THE ISLE OF MAN LAND REGISTRY

Land Registration Act 1982 ("the Act")
And
Land Registry Rules 2000 ("the Rules")

IN THE MATTER between:

Applicants	: Philip Charles Matthews & Eilish Mary Matthews
and	
Objector	: The Very Reverend Nigel Philip Godfrey
in respect of:	
Application Number	: 201301470
Property	: 4 Marguerite Place, Foxdale, Parish of Patrick IM4 3HE Isle of Man ("the property")
Nature of application	: Application in terms of section 46 of the Act and Rule 40 of the Rules to enter an appurtenant right of way on the register of the title to the property ("the application")

Decision of G. E. Anderson, Assistant Chief Registrar, Legal Officer (Land), in respect of the application for first registration of the property by the applicants

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Introduction

1. Marguerite Place is the name given to a terrace of three cottages which front on to a sharp bend in Mines Road leading from the village of Foxdale towards The Braaid and then on to Douglas. It was originally comprised of six small cottages which were built on a portion of The Masters Fields, part of the estate of Ballamenagh in Foxdale. These fields adjoined the old Foxdale mines and it appears that the cottages, which must have been built in the early 1800's, were occupied by the miners who worked on the mines, and their families.

2. With the passage of time the cottages were consolidated so that at first the six cottages became five until what is the position today – three cottages numbered 2 (a consolidation of 1 and 2), 4 (a consolidation of 3 and 4) and the end terrace on the south eastern side being number 5 Marguerite Place.

3. The design and the layout of the cottages lends itself to close community living and although over the years the owners and occupants have lived in harmony, the communal spirit has been tested by the dispute which arose out of this application, a dispute between the owners of two of the adjoining cottages, Number 4 and 5 Marguerite Place.

Representation of the parties

4. The applicants are the owners of Number 4 Marguerite Place ('Number 4'). The applicants are litigants in person. The application for first registration was lodged in the Land Registry on their behalf by the firm of advocates, Corlett Bolton & Co of Douglas but the applicants decided against legal representation at the hearing.

5. The objector appears in a representative capacity as the executor in a deceased estate and in whom the legal estate in Number 5 Marguerite Place ('Number 5') is vested. The objector is represented by Mr Christopher Webb, an advocate of the Isle of Man High Court, of the firm of advocates MannBenham of Douglas.

Application for first registration

6. The applicants lodged a voluntary application in the Land Registry on the 4th July 2013 for the first registration of the freehold estate with an absolute class of title in Number 4. As is the practice on first registration, the Certificate of Title contained in Box 15 of Form 1: *Application for First Registration* was signed by an advocate from Corlett Bolton & Co.

7. As part of their application, the applicants claim that they have acquired by prescription a right to park on the adjoining property which is Number 5 Marguerite Place. They have applied for the easement of parking to be entered on the title as an appurtenant right, that is, a right or interest to which the property is entitled over other land. If the claim is accepted, the right to park will be entered as a burden on the property which is subject to such right.

8. The details of the claim are set out in Item 3 of Appendix F: *Appurtenances* which is the appendix included in the application listing the appurtenant rights to which the applicants claim they are entitled. The claim reads as follows:

"A prescriptive right to park a motor vehicle at all times of the day or night on the area shown coloured orange on the filed plan enclosed with this Application as evidenced by the following:

(1) Affidavit of Philip Charles Matthews	*dated 23rd May 2013*
(2) Affidavit of Eilish Mary Matthews	*dated 23rd May 2013*
(3) Affidavit of Colyn Godfrey Baillie-Searle	*dated 23rd May 2013*
(4) Affidavit of Nicola Kennedy	*dated 4th June 2013".*

9. The Boundary Map, or survey map extract, which was lodged with the application showed the parking place ("the parking space") as being rectangular in shape and close to the cottage building, the end terrace Number 5. The original map did not give the dimensions or co-ordinates of the parking space and the Land Registry was therefore unable to plot and delineate the position and the extent on the Index Map. For this reason, paragraph 1 of the Directions Order dated 13th November 2014 made by the Assistant Chief Registrar required the applicants to serve and file 'an extract from a survey map extract on which the dimensions and or the co-ordinates of the property…are clearly indicated and delineated'. The applicants produced a map which is headed 'Survey Map' and which is signed by Mr Matthews and which is stated as being: 'Map produced and accurate as of Tuesday 18th November 2014' ("Plan 1"). Due to the technical nature of the claim and for a better understanding of the locality

in which the parking space is situated I have attached a copy of Plan 1 to this decision.

10. As prescribed by Rule 40(2) of the Rules, notice of the application for the appurtenant right was then given on the 2nd June 2014 to the person who has an interest in the land affected by the claimed right being the objector, the executor in the estate of the late Stephanie Mary Houlgrave, in whom the ownership of Number 5 vested. The objector gave notice on the 24th June 2014 of his objection to the registration of the prescriptive right and the matter then continued as an opposed application under the provisions of *Part 11: Proceedings in the Land Registry* of the Rules.

11. It was at this stage of the proceedings that the applicants informed the Land Registry that they wished to represent themselves at the hearing but that their advocates, Corlett Bolton & Co. would remain as the advocates on record having signed the Certificate of Title contained in Form 1: *Application for first registration.*

12. Arrangements were then made for a Directions Hearing which took place on the 4th November 2014 in the Land Registry and a Directions Order was issued on the 13th November 2014. As required by the Order, the applicants produced a revised survey map extract giving details of the parking space (Plan 1), both parties provided written submissions and skeleton arguments and on the 6th May a site inspection of the property was held in the presence of the parties.

Site inspection of Marguerite Place

13. The site inspection was instructive and gave both a clear picture and context to the dispute between the parties.

14. Marguerite Place was built on the corner of Mines Road (the A24) and the road known as Kionslieu Hill in Foxdale. Number 2 stands at the north western end on the corner of the two roads, number 4 is the mid-terrace dwelling and number 5 is at the south eastern end. Behind the row of cottages lies a passageway which originally led from one end to the other end of the cottages and which gave access to the rear of the cottages. To the rear of the cottages and on the other side of the passageway is the garden area for each cottage. When first built, the area behind Numbers 4 and 5 Marguerite Place contained a block of five toilets for the use of the cottages.

15. In front of the cottages there is a broad pavement which has been tarred and which is demarcated by a concrete kerb. Evidence led at the hearing was that this was done in 1985. As is evident from Plan 1, the shape of the pavement follows the curve in the bend in Main Road, broadest in front of numbers 2 and 4 but gradually narrowing towards the front of number 5. The front doors of number 2 and 4 open directly on to the pavement area whilst the front door of number 5 is around the side of the building through a small pedestrian gate leading from Mines Road. The shape and size of the pavement is relevant because it is used by the applicants to park their cars.

16. From a practical point of view the string of land transactions involving sales, transfers and exchanges which I will detail later left Marguerite Place with three cottages –

- the end terrace number 2 with a large parcel of land at the rear on which the owner built, inter alia, a garage to house his motor vehicle

- the mid terrace Number 4 with only a small garden at the rear accessible only from the passageway and

- the end terrace Number 5, the smallest cottage of the three but with a large parcel of land adjoining the southern boundary with access directly from Mines Road.

17. The configuration of the cottages and the position of Number 4 is important in understanding how the issues in this application arose and provides a useful backdrop to the evidence of the witnesses.

18. I will now turn to the individual properties in Marguerite Place starting with Number 5 which the applicants claim is the servient tenement, which is comprised of two component parts, the cottage and, more importantly, the adjoining open area on which the applicants claim they have a right to park.

The cottage at 5 Marguerite Place

19. The Abstract of Title in respect of 5 Marguerite Place which was produced at the hearing by the objector commences with a reference to a Deed of Settlement dated 22nd March 1837 whereby John Clucas and his wife appointed two trustees to hold on trust the land known as Masters Field and all buildings erected thereon which included the cottages. Masters Field was a large tract of land surrounding the cottages and bordered on two sides by the Mines Road and Kionslieu Hill.

20. The separation of the land on which the cottages were built and the surrounding field took place in 1887. By Deed of Conveyance dated 6th January 1887 the beneficiaries of the trust, Richard Lace and Margaret Lace and the life tenant, Margaret Lace sold and conveyed to The Isle of Man Mining Company Limited the parcel of land known as Masters Field "with the exception of dwelling houses buildings yards and premises belonging thereto…"

21. The separation from the surrounding field left the cottages on a small piece of land surrounded on two sides by roads and at the rear by gardens whilst the boundary between the field and the end terrace, 5 Marguerite Place, left a narrow strip of land adjoining the gable wall. The position of the southern boundary of Number 5 as it was in 1887 closely approximates and follows the low wall leading from the road boundary and side gate to the steep bank and which is partially delineated by the letters J and K on Plan 1.

22. The position as it was in the late 1800's appears to have stayed the same for the next century. A compact building of small cottages with a common passageway, shared communal facilities and gardens at the rear but separated from the surrounding field.

23. In 1971 Eric Goddard Houlgrave and his first wife, Kathleen Mary Houlgrave ("Mr and Mrs Houlgrave") purchased the field of over three acres, including the parcel of land now adjoining Number 5, which surrounds Marguerite Place.

