A SPORTING CHANCE IN THE COURT OF APPEAL III

This is the last of a three-part casenote on the decision of the Court of Appeal in ***Regency Villas Title Ltd & Ors v. Diamond Resorts (Europe) Ltd & Anor*** [2017] EWCA Civ 238. *The first part of the casenote considered the factual background of the appeal, the judgment at first instance of HH Judge Purle QC* [2015] EWHC 3564 (Ch)*, the summary of the arguments on the appeal and the decision on the construction of the grant which was the subject of the appeal. The continuation of the casenote considered (i) whether the easements could exist given that there was no obligation on the defendants to maintain the facilities (ii) whether the judge was right to allow an easement over future facilities (iii) should he have "unpacked" the easements granted and considered each facility separately (iv) what the Court determined in relation to each category of the facilities and the appropriate order on the appeal. This last part of the casenote considers some of the practical implications of the decision in more depth.*

Unpacking

In the first place it is not a permissible approach to construe a grant of several purported rights as a composite whole. It is certainly important to construe a grant in the context of where it is found in the transfer or other document which creates it – is it, for example, to be found in the context of a series of other clauses which create undoubted easements? - but it is not enough to say that a composite grant of various specific sporting and recreational facilities is of itself valid in every particular. The validity of each of the purported easements granted by a composite grant will depend on an individual examination of each of the specific facilities over which the grant is made. In other words, the grant must be "unpacked" and considered on a one-by-one basis, particularly so if one or more of the rights asserted is a novel right in law. In this case there were 9 facilities, either existing at the date of the grant or created subsequently, and they ought each to have been considered separately.

The judge had therefore granted too wide a declaration when he allowed the claimants (albeit limited to 6 persons using any one timeshare property at any one time) to

> "use the golf course, squash courts, tennis courts, all common parts of the ground and basement floors of … Mansion House (including the swimming pool and leisure facilities therein), gardens, and any other

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> sporting or recreational facilities thereon, whenever created, including the putting green and croquet lawn, without payment of any charge or fee for the exercise of those rights (other than for items of a consumable nature) subject to any reasonable provisions made for their regulation in the ordinary course …".

Instead, having unpacked the easements claimed and considered them individually, he ought only to have granted declarations which allowed the claimants (again limited to 6 persons using any one timeshare property at any one time) to

> "use the *existing* golf course, squash courts, tennis courts, croquet lawn and putting green, and Italianate gardens, without payment of any charge or fee for the exercise of those rights (other than for items of a consumable nature or for services or for the use of any of the defendants' chattels) subject to any reasonable provisions made for their regulation in the ordinary course …"

Extensions, Substitutions and Moved Facilities

Whether a purported grant is confined to existing facilities or extends to future facilities will again depend on the construction of the grant itself. However, whilst it is undoubtedly possible for the parties to agree to the grant of an easement which will take effect in the future, it is to be expected that parties who wish to achieve such a result will make clear the extent of what they intend. In other words, the grant of an easement to arise in the future will need clear words to give effect to such an intention. If words of futurity are not there, they are unlikely to be imported.

What, then, of replacement and extended facilities? Again, it will depend on the construction of the grant in question, but in general a new or improved facility which merely replaces an existing facility (a) of the *same type* and (b) on the *same area of ground* would be likely to be covered by the ambit of the grant. If an easement is granted for so long as the dominant and servient tenements exist, it would make no sense to grant the right to use the originally existing facilities, but not any replacement or improved facilities later provided for the same purpose on the same ground. That would stultify the rights granted on the occasion of any purported upgrading or improvement.

By contrast, however, it will require very clear words to convince a court that the grant covers major extensions to existing facilities or cases where facilities are sought to be substituted or moved from one piece of land to another. In this case the grant was to use *"the"* swimming pool,

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not "*any*" swimming pool anywhere on the servient land. If it is sought to move the facility elsewhere on the servient land, the parties must stipulate that the right granted extends to "any" such facility wherever situated on the land sought to be burdened. Definition of the right granted by the use of the definite article, as in the instant case, would be likely to be fatal to any relocation, significant extension or substitution of facilities for those existing at the date of the grant.

