[2025] UKFTT 00153 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2022/0562

BETWEEN

Peter Nigel Joseph Stenner

Applicant

and

Teignbridge District Council

Respondent

Property Address: Land and Building at the Den, Teignmouth
Title Numbers: DN496449, DN427810, DN121970, DN353858

Judge Colin Green

Hearing via CVP
On: 30 and 31 July 2024

Applicants' Representation: **Montague Palfrey of Counsel**

Respondents' Representation: **Jonathan Ward of Counsel**

DECISION

Introduction

1. This matter concerns an application by the Applicant, Peter Nigel Joseph Stenner ("Mr. Stenner"), in Form AP1 for registration of the benefit and noting of the burden of an easement, being a right to store [up to six] boats and related equipment and to carry out maintenance on the boats during the winter months beginning 1 October through to 31 May over that point of the Lower Point Car Park shown edged green on the plan to his

Statement of Truth dated 3 September 2021. It was accepted by Mr. Palfrey that the words I have added in brackets accurately reflect the nature of Mr. Stenner's case. The right to the storage of boats is the primary easement claimed with the right to carry out maintenance an ancillary right.

2. The property for the benefit of which the easement is claimed, the dominant tenement, consists of three beach huts located close to the beach of the River Teign: Beach Hut 34 (title no. DN427810), 41 (title no. DN121970), and 42 (title no. DN353858) (collectively the "Beach Huts").

3. The land claimed to be subject to the easement, the servient tenement, is a roughly triangular parcel of land ("the Boat Storage Area") lying to the north-west of the Beach Huts and at the southern end of Lower Point Car Park which forms part of an area of land owned by Teignbridge District Council ("TDC"), the Respondent, of which it was registered on 26 May 2004 (title no. DN496449).

4. In summary, Mr. Stenner's case is that he runs a boat hire business called "Teign Boat Hire" which he took over from Mr. Sydney Back ("Mr. Back") and Mr. Fred Drew ("Mr. Drew") in 1982 and that has been carried on from the Beach Huts. The boat hire business is largely cyclical; the summer holiday season runs from the beginning of May until late September, and the off season runs from October to the start of May. During the summer months the boats are stored on moorings when not in use, so boat storage space is only required during the off season. Mr. Stenner claims that since 1982 he has used the Boat Storage Area for the purpose of carrying out maintenance and repairs on up to six boats used in connection with his hire business and to store them along with related equipment during the winter months (1 October to 31 May).

5. TDC dispute, both factually and as a matter of law, that there is any such prescriptive easement, relying on various grounds that will be dealt with under the headings below.

6. The hearing was conducted remotely over two days via CVP but there was no site view as it was considered that the maps and photographic evidence provided by the parties would suffice. I was greatly assisted by the skeleton arguments provided by counsel,

and I am grateful for their detailed submissions and patience in dealing with questions raised by me.

7. In addition to Mr. Stenner, several witnesses were called on his behalf: Stephen Mortimore, Rona Boyne, Steven Combstock, Roger Matthews, and Humphrey Vince, all of whom were cross-examined with the exception on Mr. Matthews whose evidence was not challenged. There is a statement from Michael Vince but he was not available to give testimony. For TDC Tonya Short was the sole witness. Where material, I will identify their evidence in my findings below.

Evidence and findings of fact

8. From an early age Mr. Stenner was interested in boats and during his summer holidays he would spend time at a beach hut rented by his parents on River Beach from which he learnt about the boat and fishing business. In about 1970 he got to know Fred Drew who had owned a boat hire company but in 1962 had sold the majority of the business to his nephew, Sydney Back. They traded as "Fred Drew and Syd Back" although Mr. Drew had taken a lesser role in the business and retained ownership of one of the Beach Huts. Mr. Stenner was introduced to Mr. Back who operated the business from Beach Hut 34 from which he hired the boats and where parts and fuel were kept.

9. The business had about ten boats: motorboats, rowing boats and fishing boats, which were used for families who wanted time on the water or groups for fishing. The boat hire business is cyclical, and it is during the summer months – from the beginning of May until late September – that it is at its busiest. At the beginning of the summer season boats were kept on the mooring to be hired and taken out. In the winter months, the boats were stored in the Boat Storage Area as well as the concrete area in front of it, an arrangement shared with other boat hire businesses and some local fishermen.

