EASEMENTS – class still open

The class of rights which may qualify as an easement has not been closed. This allows the law to adapt to changed circumstances and develop. By a recent helpful decision some certainty has been provided for a type of right regarding which there was previously a surprising absence of authority.

In Moncrieff v Jamieson [2007]UKHL 42 (parking case) Lord Scott (at para. 47) doubted whether a right to use a neighbour's swimming pool could ever be a servitude in Scotland because there would be no obligation on the pool's owner to fill it with water and no right for the person entitled to the right to do so. He indicated that such a right would be an "in personam contractual right".

The issue arose for decision in Regency Villas Title Limited v Diamond Resorts [2015] EWHC 3564 (Ch) and HHJ Purle QC held that an express right to use sports and recreation facilities can take effect as an easement. It was material that the issue arose in the context of a timeshare involving facilities which were intended to enhance the timeshare units. It was important as there was neither a contractual relationship nor a landlord and tenant relationship between the parties. Unless the rights qualified as an easement the claiming timeshare owners would not be entitled to use the facilities and in order to do so would, therefore, have to pay a commercial charge. The owner's defence was that the rights were mere personal rights and reliance was placed on the dicta of Lord Scott in Moncrieff v Jamieson.

The judge held that the rights granted were not personal rights but were capable of being easements satisfying the four general conditions set out by Danckwerts LJ in the well-known case of Re Ellenborough Park [1956] Ch. 131 (right to full enjoyment of communal gardens). In consequence those with timeshare entitlements could exercise the rights without being required to pay a charge or contribution to expenses.

The familiar general conditions to be satisfied by a right in order to qualify as an easement are:

(1) there must be both a dominant and servient tenement;
(2) the right must accommodate the dominant tenement;
(3) there are different owners of the dominant and servient tenements;
(4) the right must be capable of being an easement.

The issue focused on the last of these conditions. In deciding the issue three questions drawn from the judgment in Re Ellenborough Park were particularly considered by the judge, namely:-

(a) is the right too wide or vague – with these rights there was no uncertainty arising from the terms of the grant. The judge had no problem holding that the right covered both existing and future facilities.

(b) does the right deprive the servient tenement owner of the rights of proprietorship or possession – as the owner retained control of the grounds and buildings with the ability to alter and improve them this did not arise.

(c) was it a mere right of recreation and did the right confer a benefit on the timeshare buildings – the grant was made by a developer and not by a neighbour. It was to enhance the attraction of the timeshare units. The judge considered that a mere recreation right was a reference to a personal right which did not benefit the dominant tenement. As the grant was made by a developer rather than a neighbour the judge had no problem in holding that the rights were not just personal.

Additional points coming out of the judgment

(i) A requirement to expend money on the part of the owner of the servient tenement will exclude an easement. In this case there was no obligation to maintain the facilities and the facilities could be left by their owner to fall into disrepair unless those entitled to the right entered to carry out repairs or maintenance. The judge indicated it was possible in theory that the pool could be filled using a tanker.

(ii) The facilities covered were a swimming pool, golf course, squash courts, tennis courts and gardens. It follows that in the appropriate circumstances a right relating to any of these facilities can be an easement.

(iii) It was accepted that the use of the facilities could be subject to restrictions and regulations imposed by the owner in the ordinary way provided that these did not cause a substantial interference with the exercise of the rights. This would, for example, prevent everyone turning up at the same time to use the facilities.

(iv) No charge could be levied for the use albeit that a voluntary payment was actually being made by the timeshare owners to keep up the quality of the facilities. The implication argument for a fee failed on the basis of the old test that such charges were neither necessary for business efficacy nor obvious. Whether or not such charges were reasonable was irrelevant.

As the judge said the decision is a short step on from the result in re Ellenborough but there is an advantage in that step being taken. It secures increased certainty and shows that the law does develop to adapt to changed circumstances. It shows that the oft repeated statement that the class of easements has not closed has real meaning.