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Easement of Car Parking: The Ouster Principle is Out but Problems may Aggravate

Lu Xu*

Introduction

Easements are non-possessory rights in land. They cannot amount to possession, exclusive or joint user of the land. They cannot bar the servient tenement owner from possession and control of his land.¹ This is often referred to as the “ouster” principle.

In the context of rights for the parking of motor vehicles, the ouster principle has been the most daunting obstacle to the recognition of these rights as easements. Parking is a form of very extensive use of the land. It often leaves the owner of the land with no obvious benefit. Parties challenging the validity of easement of car parking often base their cases on the ouster principle. If the right violates the ouster principle, it cannot be an easement.

On the other hand, given the increasing number of parking rights and their value, to categorically deny all parking rights of easement status is unrealistic and unthinkable. Consequently, some parking rights have been accepted as easements, while others were not. For many years, the courts have been trying to draw a line between the accepted and the unacceptable.

* Lecturer in Property Law, University of East Anglia. I am grateful to Professor Duncan Sheehan for comments on earlier drafts of this paper.

¹ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn), [5.1.6] and [5.1.62].

The Court of Appeal decision in *Batchelor v Marlow*² was perhaps the high watermark of the impact of the ouster principle in this context. The owners of a garage claimed that they have acquired, through prescription, the easement to park a number of vehicles on neighbouring land. The judge at first instance supported this claim but limited the scope of this right to daytime on weekdays only. This decision was overturned by the Court of Appeal. The right claimed was seen as too extensive to the extent of rendering the ownership of the land “illusory”. *Batchelor* remains as the only Court of Appeal case which decided car-parking disputes on the ouster principle.

Meanwhile, the House of Lords had the opportunity to contribute on this topic in an appeal from Scotland, *Moncrieff v Jamieson*³. The dispute in the case was whether a right of parking was implied into an express grant of right of way, which was settled by the extreme and unusual circumstances of the case set on a seaside cliff in Shetland. During the course of the litigation, counsels argued whether rights of car-parking could be servitudes at all under Scots law. In response, four out of five Law Lords stated that parking can be recognised as servitude as a matter of principle.⁴ Furthermore, the two English Law Lords who delivered substantial speeches, Lord Scott and Lord Neuberger, found little difference between the Scots law of servitude and the English law of easement on the issues relevant to this case.⁵ Seizing this opportunity, both judges went on for a discussion of mainly English authorities on the ouster principle and car parking rights. Both their lordships were explicitly critical of *Batchelor*.⁶

Many commentators see *Moncrieff* as a breakthrough for the formal recognition of easements for parking.⁷ The Law Commission is recommending legislative change to reverse the decision in *Batchelor*.⁸ It seems only a matter of time before any obstacle to the acceptance of parking rights as easements would be ousted by legislation. On the other hand, the status of the law as things stand without the legislative change is largely unclear. There is limited scholarly publication on this topic other than many reasonably concise case comments. Yet the issue may be of importance in the near future,

² [2001] EWCA Civ 1051.

³ [2007] UKHL 42.

⁴ *Moncrieff* (fn3), Lord Scott at [47], Lord Rodger at [75]-[77], Lord Mance at [102] and Lord Neuberger at [137].

⁵ *Moncrieff*, [45], [111] and [136].

⁶ *Moncrieff*, [59] and [143].

⁷ E.g. Sebastian Kokelaar, ‘Parking restrictions’ (2008) 0809 *Estate Gazette* 194; Allyson Colby, ‘Easing into a defined legal space’ (2009) 0935 *Estate Gazette* 100.

⁸ *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327), [3.208].

especially given the fact that it is unknown when, if not whether, the proposed statutory reform will materialise.

In this article it is submitted that *Moncrieff* represents a change of attitude in the way that the courts view parking rights and the ouster principle. It is argued that, even before any statutory intervention, *Batchelor* is now untenable as the binding precedent due to its inherent ambiguity. However, the end of the ouster principle in the context of car parking would not solve all the difficulties surrounding this topic. There are many unanswered questions regarding the basic nature of different types of parking rights, such as exclusive rights and shared rights.

More importantly, it is submitted that the Law Commission's recommendation to abolish the ouster principle regardless of context is unnecessary, disproportionate and unprincipled. If unchecked, the proposal threatens to damage the foundation of many established structures in English property law far beyond easement, such as ownership, leases and adverse possession.

The Difficulty of *Batchelor*

The importance of *Batchelor* lies in the fact that this is the only Court of Appeal decision where the court actually decided a case about car-parking rights on the basis of the ouster principle. In other words, this is the only in-point and binding decision, so far as the English law is concerned, supporting the notion that a right of car-parking can be denied the status of an easement due to the extent of its interference on land owned by another. Such position is formally unchanged despite the flurry of cases and opinions in the following decade. *Moncrieff v Jamieson* is the only House of Lords discussion on this point. It is merely of persuasive force as a Scottish case, despite the enthusiasm shown by senior English judges. The other relevant Court of Appeal decisions in the 21st century, such as *Saeed v Plustrade Ltd*⁹ and *Montrose Court Holdings Ltd v Shamash*¹⁰, seemed determined in not analysing the nature of the parking rights involved in the case.

Nevertheless, there is no doubt that the binding force of *Batchelor* as a precedent has been severely weakened following *Moncrieff*. Judges in the lower court may find

⁹ [2001] EWCA Civ 2011.

