# New recreational easements

1. Issue - Is it possible to grant a valid easement in relation to recreational or sporting facilities? A question to which one would expect a simple answer but the successive judgments in Regency Villas Title Limited v Diamond Resorts (Europe) Limited illustrate that it has been far from simple to obtain an answer. The history of the answer is that for a long time it was no but that was changed by HHJ Purle QC to a simple yes. After consideration by the Court of Appeal the answer was a much more restrained yes. By a 4:1 majority in the Supreme Court the answer has reverted to yes but with questions remaining.

2. Characteristics of an easement – the starting point in arriving at an answer is consideration of the oft cited four characteristics of an easement referred to by the Court of Appeal in Re Ellenborough.[1] These are

   (i) there must be a dominant tenement and a servient tenement ("st"),

   (ii) an easement must accommodate the dominant tenement[2] ("dominant tenement"),

   (iii) dominant and servient owners must be different persons, and

   (iv) a right over land cannot amount to an easement unless it is capable of being the subject-matter of a grant.

3. Re Ellenborough - The case was concerned with the validity of the following right

   "And also the full enjoyment ... at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land ... in the centre of the Square called Ellenborough Park which said pleasure ground is divided by the said Walliscote Road"

[1] [1956] 1 Ch. 131

[2] Romer LJ in Miller v Emcer Products Limited [1956] EWCA Civ 6 described this as meaning that it is calculated "to enhance its beneficial use and enjoyment". There must be a connection between the right and the normal enjoyment of the dominant tenement (Warren J. in Polo Woods Foundation v Shelton-Agar [2009] EWHC 1361 (Ch) at para. 90).

This right was combined with covenants to use the land as an ornamental pleasure ground, not to build on it save for certain permitted structures and to retain as an ornamental pleasure ground.

4. The argument on behalf of the owners of Ellenborough Park was that the right was an ius spatiendi and as such could not qualify as a valid easement. The above characteristics which were cited in Court from Cheshire (7th Edition) and Gale were the basis for the argument.

5. As regards characteristic (b) it has to be shown that the right is connected to the enjoyment of the dominant tenement and not just a benefit to the owner personally. Enhancement of the value of the dominant tenement is material but not conclusive. Not surprisingly the right to use a communal garden was held to accommodate an abutting townhouse.

6. Sir Raymond Evershed MR stated that characteristic (iv) raised the questions whether the rights

   (i) are too wide and vague;

   (ii) are inconsistent with the proprietorship or possession of the servient owner; would amount to joint occupation; or would substantially deprive the owner of the servient tenement of proprietorship or legal possession;

   (iii) constitute mere rights of recreation possessing no utility or benefit

7. He analysed the right granted as comprising

   (a) the right to walk on or over those parts provided for the purpose which would be the paths and (subject to restrictions in the ordinary interests of the grass) the lawns;

   (b) to rest in or upon seats or other places provided;

   (c) if certain parts were set aside for particular recreations such as tennis or bowls to use those parts for those purposes subject again in the ordinary course to provisions made for regulation

   But not including the right to pluck flowers or trample at will over the park or interfere in the laying out or upkeep of the park.

   The rights were well defined and understood and distinct from a privilege to wander at will. Accordingly, the first

question was answered in the affirmative. Further the rights were found not to involve joint occupation or any inconsistency with the proprietorship or possession so the second also was.

8. Historic objection to recreation rights - the objection that a right of mere recreation cannot qualify as an easement appears to arise from cases such as: -

   A-G v Antrobus[3] in which Farwell J. rejected a claim to a public right to view Stonehenge on the ground that it was a ius spatiandi which is not known to English law[4]; and

   Mounsey v Ismay[5] which rejected a claim to a public right to go on to land on Ascension Day each year to hold a horse race. Baron Martin stated that an easement "must be a right of utility and benefit and not one of mere recreation and amusement"[6].

   International Tea Stores v Hobbs[7] in which Farwell J, stated

   "The instance suggested by Lord Coleridge in his argument illustrates my meaning: he put the case of a man living in a house at his landlord's park gate, and having leave to use and using the drive as a means of access to church or town, and to use and using the gardens and park for his enjoyment, and asked, Would such a man on buying the house with the rights given by s. 6 of the Conveyancing Act acquire a right of way over the drive, and a right to use the gardens and park? My answer is "Yes" to the first, and "No" to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere jus spatiandi, is not so known."[8]

9. The Master of the Rolls felt that the statement of Baron Martin "must be at least confined to the exclusion of rights to indulge in such recreation as were in question in the case before him, horse racing or perhaps playing games, and has no application to the facts of the present case." Walks in a garden possibly with small children in prams was not regarded as mere recreation or amusement and have a utility.

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[3] [1905] 2 Ch. 188
[4] At page 199 Farwell J. stated that "the right of walking around and inspecting the stones is not one which could be the subject-matter of the grant."
[5] (1865) 159 ER 621
[6] At page 625
[7] [1903] 2 Ch. 165
[8] Page 172

10. Further the Court of Appeal doubted that a right akin to a ius spatiendi was unknown to English law. Farwell J. had given no authority for his statements and in so far as they related to whether such a right could be granted in favour of an individual were obiter. He had not had cited to him the judgments in Duncan v Louch[9] which accepted that a right to walk in an area such as a square for pleasure rather than with the intent to pass from one point to another can be the subject of a grant[10]. Patteson J. stated that

"I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another?"

11. It may be that the previous reluctance to accept rights akin to an ius spatiendi as valid easements was based on Victorian concern not to unduly fetter the ability of the owner of land to deal with or use and develop that land. Lord Brougham in Keppell v Bailey[11] stated that "Incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner …". Cresswell J. in Ackroyd v Smith[12] stated that "It is not in the power of a vendor to create new rights not connected with the use or enjoyment of land, and annex them to it: nor can the owner of land render it to a new species of burthen, so as to bind it in the hands of an assignee …". These authorities were relied on by Sir Peter Gibson LJ when referring to "the reluctance of the law to recognise new forms of burden on property conferring more than contractual rights."[13]

12. As against this Lord Chancellor St. Leonards stated that "the law of this country, and the law of Scotland, frequently is enabled to adapt itself to changes in the circumstances of mankind, without doing violence to its original principles and rules….the law naturally adapts itself".[14] However, he went on to say that did not apply to recreation, taking air and exercise as these are not modern inventions and so a right to use an area of land for wandering and recreation" could not in Scotland be a servitude.