10. The Lower Point Car Park was busy during the summer season with parking for locals and tourists who wished to use the beach. The Car Park had a capacity for about 32 cars and about 4 cars could be parked in the Boat Storage Area. In the off season during the winter months there was far less use of the Car Park by vehicles and the Boat Storage Area was available for the storage of boats as there was no demand for boat hire. At the end of the summer season those who wished to store boats would wait until high tide

and using a winch and jacks lift the boats onto winches or trailers and move them into the Boat Storage Area, that could take up to six boats, and also the concrete area immediately to the south. Once in the Boat Storage Area the boats would be elevated on blocks so that any necessary maintenance, repairs and painting could be undertaken. It was also preferable to keep the boats in this area in the Winter months as there was less prospect of damage than if they remained moored.

11. The Boat Storage Area was bounded on one side by white boundary stones and alongside the stones, railings, also used to dry fishing nets. The railings were moved by the Council in the summer months to create a larger area for coach parking, and were moved back in the summer, but eventually the railings remained in place all year round. When resurfacing the Car park TDC replaced the stones with a white line, subsequently a blue line, marking off one side of the Boat Storage Area.

12. The practice of storing some boats in the Boat Storage Area during the winter months was in place when the boat hire business was run by Mr. Drew and Mr. Back. Mr. Stenner was told that the practice dated back to the mid-1940s.

13. Mr. Stenner worked for the business from 1970 and in 1978, once he had left school, he worked their full time. In 1982 he acquired the business from Mr. Back (Mr. Drew had passed away in 1978). Mr. Stenner paid the agreed sums over the following three years and also acquired the three Beach Huts which he continued to use for the business, now named "Teign Boat Hire", in the following manner.

13.1. Beach Hut 42 was informally and defectively conveyed to Mr. Stenner by Alfred Broom in October 1982 but this was not perfected until the confirmatory conveyance of 27 February 1995. Apparently, there was then no good root of title and it was registered on 10 March 1995 with possessory title, upgraded to title absolute in June 2007.

13.2. Beach Hut 41 was purchased by Mr. Stenner and he was registered on 22 July 1999.

13.3. Beach Hut 34 was purchased by Mr. Stenner from Sydney Back on 9 June 2000 and he was registered as proprietor on 29 June 2000. Mr. Back had been registered as proprietor shortly beforehand on 15 March 2000 with possessory title. The title was upgraded to title absolute in 2012.

14. There is also a nearby workshop ("the Workshop") of which Teignmouth Maritime and Property Holdings Limited (a company run by Mr. Stenner) was registered as proprietor on 19 January 2021 (title no. DN580658). Since Mr. Stenner's claim rests on prescription, requiring at least 20 years continuous user, the prescriptive easement over the Boat Storage Area is not claimed for the benefit of the Workshop.

15. Mr. Stenner's account of matters is that after this purchase in 1982, he has continued to use the Boat Storage Area in the manner described. He would not have purchased the business and the Beach Huts other than on the basis that the Boat Storage Area was available for the storage and maintenance of the boats during the winter months, which had never been challenged or subject to discussion with TDC. When Mr. Stenner first started helping in the business there were four or five other boat hire business on the beach, but over the years this has reduced to Mr. Stenner's business alone.

16. By a licence agreement dated 8 March 2004, TDC granted to River Teign Rowing Club Limited a licence to use part of the Lower Point Car Park for the storage of two rowing boats (gigs) for the period 1st April 2003 to 31st March 2004. Presumably, given the impending expiry of that term, the agreement reflected an earlier oral arrangement. The area of land over which the licence was granted was larger than but included, the Boat Storage Area.

17. No fresh licence was granted but the use of the relevant part of the Car Park by members of the rowing club continued, with the storage of more than two gigs on occasions. There were negotiations for a fresh written licence in late 2019 but nothing came of this, and by a letter bearing the date 4 May 2023 (it must have been originally dated and served in early 2020) TDC gave the club notice of termination of the licence on 15 April 2020.

18. Mr. Stenner's account is that the gigs were on occasions stored within the Boat Storage Area during the summer months, but when boats were moved into that Area for the

winter/off season, the rowing club would remove the gigs and store them to the west within the area designated by the licence for gigs but leaving the Boat Storage Area free for Mr. Stenner's boats. There would not have been sufficient room for both gigs and boats during the winter months. This was confirmed by the evidence of Mr. Mortimore and Mrs. Boyne, both of whom were members of the rowing club, as well as some aerial photographs.