¹⁰ [2006] EWCA Civ 251.

themselves bound by *Batchelor*, but persuaded by other sources in the opposite direction. Although some suggested that *Moncrieff* provided clarity in this much litigated area for English law,¹¹ it is understandably difficult for the lower courts to explicitly found their decisions on *Moncrieff*.

As things stand, the court is happy to entertain both the *Batchelor* test and the *Moncrieff* test when they produce the same conclusion that the ouster principle does not apply to the case at hand, as seen in *Virdi v Chana*¹², discussed below, and *Polo Woods Foundation v Shelton-Agar*¹³. But such a verdict of “no-conflict” between the two tests can be nothing more than a fortuitous excuse to delay the inevitable confrontation between the two approaches. Leaving aside technicalities such as persuasive or binding authorities, English law or Scots law, Court of Appeal or House of Lords for a moment, the principles are clearly incompatible when applied back to the two cases.

The *Moncrieff* test asks what the dominant tenement owner can do, in terms of whether it is a clearly defined right of parking, or vaguely claimed rights which may amount to sharing of possession similar to that in *Copeland v Greenhalf*¹⁴. This approach would have echoed remarkably well with the facts and first instance decision in *Batchelor*. The judge made considerable efforts in distinguishing two different types of rights claimed by the garage business occupying the dominant tenement. The judge decided that the right to “store” vehicles waiting repairs, sometimes for many months without being moved, on certain part of the servient land, would amount to the exclusion of servient tenement owner and could not be an easement.¹⁵ On the other hand, “parking” of roadworthy vehicles on a daily basis by owners, employees and customers of the garage on another part of the servient land was acceptable. Consequently, the part of servient land used mainly for “storage” was free from any easement and only the part subject to “parking” was burdened by such rights. In the light of *Moncrieff*, the judge could certainly be applauded for this clear and principled analysis of the facts. If *Moncrieff* is right, then the reversal of *Batchelor* by the Court of Appeal is wrong.

¹¹ Amy Goymour, ‘Easements, servitudes and the right to park’ (2008) CLJ 20, 21.

¹² [2008] EWHC 2901 (Ch).

¹³ [2009] EWHC 1361 (Ch), [119]-[132].

¹⁴ [1952] Ch 488. The right claimed in the case by a wheelwright was to leave unlimited number of vehicles on a narrow strip of land and to enter the land at any time to repair them. The court decided the right was too extensive to be an easement as it practically claimed the whole beneficial user of the land.

¹⁵ *Batchelor v Marlow* (Chancery Division) 2000 WL 664566 on Westlaw, [41].

The ratio of *Batchelor* and the essence of its test is encapsulated in the widely quoted statement by Lord Justice Tuckey that the restriction placed by the car-parking would make the ownership of the land “illusory”. This is a development and extension of the approach in *London & Blenheim Estates Ltd v Ladbrooke Retail Parks Ltd*¹⁶, where it was stated that “[t]he essential question is one of degree”. In other words, a right of parking may become too extensive to be an easement if it crosses certain threshold. Before *Moncrieff*, many commentators had accepted that the relative size of the property to the easement claimed would be the key to reconcile conflicting decisions in English law.¹⁷ This size-comparison approach was specifically doubted by Lord Scott in *Moncrieff*.¹⁸ In any case, the owner of the servient tenement in *Batchelor* retained at least two out of eight possible parking spaces, in addition to adjacent land which was not subject to any easement.¹⁹ Another possible reconciliation of the two cases could have been in regard to the time such rights may be exercised. However, the right claimed in *Batchelor* was between 8.30am and 6pm Monday to Friday and it rendered the ownership illusory. The right claimed in *Moncrieff* was unrestricted by time at all, hence more extensive than that in *Batchelor*. If *Batchelor* is right, then *Moncrieff* is wrong.

Moreover, Lord Justice Tuckey in *Batchelor* considered a number of suggested uses for the land if burdened with the easement and discounted them all. These included selling the servient land to the dominant tenement owner, concreting over the surface, and charging for out-of-hour parking. Interestingly, Lord Justice Tuckey dismissed the prospect of selling the land as the proof of valuable ownership because the easement would have given the dominant tenement owner “in practice a beneficial interest and no doubt the price would reflect this fact”.²⁰ Surely any land burdened with a substantial easement would be less valuable than if it is not, whoever it is to be sold to. If any money is to change hand in such a transaction, the ownership burdened by the easement is not at all “illusory”, given that someone is willing to pay for it. The core test of *Batchelor* is therefore unclear and, with respect, difficult to reconcile with its own facts.

¹⁶ [1992] 1 WLR 1278.

¹⁷ Alexander Hill-Smith, ‘Rights of parking and the ouster principle after *Batchelor v Marlow*’ [2007] Conv 223, citing Megarry and Wade *Law of Real Property* (6th edn) as an example.

¹⁸ *Moncrieff* (fn3), [57], with which Lord Neuberger explicitly agreed at [143].

¹⁹ *Batchelor v Marlow* (Chancery Division), [44]. The judge reduced the number of parking spaces from 8, claimed by the garage, to 6 because there was evidence that two of the parking spaces were used for car “storage” rather than car “parking”.

²⁰ *Batchelor* (fn2), [17].

