under a duty to mitigate it by making use of the publicly available "Residents Parking" spaces in the street, the Deputy Judge decided that the proper figure to award her for the loss of her right to park on the forecourt during the period of three years, five and a half months since the end of May 1997 to the date of his judgment was £6,300.

49. Mr Brock QC did not in this court pursue the contention relating to mitigation, but did contend that the discournt of 10% adopted by the Deputy Judge was too low. The Deputy Judge, however, had had the advantage of hearing all the evidence, and, on the evidence presented to us, I can see no grounds for interfering with his assessment of that percentage or of the aggregate sum of £6,300.

Conclusion

50. For all these reasons I would dismiss this appeal. I would affirm the Judge's Order with the substitution of the phrase "the right to park" for the phrase "an easement to park" in paragraph 1 of the Order, for the reasons appearing from paragraph 22 of this judgment. I would invite submissions from counsel as to whether any further variations of the Order or further directions are necessary or appropriate in the light of this court's decision and in the events which have happened.

Lord Justice Robert Walker: I agree.

Lord Justice Auld: I also agree

Order: appeal dismissed with costs subject to detailed assessment.

(Order not part of approved judgment)