24. In 1979 Mr and Mrs Houlgrave purchased Number 5. Number 5 was then comprised of the dwelling, a shed in the passageway, a triangular shaped rear garden, including the water closet with steps leading up to it, and the narrow strip of land adjoining the southern side of the building containing the front entrance.

The open area adjoining 5 Marguerite Place

25. By 1983 Mr and Mrs Houlgrave owned numbers 3, 4 and 5 Marguerite Place as well as the surrounding field of over three acres. On the 7th January 1988 they sold off numbers 3 and 4 Marguerite Place but retained Number 5. I will deal with the devolution of title to 3 and 4 Marguerite Place when I examine the title to what the applicants claim is the dominant tenement – Number 4.

26. On the 17th June 1988 Mr and Mrs Houlgrave sold and conveyed to a company called Capital Venture Investment Company Limited most of the surrounding field which has since been developed into a residential estate. However, they did retain a small parcel of land adjoining the southern boundary of Number 5 stretching from the boundary wall along the boundary with Mines Road up to the Clock Tower and which parcel was incorporated into and became a part of Number 5. On this parcel of land is a confined area which, as the evidence will reveal, was loosely called the "car park". The car park is delineated by the letters D, E, F, G, H, J, K and D on Plan 1. It is a level expanse of ground which is grassed and bordered by the low boundary wall of Number 5 (between points J to K) and a retaining wall (between points D to H) behind which rises a bank which has been developed into a garden. The car park has direct access to Mines Road through two wooden gates supported on either side by Manx stone columns. The gates open inwards. Next to the one column is the pedestrian gate leading along the area shaded green to the front entrance of Number 5.

27. It is on this area that the applicants claim they are entitled to park.

28. The evidence will reveal that the area referred to as the "car park" was in fact used for a number of purposes and therefore there was some dispute about the reference to it being only a 'car park'. To avoid any association of ideas I will refer to this level expanse of land as being the "open area". Mr Webb drew attention to the fact that the reference to the plan in the Schedule to the 1988 Conveyance referred to in paragraph 31 is qualified by the words "for identification purposes only".

29. On the death of his first wife, Kathleen Mary Houlgrave on the 20th April 1989, Number 5 and the open area (collectively Number 5) vested solely in Mr Houlgrave and on his death on the 23rd August 2001, it was bequeathed to and vested in his then wife, Stephanie Mary Houlgrave by Deed of Vesting Assent dated 28th February 2002. And finally, on the death of Stephanie Mary Houlgrave on the 23rd October 2012, a Grant of Probate was issued by the High Court of Justice on the 5th November 2012 in favour of The Very Reverend Nigel Philip Godfrey.

30. The estate of Stephanie Mary Houlgrave, including Number 5, therefore vests in the objector who has an interest in the outcome of this application.

The applicants' property – 4 Marguerite Place

31. On the 7th January 1988 Mr and Mrs Houlgrave, the owners then of 3, 4 and 5 Marguerite Place, sold and conveyed to Edward John Wilde and Diane Lynne Wilde ('the 1988 Conveyance') the cottage described as 4 Marguerite Place, a consolidation of cottages numbered 3 and 4. Number 5 was retained by them. The plan which was annexed to the 1988 Conveyance ('the 1988 Deed Plan') refers to the open area as being the "car park".

32. The parties appear to have recognised the unique and, to an extent, landlocked position of the mid terrace cottage and the need to make provision for rights affecting both properties. The 1988 Conveyance reserved the following rights in favour of the purchasers, Mr and Mrs Wilde:

> "(i) *the right of free and uninterrupted passage of electricity water and sewage from and to the Scheduled Property* [No 5] *through such of the sewers drains conduits gutters watercourses and pipes serving the Scheduled Property as are situate in on or under any other buildings and land of the Vendors adjoining the Scheduled Property together with the right so far as may be necessary to enter on any adjoining or neighbouring property of the Vendors after giving the Vendors or the occupier thereof reasonable notice for the purpose of repairing cleansing maintaining and renewing such sewers drains conduits gutters watercourses and pipes and walls and any other parts of the Scheduled Property the Purchasers making good any damage occasioned in the exercise of such rights and*
>
> *(ii) the right to pass and repass on foot only over and along the passageway delineated and coloured Green on the plan hereto annexed"* [coloured green on Plan 1]

and the purchasers covenanted to:

> *(ii) erect a wall incorporating a gate between the points marked e-f on the plan…."*.

The wall and the gate is positioned in the passageway between the boundary of Numbers 4 and 5 and controls the access along the passageway.

33. The owners and occupiers of Number 4 were therefore entitled to an easement of right of way over the area coloured green on Plan 1 being a part of the passageway and the narrow strip of land adjoining the building. There was no express grant of a legal right of way on to or over the open area.

34. By Deed of Conveyance dated 31st January 1990 (which the parties accept was incorrectly dated and which should have been dated 31st January 1991 as correctly stated on the cover sheet of the deed) (Deed number 1991/643)('the 1991 Conveyance') Mr and Mrs Wilde sold and conveyed the property to the applicants. The Schedule in the 1991 Conveyance referred to the 1988 Deed Plan.

35. On the 8th July 2001 Mr Houlgrave and the applicants entered into a Deed of Grant of Easements ('the 2001 Easement') in order to give legal effect to the request of the applicants to make provision for the laying of a main for gas services over Number 5 in favour of Number 4. Mr Houlgrave, as grantor, granted the applicants, as the grantees, the right, after obtaining the necessary consents:

> "*…to enter upon the Grantor's Property with workmen tools and all necessary equipment to lay and construct in or under the Grantor's Property a main for the passage or conveyance of gas to the Grantees' Property together with the right to enter upon the Grantor's Property for the purpose of inspecting repairing and maintaining such main the Grantees in exercising such rights doing as little damage as possible to the Grantor's Property and restoring the surface thereof to at least s good a state of repair as it was in prior to such exercise…."*.

36. It was noted at the hearing that, although it may have been the appropriate time to do so, the 2001 Easement does not provide for the grant by Mr Houlgrave of an easement of parking in the open area in favour of the applicants.

2 Marguerite Place

37. To complete the conveyancing picture of Marguerite Place, I will turn briefly to the last of the three cottages - number 2 Marguerite Place.

38. On the 18th July 1975 Colyn Godfrey Baillie-Searle ("Dr Baillie-Searle") purchased the cottage numbered 2 Marguerite Place from Gordon Lewis Quirk and on the 21st November 1980 he purchased the adjoining cottage numbered 1 Marguerite Place from Mr and Mrs Houlgrave. These two cottages were consolidated into one cottage numbered 2 Marguerite Place.

39. On the 20th January 1983 Mr and Mrs Houlgrave and Dr Baillie-Searle entered into what was in effect a deed of exchange – Dr Baillie-Searle acquired two parcels of land to the rear of 1 and 2 Marguerite Place and in exchange he conveyed his title to the water closet at the rear of Number 5 and waived any interest in and easements over that property in favour of Mr and Mrs Houlgrave. This is relevant because Dr Baillie-Searle now owned a long rectangular piece of land at the rear of his dwelling on which he erected a garage in which to park his motor vehicle.

40. As will be seen when I turn to their evidence, the applicants called Dr Baillie-Searle as a witness. As a fellow resident of Marguerite Place for many years and whose father owned the cottage before him, Dr Baillie-Searle was able to give useful evidence on the facts of the case.

Hearing convened under Rule 120 of the Land Registry Rules 2000

41. A hearing was convened under Rule 120 of the Land Registry Rules 2000 in order to consider the application for the prescriptive right of way and the objection lodged by the objector.

42. Rule 120 provides that:

"(1) Where any question, difficulty or dispute arises during an investigation of title, or in any registration or other proceeding in the Registry, the Registrar may give notice to all persons interested to attend before him, at a time and place specified in the notice, for consideration of the matter.

(2) After hearing any representations made by any person so attending, the Registrar shall make such order in the matter as he considers just."

43. The hearing was convened and took place on the 22nd October 2015.

The case for the applicants

44. The applicants were litigants in person with Mr Matthews taking the lead in examining his witnesses and cross examining the objector.

45. The application lodged in the Land Registry stated that the claim of the applicants to the prescriptive right was evidenced by the four sworn affidavits of Philip Charles Matthews, Eilish Mary Matthews, Colyn Godfrey Baillie-Searle and Nicola Kennedy. At the hearing, evidence was given by three witnesses only, the two applicants and Dr Baillie-Searle.

Evidence of Philip Charles Matthews ('Mr Matthews')

46. In his evidence Mr Matthews stated that the applicants have acquired by prescription a right to park a motor vehicle at all times of the day or the night in a parking space in the open area represented by the letters MNOP on Plan 1. If you drive through the wooden gates of Number 5, the parking space is straight ahead in a line with the gates and close to both the garden retaining wall and the low wall which was the boundary of Number 5 before Mr and Mrs Houlgrave purchased the adjoining open area. The far end of the parking space is in a line with the passageway at the rear of the cottages.

47. A point of law raised by the objector, and which I will deal with at the outset of the evidence, is that the claim of the applicants is fundamentally flawed in that whilst they claim a right to park on the area marked MNOP, they failed to include in their pleadings a claim for a prescriptive right of way in order to access the parking space. The applicants need to drive from the wooden gates over the open area to the parking space and to do this they need a legal right to do so.