Virdi v Chana

Consequently, this “illusory ownership” test provides the easiest escape route from an unwanted binding authority. *Virdi v Chana*²¹ is one such example where the judge afforded all the weight of authority he had to show for *Batchelor* and then relied on the “illusory ownership” test to break free from it. The size of the land in dispute in the case was only big enough to park half of a car. Conveniently there was an unregistered and apparently ownerless strip of land abutting it which would accommodate the other half. In front of the Land Registry Adjudicator, the claimant established by prescription the easement to park one car, or more precisely part of the car, over the contested space owned by the registered proprietor. The registered proprietor appealed on the basis that such an extensive right would exclude him from his land given its size. The appeal was unsuccessful and the right to park half a car was accepted as an easement.

This case may appear to be the final chapter of the quest started by *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd*²² to answer the “essential question of degree”. The decisions that the courts have been making were getting ever closer to finding the threshold between what is and what is not acceptable as an easement of parking. In *London & Blenheim* it was for a few cars in a very large communal car-park. In *Batchelor* it was for six cars over the space for eight. In *Virdi* it was now half a car over the space not big enough for one car. If *Batchelor* is still the authority it was before *Moncrieff*, surely the right in *Virdi* was too extensive over too small an area to be an easement. It was therefore highly important that *Virdi* avoided this conclusion.

The judge in *Virdi* approached the question from a very different angle. Because the owner of this small patch of land could not have parked a car himself without committing trespass against neighbouring “ownerless” land, he effectively had no right to park a car there. As he had no right to start with, the easement claimed did not exclude him from parking. Furthermore, the judge agreed with many suggested uses that can possibly be made of the land despite the easement, such as the right to stand there and repair nearby fences, or to place decorative flower pots as long as they did not interfere with parking. The most interesting of these was presented by the judge himself

²¹ [2008] EWHC 2901 (Ch).

²² [1992] 1 WLR 1278.

as the right to alter the surface of the parking space.²³ Possibly to avoid direct contradiction with Lord Justice Tuckey in *Batchelor*, who dismissed any notion that the land owner may benefit from concreting over the parking space,²⁴ the judge specifically pointed to some “aesthetic reasons” for any surface change near a residential property.

It is difficult to miss the artificialness in the efforts to distinguish *Batchelor*. The only thing that the claim in *Batchelor* took away from the land owner was the right of parking between specified hours. The Court of Appeal in rejecting the claim quickly dismissed anything other than parking during these hours as useful or valuable enough to save the ownership from being “illusory”. *Virdi* tried to decide the case on the basis that the servient tenement owner *had* no means of parking a car without committing a legal wrong. However, what if he somehow locates the owner of the neighbouring unregistered land and acquires the right to park half a car over it? The only thing to stop him from legitimately parking over his land and the neighbouring land would be the claimant’s easement.

This is indeed the heart of the difficulty in *Batchelor*’s approach. Any parking right valid merely on the basis of this “question of degree” may not survive a change of the size of the land it is granted over. Any non-illusory ownership founded on adjacent land may disappear as soon as the adjacent land is disposed of, or unusually as in *Virdi*, when more land is acquired. Logically therefore, any use which saves the ownership from being “illusory” must be based on the exact space claimed by the parked cars rather than its surrounding areas. In this regard, *Moncrieff* must have also significantly affected the attitude of the English courts. Some of the statements made by Lord Scott in particular would fly right in the face of earlier English decisions. In *Central Midlands Estates Ltd v Leicester Dyers Ltd*²⁵, for example, the court dismissed any suggestion to possibly make use of space above or below parked cars as “rather far fetched”. It seems unlikely that any judge would see things in the same light now, after Lord Scott explicitly referred to the ability to “build above or under the parking area” as reasonable use.²⁶ The willingness of the judge in *Virdi* to accept change of surface “for aesthetic reasons” as reasonable use is perhaps sending out the clearest signal that any use, whether farfetched or not, may now be looked at by the court.

²³ *Virdi* (fn21), [25].

²⁴ *Batchelor* (fn2), [17].

²⁵ Chancery Division (21st January 2003), 2003 WL 116716 on Westlaw.

²⁶ *Moncrieff* (fn3), [59].

The Law Commission is now calling for the abolition of the ouster principle.²⁷ Even before any statutory intervention, it seems unlikely that *Batchelor* would still be relied upon as binding authority by the English courts. The foundation of the case has been shaken by *Moncrieff*. More importantly, the case itself provided an easy escape route for lower court in the form of this uncertain and undefined test of “illusory” ownership. After all it only takes the possibility of re-painting the surface, placing flower pots, or the hypothetical use above or below the surface to make the ownership of land not illusory. It is difficult to see how *Batchelor* can cause any further problem for English law in the context of parking. The only thing illusory now is *Batchelor* itself.

Outstanding Problems

However, the difficulties of car parking rights in property law do not stop here. Indeed, it is possible that the end of the ouster principle will aggravate some of the problems previously hiding in the background behind this more prominent debate.

Exclusive Parking Right

At the forefront of imminent difficulty is the nature and validity of exclusive parking rights. Land Registry data suggests that over 7,500 exclusive rights to park were created in 2009/2010.²⁸ This is despite the obvious danger of such exclusive right falling inconsistent with *Batchelor*, until a legislative change.²⁹ It seems that exclusive parking rights are here to stay when the overwhelming momentum against the ouster principle is taken into consideration.