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[9] (1845) 115 ER 341
[10] Lord Denman CJ at page 344; Coleridge J and Wright J at page 345
[11] (1834) 39 ER 1042
[12] (1850) 138 ER 68
[13] London & Blenheim Estates Limited v Ladbroke Retail Park Limited [1993] 4 AER 157 at page 163
[14] Dyce v Lady Hay (1852) I MacQueen 305 at page 312 approved by Lord Shaw of Dunfermline in A-G of Southern Nigeria v John Holt & Co. (Liverpool) Limited [1915] AC 598 at 617 when confirming that "The law must adapt itself to the conditions of modern society and trade."

13. The lengthy judgment in Re Ellenborough Park suggests that the limitations expressed by judges such as Farwell J over the preceding 150 years had been wrong. Not only did the Court of Appeal accept as an easement the right to enjoy a garden as distinct from a right to cross it passing from point A to point B[15] but it also hinted at other rights which could qualify as easements such as the right to use a tennis court.

14. As can be seen from the hypothetical example discussed in the International Tea Stores case (quoted in paragraph 8 above) significant consequences could occur from the actual decision in Re Ellenborough. For example, in sales off of part of a land will there possibly be an implied grant of a right to wander over the paths of the retained land for pleasure? Such an implied easement could have a greater impact than an implied right of way to use a drive.

15. It was nearly another sixty years before the potential provide by the judgment in Re Ellenborough was explored. The opportunity was seized with some relish by HHJ Purle QC in Regency Villas Title Limited v Diamond Resorts (Europe) Limited[16] who set about enthusiastically creating new rights.

16. Background to Regency Villas case - the background is important. The claim was on behalf timesharers entitled to weekly or fortnightly timeshares in 26 units known as Regency Villas on land known as Elham House. There were also timeshare units on adjoining land known as Broome Park Estate ("the Estate") including the building known as Mansion House. Sporting and leisure facilities were located outdoors and in the basement and ground floor of Mansion House. These facilities included an eighteen hole golf course (leased to the Second Defendant), tennis, squash, croquet and a putting green outdoors and indoors a reception, billiards room, tv room, gym, spa, sunbeds, sauna, bar and restaurant although the types of facilities were not set out in full in the judgment of HHJ Purle QC.

17. The timeshares in relation to the Estate were created by a lease which included by way of landlord's covenant a right to use the facilities and an obligation imposed on the

[15] In Kennerley v Beech [2012] EWCA Civ 158 the possibility of a right akin to that in Re Ellenborough Park was acknowledged but a specific right of way granted to reach a terminus (in that case a kitchen garden) did not convert to such a right when the use of the terminus is lost. Such a right would be personal to the grantee rather than accommodating the dominant tenement.

[16] [2015] EWHC 3564 (Ch)

landlord to maintain the facilities. In consequence the burden could be enforced against the landlord from time to time. In contrast there was no lease in relation to Regency Villas. Instead there had been a transfer out of the Estate in 1981 to a predecessor of the present owner of Elham House which included an express right to use the facilities. It made no provision for fees to be paid in return for their use. There was a covenant to maintain the facilities by the grantor but as it was positive the burden did not run with the land. The further transfer on of Elham House was one day after the 1981 Transfer.

18. The dispute was whether the owners of the Estate (including the lessee of the golf course on the Estate) could charge commercial fees for such use. It was argued that because those entitled to timeshares in Regency Villas and the owner of Elham House were not entitled to use the facilities under the 1981 Transfer on the ground that the rights did not qualify as easements they must, therefore, pay for any such use. The Claimants contended that they are entitled to use the facilities without charge because the rights constitute easements.

19. The Claimants' case hung solely on the rights granted by the 1981 Transfer. There are no landlord's covenants to enforce. Unlike Re Ellenborough there are no restrictive covenants associated with the rights which although technically making no difference on the issue did make a significant practical difference. The rights are entered on the registered title of the two properties at HM Land Registry but that did not influence the outcome and did not itself confer validity on such rights if otherwise the rights do not constitute easements.

20. In the 1981 Transfer there were three sets of rights expressly granted. The first two were standard rights – the first rights of way and the second services. It is the third set which has been the subject of the dispute. It reads in the 1981 Transfer:

"thirdly 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 Broome Park Mansion House, gardens and any other sporting or recreational facilities (hereafter called "the facilities") on the Transferor's adjoining estate"

21. This grant described some of the existing facilities but not all of them. Since the grant in 1981 there have been changes to the facilities. The most significant was that the

outdoor heated swimming pool had been filled in and replaced by an indoor pool in the basement of the Mansion House.

22. HHJ Purle QC - as stated above HHJ Purle QC sitting as a Deputy Judge of the High Court enthusiastically took up the cause of the Regency Villas timesharers and held that the right granted is an easement both as regards facilities existing at the date of the 1981 Transfer (whether or not subsequently altered or moved) and subsequent facilities.

23. In the process of doing so the judge found that:

(i) the right was not intended to be a personal right. As it was set out in a list of easements that is difficult to take issue with.[17] Had it been personal it would have lasted only 24 hours.