48. The survey map extract originally lodged with the application by the advocates on behalf of the applicants represented the parking space as a rectangular area of land stretching from the wooden gates to and including the area MNOP. This area is coloured orange on the plans which were annexed to the affidavits of Mr and Mrs Matthews and blue on the plans annexed to the affidavits of Dr Baillie-Searle and Nicola Jane Kennedy. This area appeared to be an approximate description in that it varies on the plans both in size and extent with the colouring crossing over the low boundary wall up to the front door of Number 5. The map also did not distinguish between the area the applicants allegedly use for parking and that used as a right of way to gain access to the parking space. As referred to in paragraph 9 above, and in compliance with the Directions Order, the applicants produced Plan 1 which gives specific details of the parking space.

49. The evidence of Mr Matthews is that, in producing Plan 1, they were mindful that access to the parking space was required, as is evident from the first paragraph of their Statement of Case, which states that: "The Affidavits still refer to the same location, although the shading on the original map also included the access route to the parking space". I therefore accept that if I am to find that the applicants have parked their motor vehicles in the area MNOP for the requisite prescriptive period, they must equally have exercised a right of way to gain access to the parking space for the same period. As such they would be entitled to a right of way to the parking space. I therefore do not accept the argument that this should have been separately, or at least more clearly, pleaded. This question is dealt with in the textbook, *Private Rights of Way – Bickford Smith, Francis, Jessel and Shaw (1st edition) Jordans at paragraph 2.30* in the following way:

> *"A right to park will need a means of reaching the parking space. This right of access may be seen as ancillary to the parking or as a separate easement, itself appurtenant to the dominant tenement……A right to reach the parking space may be a way of necessity."*

In my view, if the applicants are entitled to the right to park, the right of access would be ancillary to the parking.

50. Mr Matthews stated that when he and his wife purchased Number 4 in January 1991 they believed that the large car parking area adjoining Number 5 was for the use of the owners and occupiers of both 4 and 5 Marguerite Place. This belief was based on the fact that the 1988 Plan annexed to the 1988 Conveyance, which formed part of

the Abstract of Title which was handed to them by their advocates, clearly marked and labelled this area as "Car Park". In his evidence Mr Matthews also stated that they 'assumed' that it was a car park for the use of the occupiers of Marguerite Place.

51. Mr Matthews stated that Mr and Mrs Wilde, the predecessors in title to Number 4, also used the open area for the three years of their ownership but no evidence or supporting affidavits to this effect were presented and I have therefore disregarded this evidence of user between 1988 and 1991. This point was also raised by Mr Webb in cross examination.

52. Mr Matthews divided the years of user into different periods.

53. For the first period of three years from 1991 until 1993 the applicants had the sole use of the open area because the tenants of 5 Marguerite Place did not have a car. During this period the applicants had only one vehicle driven by Mrs Matthews who parked her car in the area designated MNOP whilst a second unroadworthy car, used for spare parts, was permanently parked to one side of the open area. An appendix to the applicant's Statement of Case is a photograph of the unroadworthy car parked in the open area alongside the parking space with Dr Baillie-Searle crouched in the vehicle.Mr Matthews did not have a driving licence until 1996. Under cross examination, Mr Matthews stated that although they 'normally' parked in the area MNOP, they did not only use MNOP but did most of the time. Mr Matthews stated that they did have the use of the whole open area but he agreed with Mr Webb that if they had applied to the Land Registry for a right to park anywhere in the open area – 'the complete use of the car park' – it would make it impossible for the owner of Number 5. Mr Matthews confirmed, under cross examination, that they had used the specific parking area 'most of the time' and more than any other place in the open area but that they did use other parts of the open area, for example, their son's moped was parked there for three years and three bicycles were left in this area. The words in quotations are those used by Mr Matthews during his evidence.

54. In 1993 Number 5 was let by Mr Houlgrave to Ronnie and Margaret Moore. Mr Moore, who was a builder and handyman, owned what was described as an 'old work van'. For the second period of ten years between 1993 and 2003 the applicants and the Moores had an amicable arrangement regarding the shared use of the open area. The applicants did not seek the permission of the owner of the open area or of the new tenants to park there. Mr Matthews' evidence about the shared use of the open area is that he would normally use the parking space directly in line with the entrance for the reason that he would leave for work first thing in the morning between 6:30 to 7:00am and that Mr Moore would park to the right, looking in from the road, of the area MNOP in the larger part of the car park. Mr Moore then had the freedom of the open area to park where he liked. The applicants did not always use MNOP but sometimes parked in the road in front of Number 4 or in other places inside the open area, including in front of the parking space. On occasion Mr Moore would have to ask the applicants to move their car because the wooden gates were never closed.

55. The wooden gates remained open during most of this period until the Moores bought a puppy in 2002 and at their request the wooden gates were then closed for the first time. Sometime during this period Mr Moore changed his van for a small white Citroen sedan ('the Citroen').

56. In 1993 the first of the applicants' three children were born. According to Mr Matthews, Mrs Matthews found it easier to park in the area MNOP because it gave her ready access to the back door of Number 4 for moving her children, their buggy's and

the shopping. Parking in front of the house on the pavement was not suitable because of the busy road.

57. It seems that at the insistence of Mrs Matthews, who gave Mr Matthews driving lessons as a Christmas present in December 1995, Mr Matthews finally got his driving licence in 1996. Thereafter, Mr Matthews, whose car was bigger than Mrs Matthews, parked his car in the parking space and Mrs Matthews on the pavement in front of the house.

58. The third period runs from the death of Ronnie Moore in 2003 until the date of the application of the 27th June 2013. Mr Matthews admitted that they did not always park in the parking space but that there were various reasons for this. Over the weekends when they were busy and 'out and about', it was not convenient to use the parking space. Both the applicants were teachers entitled to long school holidays and the parking space would also not be used during their absence on holiday for periods of up to six weeks. Another reason for such infrequent use was that, to keep control of their dog, Mrs Moore requested that the gates be kept closed which made parking more difficult.

59. The Citroen also featured in the evidence of Mr Matthews. On her husband's death in 2003, Mrs Moore asked that for sentimental reasons her husband's car – the Citroen – be allowed to stay in the open area. According to Mr Matthews the Citroen was parked for most of the time to the one side of the open area next to a greenhouse erected on the side closest to the Watch Tower. When the grass became overgrown, and as the Citroen was never locked, either the handbrake would be released and the Citroen moved around manually or sometimes, Mrs Moore's brother, Beresford was able to start the Citroen and move it. Mrs Moore also became reclusive after her husband's death and never again slept at Number 5, Beresford collecting her each evening and returning her to the house the next morning. For this reason Mr Matthews said that since 2003 they have been the only daily users of the open area.

60. The evidence of Mr Matthews moved on to the meeting between Mrs Matthews and the objector on the 25th May 2012. It was at this meeting that the applicants learned for the first time that Number 5 was to be sold and that to assist with the marketing of the property the applicants were asked to remove a number of items, such as their kayaks, from the garden which is the area behind the open area. The applicants were upset by this turn of events for two reasons – firstly, they believed that they had the right of first refusal to purchase Number 5 which they said Eric and Stephanie Houlgrave had verbally promised them in July 2001 and secondly, they were concerned that a sale might compromise the security of tenure of the tenant, Margaret Moore. Mr Matthews said they had asked for the right of first refusal because they were aware of the 'complications' that had arisen due to the close communal living between 4 and 5 Marguerite Place – the right of way skirting the front door of Number 5, the easement for a gas pipeline running through the car park and, in fact, through the area MNOP, the access to the valley guttering through the roof of Number 5, the fact that one metre of Number 4 is situated within the curtilage of Number 5, the position of the downpipes from the shared guttering and the issues surrounding the car park. Finally, the applicants were concerned about the impact any building development which may take place at Number 5 would have on their property and which may not take into account the complications listed above.

61. The applicants decided to commission a valuation of Number 5 and Mr Charles Garside of the estate agents and chartered surveyors, Deanwood was appointed. In the Valuation Report ('the 2012 Report'), which valued the property at one hundred and ten thousand pounds, the surveyor drew the attention of the applicants to the fact

that legal advice should be sought regarding the right to use the car parking space. It is this Report which Mr Matthews says precipitated the application for first registration and the claim for the prescriptive right.

62. The applicants made an offer to purchase the property for an amount of sixty five thousand pounds which, Mr Matthews admitted, was ridiculously low. This offer was not accepted by the objector.

63. Under cross examination by Mr Webb, Mr Matthews was unable to point to an easement of parking or to a right of way to access the parking space in the Abstract of Title to Number 4. Mr Matthews said that it was their belief that the words 'Car Park' written on the 1988 Deed Plan gave them the right to park there even though this plan was described as being 'for identification purposes'. Mr Matthews pointed out that Mr and Mrs Houlgrave saw the applicants using the open area and made no comment about such user or tried to stop such use.

64. In answer to the question as to why the applicants did not deal with the question of the right to park in the parking space when they entered into the 2001 Easement with the owners of Number 5, Mr Matthews said that, at that time and in other conversations, the question of parking was regarded as a *fait accompli* and that the applicants had a legal right to park in the open area. Mr Matthews said that he first became aware that the right to park may be an issue when it was raised in the 2012 Report.