The real problem then is to find a place for such exclusive parking right in the established framework of easement and property law. The essence of such exclusive parking right is not only about excluding the servient tenement owner from parking in the particular space, but to prevent the servient tenement owner from granting a similar right to anyone else in regard to the space. Few easements recognised by English law have demonstrated such characteristics.³⁰ There is no path which can only be used by one

²⁷ Law Com No 327, [3.209] and Draft Bill Clause 24.

²⁸ Law Com No 327, [3.204] fn 211.

²⁹ Law Com No 327, [3.204].

³⁰ The only example of exclusive easement given in Gray and Gray (fn1) [5.1.61] is *Moody v Steggles* (1879) 12 Ch D 261.

dominant tenement owner to the exclusion of the servient tenement owner and all other neighbouring proprietors. There is no right attached to one electricity cable running across servient land to exclude any other electricity cable along its route. If the right of parking a number of motor vehicles within a specified area can include the right to prohibit anyone else from parking in the same area, then what about the right to put pleasure boats onto a private canal to the exclusion of any other pleasure boat? This is of course referring to *Hill v Tupper*³¹, one of the first lessons of English property law.

Perhaps the root of the problem lies in the fact that no dominant tenement owner of any other type of easement would have as much interest in the way the servient tenement is run. Easements impose no positive burden. A servient tenement owner just needs to tolerate the use by each and every dominant tenement owner, however many there are. Between any pair of dominant tenement owners there is, until these parking rights, no interaction, relationship or any sense of enforcement of right. English law has no answer to this as things stand because the question has never been asked before.

Parking Right and Right of Way

Even if exclusive parking rights are to be taken at face value, as an easement effectively excluding anyone else from parking in a specified area, there remain much uncertainty as to its interaction with other proprietary interests and physical objects.

The neighbourhood dispute in *Waterman v Boyle*³², which was frowned upon by Lady Justice Arden for its un-neighbourly manner, was mostly down to the existence of a wall which prevented the turning, for the purpose of parking, of a particular car belonging to the dominant tenement owner. The predecessor in title to the dominant tenement owner, however, had no such problem because she drove a different, presumably smaller, car. Given that any exclusive parking right over a designated space is likely to be coupled with the necessary right of way for access, would the size of the parking space granted also define the scope of the right of way? Or would it be determined by previous exercise if there is any? What if the “car park” has only been used for motorcycles?³³ Would that preclude any use for cars or vans in future?

³¹ (1863) 159 ER 51.

³² [2009] EWCA Civ 115.

³³ The term “car parking” or “car park” would include “motorcycle parking”, see *Donington Park Leisure Ltd v Wheatcroft & Son Ltd* [2006] EWHC 904 (Ch), [34].

An even more practical question is the manner in which cars can be driven to the exclusive parking space. In *PropertyPoint Limited v Kirri*³⁴, the dominant tenement owner claimed a right of way over servient land for the sole purpose of turning vehicles. This would enable cars to be reversed into a garage, so that upon leaving the driver can avoid reversing onto a busy road. Hence if a right of way is granted in combination with an exclusive right to park at a specified spot, does it need to specify a right of forward parking or reverse parking?

The more difficult legal question is where the right of parking is in conflict with another person's right of way. Is the grant of a right of parking on a particular spot the same in effect as the construction of a five feet concrete wall over the place, hence constitutes an inexcusable breach of the right of way? Conversely, if an area is subject to exclusive right of parking, can the servient tenement owner still grant any right of way over it in favour of others? This again reflects the unusual and extensive impact parking rights have as an easement on the servient land.

On this topic, *Holms v Ashford Estates Limited*³⁵ was a Court of Session decision which felt the full force of *Moncreiff* as a binding House of Lords decision for Scots law. The pursuer purchased from the defender, a property developer, a flat and one designated parking space in the adjacent car-park, along with a right of way over the rest of the car-park for access. The developer made some last-minute changes to the car-park. This resulted in the creation of one additional parking space, which effectively blocked off that of the pursuers'. The trial judge found that if the added parking space was occupied by a car, it would be impossible to drive a typical or conventional car onto the pursuers' space. The pursuers claimed against the developer for not having full access to their allocated space. The developer argued in defence that they have granted a right of way to the pursuers over the added parking space, which should allow them access to their parking space.

The pursuers' key legal argument remained the same in three hearings. They argued that the right of way over the neighbour's parking space could not be a valid servitude as it would fall foul of the ouster principle. If the pursuers wanted to park onto their space or to drive the car away, they would try to find the neighbour who parked on the added space and asked her to move her car. There were instances that the neighbour could not be located. The pursuers would not park onto their own space in the evening if they knew they needed the car early the next morning. It was no doubt very inconvenient for

³⁴ [2009] EWHC 2958 (Ch).

³⁵ [2009] CSIH 28.

all those involved. The owner of a parking space could not possibly be expected to tolerate such hassles in the name of a servitude. This view was supported by the sheriff and the sheriff principal on appeal.

Yet the understanding of the ouster principle has been changed by *Moncrieff*, which came before the Court of Session heard the case. In view of the rather relaxed threshold set out in *Moncrieff*, the Inner House held that the servitude was not necessarily invalid for the reason of ouster principle and overturned the previous decision. Remarkably, the court even suggested the right to ward off third parties who might want to have a barbecue on the parking space as signs that there was still possession and control of the area.³⁶

Holms v Ashford Estate is a Scottish case and it is unclear as to how different English law would be here. In any event the case was unsatisfactory in the sense that this was not a direct contest between the right holders, with inconclusive outcome. However, what emerged here was a competition never seen before in Scots or English law between two different types of servitudes or easements: the right of parking against the right of way.³⁷

Essentially, this is a question of what do the law make of a parking space and the exclusive right to its use. Is it seen as a permanent obstruction to any right of access or passage, in effect a virtual brick wall? No easement before has had such a “brick wall” effect on other easements. It seems that considerable uncertainty still clouds the concept of exclusive parking rights, even after the ouster principle is gone from this context.

