

**Judgment 19/2008**

**Les Banques Holdings Ltd v Good and Good – Royal  
Court (Civil Action File 1130) – 24 June 2008**

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**Action in trespass – use of residential car park – whether plaintiff must have exclusive possession in order to bring an action in trespass – Jersey and English authorities reviewed – exclusive possession held not to be a prerequisite to bringing an action for trespass – grant of a right to use an area of land does not necessarily involve a grant of possession (See Judgment 39/2007)**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

**Civil 1130**

The 24<sup>th</sup> day of June 2008 before Richard John Collas, Deputy Bailiff alone

LES BANQUES HOLDINGS LIMITED

Plaintiff

v

ALBERT FERDINAND GOOD  
&  
CATHERINE EILA GOOD

Defendants

Whereas on 2<sup>nd</sup> June 2008 the Deputy Bailiff considered the preliminary issue as to whether it is a requirement of the law of trespass that the Plaintiff must have exclusive possession of the land in question in order to bring a claim in tort and heard thereon Advocate C.J. Hay for the plaintiff and Advocates P Richardson and S Geall counsel for the defendants the Deputy Bailiff this day handed down judgment in the terms attached hereto and ruled that exclusive possession is not a prerequisite to bringing an action for trespass AND the Deputy Bailiff gave an indication of the directions he would give to the Jurats as to the factual question as to whether the said plaintiff has the necessary degree of possession in this matter.

S M D ROSS  
H M Deputy Greffier



of a building therein defined as the “*Resultant Car Park Building*” forming part of a large development of offices and apartments in the area known as Admiral Park, Les Banques, St Peter Port.

4. The Defendants are the owners, by virtue of a conveyance dated 24 May 2007, of Apartment number 14, being part of the Alligande Building in the Admiral Park development.
5. The conveyancing documentation is more complex than any I have ever seen in Guernsey with several schedules of lengthy and detailed rights and servitudes to which the conveyances were all made subject. By a Conveyance and Amendment agreement dated 31 July 2007, between both of the parties to this litigation and all the then owners of other properties on the development, amended schedules were substituted for the originals and in this case I am concerned with the second and third schedules to that Reforme entitled respectively “*The First Management Company Schedule*” and “*The Second Management Company Schedule*”.
6. In this judgment I have tried, whenever possible, when referring to expressions defined in the conveyancing documents to write the expression as it is defined including, where appropriate, the use of capital letters.
7. In clauses 1.39 and 1.9 of the second schedule, the definitions of “*Resultant Car Park Building*” and “*Car Park Building*” define the former as including the Office Car Park and the Residential Car Park. As the names indicate, the Office Car Park is for the use of the occupants of the offices and the Residential Car Park is for the use of the occupants of the Apartments on the development.
8. This case concerns the Residential Car Park.
9. Each owner of an Apartment is granted certain rights over the Residential Car Park including the right to use the post box in the Post Areas; the right to park a roadworthy private motor car, motorcycle or bicycle on an Allocated Car Parking Space and the right to use the Refuse Areas for the purpose of storing household refuse.
10. The Plaintiff, as owner of the Resultant Car Park Building has a number of obligations including to maintain, to light, ventilate and clean the Resultant Car Park Building, to paint the floors, to insure it, to keep detailed and accurate accounts and to use its best endeavours to provide at all times no less than 100 Car Parking Spaces, and to take steps to enforce any breach of a covenant by any of the Apartment owners. The covenants are set out in the second schedule at paragraph 8, in 28 numbered sub paragraphs on pages 128 to 132 of the Court bundle.
11. The case before me concerns a storage cupboard or shed, erected by the Defendants in the Residential Car Park Building, immediately adjacent to the Defendants’ Allocated Car Parking Spaces and in an area which has not been, and will not be, allocated to the owner of an Apartment.

12. The Plaintiff objects to the Defendants' shed and wishes to have it removed. It has brought an action pleaded in trespass and as an aggravation of the covenants. The Plaintiff seeks damages, an order that the shed be dismantled, and a declaration that the erection of it was unlawful.
13. At the start of the hearing, I observed that it appeared to me that the covenants in the schedules were charged covenants for the purposes of the Real Property (Reform) (Guernsey) Law 1987 and suggested it might have been easier, quicker and cheaper for the Plaintiff to have proceeded simply by using the remedies available under the 1987 Law. Following a brief adjournment, the Plaintiff's Advocate indicated that he wished to amend the pleadings to rely upon the 1987 Law. When a written application to amend was produced, the 1987 Law remedies were pleaded in addition to the existing case in trespass and *aggravation*. The Defendants' Advocate said he was unable, at short notice and in the absence of clients' instructions, to agree to the amendment. It was therefore necessary to continue to hear the legal issues regarding trespass and in particular whether the Plaintiff had exclusive possession, or sufficient possession of the Residential Car Park to bring an action against the Defendants in trespass.