65. In his Statement of the Case, Mr Matthews drew attention to a Planning Application number 87/01980/B in 1988 in which Mr Houlgrave applied for, and was granted, permission to erect a pair of garages at Number 5. This application only came to light in the 2012 Report. Mr Matthews suggested that this indicated an intention to provide parking for both Number 4 and 5. The admission of the Planning Application was objected to by Mr Webb but I am of the view that little turns on this because Mr Matthews admitted that there was nothing in the application to confirm that the garages were to be used by Number 4 and 5 but rather that it was an assumption he made because he did not believe that such a small cottage as Number 5 would need two garages.

66. The question of alternative parking arrangements was raised by Mr Webb. Mr Matthews said that there was not enough space on the pavement in front of Number 4 to park two motor vehicles although there was enough for one car. Mr Matthews pointed out that, before it was tarred and made into a pavement, this area had previously been a part of the road which extended right up to the front doors of Marguerite Place. Mr Matthews was of the view that parking on the pavement was illegal, although he confirmed that he had never been prosecuted for a parking offence. Mr Matthews was concerned that parking in this way impeded pedestrians.

Evidence of Eilish Mary Matthews ('Mrs Matthews')

67. The evidence of Mrs Matthews was short and to the point.

68. Mrs Matthews stated that Mr and Mrs Wilde, the people from whom they purchased Number 4, informed them, as they walked around the property, that the open area was for their use as a car park. Mrs Matthews never questioned this statement and they were never told that they could not park there. In fact, the right to park was never discussed with Mr Houlgrave in the many conversations she had with him, even when they were standing next to her car in the car park.

69. Mrs Matthews stated that although the Wildes said they were entitled to park in the open area, they did not tell the applicants that they should park in the parking space MNOP. Mrs Matthews said that the applicants had normally parked one of their cars in the parking space as well as sometimes parking more than one car in the open area. Normally Mr Matthews' car, which was the bigger of their two cars, was parked in the parking space and Mrs Matthews parked in front of Number 4. Mrs Matthews stated that when they first moved into Number 4 in 1991, the tenants of Number 5 did not have a car, and as such it was convenient for her to use the parking space MNOP because it was closest to the rear door of Number 4 readily accessible along the rear passageway. In this way Mrs Matthews could reverse her car into the parking space which enabled her to see her children asleep in the back seat of the car. With three children Mrs Matthews made frequent use of the parking space.

70. After the death of Mr Moore, Mrs Moore became reclusive, staying in the house with her dog. Mrs Moore did not drive. Mrs Matthews would park in the parking space which she referred to as 'our space' whilst Ronnie Moore's car was parked to one side of the car park near the greenhouse but was moved around when the grass had to be cut. Mrs Moore had no objection to the applicants parking in the parking space.

71. Mrs Matthews said that the applicants would not normally use the other areas of the car park unless they were going away on holiday and parked both of their cars in the car park.

Evidence of Dr. Colyn Godfrey Baillie-Searle ('Dr Baillie-Searle')

72 Dr Bailie-Searle gave evidence on behalf of the applicants.

73. In his introduction, Dr Baillie-Searle said that he had known Eric Houlgrave and his family since 1948 because his father and Eric Houlgrave, who had been teachers in Kensington Road, Douglas, were good friends. In December 1974 his father, who was living in South Africa at the time, visited Eric Houlgrave in the Isle of Man and discussed plans to set up a craft centre. From 1976 onwards his father and Eric Houlgrave joined forces and ran the Foxdale Craft Centre.

74. Dr Baillie-Searle said that at that time Mr Gordon Lewis Quirk owned all five cottages – numbers 1, 2, 3, 4 and 5 Marguerite Place and he knew the properties from architectural drawings prepared by his father. Dr Baillie-Searle purchased from Mr Quirk Number 2 Marguerite Place and one of the toilets (former stone built water closet) at the rear of Number 5 and moved in on the 28th August 1975. In 1976 Dr Baillie-Searle went to work in the United Kingdom as a research engineer but returned in 1981. He said that as he wanted a workshop and a garage for his property and as Mr Houlgrave wished to convert Number 3, 4 and 5 into two dwellings, they entered into a deed of exchange whereby Dr Baillie-Searle acquired two parcels of land to the rear of Number 2 and, in exchange, he conveyed the toilet and waived his easement of access to the toilet. Dr Baillie-Searle now has a driveway and garage at the rear of his property where he parks his car and there is therefore no reason for him to use the car park. In any event, there is no longer a passageway or rights of access from Number 2 to the open area because there is now a boundary wall between Numbers 2 and 4.

75. Dr Baillie-Searle said that it was his father who prepared the 1988 Deed Plan and the architectural drawings for the renovation of Number 5 which was extended to include an internal toilet. It was on these drawings that the reference to a 'Car Park' was first

made and Dr Baillie-Searle assumed that this was done as the result of planning requirements. In answer to a question from Mr Webb, Dr Baillie-Searle said that anyone could have parked in the car park.

76. Dr Baillie-Searle could not recall whether the car park was used as such in 1975 when he bought Number 2. He would always park in the road even though there was no pavement then, the pavement only being built in 1985. Dr Baillie-Searle recalled that both the Wildes and the applicants also parked in front and that there has never been an issue about parking there. Dr Baillie-Searle has never seen any traffic wardens checking the pavement area for parking violations.

77. In reply to a question put to him by Mr Matthews, Mr Baillie-Searle confirmed that since 1991 the applicants had normally parked in the parking space MNOP. At one stage the applicants had two cars in the car park, the roadworthy car being normally parked in the parking space and the second car used for spare parts being parked to the side. Dr Baillie-Searle noticed the parking arrangements every time he passed the car park on his way to Douglas.

78. When cross-examined on the parking arrangements, Dr Baillie-Searle went on to say that Ronnie Moore would also park in the parking space MNOP but not all of the time and 'probably to the right of MNOP'. He stated that if any building material or a skip had to be delivered to the cottages, it would be deposited in that area – MNOP – which was the closest point of access to the cottages. If no material was to be delivered, Mr Moore would park in the parking space because it was convenient to drive out of the car park. When asked whether Mr Moore would then not be using Mr Matthews' parking space, Dr Baillie-Searle's reply was in the negative, saying that he did not know that a specific space had been allocated to Mr Matthews because "that is a car park, and a car park is a car park".

79. On a number of occasions when giving evidence, Dr Baillie-Searle emphasised that the owners and occupiers of the cottages at Marguerite Place lived in peaceful harmony. Dr Baillie-Searle confirmed that the occupants would park where it was most convenient to the other occupants. He used expressions such as "we got on so well with everybody there" and "we got on so well as a community" and we were "very lucky".

80. Over the years Dr Baillie-Searle said that the occupants of the cottages must have developed the habit of parking in certain areas of the car park but that he only took notice when checking on the welfare of Margaret Moore.

81. After Mr Moore's death in 2003, Dr Baillie-Searle confirmed that Margaret Moore wanted her husband's white Citroen to remain in the car park because she felt that her late husband "was still there". Dr Baillie-Searle said that Mr Moore's car was parked in the parking space MNOP. Dr Baillie-Searle then spoke with Beresford, Margaret Moore's brother and said that the Citroen should be moved for the reason that it was parked in the space where the applicants were allowed to park and for the delivery of building material. Dr Baillie-Searle said that the applicants "sometimes" parked in the parking space after Margaret Moore had left for the evening and that they "sometimes" parked their car there during the day and when they went on their holidays. When asked where Mr Moore parked his white Citroen, Dr Baillie-Searle said that it was "usually", but not all the time, parked back from the gate and closest to Number 5. He said that the car was moved around all the time.

82. Dr Baillie-Searle said that they did not want to upset Margaret Moore who wanted the Citroen car close to her. The car was moved around and ended up closer to the greenhouse. Eventually the car was removed for scrap metal by Manx Metals.

83. Dr Baillie-Searle could not recall that the applicants ever sought or were granted permission to use the car park from the owner, Eric Houlgrave who would have seen their car parked there.

Evidence of The Very Reverend Nigel Philip Godfrey ('the objector')

84. The only witness called by Mr Webb was the objector himself, The Very Reverend Nigel Philip Godfrey. The witness list presented by the objector under the Directions Order included Mr Cleveland Perry, the brother of Margaret Moore, as a witness but he subsequently declined to give evidence.

85. The witness statement of the objector states that he is the executor of the will of Stephanie Mary Houlgrave who died on the 23rd October 2012. By a Deed of Vesting Assent dated 28th February 2002 the property situated at Number 5 had vested in Stephanie Mary Houlgrave.

86. The objector confirmed that Ronald and Margaret Moore had been tenants of Number 5 since 1993 and that on Ronald's death in June 2003, Margaret Moore had continued to rent the property. The objector stated that prior to May 2012 he called at the property in order to collect the rent which was an amount of one hundred and twenty pounds "every other month", that is, sixty pounds per month. It was difficult to get hold of Margaret Moore and he therefore had to make clear arrangements with her regarding payment of the rent.

87. The objector reported that the day to day activities of Margaret Moore are managed by her brother, Beresford whilst another brother, Cleveland Perry who lives in Peel deals with her more strategic needs. He confirmed that Margaret is now in a retirement home and that she no longer occupies Number 5.

