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RECREATIONAL EASEMENTS: A RIGHT TO HAVE FUN?

In *Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd*, the majority of the Supreme Court expressly issued 'a clear statement that the grant of purely recreational (including sporting) rights over land which genuinely accommodate adjacent land may be the subject matter of an easement' ([2018] UKSC 57, [2019] A.C. 553, at [81]). In so doing, it was very conscious that it was entering upon new territory, with specific reference to the extensive facilities provided for the owners and occupiers of a timeshare complex. Recognition of this 'new species of easement' was regarded as consistent with changing social attitudes, which now see such recreational and sporting activity as 'so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit' (at [76] and [81]). That having been said, Lord Carnwath JSC delivered a strong dissenting judgment, while it may also be suggested that the rather unusual factual matrix may preclude any opening of the floodgates.

Broome Park, the former home of Lord Kitchener, was converted into a country club which included a substantial leisure complex on the lower floors of the main Mansion House, together with a range of outdoor sporting and recreational facilities, among which were an 18-hole golf course, an outdoor heated swimming pool, tennis and squash courts and formal gardens. The first and second floors of the Mansion House were converted into timeshare apartments with free rights through a leasehold structure to use the communal and leisure facilities within the lower floors of the Mansion House and its surrounding grounds. In 1981 the owners of Broome Park sold Elham House, a smaller villa on the estate, to an associated company for conversion into more timeshare apartments, again with free rights to use the leisure complex. On this occasion, however, a freehold structure was employed, the associated

company transferring the villa to a nominee company to hold it in due course for the benefit of an unincorporated association comprising the purchasers of the timeshare units within the development. Importantly, the 1981 transfer included the grant of:

> the right for the transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of the Broome Park Mansion House, gardens and any other sporting or recreational facilities (hereafter called 'the facilities') on the transferor's adjoining estate.

No payment was required for the exercise of this right in that it envisaged (in the event, over-optimistically) that the maintenance costs would be met by members of the public paying to use the leisure complex. Subsequently, the leisure complex was sold to the defendants who commenced to charge the timeshare owners in the villa for using some of the facilities, which had not only undergone considerable alterations (for example, the swimming pool being moved indoors), but were also less extensive. The nominee freehold owner and the timeshare owners then issued proceedings against the defendants for a declaration that they were entitled, by way of easement, to the free use of all the sporting or recreational facilities within the leisure complex, together with both an injunction restraining future interference with those entitlements and the return of sums paid. The trial judge and the Court of Appeal found that there was indeed such an easement, although the Court of Appeal limited its scope, carrying out a detailed analysis as to whether each right met the necessary conditions as laid down by *In re Ellenborough Park* ([1956] Ch. 131).

As seen, the Supreme Court extended the categories of potential easements so as to include what could 'only be described as a right of "recreation and amusement"' (at [75]). In this regard, there was clear affirmation that the nature of any inquiry into whether a right is

capable of being an easement will usually be fact intensive and, on the facts of the case itself, great weight was placed upon the timeshare development being 'quintessentially for holiday and recreational use' (at [2] and [76]). Not least, without the grant of such an easement, ownership and occupation would have become largely devoid of purpose once any direct contractual rights had been exhausted. At the same time, reference was made to earlier recognition of recreational easements in Commonwealth jurisdictions: for example, in the Canadian case of *Dukart v Corporation of the District of Surrey* ([1978] 2 S.C.R. 1039) the status of easement had been conferred upon rights over a beach pertinent to a resort development (see also A. Baker, "Recreational Privileges as Easements: Law and Policy" [2012] Conv. 37). And, as indicated, further justification was to be found in the need for the common law to track novel forms of landholding and land use, in which respect a significant factor was that 'the advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the pejorative expression "mere right of recreation and amusement, possessing no quality of utility or benefit" has become a contradiction in terms' (at [59]). Such an approach was not only of relevance in allowing the right at issue to meet the fourth condition for the existence of an easement as laid down by *In Re Ellenborough Park* (that the right should lie in grant), but was also of assistance in its meeting the second condition (that the right should accommodate the dominant tenement), the more so where the dominant tenements were timeshare apartments. In this, the Supreme Court largely adopted the reasoning of the trial judge and the Court of Appeal. There was divergence, however, from the Court of Appeal in finding that the grant was to be construed as, in substance, the grant of a single easement to use such recreational and sporting facilities as might be provided within the leisure complex from time to time: thus, the grant included, for example, the swimming pool which had subsequently been moved indoors.