19. There is also support for Mr. Stenner's account of boat storage generally from his witnesses. Mr. Mortimore, who worked as a local fisherman and boatman, also made use of the Boat Storage area in the summer months. Mrs. Boyne has been familiar with the Car Park and Boat Storage Area all her life as her family have been fisherman for several generations. She owns two storage huts adjoining the hard standing below the Area: one she has used all her life, the other was acquired about 3 years ago. These are used for storage and leisure, and she has stored her own boats on the hard standing for many years. Mr. Combstock has worked with local boatmen all his life and as the manager of Mr. Stenner's business for the last 30 years. In cross-examination he confirmed that only about six boats will fit into the Boat Storage Area, but in some years they may not be sufficient space for the odd boat. Mr. Matthews evidence was that for as long as he could remember smaller boats were laid up in the winter in the area of the Car Park where the railings are now situated. Humphrey Vince has lived and worked in Teignmouth for most of his life and for the last 16 years employed by the Teignmouth Harbour Commission in the capacity as Assistant Harbourmaster and more latterly Acting Harbourmaster. His evidence was that between October and May local boatmen and fishermen lay up their small vessels around the Lower Point Car Park area, including the Boat Storage Area used by TDC for extra parking spaces in the summer season. During the winter months storage is allocated by all concerned bring the boats up on a particular day, with particular spots used by certain persons, although he was unable to say if Mr. Stenner's boats were within or outside the Boat Storage Area each year.

20. Tonya Short, has been employed as TDC's car park manager for the last 8 years. Her statement challenges the use which Mr. Stenner claims has been made of the Boat Storage area, relying largely on aerial photographs with which she had been supplied by TDC's property team, and their interpretation of those photos. Although Ms. Short's

initial position was that there were no photos that showed boats within the Boat Storage Area, in cross-examination this changed. She accepted that a Google Earth photo from May 2020, relied on by Mr. Stenner, showed boats within the Area, and two gigs outside it, and that a photo exhibited to her statement appeared to show the same. Considering other photos exhibited to her statement, one from April 2021 shows no gigs but boats within the Area, and other photos are identified only by year and it is not known in which month they were taken. It is not possible to draw any reliable conclusions from them.

21. In my view, TDC's aerial photographs do not contradict those relied on by Mr. Stenner, nor the account he and others have provided of the use made of the Boat Storage Area during the winter months.

Requirements for a prescriptive easement

22. There are certain requirements particular to the acquisition of an easement by prescription, many of which were in issue.

User

23. Mr. Stenner must establish a continuous period of 20 years user by him or his predecessors in title, or on their behalf. Under the Prescription Act 1832 that period must be before next before application to the Land Registry (14 September 2021) but if for some reason that cannot be satisfied any prior continuous period of 20 years will suffice under the doctrine of lost modern grant, see: *Newnham v Willison* [1987] 56 P.&C.R. 8.

24. Mr. Ward submitted that on the evidence Mr. Stenner had failed to establish 20 years' continuous user in respect of the Boat Storage Area. His use has been in common with other local boat users, such as fisherman, who had no nearby premises, and boats were stored on a first come-first served basis in both the Area and the adjoining hard standing. I do not consider this to be in itself a sufficient objection. An easement can be obtained by prescription over a shared road or path, and I am satisfied that Mr. Stenner has used the Boat Storage Area for storage of up to six boats since 1982 during the period October to May, albeit that there have been times when the boats of others were stored in the Boat Storage Area, though less frequently as the other boat hire businesses closed.

25. I accept that if the right claimed were exercised by Mr. Stenner to its full extent, this would give him a monopoly for boat storage within the Area – the storage of other's boats would probably amount to an interference with his easement – but in my view the issue of the extent of the right is something best considered in relation to ouster, dealt with below.

