"*Being a good sport*": the Supreme Court considers for the first time the extent to which the right to the use of sporting facilities may be conferred by way of easement. (*Regency Villas Title Ltd & Ors v Diamond Resorts (Europe) Ltd & Ors* [2018] UKSC 57)

By Lucy McCormick

Summary

1. In the well-known leading case of *In re Ellenborough Park* [1956] Ch 131, the Court of Appeal decided that the shared recreational use of a communal private garden could be conferred upon the owners of townhouses built around and near it by means of easements. In the present case, the conveyancers had sought to convey a much wider range of activities using the same technique – including the use of a golf course, an outdoor heated swimming pool, squash courts and formal gardens. The Supreme Court noted that grant of an easement in such circumstances was novel, given the substantial ongoing running costs and operational responsibilities. Ultimately, however, the majority found that the grant of these purely recreational rights over land could be the subject matter of an easement. Lord Carnwath dissented, arguing that the intended enjoyment of the rights granted in this case, particularly as to the golf course and swimming pool, could not be achieved without the active participation of the owner of those facilities in their maintenance and management.

Background

2. As readers will be aware, an easement is a species of property right which confers rights over neighbouring land. The two parcels of land are traditionally known as 'the dominant tenement' and the 'servient tenement'. The effect of the rights being proprietary in nature is that they 'run with the land', both for the benefit of the successive owners of the dominant tenement, and by way of burden upon the successive owners of the servient tenement. By contrast merely personal rights do not generally pass to successive landowners.

3. The dispute arose in the context of Broome Park, a substantial country estate near Canterbury. *Inter alia*, Broome Parke encompassed a large C17th house known as

'the Mansion House' and a smaller property known as 'Elham House'. In 1967, Elham House and adjoining land were conveyed away. This is the alleged dominant tenement of the disputed easement. The seller retained the rest of Broome Park, including the Mansion House (jointly "the Park"). This is the alleged servient tenement.

4. In the late 1970s, the Park was acquired by an investor to develop a timeshare and leisure complex. This included the creation of (i) timeshare apartments in the Mansion House; (ii) a club house for the timeshare owners and other paying members of the public in the Mansion House, including restaurant, TV, billiards and gymnasium facilities; and (iii) sporting and recreational facilities in the surrounding grounds, including a golf course, outdoor heated swimming pool, tennis and squash courts and formal gardens. The development was a success, and in 1980 the developers acquired Elham House as well with a view to constructing further timeshare apartments.

5. As part of this process, in 1981 the investor transferred Elham House to an associated company. There was a further transfer the following day to a trustee for intended timeshare owners. The relevant grant of rights stated that: *"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 floors of the sporting or recreational facilities … on the Transferor's adjoining estate."* As at that date, most of the relevant recreational and sporting facilities had been built.

6. Over the years, the facilities were gradually reduced – the swimming pool was filled in, the riding stables demolished, and the putting green, croquet lawn, Jacuzzi and roller skating rink closed. Between approximately 1983 and 2012, the timeshare owners at Elham House had from time to time made contributions towards the cost of the facilities, albeit while reserving their position. However, this arrangement broke down and a dispute arose about whether the timeshare owners at Elham House were obliged to pay towards the facilities.

7. Ultimately those with an interest in Elham House issued proceedings, claiming a declaration that they were entitled, under an easement, to free use of all the sporting and recreational facilities from time to time provided within the Park. They also sought the return of sums paid for use of the facilities since 2008 (as damages for breach of easement or by way of restitution). Conversely, the defendants denied that

the claimants had the benefit of any easement in relation to the facilities, and counterclaimed for a *quantum meruit* award in respect of the provision of those facilities in and after 2012 to the extent not previously paid.

8. At first instance, the claimants were successful, save only for the recovery of payments made for the use of facilities before 2012, which the judge found had been made by agreement rather than under protest (that monetary claim was not further pursued).

9. In the Court of Appeal, the claimants were again successful on the main issue about whether the rights over the facilities constituted an easement. The judge's decision was reversed on matters of detail; in particular the claimants were held to have no rights in relation to a new swimming pool constructed in the basement of the Mansion House. In addition, the counterclaim for *quantum meruit* succeeded in part, in respect of those facilities provided in and after 2012 to which the claimants' rights did not extend (of which the most important was the new swimming pool).