88. The objector was asked to explain why he had called on the applicants in May 2012. The objector said that as the executor in the deceased estate it was his intention to sell Number 5 but had been asked by the appointed estate agents, Black Grace Cowley to arrange for the removal of rubbish, the canoes and extraneous items from the garden area prior to the sale. The objector could not recall exactly what he said to Mrs Matthew but he would have explained about the proposed sale of the property and that the party interested in the property was a family member. Mrs Matthews expressed concern about what would happen to Margaret Moore.

89. The objector alleged that it was only after this meeting and the subsequent negotiations with the applicants for the purchase of Number 5 that the applicants gave notice of their claim to an easement of parking.

90. The objector stated that he finds the claim of the applicants "at odds" with his personal knowledge of Number 5.

91. The objector said that he has had personal knowledge of Number 5 since at least May 2012 after he began visiting the property to collect the rent from Mrs Moore and to sign her rent book. The objector said that from 2012 until 2014 he had never seen any other vehicle in the car park except for the white Citroen Debut with registration

number DMN 785 P belonging to Ronnie Moore parked directly behind the double gates in such a way that it was not possible to get another car into the car park but that in the summer of 2014 it was moved to the side. The tyres were flat and grass was growing around the car. It was the objector's impression that one had to be a skilful driver to park two cars in the car park because the two wooden gates opened inwards which restricted movement. The objector said that he asked Margaret Moore who had moved the car but he did not get a clear answer from her.

92. The objector referred to a letter dated 7th January 2015 which he addressed to Cleveland Perry which was written to confirm a telephone conversation he had with Mr Perry on the 30th October 2014. He alleged that Mr Perry confirmed that for sentimental reasons and since his death twelve years earlier, Mr Moore's car had been parked in the parking space behind the double gates in such a way as to prevent any other motor vehicle entering into the open area. There are a number of other statements allegedly made by Mr Perry regarding the manner in which the Citroen was moved and the reasons for its removal. I attach little weight to this letter and to these statements for the reason that Mr Perry did not confirm the contents of the letter in a witness statement or by any other means nor was he prepared to give evidence at the hearing.

93. The objector then referred to a number of photographs which were included in the bundle of documents. The first were a series of nine photographs of the street view of Number 5 taken by Google Maps in October 2010 which show a white vehicle parked behind the gates in the parking space MNOP which the objector confirmed was the Citroen of Mr Moore. The photographs also show a grey motor vehicle parked in front of Number 4.

94. The objector referred to two further Google satellite images dated the 7th January 2006 and 3rd December 2012 both of which indicate the Citroen parked behind the gates of Number 5 in the area claimed by the applicants.

95. The next series of three photographs show the white Citroen with registration number DMN 785 P parked to the side of the car park nearest the greenhouse and to the side of the parking space. The car shows signs of rusting at the back and on the side visible to the camera whilst the grass underneath the car is brown and bare. The objector states that this was the position the car was in after it had been moved in the summer of 2014 and prior to it being scrapped.

99. The objector noted that the applicants admitted that the Citroen remained in the car park after the death of Mr Moore.

100. In light of the above the objector claimed that the applicants could not have parked their car in the parking space MNOP during the period from the death of Ronnie Moore in 2003 until 2014 when the Citroen was moved and then scrapped.

101. The objector stated that there is more than ample parking in the vicinity of Number 4. The applicants' car can be easily parked on the pavement in front of the building or the applicants may use the area besides the Kionslieu Hill before St Paul's Church or on the A24 on the left on the way to the A3. The objector referred to photographs which showed that the applicants preferred to park on the area in front of Number 4.

102. The objector contends that the position of the parking space would restrict access by a wheelchair user to the rear door of Number 5 and that the space at the rear of the parking space makes the back door of Number 5 unusable by the owner or tenant. In addition and because the gates open inwards, it is very difficult to put a second car

alongside the parking space designated MNOP. The objector maintained that any right to park would reduce the privacy and security of Number 5 and make it difficult to use the garden area.

103. It was the opinion of the objector that the purpose of the application was "to try to hinder and taint any sale of No. 5 and to secure an advantage on any sale of No. 5". He referred to the offer of sixty five thousand pounds made by the applicants to purchase the property which he is of the view is worth in the region of one hundred and thirty thousand pounds. The applicants stated that they were unable on ethical grounds to offer any more. Offers of one hundred and twenty thousand pounds and one hundred and ten thousand pounds were made by Cleveland Perry but have since been withdrawn for the reason that he has made alternative arrangements for his sister, Margaret Moore.

104. The objector referred to a Log listing details of the nine visits he made to Number 5 in a period of twenty one days at various times of the day and night between the 25th February 2015 and the 17th March 2015. On each occasion the wooden gates were shut and only on one occasion, the 4th March 2015, was the applicants' car parked behind the gates on the grass. On a number of these occasions there were two cars parked in front of Number 4. The objector took these steps because he had no clear evidence of parking by the applicants.

105. The objector stated that there were inconsistencies in the plans lodged by the applicants and as a result he had no clarity as to where the claimed parking space should be although Plan 1 did clarify this issue.

106. The objector stated that he never discussed anything about Number 5 with Eric Houlgrave and he was not made aware of there being any rights of way or parking over the property.

107. When questioned by Mr Matthews about the negotiations to sell Number 5, the objector stated that he had rejected the offer of one hundred and ten thousand pounds because Cleveland Perry had been unreliable in his dealings and he wanted nothing more to do with him. The objector stated that the value of the property would be substantially reduced if an easement of parking was granted. He said that although the building was uninhabitable and that the rent did not even cover the building insurance premiums, the value of the property was in the building which, he said, "could be put right".

Brief summary of the evidence of the witnesses

108. When weighing up the evidence of the witnesses, I am mindful of the comments of His Honour Deemster Corlett in the Manx case of *Quine and Quine v. Joughin ORD 2011/21* which had started out as an opposed application in the Land Registry. The Deemster said that: "In arriving at my findings of fact I take into account that several of the witnesses ….. were being asked to recall events and land conditions many years previously in circumstances when, at the relevant time, there was no dispute and there was thus no particular reason to take note of matters about which they were now being so closely questioned. Recollections in such circumstances are bound not to be wholly reliable."

109. On the whole the applicants and the objector gave their evidence as honestly and to the best of their ability as possible whilst obviously emphasising those points which favoured their version of events. Of the applicants Mr Matthews was rather more formulaic in his choice of words whilst Mrs Matthews was able to give context to her

evidence which I found more helpful. Although he gave evidence on behalf of the applicants, Dr Bailllie-Searle was the only witness who did not have an interest in the outcome of the case and for that reason and for his ability to recall clearly certain facts and details about the case, I have preferred his evidence on some of the key issues. It should also be remembered that the Houlgrave and Baillie-Searle families were close family friends and business associates who at one stage together owned all five of the cottages at Marguerite Place and who were in business together. As such Dr Baillie-Searle had personal knowledge from an early age of the living arrangements at Marguerite Place. The evidence of the Objector who acts herein in a representative capacity was limited for the reason that his knowledge of Number 5 only began in May 2012 when he began to collect the rent from Mrs Moore.

110. The evidence about the description of the open area as a "car park" on the 1988 Deed Plan is contradictory. Mr Matthews said that the applicants believed that they were entitled to park in this area because this area was clearly marked as a "car park" on the 1988 Deed Plan which formed part of the legal documents handed to them by their advocates and therefore, by implication, he assumed they were entitled to a legal right to park there. Mrs Matthews never questioned the statement of their predecessors in title that they were entitled to park there. Dr Baillie-Searle, whose father prepared the 1988 Deed Plan, assumed that it was called a 'car park' for planning requirements. A closer examination of the plan shows that a number of other features on the plan are identified such as the 'grass' and the 'yard' of Number 4, the 'car park' and the 'Victoria Memorial Clock'.

111. The evidence of the applicants was that they parked anywhere in the open area, including storing a car for spare parts, a moped and bicycles, and sometimes, after Mr Matthews was issued with his driving licence, parked more than one car in the open area but that they 'normally' or 'most of the time' and 'more than any other place in the open area' parked in the parking space. According to Mrs Matthews, Mr Matthews' car, which was the bigger of their two cars, was normally parked in the parking space and her car in front of Number 4.

112. The evidence reveals that there were a number of stages during the period from 1991 until 2014 with each stage offering up a changing scenario affecting the use of the open area:

(a) during the period from 1991 to 1993 the tenants of Number 5 did not have a car and according to the applicants, Mrs Matthews, who was the only driver in the Matthews' family, was the sole user of the open area. An old car used for spares was also parked in this area by the applicants;

(b) in 1993 Mr and Mrs Moore became tenants of Number 5 and thereafter parking in the open area was shared by agreement between the applicants and the new tenants;

(c) from 1993 until 1996 parking in the open area was shared between the van used by Mr Moore for his business and the car of Mrs Matthews who parked there for her convenience and that of her small children;

(d) in 1996 Mr Matthews was issued with his driving licence and the evidence of the applicants is that they acquired a second and bigger car for the use of Mr Matthews. Given that the evidence shows that Mr Matthews has only driven and therefore used the parking space since 1996, he would not be entitled to the prescriptive right claimed for the reason that the full limitation period of twenty one years has not run its course as far as he is concerned. In my view

it is only Mrs Matthews who may lay claim to the prescriptive right. This was a point taken by Mr Webb;

(e) from 1996 to 2003 the applicants shared the car park with Ronnie Moore. During this period the van was exchanged for the white Citroen car;

(f) in 2002 the Moores acquired a dog and from then on and at their request, the wooden gates leading from the road to the open area were kept closed. In practice this made parking more difficult and less convenient than when the gates were left open; and

(g) from 2003 until 2014 when Mr Moore's vehicle was finally removed for scrap, the Citroen remained in the car park for sentimental reasons with the applicants allegedly continuing to share the area. Mr Matthews admitted that they did not always park in the parking space for the reasons which I have already touched on but that such failure to use the parking space would not be for longer than six weeks. The evidence of Mr Matthews that the Citroen was parked alongside the parking space during this period was contradicted by Dr Baillie-Searle and the objector who pointed to a number of photographs taken by Google Maps which show the Citroen parked in the parking space.