26. Mr. Ward questioned Mr. Stenner's ability to rely on user since 1982 in the light of the title history of the Beach Huts (see paragraph 13 above) and that the replies to pre-contract enquiries undermined Mr. Stenner's account of matters. Mr. Stenner acquired Beach Hut 34 in June 2000 with possessory title which necessarily would not have attracted any corollary easements. Prior to this no easement could accrue to him because prescription must be both by and against the fee. That is correct, but the user relied on does not have to be that of the fee simple owner, use by an occupier can suffice and there is no reason why an owner with possessory title cannot rely on his own use, or that of another, prior to registration, as an occupier of the dominant tenement. Here, all registrations with possessory title were in respect of the freehold.

27. Enquiry 6 of the Enquiries Before Contract in 2000 in respect of Beach Hut 34 included the following:

> *"6. Facilities*
>
> *Except in the case of public rights or where particulars have already been given, what rights are there for the use of the following facilities, whether enjoyed by the owner or occupier of the property, or over the property for the benefit of other property:*
>
> *[…]*
>
> *-- Access and facilities for repair, maintenance and replacement"*

The answer to this enquiry was, "None to the best of the Seller's knowledge".

28. In my view, it is by no means clear that this enquiry would cover the right to repair and maintain boats stored in the Boat Storage Area, as distinct from repair and maintenance of the Beach Hut being sold. In any event, I attribute no real significance to the reply, and do not consider that it weakens the account given by Mr. Stenner.

Continuity/cessation of user

29. Mr. Ward also argued that Mr. Stenner's use of the Boat Storage Area was not sufficiently continuous and that there had been a cessation of user. He put it as follows: it is entirely conceivable that the user would stop one season and not resume. Mr. Starmer's evidence was that many boat hire businesses have failed on River Beach. The Beach Huts would readily be put to use as beach huts or some other commercial activity (kiosk, concession stand etc) and which would not involve boat storage. Any boat hire business might prefer to store and maintain boats offsite in a suitable yard. On his own case, in 2021 Mr. Starmer purchased the Workshop from where he now operates his business (at least in part). The annual interruption in user is sufficient to exclude an inference of actual enjoyment of the right he claims.

30. I consider that the question of continuity and cessation must be viewed in the context of the right claimed, which operates from October to May. It was accepted that a prescriptive easement is capable of being seasonal, and by its nature the continuity required is within that period, not all year round – there can be no cessation of user outside that period. It is possible that user might cease at some point, but that is true of any easement in the process of acquisition by prescription. It would only be if there was a cessation during the winter months that there would be a break in the necessary continuity, and in the present case there is no evidence of that.

User as of right

31. A party seeking an easement by way of prescription must show that he has used the right as if he were entitled to it; the user which will support a prescriptive claim must be user *nec vi, nec clam, nec precario* (without force, without secrecy, without permission). TDC's case is that Mr. Stenner's use was with force (in the sense of storage within the Boat Storage Area having been contentious), and/or secret in nature, and/or with TDC's permission.

32. As regards contentious user, in 2019 there were negotiations between TDC and Teign Fishermen and Watermen's Association ("TFWA") for the grant of a lease over the Boat Storage Area. Mr. Stenner's evidence was that he met with an official to discuss this. In his statement he says that this was as a representative of TFWA, but in cross-examination stated that this was not as an official representative as TWFA was dormant

at this point. He was unable remember if he made his unofficial capacity clear. There is an internal email from TDC's Estates Surveyor of 7 October 2019 which refers to a meeting with Mr. Stenner concerning a 10-year lease, which had been rejected by Mr. Stenner on the basis that there was a historic right to store boats. In cross-examination Mr. Stenner was asked if he considered whether TDC was challenging the right and he considered that might be the case given that a lease was being proposed.

33. Mr. Stenner does not appear to have had any further involvement in the lease negotiations, and although a draft lease was provided in favour of TFWA matters proceeded no further. I accept Mr. Stenner's evidence that he has not had discussions with anyone from TDC concerning the Boat Storage Area before October 2019, and Ms. Short's suggestion that it was Mr. Stenner who painted a line to replace the kerb stones is unsupported by any evidence.

34. I can see some merit in the argument that TDC's wishing to regularise the position in respect of the Boat Storage Area was an indication that it no longer acquiesced in the storage of boats, but as stated above, even if this prevents reliance on the 1832 Act, 20 years continuous user prior to October 2019 would suffice under lost modern grant.