## The Law

14. The Defendants rely upon a decision of the Jersey Royal Court, *St Helier Parish -v- Manning [1982 J.J. 183]* in which the Court said at page 187 "*both parties agreed that by the Common Law of both England and Jersey, the form of possession of land necessary to support an action of trespass against a wrongdoer must be exclusive*". The case concerned a charabanc which the Defendant had parked on a public road and which he and his family occupied as their home. The Court stated in its conclusion at pages 194 to 195:

*"For all the above reasons, we conclude that the position is as follows: a Parish is the owner of all public by-roads within the boundaries of the Parish. Such by-roads are administered by the Roads Committee of the Parish, as the Highway Authority constituted under the Roads Administration (Jersey) Law, 1960, but the Roads Committee acts merely as the agent of the Parish, and therefore the ownership and possession of all by-roads in the Parish are vested in the Parish. The electors of the Parish, whether principals or not, individually have no possession, legal or equitable nor any freehold interest in such roads. The ownership and possession of the Parish are therefore exclusive, but subject to the right of all members of the public to use such roads for a lawful purpose (as previously described) and in accordance with any statutory restrictions which may apply to a particular by-road.*

*It follows that, because the Plaintiff has exclusive possession of the road, we reject the special defence and find that the Parish can maintain an action in trespass against the Defendant."*

15. The Defendants' Advocate referred me to chapter 19 of Clerk and Lindsell on Torts and that drew my attention to the recent House of Lords decision in *J A Pye (Oxford) Ltd v Graham* [2003] 1 A.C. 419. As the case was not cited to me during the hearing, I have given Counsel the opportunity to make submissions regarding it subsequently. Their Lordships were concerned with the interpretation of the word "possession" in the Limitation Act of 1980, and held that the word bore its ordinary meaning as in the law of trespass or conversion.

16. In his speech with which the other four judges agreed, Lord Browne-Wilkinson, at page 432 G approved the following passage from the Judgment of Slade J in *Powell -v- McFarlane* (1977) 38P & C R 452 at page 469:

*"Possession of land, however, is a concept which has long been familiar and of importance to English Lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession."*

17. In my opinion, the possibility that another person may have a better right to possession is a clear statement that exclusive possession is not a prerequisite to bringing an action for trespass. That answers the first of the two questions posed at the start of this judgment.

18. As for the second question, I will be directing the Jurats that they must consider whether the Defendants are in possession of the Residential Car Park. At page 435F of *Pye*, Lord Browne-Wilkinson held:

*"there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession."*

19. It is interesting to note that just above that passage, Lord Browne-Wilkinson indicated that the definition of possession is well established having been used by judges and writers in the past and that it originated from Roman Law.

20. The Jurats will have to consider whether there is any evidence that the Defendants intended to enter into possession of the Residential Car Park, either alone or jointly with the other Apartment Owners having rights to use the same. I will suggest that they look for any evidence of that intention in the conveyancing documentation. The 11 January 2007 conveyance declares that the Plaintiff entered into possession of the premises thereby conveyed on the date of the conveyance, subject only to four existing leases which are not relevant.

21. The 24 May 2007 conveyance to the Defendants states that the only premises into which they entered possession was their Apartment. It did not state that they were entering into possession of the Residential Car Park, either alone or jointly with others.
22. Advocate Richardson, on behalf of the Defendants, argues that possession is to be inferred from the wording of the rights created in the schedule and, for example, the definition of Residential Car Park in paragraph 1.38, which included the words “for the exclusive use of the occupants of [the Apartment Buildings]”.
23. I will direct the Jurats that the schedule needs to be construed as a whole and that the purpose of the definition is to identify the building, not to grant rights over it. The extent of the rights enjoyed by the Defendants is to be discovered by looking at the main body of the schedule and, in particular, paragraph 3 entitled “Rights of the Purchaser”.
24. I will also direct the Jurats that a grant of a right to use an area of land does not necessarily involve a grant of possession. Once it is understood that possession involves an intention to possess, it is clear that a land owner may grant to another person the right to use land for a particular purpose without there being any intention that the other person shall enter into possession of the land.
25. If the Jurats decide that the Defendants have possession of the Residential Car Park, I will direct them to consider all the relevant provisions of the schedules to decide whether the Plaintiffs have a greater degree of possession and/or a greater degree of control of the premises to enable them to maintain an action in trespass against the Defendants.