(ii) in construing the grant the judge took account of the grant being made in the context of a timeshare arrangement and that the facilities would be regarded as a substantial benefit for timesharers.[18]

(iii) the right did not require the Defendants to incur expenditure.[19] Had it done so then the right could not qualify as an easement. It was always open to the defendants to withdraw from running the facilities leaving the Claimants to decide whether to take on that expenditure.[20]

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[17] Para. 63

[18] Para. 41

[19] Para. 33. This was the issue in Rance v Elvin [1985] EWCA Civ 7. The Claimants was entitled to an uninterrupted supply of water through the pipes running under the Defendant's land but was not entitled to a supply of water because that would have subjected the Defendant to the obligation to make payment for the supply to the Water Company. In consequence the Defendant could not physically interfere with the passage of water through the pipes but could not be compelled to ensure the water supply comes into the pipes. It meant that the right was precarious because the Defendant could end the supply by refusing to pay. This decision was followed in Duff v Lamb (Court of Appeal 10th April 1997) with regard to the supply of electricity. These authorities are subject to the refinement in Cardwell v Walker [2003] EWHC 3117 Ch. which permitted a positive obligation (supply of tokens for machine providing electricity) based on the benefit and burden principle.

[20] See the general principles set out in paragraph 8 of Carter v Cole [2006] EWCA 398 and in particular neither a dominant owner nor a servient owner being obliged to maintain or repair the roadway on the servient tenement.

(iv) neither the exercise of the right[21] nor the taking on of the running of the facilities involved the taking of either joint occupation or possession.[22] It was accepted that the timesharers could not all enjoy the same facility at the same time. Further the Defendants are entitled to regulate the use of the facilities in the interests of good management.[23]

(v) there was no legal impediment to the right constituting an easement provided that there was such an intent.[24] This is notwithstanding Lord Scott's doubt in Moncrieff v Jamieson[25] that a right to use a neighbour's swimming pool could be an easement as the pool owner would not be obliged to keep it filled with water and the grantee would not be able to do so. The Judge felt that because the right discussed involved not developers but neighbours it could be construed as personal[26] but that in any event "the example given by Lord Scott has no application to the present case"[27] without explaining why.

(vi) the right extended to facilities which were not there at the time of the 1981 Transfer.[28]

(vii) the right also applied to facilities which existed at the date of the 1981 Transfer but which had been altered or improved since the 1981 Transfer.[29] The judge considered that if this was not the case then an improvement of the facility would be a substantial interference and that could not have been intended.

(viii) applying the finding in (vii) he held that the Claimants were entitled to use the indoor swimming pool notwithstanding that it had been relocated from outdoors.

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[21] Applying Miller v Encer Products Limited [1956] Ch. 304 at para. 47. Romer LJ stated that it was a common feature of easements that whilst rights are being exercised by a dominant owner the servient owner would be excluded but that does not amount to ouster of the servient owner.
[22] Para. 52. In Mulvaney v Gough [2002] EWCA Civ 1078 in a case concerning a prescriptive right the point was made strongly that retaining land as an ornamental garden does not mean that the owner has lost control or possession. Changes can be made by the owner provided that they do not substantially interfere with the right to enjoy the ornamental garden.
[23] Paragraphs 46 and 47.
[24] Para. 56
[25] [2007] 1 WLR 2620 at 2636E
[26] Para. 64
[27] Para. 62
[28] Para. 45
[29] Para. 45

24. The judge stated that no English or Scottish authority determined whether an easement could exist to use recreational or leisure facilities but in reaching his decision the judge drew comfort from a number of Commonwealth decisions on the topic:

Dukart v District of Surrey[30] - right to access the waters of bay for benefit of resort development which included right to cross over or promenade along the beach.

Grant v Macdonald[31] - right to build and use a swimming pool on part of neighbour's land.

Riley v Pentilla[32] - right to use common area "for the purpose of recreation or a garden or park".

City Developments v Registrar General of the Northern Territory[33] - right to use lake and foreshore for private recreational purposes for benefit of resort complex.

25. The outcome was that without analysing the individual rights contained in the package of rights the judge found that a single comprehensive right to use the facilities had been granted which constituted an easement. From the point of view of drafters the outcome was particularly good news because the scope of the right applied to both future facilities and alterations to existing facilities no matter how substantial and no matter that this involved a relocation of the facility.

26. On the basis of this judgment the Claimants were entitled to continue to use all the facilities including the new indoor pool without the need to pay any fees save for consumables such as the charge for electricity when using a squash court.

27. Court of Appeal - The matter went to appeal with a single judgment given by the Chancellor of the High Court.[34] A

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[30] Supreme Court of Canada (1978) 86 DLR 609

[31] British Columbia - [1992] 5 WWR 577. In this case the issue was whether the servient tenement was for the exclusive use of the dominant owner. It was held that it was only the pool once constructed and improvements such as a gazebo which were to be used exclusively and that this exclusivity did not prevent the right from being an easement.

[32] [1974] VR 547

[33] (2001) NTCA 7 affirming Thomas J [2000] NTSC 33. At para. 44 he stated that "the term "recreational purpose" is to be construed sensibly and reasonably in the context of rural lakeside recreation, this must include walking across and around the land surrounding the lake; swimming and boating …and recreational activities such as photography, birdwatching and other types of passive recreational activity."

[34] [2017] EWCA Civ 238

less enthusiastic analysis took place which involved three stages. The first stage was to construe the wording of the grant. The second stage was to consider whether rights to carry on recreational or sports activities can constitute easements. The third stage was then to "unpack" the rights found to be contained in the grant as a result of the first stage and determine whether each individual right is a valid easement rather than there being a grant of a single right to use the facilities from time to time. The Court of Appeal's construction was much more restrictive than that of HHJ Purle QC.

28. Court of Appeal construction –the argument on behalf of the Defendants in the Court of Appeal was that because the Defendants could not be compelled to spend money maintaining the facilities and had the absolute discretion to withdraw the facilities this is inconsistent with the rights constituting an easement.[35] The Court of Appeal considered that the first step in addressing that argument was to construe the "thirdly" section of the grant of rights in the 1981 Transfer.