Two further aspects of the judgment may be highlighted. First, its effect may not in practice see any major opening of the floodgates. It may be reiterated that the Supreme Court was swift to emphasise that, as a general rule, this is an area of law which is fact intensive, while more specifically the legal structure in question was unusual in that the rights in favour of the timeshare apartments were granted freehold as opposed to leasehold. In the words of Lord Carnwath JSC, '[w]hatever our conclusion on this appeal, no-one suggests that the conveyancing technique used in this case is a suitable model for future timeshare arrangements of this kind' (at [94]). And a point of note is that the maintenance covenant in the lease comprising the timeshare apartments in the Mansion House (which were not subject to the litigation) had been successfully enforced so as to require the building of the new swimming pool to replace that which had fallen into disuse and been infilled.

Secondly, the judgment explored whether more than 'mere passivity' is required from the owner of the servient tenement; and, in this context, Lord Carnwath JSC was unequivocal in his dissent. It has been settled law that the owner of a servient tenement is not as a general rule under any obligation to execute repairs necessary to ensure the enjoyment or convenient enjoyment of an easement by the owner of a dominant tenement: see, e.g., *Jones v Pritchard* ([1908] 1 Ch. 630), although it would seem that an exception exists in respect of an obligation to fence: *Crow v Wood* ([1971] 1 Q.B. 77). Nevertheless, even prior to *Regency Villas*, there had been some uncertainty as to how this general rule might operate in respect of recreational rights, Lord Scott of Foscote in *Moncrieff v Jamieson* ([2007] UKHL 42, [2007] 1 W.L.R. 2620) doubting (obiter) whether a right to use a swimming pool could ever qualify as a servitude in Scottish law, since the servient owner would not be obliged to keep it full of water, while the dominant owner would not be in a position to do so. In *Regency Villas* itself, the majority directed focus to the availability of 'step-in rights', namely 'rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the

rights granted to be used' (at [65]). And its interpretation of these rights was relatively expansive, on the facts going so far as to include the provision of a level of maintenance sufficient to ensure meaningful use of even the golf course and swimming pool, subject to certain limitations. Thus, the extent of the 'step-in rights' could not be so great as to result in the servient owner taking control of the dominant land, in which case there might be 'ouster' of the dominant owner which would be incompatible with the grant of an easement (at [65]); and, in addition, certain recreational facilities were considered to involve such active and continuous management and operation by the servient owner that no exercise of 'step-in rights' would render them useable (as might be the case for free rides on a miniature steam railway or adventure rides in a theme park). Lord Carnwath JSC, by contrast, set the bar at a different level (and see also, e.g., C. Bevan, "Opening Pandora's Box? Recreation Pure and Simple: Easements in the Supreme Court: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*" [2019] Conv. 55). In his view, the extent of activity involved went beyond maintenance or repair, amounting instead to 'taking over the organisation and management of a "leisure complex"' (at [102]). He also questioned reliance on *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* ([1976] Ch. 13), a case where the court addressed, inter alia, a 'right of self-help' to mow a disused airfield, in that he felt the better analogy would have been with 'step-in rights' over an operational and commercial airfield. And he further observed part of the *Dowty Boulton Paul* judgment to be obiter, the easement issue being expressly considered 'somewhat peripheral' (at [23D]), while it may be observed that *Jones v Pritchard*, often cited as authority that a servient owner is under no general obligation to keep a bridge in repair, concerned a party wall.

In conclusion, wherever the bar may be set in terms of the degree of 'step-in rights' that are consistent with the grant of an easement, what is certain is that *Regency Villas* saw the Supreme Court having to grapple with difficult issues as to how far the common law should

accommodate as easements rights which might earlier have been characterised as no more than a ‘right to have fun’. Arguably, once a freehold structure was adopted to confer the right to use the leisure complex, the position had already become problematic: either there was no easement, in which case a central purpose for purchasing the timeshare apartments was substantially obviated; or there was an easement, in which case major ongoing management obligations were required for its exercise, in all likelihood taxing the capacity of the dominant owners. Faced with these alternatives, the majority of the Supreme Court favoured the latter, with significant factors being the intended use and changing social attitudes towards recreation, but for the future, at least in such circumstances, some comfort may be drawn from the preference of conveyancers for a leasehold as opposed to a freehold structure.