10. In the Supreme Court, the appellant defendants pursued their contention that the 1981 Transfer granted no enduring rights in the nature of easements in relation to any of the facilities within the Park. The claimants by cross appeal sought to restore the judge's conclusion as to the full extent of their rights in relation to the facilities, including the new swimming pool, and accordingly sought to have dismissed the Court of Appeal's order for a *quantum meruit* award in favour of the defendants.

The Supreme Court decision

11. The Supreme Court began its analysis with the grant of rights in the 1981 Transfer, noting that:

    11.1. Firstly, it was '*abundantly plain*' that the parties intended to create an easement, rather than a purely personal right. That being the manifest common intention, the court should apply the validation principle ("*ut res magis valeat quam pereat*") to give effect to it, if it properly can **[25]**;

    11.2. Secondly, the grant was in substance of a single comprehensive right to use a complex of facilities as they evolved, not fixed as they existed in 1981 **[26-29]**;

11.3. Thirdly, there was no express requirement for contribution to the operational costs (and an argument for an implied term was not pursued after failing at first instance) **[30]**.

12. The Supreme Court noted that '*the facilities granted in the present case undoubtedly broke new ground within the context of easements, beyond that established in In re Ellenborough Park*' **[74]**. Against the recognition of recreational rights over a leisure complex as easements, it noted two main factors:

12.1. First, if annexed to a freehold, they are indeterminate in length, whereas a timeshare structure is frequently set up for a limited number of years. Furthermore the rights conferred are likely to burden the servient land long after the leisure complex in question has outlived its natural life **[79]**.

12.2. Secondly, the use of easements as the conveyancing vehicle for the conferring of recreational rights for timeshare owners upon an adjacent leisure complex is hardly ideal, given that there is no way in which enforceable obligations of that kind may be imposed upon the servient owners so that the burden of them runs with the servient tenement. Compare a leasehold structure, in which the burden of positive covenants may be made to run with a leasehold reversion **[80]**.

13. Nonetheless, a majority found that the Supreme Court should affirm *In re Ellenborough Park*, and gave 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, provided always that they satisfy the four standard conditions for an easement.[1] Where the actual or intended use of the dominant tenement is itself recreational, as will generally be the case for holiday timeshare developments, the accommodation condition '*will generally be satisfied*'. Whether the other conditions, in particular the fourth condition, will be satisfied will be a question of fact in each case. The court observed that '*Whatever may have been the attitude in the past to "mere recreation or amusement", recreational and sporting*

[1] I.e. that "*i) There must be a dominant and a servient tenement; ii) The easement must accommodate the dominant tenement; iii) The dominant and servient owners must be different persons; iv) A right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.*" **[35].**

activity of the type exemplified by the facilities at Broome Park is 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.'

14. The appeal was therefore dismissed.

15. On the cross appeal, the majority held that the Court of Appeal was wrong to limit the grant of rights to the facilities in existence at the time of the grant in 1981; the facilities referred to in the grant were bound to change over time and the new indoor swimming pool was, once complete, a facility made within the complex**.** There was also '*no real basis*' for the sharp distinction which the Court of Appeal had drawn between outdoor and indoor recreational and sporting facilities **[88-92]**. The cross-appeal was therefore allowed and the first instance judge's consequential orders in this respect restored.

16. Lord Carnwath gave a dissenting judgment, noting that the '*intended enjoyment of the rights granted in this case, most obviously in the case of the golf course and swimming-pool, cannot be achieved without the active participation of the owner of those facilities in their provision, maintenance and management'***[95]**. Thus, Lord Carnwath would not extend the *Ellenborough Park* principle to what was, in effect, a '*permanent membership of a county club*'. He considered that such an extension of the law on easements is not supported by authority and wrong in principle **[96]**.

Significance

17. In showing that use of leisure facilities can amount to binding property rights and not just personal contractual rights, this decision will be of considerable interest to those owning and advising on time share developments.

18. More generally, in the recognition of a 'new' easement, this case is an illustration of property law evolving with the times. Particularly notable is the acknowledgment in the decision of the increasing social importance and utility of sport in modern life. In that sense, it chimes with earlier cases such as *Bolton v Stone* [1951] AC 850, where

the House of Lords noted the social utility of sport and declined to find negligence when a claimant was injured by a ball from a neighbouring cricket pitch.

19. Nonetheless, such flexibility in the recognition of new easements carries risks, notably such easements might be granted, but cannot then later easily be discharged. There is at present no statutory basis for the modification or discharge of easements, such as exists in relation to restrictive covenants. The Law Commission's 2011 report proposes that there should be, and this Supreme Court decision may provide further impetus for change.

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