29. On the issue of construction the Court of Appeal concluded that

(i) the natural meaning of the wording covered the existing sporting and recreational facilities but not the restaurant or bar;

(ii) it is possible to make a grant which is to take effect in the future but to do so the wording used must make that intention clear. In the wording used in the 1981 Transfer there was no element of futurity as there was with the second grant of the service easement.[36]

(iii) the rights will cover replacements, substituted or altered facilities provided that these are the same facility located on the same area of the Estate as when the right was granted (subject to (iv) below). The right will not apply to a facility which is moved to a different part of the Estate or which is substantially extended to take in a part of the Estate not subject to the facility at the time of the 1981 Transfer. The judgment emphasised that areas of land are subjected to an easement and it does not extend outside that area. In doing to it approved the dicta in the judgment of Lightman J. in Greenwich NHS Trust v London and Quadrant Housing Trust[37] that a right of way cannot be unilaterally diverted by the owner of the st.

[35] Para. 25
[36] Para. 40
[37] [1998] 1 WLR 1749

(iv) a minor or de minimis extension of a facility will not cause it to fall outside the scope of the right[38].

30. This part of the Court of Appeal decision immediately excluded the Claimants from being entitled to a right to use the indoor swimming pool in the absence of an amended grant. The filling in of the outdoor swimming pool was a substantial interference with the right to use that pool but a claim for damages would now be statute-barred.[39] In consequence they would be entitled to a declaration that there is a right to use the outdoor pool but as the Defendants are under no obligation to provide a pool the likelihood is that the declaration would only benefit the Claimants if they wanted to incur the cost of digging it out so that it could be made usable again.

31. Having greatly restricted the scope of the rights by reason of their construction of the grant in the 1981 Transfer it was then accepted that it was necessary to consider whether rights to use recreational and sporting facilities can be easements and to "unpack" the grant and to consider each of the individual rights. This is in sharp contrast to HHJ Purle QC who looked at the grant as a whole and never dealt with the specific individual facilities subject to the grant.

32. The argument that the rights could not be easements because of the ability to withdraw the facilities was rejected.

33. In looking at the rights individually the Court of Appeal realised that some had not previously been recognised as easements. In deciding whether a right could exist as a new easement it was considered that it was necessary to take account of changes in the views of society. In particular undertaking physical exercise is now considered to be of much greater importance with the consequence that a right will not automatically be prevented from qualifying as an easement because it concerns "mere recreation or amusement". The statement of Baron Martin would no longer hold good and a right to carry out recreational physical activities would not prevent the right qualifying as an easement. Such rights can now be viewed as being rights of utility and benefit.

[38] Para. 44
[39] Paragraphs 72 and 74

34. However, to qualify as an easement a right to use land for recreation or amusement must

(i) not be too wide or vague;[40]
(ii) not impose positive obligations;[41]
(iii) involve joint occupation by the owners of the dominant tenement and servient tenement;[42]
(iv) not exist over chattels.[43]

The Court of Appeal applied these requirements to each of the right to use the individual facilities as follows. These are considered here notwithstanding the decision in the Supreme Court so as better to understand that decision and because some of the points discussed may here still be relevant such as the restrictions on step-in rights in the event that the servient tenement owner ceases to maintain the facility and the ability of the servient tenement owner to charge for services.

35. Garden –this right to use the Italianate gardens was the simplest to decide. Applying re Ellenborough Park it is an easement.[44]

36. Swimming pool – as discussed above in paragraph 29 there was as a matter of construction no right to use the indoor swimming pool. It left the issue whether there was a right to use the outdoor swimming pool although this would only provide the limited benefit discussed in that paragraph.

37. The utility and benefit of such a right was regarded as being obvious. The Court of Appeal expressed itself as acutely aware of the doubts of Lord Scott in this context but it considered that in the event of a failure by the servient tenement owner to fill the pool it was open to the dominant tenement owner to supply the water needed to operate the pool[45]. The arguments before it regarding this right had focused on whether the water supplied was a chattel and whether the right was really a right to use the water and was thus a right to use a chattel and so not an easement. This was rejected with the right being equated to a right to swim in a lake which would not give rise to an issue regarding whether the water is a chattel.[46]

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[40] Para. 58
[41] Para. 59
[42] Para. 60
[43] Para. 61
[44] Para. 64
[45] Para. 71
[46] Para. 72

38. It was acknowledged that modern swimming pools will often have sophisticated filtration, heating, chlorination and water circulation systems. In order to avoid significant health issues these systems may be crucial. It is stated that although water is essential to the right "such systems are not essential to the benefit and utility of using the pool."[47] But in any event any desirable filtration or other plant can be provided by the dominant tenement owner. Neither the provision of water nor a filtration plant could in the judgment of the Court of Appeal be regarded as sharing possession of the land on which the pool is constructed.

39. It was accepted that the exercise of such a right would be subject to restrictions "if only on account of safety considerations."[48] The nature of such restrictions must not deprive the dominant tenement owner of the substance of the right.

40. Interestingly it was suggested that the Defendants might properly be able to charge for the use of their chattels and services but without any elaboration. As the charging of fees to use the rights is at the heart of this dispute this could be a very significant throwaway line. How is such a fee to be quantified? Is it for the servient tenement owner to decide in that owner's absolute discretion or does it have to be a reasonable fee? What happens if the dominant tenement owner says it does not want the chattels or services and just wants to exercise the right without payment? Is the dominant tenement owner entitled to demand that it be able to exercise the bare right? It would seem that there is plenty of scope for further disputes.

41. Tennis courts – the fact that this involves playing a game will not block the right from being an easement. This particular right had been suggested in re Ellenborough as part of the wider right to enjoy the ornamental pleasure garden. There is a clear utility and benefit to a dominant tenement. In the event of the servient tenement owner failing to maintain the tennis courts it is open to the dominant tenement owner to maintain the surface of the courts and to provide nets. This would not constitute actual or shared possession.[49]

42. Again the possibility of the Claimants charging for the use of any chattels provided by them in the course of their

[47] Para. 72
[48] Para. 73
[49] Para. 66

business. Again there is no elaboration of the implications of such a course of action.