113. The evidence of Dr Baillie-Searle is important. He had no reason to place an emphasis on one set of facts above another.

114. By its nature the evidence of the objector is limited. The objector's personal knowledge of the property begins in May 2012 when, in his capacity as executor of the estate of Stephanie Mary Houlgrave, he starts to collect the rent from Mrs Moore. From this point, his evidence is clear – that the Citroen of Mr Moore and no other car was always parked in the parking space. The objector also referred to Google Maps and photographs which show the position of the Citroen in the parking space on certain dates and that the applicants park their car on the pavement in front of Number 4.

115. What does seem clear from the evidence is that the owners and occupiers of the cottages in Marguerite Place were a close community who lived in harmony under the benevolent eye of the owner of Number 5 who was both aware of the arrangements regarding the use of the car park and who never challenged such arrangements. That changed with the appointment of the objector whose primary responsibility as the executor is to administer and wind up the estate for the benefit of the heirs and beneficiaries.

116. I will explain my findings of fact when discussing the applicable principles of law.

The applicable law

117. The applicants' claim that they have acquired by prescription an easement entitling them to park at all times of the day or night in the area marked MNOP on Plan 1 of the property situated at Number 5 Marguerite Place.

118. As stated at paragraph 35-002 of the textbook 'The Law of Real Property', Megarry & Wade (7th edition):

> *"Prescription is primarily a common law doctrine, though extended by statute, by which certain incorporeal rights (such as easements and profits) can be acquired over the land of others. Fundamentally it is a rule of evidence, leading*

to a presumption of a grant from the owner of the land and therefore of a title derived through him".

119. Although the claim is based on prescription, the statute to which the applicants referred in their Skeleton Argument is the English Limitations Act 1980 (section 35) which clearly does not apply in the Isle of Man. The equivalent statute in the Island is the Limitation Act 1984 and the corresponding section relating to prescription is section 34 which provides that:

> *"(1) Any right over land which has been enjoyed as of right without interruption for the appropriate period shall be deemed absolute and indefeasible, unless it is shown that it was enjoyed by virtue of an express agreement or consent in writing.*
>
> *(2) In subsection (1) 'the appropriate period means-*
> *(a) in relation to an easement, 21 years;".*

120. The reference to an English Statute and the failure by the applicants to particularise the claim for an easement by prescription in legal terminology has not, in my view, prejudiced the objector in the conduct of his defence to the claim. The applicants claim that they have exercised the right to park in the parking space as of right, without interruption and without express agreement, for a continuous period in excess of 22 years (to the date of the application). Whilst it is apparent that this may not have been pleaded by the applicants, I am mindful that the applicants were litigants in person and therefore may not have presented their case as may be the norm in a judicial hearing. That said I think that the applicants have prepared a reasonably competent and comprehensive case for the hearing which includes references to all of the main principles and issues to be decided and as such I do not think that the objector has in the course of these proceedings been prejudiced in the preparation of his defence.

121. At the beginning of the hearing Mr Webb raised a point in limine. He referred to a passage in Halsbury's "Laws of England" which states that:

> *"Where an alleged easement is shown to have been enjoyed by reason of a mistaken view of the rights of the parties entertained by both the dominant and the servient owner, there is no enjoyment as of right upon which a prescriptive claim to the easement can be based."*

This statement appears to contradicted by a passage from Gale on "Easements" (18th edition) at paragraphs 4-102 and 4-103 which says that previous editions of the book relied on the authority of *Chamber Colliery Co v Hopwood (1886) 32 Ch. D. 549* and that, in general:

> "*the subjective belief of the person carrying on the user is irrelevant; what is relevant is the character of the user; is it user of the kind that would be carried on if the person carrying it on had the right claimed? User in a mistaken belief that it is justified by a right of limited duration [as in the Chamber Collier case], which belief is acquiesced in, cannot be made the foundation of a grant of unlimited duration but to say that no user based on a mistaken belief could found a claim to prescription would be to say that the law will only presume a grant in favour of someone who is aware that he is a wrongdoer."*

On this basis and on the basis that Mr and Mrs Houlgrave, as the dominant owners, did not also labour under the same mistaken belief, I do not accept the point made by Mr Webb and will turn instead to the merits of the claim of the applicants.

122. In the Skeleton Argument of the objector Mr Webb helpfully cites the Manx case of *Mellor and Corden SUM 2010/89 dated 24th May 2013* as containing a useful summary of the law in the Isle of Man regarding the common law and the creation of easements by prescription, in which His Worship the High Bailiff stated as follows:

> *"59. Manx cases such as Cowin and Goldsmith v Moore 1522-1920 MLR 126; Ellan Vannin v Challenor 1952-60 MLR 144 and Christian and Christian v Redmond 1984-86 MLR 79 demonstrate that the common law principles regarding the creation of easements by prescription apply to the Isle of Man. The essential characteristics of an easement are set out by the English Court of Appeal case of In Re Ellenbrook Park (1955) 3 All ER 667 where at p.673 the court approved the definition given in the textbook entitled: "Dr Cheshire's Modern Real Property" (7th edition p456). The four characteristics are: (i) there must be a dominant tenement and a servient tenement; (ii) an easement must accommodate the dominant tenement [ie. be connected with the enjoyment or benefit/utility of the dominant tenement]; (iii) the dominant and servient owners must be different people; (iv) the right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant."*
>
> *60. For an easement to arise through prescription it is essential that there is a history of continuous user in fee simple as of right. According to Eaton v Swansea Waterworks Co (1851) 17 QB 267 at 275, the user must be "nec vi, nec clam and nex precario" ie. the right has been exercised for at least the required number of years, without force, without secrecy and without permission. The required number of years in the Isle of Man is now 21 years under section 34 of the Limitation Act 1984. The term "without permission" is of course read in the context of the right of a prescriptive easement resting upon some original notion of acquiescence."*

123. In support of the general principles relating to prescriptive easements, Mr Webb also referred to the Manx cases of *Pogue v Woodrow 19th April 2005 Chancery Division* and *Kelly v Bennett 20th February 2002 Common Law Division: Summary Business* whilst the essentials of easements set out above are confirmed in the legal textbook *Private Rights of Way – Bickford Smith, Francis, Jessel and Shaw (1st edition) Jordans* at paragraphs 1.33ff.

124. The objector submitted that that the applicants failed to establish or prove each and every element of the claimed prescriptive easement and that the applicants failed to make the necessary statements in their pleadings. As stated above, I am satisfied that the objector was aware of the case he was required to meet and has not been prejudiced in the conduct of his opposition to the application. It is not a case of great technical detail. That said, it will be necessary for me to examine each and every submission made by Mr Webb on behalf of the objector.

125. I will consider each of the four characteristics of an easement which are referred to in the Ellenbrook Park case.

126. **First characteristic**: There must be a dominant and a servient tenement

The objector denied that the applicants had pleaded that there was a dominant and a servient tenement. In my view this is clear. There are two adjoining but separate

parcels of land – Number 4 which allegedly has the benefit of the easement (the dominant tenement) and Number 5 which is allegedly subject to the easement (the servient tenement).

127. **Second characteristic**: The easement must accommodate the dominant tenement

The objector submitted that the claimed easement was merely a contractual right and that, in any event, the applicants could park in alternative places in the vicinity of Marguerite Place, including in front of Number 4 as frequently happened. In support of this submission the objector quoted from the case of *Re Ellenborough Park* referred to above at p170, which stated that what is required is that the right

> "*accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that 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."*

128. The test in that case was whether Ellenborough Park constituted a communal garden of the houses to which the right of "the full enjoyment" of the park had been granted. The Court of Appeal decided that such a right did accommodate each of the houses. As stated in Gale on Easements (18th edition) at paragraph 1-24:

> *"The Court recognised that mere increase in value is not decisive, and that some rights, granted with a house, may fail to qualify as easements because they are not connected or are too remotely connected, with the normal enjoyment of the house, the question whether or not a connection exists being primarily one of fact, and depending largely on the nature of the alleged dominant tenement and the nature of the right granted."*

129. In my view a right to park in Number 5 clearly accommodates the dominant tenement, Number 4. It provides ready and easy access to the rear of the passage leading to Number 4, it is secure and private and is preferable to parking on the pavement in front of the house. I think there is little doubt that it will add to the value of Number 4 in much the same way that the evidence has shown that it will cause a reduction in the valuation of the servient tenement. In my view the parking space would be for the benefit and enjoyment of Number 4.

130. **Third characteristic**: The dominant and servient tenements must be in separate ownership

This is clear from the evidence. The two properties are in separate ownership – Number 4 is owned by the applicants and Number 5 vests in the objector.