35. As regards secrecy, as the basis of a prescriptive claim is acquiescence by the owner of the servient tenement, the use relied upon must have been of such a character that the owner, diligent in the protection of his interests, must have, or be taken to have, a reasonable opportunity of becoming aware of such use. Mr. Ward submitted that TDC would not have been able to distinguish Mr. Stenner's boats from other boats. The fact that some of Mr. Stenner's witnesses might have found it difficult to tell the difference on a casual inspection is in my view of no real relevance. I accept that Mr. Stenner's boats were marked to identify them as his, and that they bore numbers that could be checked against a register of boats. I reject Mr. Ward's submission that there would be no obligation on TDC to do anything more than look at the boats since identifying their ownership would have been a relatively straightforward exercise. Nor would there be any risk of confusing permissive storage in respect of the gigs with Mr. Stenner's boats, which are fundamentally different in construction.

36. Concerning permission, Mr. Ward relied on the following.

36.1. The negotiations for the grant of a lease mentioned above. This concerned a lease to TFWA, not to Mr. Stenner, and no concluded agreement was reached.

36.2. In his statement Mr. Stenner refers to TDC moving railings with the permission of local boatmen/fisherman to make a more useable area for the coach park. The same is said in Mr. Orme's statement. This is a matter of TDC being granted permission however, not vice versa.

36.3. Mr. Mortimore refers to when the marking stones were tarmacked over and that local boatmen asked that they be replaced by a blue line. I do not consider that this can be construed as permission to store boats in the Boat Storage Area, to either local fisherman generally or Mr. Stenner.

Capable grantor

37. In respect of a prescriptive easement there must have been a capable grantor and grantee at the time of the presumed grant. Mr. Ward submitted that TDC does not have the power to grant the right claimed other than for valuable consideration or with the permission of the Secretary of State, relying on the following statutory provisions.

38. The Local Government Act 1972 at s.123 sets out the powers of TDC:-

> *"123 Disposal of land by principal councils.*
>
> *(1) Subject to the following provisions of this section, [F1and to those of the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010,] a principal council may dispose of land held by them in any manner they wish.*
>
> *(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.*
>
> *(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them."*

39. It was argued that any disposal outside of those criteria would be ultra vires. TDC is incapacitated from making a grant and it therefore cannot be presumed, see: *Rochdale Co v Radcliffe* (1852) 18 QB 287.

40. In my view, in considering whether TDC is a capable grantor, the issue is whether it had title to make a grant, nothing more. In *Rochdale Co v Radcliffe*, the defendant claimed a prescriptive easement to draw water from the plaintiff's canal for the purposes of his adjoining mill. The plaintiff did not own the water in the canal. The judgment of Erle J. was as follows:

> *"This is a claim to impose a servitude upon the canal by virtue of a twenty years' user. The party seeking to establish such a claim must shew a grant by a person capable of making the grant relied upon. Now the grant here is by persons having no distinct ownership of the water, but entitled only to the flow of it for the purposes of the navigation, and having no right to the surplus. If it had appeared, by direct evidence, that the company had made a grant to the purport now supposed, setting out their title, that grant would have appeared to be against the right of the public, and void upon the face of it. The twenty years' user, therefore, could establish no right"*

41. Similarly, here TDC owns the Boat Storage Area and would be able to dispose of it, albeit subject to certain restrictions. For the purposes of prescription that is enough for it to constitute a capable grantor.

Public nuisance

42. It is a well-established principle that although right to commit a private nuisance may be acquired by prescription as an easement, no right can be acquired by user, however long, to use land in such a manner as to amount to a public nuisance, see: *Clerk & Lindsell on Torts*, 24th Edition at paragraphs 19-82ff. Mr. Ward submitted that the Boat Storage Area is part of the Lower Point Car Park which is intended for public use and in respect of which TDC is able to grant licences for certain controlled activities to ensure the land remains available to and for the use of the public good. Since Mr. Stenner's use is not permitted, every act of user is an affront to the public's use of the Boat Storage Area for parking cars between October and May, and it is incapable of maturing into a species of right.

43. According to *Clerk & Lindsell* at paragraphs 19-03 and 19-04, a public nuisance is one which materially affects the reasonable comfort and convenience of a class of his Majesty's subjects who come within the sphere or neighbourhood of its operation, for example: obstructing the highway by rendering it dangerous and inconvenient to pass.