Shared Parking Rights

The picture seems clearer with regard to shared parking rights, in other words, the right to park one or more vehicles in a larger area, which is enjoyed at the same time with similar rights held by other neighbouring dominant tenement owners. It was previously

³⁶ [2009] CSIH 28, [53].

³⁷ The parking spaces in *Holms v Ashford* are owned outright by the flat owners, subject to right of way granted by the developer. However, nothing turned on this and it seems parking rights as servitude/easement without ownership of the land would make little difference in this context.

decided in *Newman v Jones*³⁸ and *Hair v Gillman*³⁹, both before the time of *Batchelor*, that such a right is capable of being an easement and would not engage the ouster principle. Even if the servient tenement owner is excluded from the land, this is not due to any particular easement individually, but the combined effect of many easements. It was suggested, before *Moncrieff*, that the right could be an easement if there was any sharing of time or space.⁴⁰ The exact logic of this approach is unclear, and perhaps unconvincing had *Batchelor* remained as the unquestionable authority. Suppose the only parking space in the servient tenement is shared between two neighbours, one of them parking from midnight to midday and the other one from midday to midnight, it would be two valid easements according to this theory. Then what if one of those two acquired the others' land and easement? Would the newly combined single right to park round the clock suddenly become invalid under *Batchelor*? This seems to be a ridiculous rule, or an illogical exception to *Batchelor* if that was what it was. But given the rather helpless position of *Batchelor* and the ouster principle as discussed above, this debate is now largely academic. It is extremely unlikely that any shared parking rights would be struck down on the basis of ouster principle.

However, the fact that we can safely admit shared parking rights as easements may exacerbate other difficulties associated with them. The most likely source of tension in this context is where the car-park could not physically accommodate all the cars whose owners have the right to park there. The most likely cause for disputes and litigations would be any change made or proposed to the arrangement.

In *Saeed v Plustrade Limited*⁴¹, 18 long-leaseholders of flats hold parking rights to park on land "as may from time to time be specified" by their landlord. At the beginning there were 13 spaces. After several changes, the number was reduced to 11 and the landlord also intended to sell 7 of these to purchasers of newly constructed penthouses in the development, leaving the 18 original right-holders to fight for just 4 spaces. It was held that such a change would be a substantial interference with those parking rights. Interestingly however, the Court of Appeal specifically withdrew from the Chancery judge's declaration that there was an "easement to park". Instead there was only a

³⁸ Unreported (March 22 1982, Megarry VC), mentioned by both Lord Scott and Lord Neuberger in *Moncrieff v Jamieson*.

³⁹ (2000) 80 P&CR 108.

⁴⁰ Michael Haley and Lara McMurtry, 'Identifying an easement: exclusive use, *de facto* control and judicial constraints' (2007) *Northern Ireland Law Quarterly* 490, 502.

⁴¹ [2001] EWCA Civ 2011.

“right to park”.⁴² Moreover, the judge pointed to the issue of derogation from grant as the decisive issue in the case, rather than substantial interference with easements.⁴³ This arguably unprincipled approach has been criticised.⁴⁴ Perhaps, given the ongoing landlord and tenant relationship, such ambiguity over a difficult question only six months after *Batchelor* was excusable.

An easement and a contractual right are definitely not the same in the subsequent Court of Appeal decision of *Montrose Court Holdings Ltd v Shamash*⁴⁵. There were 87 leasehold flats and 5 penthouses in the main block of flats in the development. There were also 8 two-storey houses, three of which were held on freehold. The claimants were the owners of one of those three freehold houses. Their title also suggested that they had “some rights to park” in the courtyard of the development, owned by the estate owners, subject to regulations made by the estate owners.⁴⁶

With 114 spaces available in this development for 100 households, it would be enough if each of the households owned one car. It was plainly insufficient as things developed to the stage that most households have more than one car.⁴⁷ Consequently some fifteen years after the grant of these “some rights to park”, the estate owners wanted to introduce some form of regulation system through the issue of parking permit for all leaseholders in this development, effectively limiting them to one car per household. The claimants as freeholders wanted two parking permits so they could park two cars as before. The first instance judge was persuaded to give them two permits. The Court of Appeal overturned the decision and awarded them only one. Noticeably, Lord Justice Chadwick who gave the only substantial decision again expressed doubt over the status of the right as an easement, if the right holder intended to park continuously in the space place for more than 72 hours in one go.⁴⁸ This was despite the fact that the right is between two neighbouring freeholders, rather than a landlord and his tenant as in *Saeed*. Perhaps *Batchelor* was at the pinnacle of its influence on parking rights, to the extent that Lord Justice Chadwick, who had no problem in declaring a comparable shared parking right as easement previously in *Hair v Gillman*⁴⁹, took a cautious

⁴² *Saeed*, [22] and [50].

⁴³ *Saeed*, [39].

⁴⁴ Hill-Smith (fn17), 230.

⁴⁵ [2006] EWCA Civ 251.

⁴⁶ *Montrose* (fn45), [12]-[13].