131. **Fourth characteristic**: The easement must be capable of forming the subject matter of a grant

The question as to whether the right to park was capable of being an easement in the Isle of Man appears to have been accepted in the Manx case of *Vaughan v Fletcher CLA 2000/19 (judgment delivered by His Honour Deemster Cain on the 10th July 2000).*

132. The Court in this case was called on to decide about the extent of a private right of way over land known as Hannah's Yard in Kirk Michael. Although the case concerned

the issue about the right of way, Mrs Vaughan gave evidence that she and her husband, their visitors and tradesmen frequently parked vehicles in Hannah's Yard, a large open yard about 50 feet square, owned by Mrs Fletcher. Deemster Cain stated at page 8 that:

> "*The evidence about parking is not as clear. While I have no doubt that vehicles have been parked on Hannah's Yard by the owners and occupiers of Mona House since 1967, there is no evidence that parking was in any particular part of Hannah's Yard. In fact the evidence is that parking was random. I will consider whether this was sufficient to create a right to park"*

and again at page 14:

> *"Lastly there is Mrs. Vaughan's claim to a right to park on Hannah's Yard. Mr. O'Riordan accepted that a right to park was capable of being an easement. This was established in* London and Blenheim Estates Ltd v Ladbroke Retail Parkes Ltd (1993) 1 All ER 307. *However Mr. O'Riordan submitted that for such an easement to arise in the present case there would have to be an established user of a specific parking space rather than general use of different spaces over a large area. Mr. O'Neill referred to the evidence of Mrs. Vaughan and Mr. Harper. Mrs. Vaughan said that she and her husband "would on frequent occasions park in random positions within Hannah's Yard." Mr. Harper also referred to "the parking of vehicles in various random positions within Hannah's Yard."*
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> *In* London and Blenheim v Ladbroke Retail (above), *Judge Baker QC said at page 317:*
>
> *"The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it could not be an easement, though it might be some larger or different grant."*
>
> *If Mrs. Vaughan has a right to park at random anywhere in Hannah's Yard, this would leave Mrs. Fletcher without any reasonable use of Hannah's Yard at all, and, in my view, that could not be an easement. There is no evidence that any particular place in Hannah's Yard has been habitually used for parking by Mrs. Vaughan or her predecessors in title, and I am not satisfied that any right to park has been established. The claim in respect of a right to park on Hannah's Yard is therefore dismissed."*

133. The applicants do not claim that they are entitled to park anywhere in the 'car park' or the open area. In fact, under cross-examination, Mr Matthews agreed with Mr Webb that if they had applied for the right to park anywhere in the car park it would have made it "impossible" for the owner of Number 5. It would seem that the facts of Vaughan's case are similar to those of the present application. Hannah's Yard was surrounded on three sides by stone walls and an opening from the main road opposite the doors of a garage and it may well be that on those facts parking a car 'at random' in the yard may well have left no reasonable use of the yard to the servient owner. In this application, the open area which is also a confined space can fit two small cars with some difficulty and therefore the right to park anywhere would likewise, in my view, leave the owner of Number 5 without any reasonable use of the open area.

134. It is the principle of the owner being left with reasonable use of the servient tenement which is confirmed in the passage by Gale on *Easements (18th edition) at paragraph 9-96* as follows*:*

> *"There appears to be no reason in principle why a right to park a car somewhere in a defined area should not be capable of being an easement provided that (a) it is made appurtenant to a dominant tenement, and (b) the right is not so excessive as to exclude the servient owner and leave him without any use of the area in question for parking or anything else."*

135. The applicants, however, do not claim a right to park a car "somewhere in a defined area", that is, somewhere within the open area or car park, but rather the applicants claim that "they are entitled to an appurtenant right to park a motor vehicle at all times of the day or the night in the area that is marked by the letters MNOP…and which forms a part of the property situated at 5 Marguerite Place."

136. Does Manx law recognise a right to park within a single car space as being capable of constituting an easement? It would seem from the judgment of Deemster Cain that he did not exclude the possibility of such a right coming into existence but that in the Vaughan case, there was "*no evidence that any particular place in Hannah's Yard has been habitually used for parking…"*

137. I therefore accept that in Manx law the following principles apply to the creation of a right to park:

(a) a right to park could exist as an easement. In England, in the context of rights of way, a right to park vehicles on clearly defined land is now established as capable of constituting an easement. The existence of an easement of parking was likewise recognised in Batchelor v Marlow, where the Court of Appeal noted that the possibility of an easement of parking was common ground between the parties. The claim for such an easement failed on the facts;

(b) the right to park could be acquired by prescription "if the evidence does establish use which is consistent and only consistent with a right which, if it had been expressly granted, would have been capable of subsisting as an easement" (Batchelor's case at page 78);

(c) the prescriptive right to park cannot be "so large as to preclude the ordinary uses of property by the owner of the land affected…" It is generally accepted that an easement cannot give to the dominant owner 'exclusive and unrestricted use of a piece of land': the legal textbook on *Private Rights of Way* (paragraphs 4.118 to 4.128). *Gale on Easements (18th edition),* with reference to Batchelor's case, said the following:

> *"Where an exclusive right to park cars on a strip of land during normal business hours on weekdays was claimed, the Court of Appeal held that the right claimed was not capable of being an easement because the owner would not have had any reasonable use of the land for parking or any other purpose; the curtailment of his right to use the land for intermittent periods would make his ownership 'illusory'."*

The approach taken by the Court of Appeal in Batchelor's case was criticised by the House of Lords in the Scottish case of *Moncrieff v Jameson [2007] UKHL 42* but they did not overrule that case which is therefore still binding authority in England;

(d) as is evident from the passage quoted by Deemster Cain from the London and Blenheim case, the question as to whether the right to park will preclude the "the ordinary uses" or "reasonable use" of the servient property is essentially one of degree; and

(e) it therefore appears that whether the right to park can exist as an easement will depend on the facts and the extent to which the servient owner is excluded from enjoyment of his land. And as stated in *Private Rights of Way at paragraph 2.28:*

> *"The issue can in part turn on identifying what the servient tenement is. A right to park vehicles may be a heavy burden on a small area but reasonable in a greater one."*

138. In my view the right to park in the space defined by the letters MNOP in the open area is not capable of being an easement for the reason that it would leave the objector and his successors in title without any reasonable use of the servient tenement. As will appear from Plan 1, the parking space defined by the letters MNOP is situated in the centre of the property situated at Number 5 Marguerite Place. Given its proximity to the building, a motor vehicle parked there would impede pedestrian access to the rear of the dwelling at Number 5, it would continually block access to the garden area, goods vehicles would not be able to deliver supplies or materials as indicated by Dr Baillie-Searle, access to the garden at the rear would be impeded and, on the evidence of the objector, it is difficult, if not impossible, with the wooden gates open for access, for the owner or occupier of Number 5 to park a second car in the open area. I agree, as well, with the submission of the objector, that it would compromise the security and the privacy of Number 5 because the gates would need to be opened, or left open, to facilitate the parking of cars. These are ordinary uses which in my view would be impeded or precluded. That it may prevent entirely the wholesale redevelopment of Number 5 by a prospective developer or purchaser is clear from the evidence given at the hearing.

139. For these reasons I find that the rights claimed by the applicants are not capable of being an easement.

140. Notwithstanding this finding, having had the benefit of hearing the evidence of the witnesses at the hearing, I would like to deal with the remaining aspects of this application.

141. The final requirement for an easement to arise through prescription, as Deemster Cain said in the Vaughan case, is that "…a right of way which has been enjoyed as of right, that is as if the user were entitled to it, without interruption and without express agreement, becomes absolute and indefeasible after 21 years." The enjoyment as of right must be nec vi, nec clam, nec precario, that is, neither by violence, nor by stealth nor by the permission or consent of the owner.

142. It would seem to me that on those occasions when the applicants did park in the open area, they did so as of right. There is no suggestion that the exercise of the right was by violence and I also do not agree with the submission of the objector that because the applicants sometimes parked at night after Margaret Moore left for the evening, their user of the parking space was 'by stealth.' From the evidence this would have been done in consideration of Mrs Moore's welfare.

143. The question as to whether the user was with the permission of the owner is more difficult to answer. *Gale at paragraph 4-95* states that in the law of prescription, there is a fundamental distinction between enjoyment under a licence or permission from the owner of the servient tenement on the one hand and acquiescence by the owner on the other hand. "*This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not 'as of right'.*" It seems clear to me that Mr and Mrs Houlgrave 'acquiesced' in the user by the applicants, there being no evidence of permission being sought from or granted by the owners or demands being made by them that the applicants desist from their actions. On the contrary, Mrs Matthews often stopped to talk to Mr Houlgrave alongside her car which was parked on his property without him saying anything. To my mind that is acquiescence.

144. The statement in Gale that permission granted by a tenant in occupation of the servient tenement is sufficient to defeat a prescriptive claim needs a brief response. There was evidence that when Number 5 was let to Mr and Mrs Moore they, as the tenants, knew that the applicants used the open area for parking. Mr Matthews said that he discussed parking arrangements with Mr Moore because he was the first to leave for work in the mornings. I find that the parking was shared by the tenants and the applicants by mutual agreement and that there is no evidence that the parking of the applicants was with the permission of the tenants.