44. In the present case however, the evidence of Mr. Stenner and others was that during the winter months there is a substantial reduction in demand for parking in the Lower Point Car Park, and the presence of boats in the Boat Storage Area during that period presents no hindrance. Members of the public have sufficient available parking spaces elsewhere in the Car Park. This evidence was not challenged and is confirmed by an TDC internal email of 14 October 2016 from Sue Edwards who states, "The area has always been difficult and doesn't make much in winter". Indeed, the fact that TDC was prepared to grant a year-round licence to the rowing club over an area larger than the Boat Storage Area, which was allowed to run for several years, suggests that the public's right to park in the Lower Point Car Park is not affected in any material way by boat storage at the southern end. Nor was there any evidence of complaints from users of the Car Park concerning obstruction. Therefore, I am unable to conclude that the right claimed would amount to a public nuisance.

Other requirements

45. There are four conditions for the recognition of a right as an easement, prescriptive or otherwise: (1) there must be a dominant and a servient tenement; (2) the easement must accommodate the dominant tenement; (3) the dominant and servient owners must be different persons; and (4) the easement must be capable of forming the subject-matter of a grant.

46. As to (1), the Beach Huts are the dominant tenement and the Boat Storage Area the servient tenement.

47. Regarding (2), easements must be not only appurtenant to a dominant tenement but also connected with the normal enjoyment of the dominant tenement. The easement therefore cannot be solely personal to the owner of the dominant tenement, but must improve the general utility of the dominant tenement, and can do so by benefitting a trade carried out on the dominant tenement, at least if the trade is long established, see:

Megarry & Wade, *The Law of Real Property*, 10th Edition at paragraph 26-008 and the judgment of Lord Briggs in *Regency Villas Title Ltd v Diamonds Resorts (Europe) Ltd* [2018] UKSC 57, at paragraphs 36, 40 and 56.

48. Mr. Ward relied on a distinction between a right that is reasonably necessary for the enjoyment of the dominant tenement and something that only makes it more convenient, which is not sufficient. The distinction is drawn in the judgment of Santow JS in *Clos Farming Estates v Easton & Ors* [2002] NSWCA at paragraph 31, in considering the meaning of "accommodation" in this context:

> *"First, it requires there be a natural connection between the dominant and servient tenements. The right must be reasonably necessary for the enjoyment of the dominant tenement and not merely confer advantage on the owner of that tenement, as would a mere contractual right; Finlay 91 WN(NSW) 730 (DC). Reference was made by the Trial Judge to Hill v Tupper [1863] EngR 493; (1863) H&C 121and In Re Ellenborough Park (supra). Bryson J concluded that whether the right granted accommodated and served the dominant tenement depended on whether the right granted was connected with the normal enjoyment of the dominant tenement. That is a question of fact, dependent on the nature of the dominant tenement and the right granted. It was not enough that the land be a convenient incident to the right. Rather the nexus must exist in a real and intelligible sense (Judgment at [22]). Additionally, Bryson J recognised that facilitation of the business or commercial use in which the dominant land is involved may, in limited circumstances, be nonetheless sufficient to create the requisite nexus, provided the criteria for an easement is satisfied (Judgment at [36]). Bryson J concluded that in reality the Fourteenth Restriction did not accommodate lot as a piece of land. This was because he concluded that there was no evidence supporting any "accommodation, advantage or enhancement of lot 86". Thus "Lot 86 could be a convenient incident to action under the Fourteenth Restriction: but that is not enough" (Red Book, 38 at para 47)."*

49. It was argued that the right claimed here for the storage of boats is no more than a convenience, and that the Beach Huts do not reasonably require the storage of boats. It is a particular business use that is being accommodated, not the dominant tenement itself, which is not enough. There is no nexus between the Beach Huts and the Boat Storage Area as storage can take place without owning adjacent premises, such as with some fisherman, and the Beach Huts do not have to be used for boat hire: Mrs. Boyne uses her huts for leisure purposes.