⁴⁷ *Montrose*, [3].

⁴⁸ *Montrose*, [30].

⁴⁹ (2000) 80 P&CR 108.

approach. It seems quite unthinkable that such a valuable right, within a stone's throw from the Hyde Park, would not be proprietary.

However, if the right is accepted as an easement, which seems to be a certainty nowadays for reasons discussed above, then the decision seems to cast considerable doubt over what the servient tenement owner can do to effectively undermine such shared parking rights. When it all started, the right holder could park more than one car. As more rights were being created in favour of others, the competition for space grew fiercer. Eventually the right holder was limited to park only one car. But could it get worse? What if the estate owners manage to accommodate 15 or 30 additional units? What if they acquire a neighbouring parcel of land and include any new properties built there into the same development? Would the right holder eventually face the situation that he will not be able to park even one car sometimes?

The root of the problem is again in the nature of car-parking which English law has not dealt with so far. If a right of way is granted over one private road in favour of five people, there is little difference if the right is extended to ten or fifteen people. The road may get busier and users may have to queue for a few minutes, but it is unlikely any of them would go to the court to sue over such inconveniences. However, any shared parking right is highly sensitive as to how many people are sharing it. By common sense, nine cars for ten spaces is a completely different story from that of eleven cars for ten spaces. Yet the law of easement has no experience in dealing with such difficulty and no answer to the challenging questions other than some vague "no derogation from grant" principles. No easement before car-parking has demonstrated such a sensitive nerve about the existence of similar rights in favour of other dominant tenements. As things stand for shared parking rights, it may be the case that dominant tenement owners can stop a substantial reduction in the size of the shared space by the servient tenement owner, as seen in *Saeed*. However, they may have little to challenge the increase of user or number of dominant tenements that would compete against them for the same shared right.

Car-parking is such a drastically different right from any other easement. The established structure of English property law may be exposed to an incoming flood of these rights following the end the ouster principle. We know very little about exclusive parking rights, other than that they are being created in considerable quantity. We have few answers to the difficulties in relation to shared parking rights, other than perhaps neighbourly advices and common sense. It must bewilder any layperson that property lawyers can be so ignorant about such earthly things as parking spaces.

Scope for the Abolition of the Ouster Principle

The likely uncertainty in the law is of course not the reason for not making any change to the current law. The ouster principle is not a popular party guest at the moment and may well need to leave. The Law Commission repeatedly pointed its origin to the Scottish House of Lords decision in *Dyce v Hay*.⁵⁰ In contrast, the Court of Session regarded this notion of “repugnancy with ownership” as having “evolved in the English law of easements” and “may be reflective of the particular features of the English law of easements”.⁵¹ The seminal article by Hill-Smith, which was received so well by Lord Scott in *Moncrieff* amongst other, explicitly called for the abolition of ouster principle in the context of easement for parking.⁵²

In this regard, the idea for reform in the Law Commission’s recent report is both as expected and surprising, both moderate and radical.⁵³ It was not as drastic as the suggestion in the original consultation paper to allow easements which amount to exclusive possession. Instead it specifically targeted the ouster principle and nothing else. The ouster principle dictates that a right cannot be an easement if it leaves the landowner with no reasonable use of the land. The Law Commission recommends precisely the abolition of this rule, so that even if the landowner is prevented from making any reasonable use of the land by a right, the right shall not fail to be an easement for that reason.⁵⁴ The proposal hereby answered positively the concern voiced by Lord Neuberger in *Moncrieff* over the “unexpected consequences or difficulties” if parking to the exclusion of servient land owner was unconditionally recognised as easement.⁵⁵ However, what is surprising and radical in the proposal is that there is no prescribed scope for the abolition of ouster principle. It would apply to not just parking but potentially all kinds of rights not previously encountered. Arguably this is not what has been envisaged by even the most noticeable critics of the ouster principle, such as

⁵⁰ Law Commission, *Easements, Covenants and Profits À Prendre* (Law Com CP 186), [3.37]; Law Com No 327, [3.196].

⁵¹ *Sheltered Housing Management Ltd v Bon Accord Bonding Co Ltd* [2010] CSIH 42, [35].

⁵² Hill-Smith (fn17), 234.

⁵³ Law Com No 327, [3.199]-[3.211].

⁵⁴ Law Com No 327, [3.209].

⁵⁵ *Moncrieff* (fn3). [144].

Hill-Smith and Lord Scott.⁵⁶ Given the significantly changed position between the original consultation paper and the final report and recommendation, it seems that the full impact of the proposed change has not been carefully considered. It is submitted that this is a risky move with unforeseeable implications and consequences no one has properly analysed so far.

One of the potential consequences of a categorical abolition of the ouster principle would be the acceptance of rights formerly denied as easements beyond car parking. As mentioned above, the first instance judge in *Batchelor v Marlow* carefully distinguished between “parking” of roadworthy cars and “storing” of un-roadworthy cars belonging to the garage business.⁵⁷ The former was seen as easement but not the latter. A similar concern was also expressed by Lord Justice Chadwick in *Montrose Court Holdings Ltd v Shamash* over vehicles which were left at the same place for more than a few days.⁵⁸ If the Law Commission recommendation is to become law, storing of vehicles on land will also be an easement, which may lead to problem in relation to possession claims based on such storage, discussed below.

