



14 November 2018

PRESS SUMMARY

Regency Villas Title Ltd and others (Respondents/Cross-Appellants) v Diamond Resorts (Europe) Ltd and others (Appellants/Cross-Respondents) [2018] UKSC 57
On appeal from: [2017] EWCA Civ 238 and [2015] EWHC 3564 (Ch)

JUSTICES: Lady Hale (President), Lord Kerr, Lord Sumption, Lord Carnwath, Lord Briggs

BACKGROUND TO THE APPEALS

Broome Park is a substantial country estate near Canterbury. It originally included the Mansion House, Elham House and surrounding lands. 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.

In or before 1979, the Park was acquired by Gulf Investments Ltd (“Gulf Investments”) to develop a timeshare and leisure complex. The key features were the creation of: (i) timeshare apartments in the Mansion House; (ii) a communal 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 full golf course, outdoor heated swimming pool, tennis and squash courts and formal gardens. The individual purchasers of timeshare units formed the Broome Park Owners Club (“BPOC”). They were indirectly granted free use of the communal and leisure facilities within the lower part of the Mansion House and its surrounding grounds by a lease to another Gulf company in August 1980.

Following the initial success of the development, Elham House was re-acquired in November 1980. Planning permission was obtained for the conversion and construction of 26 timeshare apartments using a freehold structure – Regency Villas. By a transfer dated 11 November 1981, Gulf Investments transferred Elham House to an associated company (“the 1981 Transfer”). A further transfer took place on the following day, to a trustee for intended timeshare owners. Elham House was then held for the benefit of the Regency Villas Owners Club (“RVOC”) members.

The grant of rights in the 1981 Transfer (“the Facilities Grant”) stated: “*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.*” Most of the relevant sporting and recreational facilities had been constructed by then. Subsequently, there was a reduction in the number of available facilities and a concern that they would deteriorate without contributions from the RVOC members. The swimming pool fell into disuse and was filled in by 2000. Other facilities, such as the putting green, croquet lawn, jacuzzi and roller skating rink, were closed and the riding stables were demolished. Further, from time to time, beginning in about 1983, the RVOC made voluntary contributions towards the cost of the facilities. When agreement about contributions broke down, the new owners of Broome Park denied that the RVOC timeshare owners had any enforceable rights as to the leisure complex, so that they could be charged for their use.

The First Respondent (as freehold owner of Elham House) and the other Respondents (as individual RVOC timeshare members) claimed 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 an injunction restraining interference with their use of the facilities, and the return of sums paid for the use of the facilities since 2009, as damages for breach of the easement or by way of restitution.

At trial before HHJ Purle QC, the Respondents succeeded in their claims, save recovery of payments for use of the facilities before 2012. In the Court of Appeal, they were again successful on the main issue about whether the Facilities Grant amounted to a grant of an easement. The judge’s decision was only reversed on matters of detail, such as the Respondents’ rights regarding a new swimming pool constructed in the basement of the Mansion House, which reduced the amount due. The Appellants succeeded in part in their counterclaim for *quantum meruit*. In the Supreme Court, the Appellants sought dismissal of all the claims and the Respondents sought restoration of the judge’s original order.

JUDGMENT

A majority of the Supreme Court dismisses the appeal and allows the cross-appeal. The judge’s consequential orders, including his order for monetary compensation for the payment under protest for use of the facilities in and after 2012, are restored. Lord Briggs, with whom Lady Hale, Lord Kerr and Lord Sumption agree, gives the main judgment. Lord Carnwath gives a dissenting judgment.

REASONS FOR THE JUDGMENT

Three main conclusions follow from the contextual factors relevant to construing the Facilities Grant [22-24]. First, the intention was to confer a property right in the form of an easement [25]. Secondly, the grant was of a single comprehensive right to use a complex of facilities as they evolved, not fixed in 1981 [26-29]. Thirdly, there is no express requirement for contribution to the operational costs [30].

The effect of *In re Ellenborough Park* [1956] Ch 131 (CA) – the leading case on easements – on the central question in this appeal, namely whether the Facilities Grant could not amount to an easement because it conferred recreational and sporting rights, is fully discussed [44-57]. Lord Briggs concludes that *Ellenborough Park* establishes that such a grant can amount to an easement [48, 52-53, 59].

Overall, the majority accepts that the grant of an easement in this case was novel, given the greater running costs and operational responsibilities, and that there are factors which tell against broad recognition of rights over such facilities as easements [75]-[80]. Ultimately, however, 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 for easements [81]. Where the actual or intended use of the dominant tenement is itself recreational, as is the norm for holiday timeshare developments, the “accommodation” condition will generally be satisfied by a recreational easement [81].

Regarding the fourth condition – whether the right is capable of forming the subject-matter of a grant – other objections based on an *ouster* (the concern in this case being “step-in rights” of the dominant owner) and *mere passivity* (the issue being alleged positive duties on the servient owner) are not accepted by the majority, because of concurrent factual findings by the courts below [60-73].

On the cross-appeal, the majority holds 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 [85, 92]. The sporting and recreational facilities referred to in the Facilities Grant were bound to change significantly over time [26, 86] and the new indoor swimming pool was, once complete, a facility made within the complex [88-92].

Lord Carnwath’s dissenting judgment:

Lord Carnwath considers that the intended enjoyment of the rights granted in this case, particularly as to 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 a full leisure complex. He considers that such an extension of the law on easements is wrong in principle and not supported by case law [96].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>