50. In my view, such an analysis requires reading "reasonably necessary" as "absolutely necessary", which is too stringent a test. Mr. Stenner's boat hire business and storage of boats in the Boat Storage Area was long established by the time he began acquiring the business and Beach Huts in 1982. I accept his evidence that he would not have done so without the ability to store the boats nearby in the Boat Storage Area. One does not consider a building as a neutral entity but must have regard to a particular use to which it has been put in assessing the question of accommodation. An easement may exist for the benefit of a business which is carried on from the dominant tenement, and if a public house can have an easement to fix a signboard to the house next door (*Moody v Steggles* (1879) 12 Ch. D 261) and a shop an easement to put out a stall in the street on market day (*Ellis v Mayor, etc., of Bridgnorth* (1863) 15 C.B. (N.S.) 52) I see no reason why the Beach Huts, used for boat hire, cannot have an easement to store the boats in a proximate location out of season.

51. There was no issue in respect of requirement (3).

52. As to requirement (4) – the easement must be capable of forming the subject-matter of a grant – this involves consideration of easements of storage and parking, and what has become known as the ouster issue: that the right cannot be so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement.

53. Before considering the application of the relevant principles in the present case I will review some of the authorities which have addressed this issue.

54. In *Copeland v Greenhalf* [1952] Ch 488, access to the plaintiff's orchard was gained from a strip of land. The defendant was a wheelwright whose premises were opposite that strip, who claimed a prescriptive right to store customer's vehicles along the strip, apart from a space left for access to the orchard, while the vehicles awaited or were undergoing repair, and awaiting collection after repair. It was held that there could be no such easement. In the words of Upjohn J. at page 498:

> *"I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is*

> *claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. 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, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription."*

55. In *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, in addressing the question as to whether a right to park cars can exist as an easement, Judge Paul Baker Q.C. stated at 288C:

> *"If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant."*

56. This was endorsed in the Court of Appeal in *Batchelor v Marlow* [2001] EWCA Civ 1051, which concerned a claim to an exclusive prescriptive right to park up to six cars on a verge on Mondays to Fridays between 8.30 a m and 6 p m. It was held that a right to park cars which would deprive the servient owner of any reasonable use of his land was not capable of subsisting as an easement; that whether such a right would do so was a matter of degree and therefore depended on the facts of each case; that an exclusive right to park six cars for 9½ hours every day of the working week would leave the plaintiff without reasonable use of his land either for parking or for any other purpose; and that, accordingly, the right found to exist by the judge was not capable of being an easement and so could not have been acquired by prescription.

57. The test set out in *Batchelor*, and its application, was criticised by Lord Scott in *Moncrieff v Jamieson* [2007] UKHL 42, in the following terms at paragraph 59:

> *"It is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up. And by what yardstick is it to be decided whether the residual uses*

> *of the servient land available to its owner are 'reasonable' or sufficient to save his ownership from being 'illusory'? It is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself. I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes. The claim in Batchelor v Marlow for an easement to park cars was a prescriptive claim based on over 20 years of that use of the strip of land. There is no difference between the characteristics of an easement that can be acquired by grant and the characteristics of an easement that can be acquired by prescription. If an easement can be created by grant it can be acquired by prescription and I can think of no reason why, if an area of land can accommodate nine cars, the owner of the land should not grant an easement to park nine cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right to station up to nine cars there and, of course, to have access to his nine cars. How could it be said that the law would recognise an easement allowing the dominant owner to park five cars or six or seven or eight but not nine? I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land."*

58. It is clear from the opinion of Lord Neuberger at paragraph 143 however, that Lord Scott's observations were not the basis of the decision:

> *"Accordingly, I see considerable force in the views expressed by Lord Scott in paras 57 and 59 of his opinion, to the effect that a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation, on the basis that the essential requirement is that the servient owner retains possession and control. If that were the right test, then it seems likely that Batchelor v Marlow [2003] 1 WLR 764 was wrongly decided. However, unless it is necessary to decide the point to dispose of this appeal, I consider that it would be dangerous to try and identify degree of ouster is required to disqualify a right from constituting a servitude or easement, given the very limited argument your Lordships have received on the topic."*

59. Both counsel accepted that *Moncrieff v Jamieson* did not overrule *Batchelor*, which remains binding in the High Court and on this Tribunal, and it is the relevant test that I should apply – if the Beach Huts have the benefit of a right to store up to six boats in the Boat Storage Area during the winter months beginning 1 October through to 31 May each year, will TDC be left without any reasonable use of the Boat Storage Area?