And storage would not be the only headache. Occupation in English land law may also become much more complicated under the reform. For instance, can the right to occupy one room in perpetuity at a neighbouring hotel become a proprietary interest? Such a right is certainly not a lease, not only because there is no term but also for the same reasons that any guest staying at a hotel has no lease. Such a right is clearly not ownership. But if the ouster principle is gone, why is this not an easement? There is a dominant tenement and a servient tenement. The right is clearly defined. If the right to park a car belonging to a business accommodates and serves the business well, then surely the right to find a place for an employee to sleep nearby, in order to deal with any emergency call for example, would accommodate it, too. It may be argued that easement cannot impose a positive obligation on the servient tenement owner, in the form of expenses such as supplying electricity and water to the room. However, existing easement for car-parking often allow the car-park owner to be reimbursed for

⁵⁶ Hill-Smith (fn17), 234, concluded that “it would be better if the Courts found that the ouster principle did not apply at all in the context of an easement of parking” (underlining added). Lord Scott specifically agreed with the conclusion in *Moncrieff*, [61].

⁵⁷ *Batchelor* (Chancery Division) (fn15), [41]-[43].

⁵⁸ *Montrose* (fn45), [30].

reasonable expenses in running and maintaining the car-park.⁵⁹ It is not difficult to see why the same cannot be provided for in this easement of “staying at a hotel room”.

So, with all obstacles now cleared, should English property law accept it with open arms? As long as there is a dominant tenement somewhere in the neighbourhood, the possibilities may be endless. In addition to completely rewriting the book on freehold ownership, leases and easements, it must be a daunting thought to imagine that all of these preposterous easements can be acquired by prescription or through implication. Surely this does not sound right to any property lawyer. But that is only because we have never met easements unbridled by the ouster principle.

The ouster principle is a highly useful and flexible tool in the hand of the court, allowing some intensive-use easements while denying others. Of course uncertainty is unavoidable with any flexible test. Consequently we have seen that, in the words of Lord Justice Chadwick, “the authorities fall on one side or the other of an ill-defined line”.⁶⁰ In the realm of car-parking, the need for it is so prevalent and unstoppable that perhaps any sense of uncertainty is unacceptable. Hence the ouster principle should be abolished, either in substance or formally, in the context of car parking rights in recognition of social demand and commercial reality.⁶¹

On the other hand, the wholesale abolition of the principle in all contexts seems to be unnecessary, excessive and potentially damaging to too much of the established property law. In the light of the much weakened authority of *Batchelor*, it is submitted that in fact no statutory change is required at all. Unless there is a rejection of *Moncrieff* and reaffirmation of *Batchelor* in a future case, the matter may be safely left to the development of common law.

⁵⁹ In *London & Blenheim Estates* (fn16), the right of parking is subject to the payment of “a reasonable share of the costs of maintaining such car park and any adjoining landscaped areas”; in *Montrose* (fn45), the car-park owner’s imposition of a £200 annual tariff for one parking permit was endorsed both at first instance and on appeal.

⁶⁰ *Hair v Gillman* (2000) 80 P&CR 108.

⁶¹ Not everyone agrees on this. Michael Haley, ‘Easements, exclusionary use and elusive principles – the right to park’ [2008] Conv 244, stated that “the justification offered for the recognition of a permanent and unregulated easement to park in an allocated bay is thoroughly unconvincing.”

Prescriptive Easements and Adverse Possession

If the ouster principle disappears completely, the impact will go much further than the possible emergence of previously nonsensical easements. It is almost certainly going to affect the balance between prescriptive easement claims and possessory claims, as often seen in cases involving the occupation of land by motor vehicles.

It is trite law that parking one car over a larger unmarked area is not enough to constitute occupation of the land.⁶² As the number of vehicles grows, there is the potential that parking of vehicles would amount to a possessory claim, as seen in the well-known case of *Copeland v Greenhalf*⁶³. However, the closer a claim gets to possession, the more likely it might violate the ouster principle and hence lose any chance of establishing an easement of car parking. In *Pavledes v Ryesbridge Properties Ltd*⁶⁴, the two claims of adverse possession and prescriptive easement to park were said to be “mutually exclusive” to each other. It was suggested by practitioners that if litigants attempt to state their case widely by claiming adverse possession or easement of parking in the alternative, they may find that that they only succeed in undermining both claims from the outset.⁶⁵

With the ouster principle in place, there is essentially a single test of control and possession separating claims of prescriptive parking rights and adverse possession of the land used for parking. In *Simpson v Fergus*⁶⁶, marking off parking spaces with reflective stripes on the side of a busy private road was not seen as enough for establishing possession. Lord Justice Walker seemed to prefer “some form of movable barrier, movable posts, chain or whatever” in order to signify physical possession of the parking space. Presumably the less intensive use of the parking spaces could have constituted an easement but the party had not had enough time for a prescriptive claim. It is also clear that the more extensive “occupation” of land by motor vehicles for long period may constitute adverse possession of the land. In *Williams v Usherwood*⁶⁷, the Court of Appeal contrasted parking cars on a stripe of waste land with parking in the “enclosed curtilage of a private dwelling-house”. The latter was accepted as evidence of possession.

⁶² *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071; *Pavledes v Ryesbridge Properties Ltd* (1989) 58 P&CR 459.

⁶³ [1952] Ch 488.

⁶⁴ (1989) 58 P&CR 459.

⁶⁵ Kam Ubhi and Mark Baumohl, ‘No parking’ (2003) 147 (14) *Solicitors Journal*, 408.