43. Croquet and putting green – the right to use these is identical in character to the right to use a tennis court. In the event that the servient tenement owner failed to maintain them then the dominant tenement owner could mow them as stated by Russell LJ happened in Dowty Paul Limited v Wolverhampton Corporation (No. 2)[50] with the grass airstrip over which there were rights for planes to land and take off.

44. Squash courts – the Court of Appeal considered that there is no difference in nature between the right to use the tennis courts and the squash courts. The only physical difference is that the squash courts are wholly enclosed but that was viewed as "a distinction without a difference". In the event that the servient tenement owner fails to provide the electricity supply to allow the squash courts to be used then it is open to the dominant tenement owner to do so by a generator or other means. In this case a coin-operated system to pay for the electricity had been installed and this was permissible.

45. Golf course – although many of the arguments relating to the right to use the tennis courts apply by analogy to golf courses it was acknowledged that there is a difference in that "contemporary golf courses have sophisticated networks of landscaped, manicured and irrigated tees, bunkers and greens, punctuated by sheds and shelters, tarmacked paths, sand boxes, pro-shops and club houses".[51] All this requires a large amount of maintenance in order to keep it in a "playable" condition involving teams of groundsmen and greenkeepers. In the event that the servient tenement owner fails to maintain a championship golf course will the dominant tenement owner need to take possession of it in order to be able to carry out the necessary works? The Court of Appeal considered that it was not necessary to take actual or shared possession in order to mow the grass and maintain the course in a playable condition.[52] In consequence the right to use a golf course can be an easement because there is an obvious utility and benefit to a dominant tenement.[53]

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[50] [1976] 1 CH. 13 at page 24B-D

[51] Para. 75
[52] Para. 78
[53] Para. 79 which interestingly had long been assumed to be the position in Scotland – Dempster v Cleghorn (1813) II Dow 40.

46. As with the other rights it was acknowledged that the servient tenement owner can regulate the use of its chattels and services "in the ordinary course".[54] Further the st owner can make a charge for such purpose. As with the swimming pool this is likely to give rise to significant issues. The large amount of maintenance will involve the incurring of substantial costs. Will the amount of such fees chargeable be significantly different from the normal fees charged to a non-member player? Who will decide? This aspect was not discussed by Lord Briggs in his Supreme Court judgment.

47. Billiard Room – the right to use the billiards room was considered by the Court of Appeal to be different from the rights relating to physical activities outdoors. First "the modern approach to taking physical exercise is not readily applicable to recreational indoor games."[55] Further such rights are viewed as a right to services or facilities rather than a right to use land. If the Defendants close these indoor facilities then there is nothing left. The Chancellor summed it up by stating that unlike "the empty swimming pool, an empty billiard room is not a billiard room at all".[56]. In consequence this right cannot be an easement.

48. Gym, sunbed, sauna, tv room, restaurant and bar– the analysis applied to the billiards room was held to be equally applicable to the right to use these facilities. They involved the provision of a service and the use of chattels but not the use of the land. Without the chattels it was stated that the gym, sunbed and sauna could not exist. Further in order to make good any failure to provide by the servient tenement owner it was considered by the Court of Appeal that the dominant tenement owner would need to take possession. None of these rights could, therefore, be easements.[57]

49. Reception area – this did not comprise a sporting or recreational facility and the right to use it could not constitute an easement.[58] This is in a case in which there were no rights relating to indoor facilities which constituted easements.

50. Outcome – the decision in the Court of Appeal significantly reduced the rights that flowed from the decision of HHJ Purle QC. As as a matter of construction any right to use future facilities or any relocated facilities

[54] Para. 79
[55] Para. 80
[56] Para. 80
[57] Para. 81
[58] Para 80

was removed. It also removed any rights relating to indoor facilities even including the indoor swimming pool on the ground that it was a relocation from outdoors. In addition it raised the possibility of the Defendants seeking to charge fees in return for services and the use of facilities which will lead to more disputes.

51. Supreme Court decision[59] - the judgment of the majority was given by Lord Briggs and Lord Carnworth gave a dissenting judgment. The majority favoured the approach adopted by HHJ Purle QC.

52. Construction - crucially the majority rejected the unpicking of the grant into individual rights but viewed the grant in the same manner as HHJ Purle QC as a single comprehensive right. Lord Briggs stated[60] that "it is in my view in substance the grant of a single comprehensive right to use a complex of facilities, and comprehends not only those constructed and in use at the time of the 1981 Transfer, but all those additional or replacement facilities thereafter constructed and put into operation within the Park as part of the leisure complex during the expected useful life of the Regency Villas timeshare development for which the 1981 Transfer was intended to pave the way. It is, in short, a right to use such recreational and sporting facilities as exist within the leisure complex in the Park from time to time."

53. The matrix for the purpose of construing the grant comprised three facts[61]:

(i) The common purpose of the development of both the Estate and Elham House was to sell timeshare units next to a leisure centre;

(ii) the solicitor acting for the transferee of Elham House knew that the timeshare units in the Mansion House with the facilities was being arranged using a leasehold structure which meant that the lessees in the Mansion house could enforce against the owner the burden of maintenance of the facilities;

(iii) the 1981 Transfer was be followed within a day by a further transfer of Elham House.

[59] [2018] UKSC 57
[60] Para. 26
[61] Para. 22

Further it was expected that the funding for the maintenance and running of the facilities would come from members of the public paying to use the facilities.[62]

54. The relationship between the timeshare units and the facilities in the leisure complex were vital. It was a strong factor in finding that the grant relating to the facilities was intended to create a property right. It encouraged the Court to hold not only that the grant concerned a single right rather than a collection of individual rights but also that the right was to use all the facilities at the leisure complex. It did not pare off some but applied to all of them so it included, for instance, the restaurant which had not been accepted by the Court of Appeal. Importantly it applied to the complex from time to time so that it covered future additions and substitutions. This allowed the right to include the new swimming pool.