60. For the following reasons I find that this is the case. *Copeland v Greenhalf* is the most similar case on its facts, which concerns storage rather than the parking of vehicles and

in which some space was left for access. That is the case here for the period October to May during which the storage of six boats, leaving no room for anything else, would give Mr. Stenner exclusive use of the Boat Storage Area during that period. Mr. Palfrey sought to distinguish *Copeland* on the basis that Mr. Stenner's use is only for part of the year, but the period is of 7 to 8 months which is a substantial part of the year. Unlike parking cars, the storage is not intermittent or restricted to certain times or days of the week. Once boats have been put in the Boat Storage Area their storage is continuous until they are moved back to moorings at the beginning of the season the following year, save for occasions when a boat needs to be taken elsewhere for specialist repair work. It is correct that TDC can use the Boat Storage Area as car parking space during the summer months, but no easement is claimed during that period.

61. Mr. Palfrey also sought to distinguish *Copeland* on the basis that there are other uses to which the Boat Storage Area can be put during October to May and significant rights that could be granted by TDC such as painting lines over or resurfacing the Boat Storage Area. In my view, with six boats, perhaps even fewer, stored in the Area it would not be possible to paint or resurface; such matters would have to wait until the boats were removed.

62. There is, of course, the possibility of TDC granting a licence for the storage of gigs in the Boat Storage Area, as was done with the rowing club, but during the period October to May any such licence could not be exercised as there would be no space available due to the presence of the boats. As mentioned above, this is exactly what happened with the gigs, which were placed outside the Boat Storage Area when the boats were moved into it.

63. Mr. Palfrey provided several post-*Bachelor* cases. To a certain extent they turn on their own facts, and largely concern rights to park, which in my view are rather different from a right to long-term storage such as that under consideration here. Nevertheless, the following should be mentioned.

64. A right to park likely cannot subsist as an easement if part of the servient land is to be occupied for a continuous period of 72 hours to the exclusion both of the freeholder and of all others having a like right (*Montrose Court Holdings Ltd and ors v Shamash and*

ors [2006] EWCA Civ 251, Lord Justice Chadwick, para 30). In the present case, apart from the spaces between the stored boats, the servient land will be occupied by boats for a continuous period considerably longer than 72 hours.

65. An easement to park a car in two parking spaces in a car park is effective where the servient owner can walk across the car park, or another car can back into a "used" part of the land when coming out from another space, or the servient owner can change the surfacing or erect and advertising board or fencing (*De La Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch), Newey J, para 22). Here, motorists who park their cars in the Car Park can use the spaces between boats to cross the Boat Storage Area to get to and from their cars, but this is not required as it is open land and other access is available to the Car Park on foot. Concerning fencing, none could be erected within the Boat Storage Area while boats are stored there.

66. There have been occasions when all or part of a car has parked within the Boat Storage Area – for example, when Mr. Stenner was issued with a parking fine – but the evidence did not establish this was anything other than occasional and in my view could not take place when six boats were stored within the Area.

Conclusion

67. In the light of the above, Mr. Stenner's claim to a prescriptive easement fails and I will direct the Chief Land Registrar to cancel his application.

Costs

68. The usual order as to costs in a land registration case is that the unsuccessful party pay the costs of the successful party, but the Tribunal may make a different order. My provisional assessment, subject to any submissions that may be made, is that the Respondent is the successful party and therefore an order for costs ought to be made in its favour.

69. The normal basis for assessment of costs is the standard basis, but in an appropriate case the Tribunal will order costs to be assessed on the indemnity basis. In either case, the Tribunal will not allow costs which have been unreasonably incurred or are unreasonable in amount. The difference is that, on the standard basis, the Tribunal will only allow costs which are proportionate to the matters in issue, and will resolve any

doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party. If costs are assessed on the indemnity basis, proportionality is not taken into account, and doubts as to reasonableness are resolved in favour of the receiving party.

70. My provisional view is that I should order that Mr. Stenner pay the costs of TDC to be assessed on the standard basis. Any party who wishes to submit that some different order should be made as to costs should serve by email written submissions on the Tribunal and on the other party by 5.00 pm on 15 November 2024, to which the other party will be entitled to reply with written submissions served by email on the Tribunal and other party by 5.00 pm on 29 November. I will then make an order for costs and if necessary give directions for their assessment.

Dated this 30th day of October 2024

Colin Green

By Order of the Tribunal