⁶⁶ (2000) 79 P&CR 398.

⁶⁷ (1983) 45 P&CR 235.

In *Burns v Anthony*⁶⁸, the long term occupation of a courtyard by vehicles belonging to a car sales business was again enough in the Court of Appeal as to the degree of physical control expected for adverse possession. This defeated a competing possession claim from a residential neighbour, which largely involved day to day personal uses such as putting out waste bins and the hanging out of washing.

The long-term “storing” of vehicles over land was without question a form of extensive use of the land. In contrast, the use made of the same land by the neighbour in *Burns v Anthony* was very much “tenuous”, as the Court of Appeal put it. With the ouster principle in force, there could be only one winner if the two competed for possession. The more extensive the control, the stronger the case there is for possession-based ownership. This conclusion is completely sensible and logical.

However, if the ouster principle is abolished regardless of context, the logic behind this seemingly self-evident interpretation will also disappear. It would be feasible to explain the extensive use of the land in storing vehicle as an easement. As seen in *Burns*, the use left for the servient tenement owner was minimal. But that is completely acceptable in the spirit of the recommendation of the Law Commission. The stronger possessory claim may actually be an easement. The weaker claim may prevail thanks to the new understanding of easement after the abolition of the ouster principle.

Any such change will have implications far beyond the context of parking or storage of cars. It will change much of the law of adverse possession. For example, an “easement of growing crops” may become possible despite excluding the landowner from any reasonable use. Then why should the growing of crops over land, such as that in *Seddon v Smith*⁶⁹, be seen as evidence of possession rather than easement? The abolition of the ouster principle will complicate many, if not most, possessory claims. It is no longer the question of finding one dividing line on a single scale of use and control: the stronger being possession and the weaker being easement. Instead there would be a choice between two different legal interpretations of the same set of facts each time: one based on an extensive form of easement and the other based on adverse possession. This turns a simple question of fact into a challenging question of law for every case. Clearly such uncertainty should be avoided, by preserving the ouster principle in all contexts other than for the parking of vehicles.

⁶⁸ (1997) 74 P&CR D41.

⁶⁹ (1877) 36 LT 168.

Conclusion

In the context of car parking, the ouster principle has caused significant inconveniences. Car-parking does not fit comfortably along any other types of easement. It is far too extensive and interfering in comparison with the rest of them. But it is also unavoidable given social demand. Parties and their advisors would keep trying to create them whatever doubts there may be as to their validity.

In this regard, the search for confirmation of the acceptance of parking easement is already on the brink of success. *Moncrieff v Jamieson* signalled the turning point in the development of the law. *Virdi v Chana* demonstrated the willingness, and more importantly a way because of *Batchelor*'s inherent inadequacies, to avoid the binding force of the precedent. Until *Batchelor* is formally overruled by another Court of Appeal or Supreme Court decision, the court may also simply turn a blind eye to any theoretical problem.⁷⁰ With the overwhelming force of joined criticism against the ouster principle from the judiciary, legislature and practice, not to mention the assumed support from the general public for allowing a right to park, it seems inconceivable that the ouster principle can resist any further in the realm of car-parking. Even without the legislative reform recommended by the Law Commission, it seems naïve to think that any first instance judge would simply admit defeat and apply *Batchelor*. To that extent the Law Commission's initiative to seal the end of the ouster principle in the context of car parking with statutory force is helpful, but not really urgent or essential.

It should also be remembered that abolishing the ouster principle does not tackle any of the difficulties which made parking rights so incompatible with established understanding of easements in the first place. Many unanswered questions remain with exclusive parking rights, shared parking rights, and the interaction between parking rights and rights of way. There are inherent difficulties in allowing an easement as extensive and interfering as car parking to exist over land, which may partly explain why it took so long for such rights to be accepted as easements in the first place. However, now that they are, or will be, accepted one way or another, the court should adopt a much bolder approach and take the lead in developing clear and useful principles to deal with practical difficulties.⁷¹

⁷⁰E.g. *Waterman v Boyle* [2009] EWCA Civ 115, no view was expressed over the grant of both available spaces for exclusive parking easement in the case.

⁷¹In *Chaudhary v Yavuz* [2011] EWCA Civ 1314, at [31], Lord Justice Lloyd implied that an easement of parking was of a different nature in terms of occupation from a right of way. Yet the issue did not arise on this appeal and nothing more was said. Following *Saeed* and *Montrose*

With all due respect, it is also submitted that the Law Commission's recommendation to categorically abolish the ouster principle is not well-thought-of. In eradicating one problem, which may be on its way out in any case, the proposal would create many more serious problems in areas where presently there is none. If enacted, it will create great uncertainty in established principles and case law far beyond the issue of car parking that it was specifically targeting. It will completely change the landscape of easements and related property law concepts, such as possession or ownership, in unforeseeable ways.

The ouster principle has been an inherent part of the law of easement or servitude in both English and Scottish law. It is simply problematic in the context of car parking. But the ouster principle continues to serve many essential and irreplaceable functions elsewhere and the baby certainly should not be thrown out with bath water. If there is to be statutory intervention on this point at all, it should be clearly restricted in scope to the parking of motor vehicles. It may even be feasible to take no legislative action at this stage and allow the common law to grow out of the shadow of *Batchelor*.

discussed above, this is not the first time in the last ten years the Court of Appeal turned away from a full discussion of easements of parking.