55. Perpetuity rule - in deciding that the scope of the grant included future facilities the Supreme Court tackled head on the issue whether such future facilities would be caught by the perpetuity rules particularly as the new swimming pool was installed more than twenty-one years after the 1981 Transfer. Lord Briggs rejected such a concern on the ground that any changes to or adjustments of the leisure complex would not give rise to independent and distinct rights.[63] The situation was comparable to a right to use a sewerage network which is modified by the rerouting of pipes. In his lordship's view this would not trigger the application of the perpetuity rule and equally changes to the leisure complex should not.[64]

56. Accommodation - the Appellants made a direct challenge to Re Ellenborough on the ground that the rights granted in that case were rights conferred for the pure (or mere) enjoyment of their exercise rather than the better enjoyment of the dominant tenements (the townhouses). For the majority in the Supreme Court this was a vital issue as it is a crucial requirement for a right to qualify as an easement. Did the right granted accommodate the Elham House and the time sharers' units?

57. This requires the right not just to be appurtenant to the dominant tenement or add to its value but it must be connected with the normal enjoyment of the dominant tenement.[65] It must be a benefit or utility for the property[66]

[62] Para. 11
[63] Para. 27
[64] Para. 29
[65] Paras 37 and 40.
[66] Para. 38

albeit that subject to a right of support most easements usually benefit humans.[67] It was stated that the right to use the Oval even if annexed to a property in Kennington would not qualify as an easement. It would add to the value of the property but has no connection to the normal use of the property. For these purposes the use can be both commercial or residential and covers contemplated use as well as actual use.[68] Although a legal requirement it was accepted by Lord Briggs to be primarily a question of fact.[69]

58. Lord Briggs referred to the inconclusive dicta prior to Re Ellenborough[70] which had been discussed at first instance and then held that Re Ellenborough was dispositive of the issue and that it was not fatal to the right satisfying the accommodation requirement that the right was granted only for recreational (including sports)use.[71] It was considered that the judgment of Evershed MR in re Ellenborough demonstrated that

(i)the decision was not dependent on the rights being essentially private as they were equivalent to the use of public parks and gardens in London;

(ii) the rights were essentially recreational with a bit of sporting use;

(iii) the rights accommodated the townhouses because the package of rights afforded the use of communal gardens to each of the townhouses. The provision of a garden to a townhouse was a benefit and utility for it.[72] This distinguished the rights from a right to visit the Zoological Gardens or the Oval.[73]

59. The Appellant put the argument that the timeshare units were ancillary to the use of the facilities in the leisure complex and "the tail cannot wag the dog" so this prevented the right from accommodating the dominant tenement. Reliance was placed on Hill v Tupper[74] concerning the exclusive right to operate pleasure boats on the Basingstoke Canal in favour of the owner of a small strip of land by the side of the canal. The basis of the decision was stated by Lord Briggs to be that the monopoly was a

[67] Para. 39
[68] Para. 41
[69] Para. 43
[70] Para. 45
[71] Para. 48
[72] Para. 52
[73] Paras 49 and 51
[74] (1862) 2 H & C 121

personal right which did not create a proprietary right[75]. Lord Briggs rejected the argument that the enjoyment of the right had to be subordinate or ancillary to the enjoyment of the dominant tenement to be an easement.[76]

60. The key point in determining whether this right accommodated Elham House is set out by Lord Briggs in paragraph 53. He stated

> "In the present case the dominant tenement was to be used for the development, not of homes, still less townhouses, but of timeshare apartments. Although in terms of legal memory timeshare is a relatively recent concept, timeshare units of this kind are typically occupied for holidays, by persons seeking recreation, including sporting activities, and it is to my mind plain beyond a doubt (as it was to the judge) that the grant of rights to use an immediately adjacent leisure development with all its recreational and sporting facilities is of service, utility and benefit to the timeshare apartments as such, just as (although for different reasons) the grant of rights over a communal garden is of service, utility and benefit to a townhouse."

61. This passage in the judgment highlights the importance of the right having been granted for the benefit of timeshare units. Had Elham House not been arranged in such a manner would the right have accommodated ordinary flats and been enforceable by the flat owners? The emphasis on the right being in favour of timeshare units is a point which is heavily stressed throughout the judgment of Lord Briggs. Does this limit the scope of the decision on recreational and sporting rights?

62. Fourth requirement – the fourth qualification is expressed as being the requirement that the right is capable of forming the subject matter of a grant. This is described by Lord Briggs as being the repository of a number of miscellaneous requirements including:-

(i) the right must be formulated in sufficiently clear terms which this right did;

(ii) it must not be precarious which this right was not;

(iii) must not be so extensive or intrusive that it ousts the servient tenement owner from enjoyment or control which is considered below as regards this right;

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[75] Para. 56
[76] Para. 57

(iv) the right must not impose on the servient tenement owner an obligation to expend money which is also considered below.

63. The further requirement that a mere right of recreation or amusement cannot qualify as an easement which applied in the past was stated to be gone. What is required is that the right should accommodate the dominant tenement. Lord Briggs followed the Court of Appeal approach that sport and recreation is a benefit or utility for those undertaking it and so is a public benefit.[77] In this regard he did not draw the distinction drawn in the Court of Appeal between activities carried on outdoors and those carried on indoors.[78]

64. It was further emphasised in the judgment that if a right "consists of or involves the use of some chattel on the servient tenement" it will not be disqualified[79]. This was stated to apply not just to chattels but to fixtures and structure as well.