145. The last part of the requirement laid down by Deemster Cain is that the user must have been without interruption for a period in excess of 21 years as laid down in section 34 of the Limitation Act 1984.

146. In my view and taken as a whole, I find that the evidence falls short of proving that the applicants have continuously and without interruption used the parking space in the open area for the required limitation period of twenty one (21) years. It is my finding that:

(a) Mr Matthews has been driving motor vehicles since 1996 and therefore, on his own version, his alleged use of the parking space falls well short of the limitation period and he should be excluded from any consideration of the claim;

(b) of the applicants, it is therefore only Mrs Matthews who was qualified to drive and in fact to use the family car(s) during the limitation period. That said, the evidence of the applicants is that Mr Matthews, whose car was bigger than that of Mrs Matthews, would 'normally' or 'usually' be parked in the parking space. If that is the case, which I find it to be, and subject to my other findings, it is only Mr Matthews who exercised such rights and, as stated in (a) above, such user falls short of the limitation period;

(c) the evidence is clear that Mrs Matthews' use of the parking space was in the early years, that is, when her children were very young, the wooden gates were left open and Mr Moore was out working for the day. At such times parking there at certain times of the day was more a matter of convenience such as when their very young children fell asleep in the back of the car or it was necessary to carry parcels along the rear passage to Number 4;

(d) as the years passed by, Mrs Matthews used the open area less, and as is evident from the number of photographs exhibited at the hearing, Mrs Matthews rather parked her vehicle in front of Number 4. Her husband now had a licence and a car and he shared the open area with Mr Moore's work van. Furthermore, it was now more convenient for Mrs Matthews to park in front of Number 4 – the car was

parked next to the front door of their house and which meant it was not necessary to open and close the wooden gates to get access to the open area. This facilitated the many brief stops at Number 4 by a busy mother who had to drive her three children to their various school and social activities;

(e) there is sufficient space for the applicants to park their two vehicles on the pavement in front on Number 4;

(f) from 1993 until the death of Mr Moore in 2003, the open area was shared by the users and occupiers of Numbers 4 and 5 Marguerite Place although the parking space was normally used by one of the vehicles of the applicants, primarily that of Mr Matthews. This much is clear from the evidence of Mr Matthews and Dr Baillie-Searle and the picture I have is that the parties parked in the open area in such a way and in such a place as was convenient to the other party and with the interests of the other party being paramount. It depended on who was the first to leave for work in the morning;

(g) after the death of Mr Moore in 2003 until the date of the application, I find little use by the applicants of the parking space. The evidence is that Ronnie Moore's white Citroen was parked in the parking space because Margaret Moore wanted her husband's car close to the house – Number 5 - for sentimental reasons. This is supported by the Google Map photographs taken in 2006 and 2010 and most importantly by the evidence of Dr Baillie-Searle, the only third party witness on whose evidence I have relied. Dr Baillie-Searle said that, after 2003, Mr Moore's car was parked behind the gate and closest to Number 5 although it was moved some of the time.

147. For all of these reasons, I therefore do not accept that the evidence proves that there has been continuous and uninterrupted user of the parking space defined by the letters MNOP by the applicants for a period in excess of 21 years.

Costs

148. Under the provisions of Rule 135 of the LRR 2000, the award of costs in respect of any proceedings in a hearing before the Registrar shall be in his discretion, and he may direct by and to whom costs are to be paid.

149. Mr Webb was of the view that a costs order should follow the outcome of the case and therefore, as the opposition of the objector to the claim to the prescriptive right has been successful, that the applicants should be ordered to pay the costs.

150. I take a different view and make no order as to costs. I find that the applicants have made an honest attempt to clarify the legal position regarding the right to park in the open area.

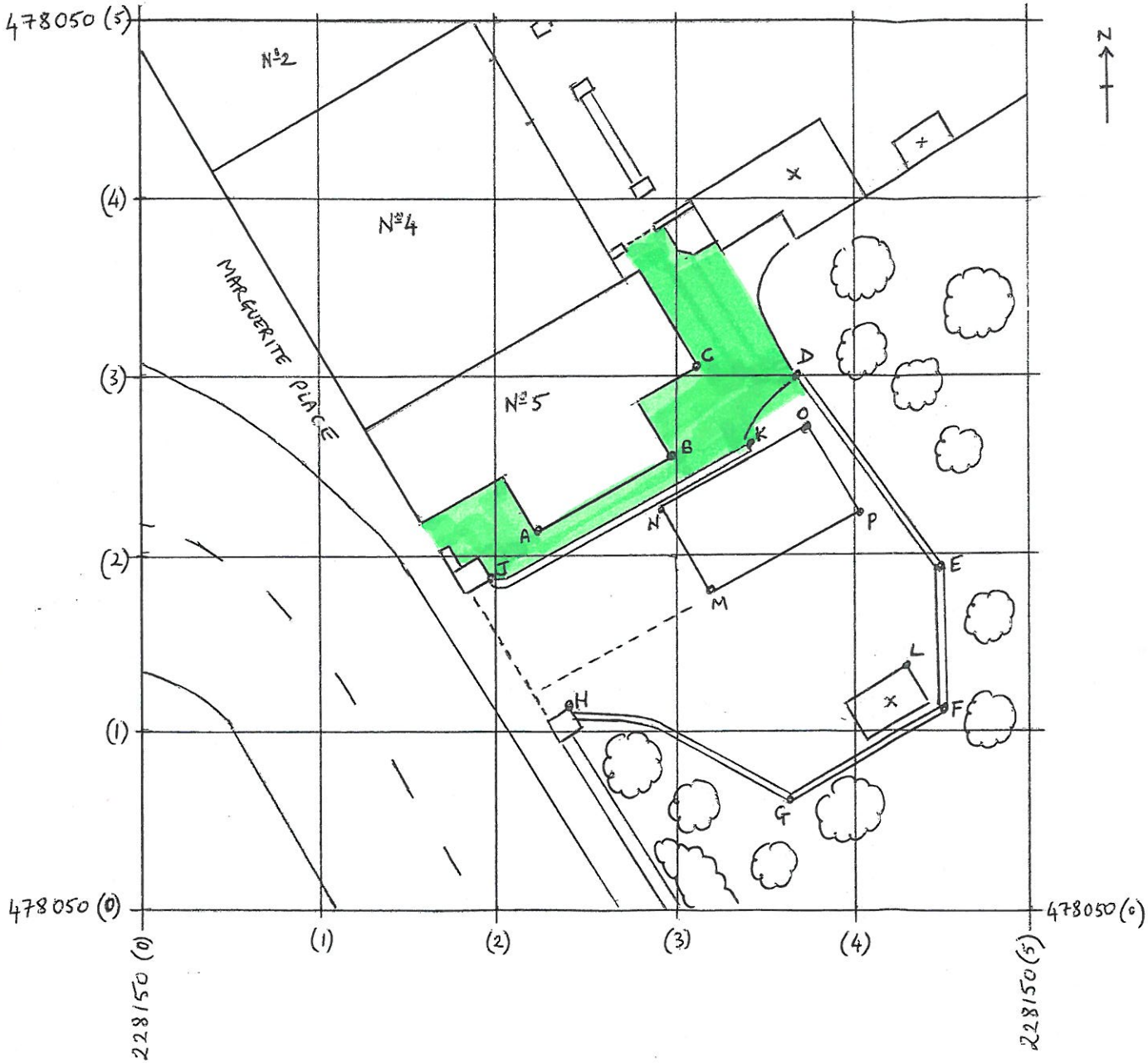
Dated at Douglas, Isle of Man on this 18th day of April 2016.

.....

G. E. Anderson
Assistant Chief Registrar
Legal Officer (Land)

SURVEY MAP RE: APPLICATION Nº 20130147O

PLOT SCALE 1:125 (BASED ON BOUNDARY MAP SCALE 1:500)
SURVEY SCALE 1:2500.



CO-ORDINATES REFER TO ISLE OF MAN BOUNDARY MAP (LAND REGISTRY), SHOWING LOWER LEFT QUARTER OF GRID SQUARE 228150 / 478050.
SCALE = 1:125 (DEPENDANT UPON ORIGINAL SURVEY)

DIMENSIONS RELATING TO APPLICATION Nº 20130147O

WALL A – B = 402 cm
LOW WALL J – K = 720 cm.
DISTANCE FROM WALL A-B TO WALL J-K = 60 cms
DIMENSIONS OF CAR PARK: D – E = 600 cms,
E – F = 415 cms, F – G = 360 cms, G-H = 595 cms
GATED ENTRANCE H – J = 340 cms, J – WALL (D-E) = 960 cms
DIMENSIONS OF CAR PARKING SPACE: M – N = 220 cms,
N – O = 420 cms, O – P = 220 cms, P – M = 420 cms
LOCATION OF CAR PARKING SPACE:
DISTANCE FROM (O-P) TO WALL (D-E) = 60 cms
DISTANCE FROM (M-N) TO GATE (H-J) = 480 cms
DISTANCE FROM (N-O) TO POINT L = 560 cms
DISTANCE FROM (M-P) TO POINT L = 350 cms
OTHER DIMENSIONS: B – K = 140 cms, C – K = 300 cms,
D – K = 270 cms, K – L = 570 cms

MAP PRODUCED AND ACCURATE AS OF TUESDAY 18TH NOVEMBER 2014
Philip Markwell.

PLAN 1