65. In respect of the fourth requirement the focus of Lord Briggs was on ouster and mere passivity. The reason for these requirements was stated by Lord Briggs to be that these "requirements serve a common public policy purpose, namely to prevent freehold land being permanently encumbered by proprietary restrictions and obligations which inhibit its utility to an unacceptable degree".[80]

66. Ouster – Lord Briggs recognised that this requirement is controversial particularly as regards parking rights and that the Law Commission had recommended that it be abolished. It was not considered necessary to resolve the issues arising from this requirement. The majority in contrast to Lord Carnworth did not consider that there was any reason to take a different view from the trial judge or the Court of Appeal who all considered that the owner of the Estate did not lose possession or control due to this right.[81] This is principally a factual issue and has the potential to result in future disputes when such rights are being considered.

67. In following those findings Lord Briggs made two important points:-

[77] Paras 59 and 81
[78] Para. 90
[79] Paras 42 and 67
[80] Para. 60
[81] Para. 64

(i) the test as to whether or not the servient tenement owner has been ousted is determined by ordinary expectations at the date of grant as to the manner in which it would be exercised and not by reference to what would happen if the ancillary "step-in" right was exercised[82]. The question with this type of right is who is expected at the start to manage the facilities rather than what are the consequences if the dominant tenement owner takes over management. In this case it was the servient tenement owner because of the timeshare units being offered on the Estate and the use by paying members of the public.

(ii) in any event "step-in rights" provide reasonable access to the servient tenement sufficient only to the extent necessary to enable the right to be exercised.[83]

68. Mere passivity – merely because the servient tenement will require maintenance a right over the servient tenement is not prevented from being an easement. For example, a right of way across a bridge requiring significant regular maintenance by the bridge owner will still qualify as an easement.[84] An obligation to maintain would disqualify the right from being an easement but a right requiring "no more than sufferance on the part of the occupier of the servient tenement."[85] The expectation at the date of the grant of this right was that the facilities would be maintained by the owner of the Estate although obliged to do so.

69. The Appellants argued that the right was "illusory as a grant of rights of practical utility for an unlimited period" unless the Estate owner accepted responsibility for the management and maintenance of the facilities. Unless the estate owner did it was argued whatever the owners of the dominant tenement could achieve through the exercise of the step-in right would be nothing like the advertised high-quality leisure complex. The majority rejected this argument because nothing in the Appellants' "submissions provided a basis upon which this court could properly depart from the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances."[86]

70. A distinction was drawn between the use of these facilities and "recreational facilities which do depend upon the active and continuous management and operation by the servient owner, which no exercise of step-in rights by

[82] Para. 65
[83] Para. 65
[84] Para. 68 Jones v Price [1965] 2 QB 618
[85] Willmer at page 631 in Jones v Price supra
[86] Para. 71

the dominant owners would make useable, even for a short period. Free rides on a miniature steam railway, a covered ski slope with artificial snow, or adventure rides in a theme park are examples which would probably lie on the wrong side of the line, so as to be incapable of forming the subject matter of an easement. But the precise dividing line in any particular case will be a question of fact."[87]

71. A difficulty with the decision of the Court of Appeal was the drawing of the distinction between qualifying and non-qualifying facilities. The distinction cited in paragraph 70 above raises similar difficulties. The leisure facilities included a restaurant. Would that not be a facility akin to those listed by Lord Briggs as requiring active and continuous management. Is it enough that some of the facilities are not and thereby ensure that the right is an easement notwithstanding that some of the facilities would by themselves not qualify?

72. Overview – notwithstanding that the right granted by the 1981 Transfer to use the leisure complex exhibited all four characteristics of an easement it was still considered necessary for the Supreme Court to decide "whether the grant for timeshare owners of comprehensive rights to the use and enjoyment of recreational and sporting facilities in an adjacent leisure complex is something which the law of easements ought to comprehend, looking at the matter in the round rather than in a series of compartments."[88]

73. Three reasons for not extending re Ellenborough and the law of easements were considered[89]:-

(i) the facilities in this case are more extensive and require more intensive management;

(ii) the facilities are open to the public and other timeshares from the Estate;

(iii) the costs in re Ellenborough were borne by the owners of the dominant tenements.

74. There were two additional factors operating against recognition of the right.[90] These are

(i) the timeshare structure is for a period whilst an easement will continue indefinite and so outlive the timeshare;

[87] Para. 72
[88] Para. 74
[89] Para. 75
[90] Para. 79

(ii) all judges in the Supreme Court agreed that adopting the grant of the right as the means of conferring a right to use the leisure complex on the timesharers at Elham House was a mistake and not the appropriate method of creating such enduring rights[91]. The leasehold structure was considered more effective as regards the scope and running of the burden of maintenance.

75. As against that it was appreciated that recreational rights have been widely recognised in the Commonwealth.[92] Further Lord Briggs considered that in favour of extension "is the principle that the common law should, as far as possible, accommodate itself to new types of property ownership and new ways of enjoying the use of land. The timeshare development, which is quintessentially for holiday and recreational use, is just such a new type, and the common law should accommodate it as far as it can."

76. Accordingly the majority considered that it should make 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 well-settled conditions which I have described"[93]. Further if the actual or intended use of the dominant tenement is itself recreational then Lord Briggs considered that the right will generally accommodate the dominant tenement. This close link between the recognition of the extension and the importance of the grantees including timesharers means that there will be issues in the future as to whether such rights are granted for the benefit of grantees who are different in character to timesharers

77. The construction of the right granted by the 1981 Transfer adopted by the majority is wider than that of both HHJ Purle QC and the Court of Appeal. It is not just a grant of a single right as held by HHJ Purle QC but it is a single right to use the leisure complex as opposed to the recreation and sporting facilities comprised within the leisure complex. This led Lord Carnworth to state with some force that in "effect what is claimed is not a simple property right, but permanent membership of a country club"[94].

78. This wider construction means:-

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[91] Para. 80
[92] Paras 77 and 78 as to such Commonwealth authorities see paragraph 24 above
[93] Para. 81
[94] Para. 96

(i) the right extends to parts of the leisure complex which the right to use alone could not qualify as an easement. For example, the right includes the right to use the restaurant because it is part of the leisure complex notwithstanding that the right to use a restaurant by itself could not qualify as an easement.[95]

(ii) it is irrelevant whether the recreational facilities are indoors or outdoors.[96] Consequently in contrast to the construction adopted by the Court of Appeal the right extends to the gym, sauna, billiards room and tv room[97].

(iii) the right applies to additions and changes to the leisure complex and not just the facilities existing at the time of the grant as held by the Court of Appeal. This means that it applies to the new indoor swimming pool[98]. Although not expressly discussed it should mean that the removal of the outdoor swimming pool is not a wrongful act as held below. What, however, if the old swimming pool is filled in but no new substitute is provided? Will that be a wrongful act or have to be accepted as the right only applies to the leisure complex in the state that it exists at the time? The tenor of the majority judgment is that the later construction is correct. Does the formulation of the right mean that the servient tenement owner can close a facility without the need to provide a substitute and block the dominant tenement owners stepping in to revive the closed facility?

79. Even with this right there are potential issues which are not addressed in the decision. In particular there is the outstanding question as whether the construction of a new facility on a previously unbuilt on part of the Estate will be subject to the right?[99] The Court of Appeal considered the application of the rights (as they viewed them) to be restricted to the areas on which there were existing facilities at the date of the grant. The majority in the Supreme Court left over the question of unbuilt on parts of the Estate. Lord Briggs without seeking to provide an exhaustive list of the possibilities suggested that one possibility was that the right was limited to the Mansion House and its curtilage.[100] An alternative possibility he suggested was that the right was limited to facilities available for multi use as part of the leisure complex wherever installed.

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[95] Para. 89
[96] Para. 90
[97] Para. 91
[98] Para. 92
[99] Para. 87
[100] Para 88

80. Dissenting judgment of Lord Carnworth – Lord Carnworth in a judgment making a number of powerful points would have construed the grant in the 1981 Transfer as a grant of a single right which did not qualify as an easement. His starting point was the basic definition of an easement in Gale on Easements cited at paragraph 95

> "An easement is a right to do something, or to prevent something, on another's land; not to have something done (see Gale on Easements, 20th ed (2017), para 1-80)."

Lord Carnworth considered that the right in the 1981 Transfer required the servient tenement owner as regards facilities such as the swimming pool and golf course to be actively involved in the provision, management and maintenance of the facilities which undermined it qualifying as an easement. His objection was not to the right being recreational in character.

81. As stated above he considered the majority' construction of the right to be akin to the membership of a country club which in his judgment did not justify the creation of a new property right. If this right qualifies as an easement then he queried what would be the legal outcome if free access to a theme park is given to apartments built on the park for time sharers.[101] He had no doubt that this would not qualify as an easement because it "would I think be quite clear that the rides and other attractions could not be sensibly and safely enjoyed without active management and supervision of their owner. In theory, no doubt, if the owner defaulted, the dominant tenants could form their own management company and take over the running of the park. But it would in my view be unarguable that such a right could take effect as an easement or property interest." In the example he gave it is to be anticipated that the majority of the Supreme Court would agree with his conclusion because there could be no effective "step-in" right due to the extent of the management involvement required to enjoy the right if the servient tenement owner stopped running the amusement park

82. Other novel rights - The novelty of the right claimed is a live issue not just in the context of sporting and recreational rights. In Clos Farming Estates v Easton[102] the Court of Appeal in NSW considered a right to enter land, plant vines, maintain them, harvest the grapes, market, package and sell. It was held not to be an easement. In the lower court it had been held that there is an overriding policy consideration that the

[101] Para. 107
[102] [2002] NSWCA 389

law favoured land being fully available for its owner to use or sell. It was found that the right if an easement would have left the servient owners with "a sterile and nominal ownership"[103]. It is to be expected that in a fast changing world this issue will arise again.

83. Drafting pointers – there are a number of points which come out of this saga and in particular the Supreme Court decision.

(i) Recreational rights – the obvious point is that it is possible to grant a right to use recreational and sporting facilities. It is not necessary to specify the individual facilities. In this case the right did not even refer to the particular leisure complex. However, this does not mean that they can be granted at will and take effect as easements. The four characteristics have to be satisfied by the right and in particular the right must accommodate the dominant tenement. This will not be as simple as it is for many easements.

(ii) Limits on scope of right – not all recreational rights can qualify as an easement. It will be interesting to see where the lines are drawn and how a right to use leisure complexes with a greater variety of different facilities will be treated.

(iii) Timeshare structure – as stated above the justification for the extension of re Ellenborough is the link between the timeshare structure at Elham House and the right to use the leisure complex. Great care will need to be exercised if such a right is to be granted in favour of a dominant tenement the use of which is different to the units in Elham House. This is so whether the right extends to a collection of facilities or to a particular facility. A right of way will accommodate all dominant tenements a recreational right will not.

(iv) Use of such easement – both the majority and Lord Carnworth were clear that the use of such a grant was misguided in the context of a timeshare structure. It cannot be stressed too strongly that the outcome of this case should not be used as a justification for using the grant of such an easement in such circumstances.

(v) Lease – rather than rely on such an easement alone it is preferable that the rights are created in a landlord and

[103] Bryson J.

tenant relationship. This permits positive covenants to be enforced against the landlord's successors. It also allows for a more detailed regime as regards the provision of the facilities, the bearing of maintenance costs and the charges levied.

(vi) Restrictive covenants – thought should be given as to whether restrictive covenants should be imposed as in re Ellenborough Park.

(vii) Terms of grant - If such a grant is used then consideration needs to be given to

(a) relocation – consideration should be given to whether an ability to move the location of the facility should be included and also any significant extension of the facility;

(b) future facilities – whether any new facilities will be covered by the right;

(c) closure – will the owner of the servient tenement be able to close any facilities without a substitute;

(d) charges - whether there are to be any charges payable in return for the exercise of the right should be made clear one way or the other so avoiding disputes as to whether a provision is to be implied.

It will be interesting to follow the impact this decision has with regard to the grant of recreational rights.