As far as extensions are concerned, it is perfectly possible that a golf course might be extended on to some acres of new land also forming part of the servient land or that further tennis courts might be built adjoining existing ones. However, such extensions cannot (at least in general terms) legitimately be permitted in the absence of explicit language, because the essence of an easement is the precise land over which it is granted. The same approach should apply in relation to substitutions and moved facilities.

On the question of a right to realign an easement, Lightman J held in ***Greenwich Healthcare NHS Trust v. London & Quadrant Housing Trust*** [1998] 1 WLR 1749 at p.1754G-H

> "a servient owner has no right to alter the route of an easement of way unless such a right is an express or implied term of the grant of the easement or is subsequently conferred on him. This view accords with the decision in *Deacon v. South-Eastern Railway Co.* (1889) 61 LT 377. In that case the question arose in respect of an easement of necessity and North J followed earlier authorities which were to this effect. Since easements of necessity arise under an implied grant (see *Nickerson v. Barraclough* [1981] Ch 426), on principle the same rule should apply in case of all grants of easements. Whilst there appears to be no English authority directly in point, this was held to be the law by the New Brunswick Court of Appeal in *Gormley v. Hoyt* (1982) 43 N.B.R. (2d) 75."

So, if the servient owner has no right to alter the route of a right of way unless the grant includes an express or implied right to do so, it must follow that a dominant owner has no right to use a right of way other than on the route granted nor to use a sporting or recreational facility other than on the land over which it was first granted.

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In the case of minor or *de minimis* extensions to the land used by the existing or replacement facilities, it appears that the courts would be inclined to accept that such an incremental increase in the land used by a golf course, or a small extension to the existing land used by a swimming pool or to the run back used by tennis courts, would be covered on the proper construction of the grant. Thus, whilst a completely new facility on new ground would very probably not be covered, a replacement facility, even one which is *slightly* extended beyond the ground used by the original facility, perhaps would be.

In practical terms, that might allow for a small incremental increase, such as the minor extension of a bunker or the small increase in size of a pond beside the putting green, but it would not permit the creation of a new putting green adjacent to the old one nor the creation of an entirely new complex of bunkers nor the excavation of a new water feature cut where none had existed before. That would be beyond the ambit of the grant, unless the clearest words are used. One can, of course, foresee all manner of disputes on either side of the line over alterations to the "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" which are part and parcel of modern gold courses (per Vos C at [75], who clearly did not share the reductionist view of the game in some quarters, that it was "just a game played on an extensive areas of grassed over land using a small ball and one or more clubs with which to hit the ball").

In summary, the essence of the grant of an easement is to use the precise land over which it is granted in a stated way. In the absence of the most specific words, a grant will not be construed as entitling the dominant owner to use *any* facility which might be constructed *anywhere* on the servient tenement in the future. If the grant is construed only as a grant to use the *existing* facilities as they stand at the date of the creation of the rights in question, that will permit the creation of new, improved or replacement facilities *of the same kind* replacing the existing facilities *on the same areas of land*, subject only to minor or *de minimis* extensions, but will not permit any substantial extensions of such facilities on additional areas of land.

Obligations on the Servient and Dominant Owners to Repair and Maintain

The decision in ***Regency Villas*** provides a welcome reiteration of the respective obligations on the servient and the dominant owners in terms of repair and maintenance, citing as a convenient

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summary the law in that respect in the judgment of Longmore LJ in ***Carter v. Cole*** [2006] EWCA Civ 398 at [8]:

> "(1) A grantor of a right of way ("the servient owner") is under no obligation to construct the way;
>
> (2) The grantee may enter the grantor's land for the purpose of making the grant of the right of way effective viz to construct a way which is suitable for the right granted to him ("the dominant owner"); see *Newcomen v Coulson* (1887) 5 ChD 133, 143 per Jessel MR;
>
> (3) Once the way exists, the servient owner is under no obligation to maintain or repair it, see *Pomfret v Ricroft* (1669) 1 Wms. Saunders (1871 ed) 557 per Twysden J, *Taylor v Whitehead* (1781) 2 Doug KB 745 and *Jones v Pritchard* [1908] 1 Ch 630, 637, per Parker J;
>
> (4) Similarly, the dominant owner has no obligation to maintain or repair the way, see *Duncan v Louch* (1845) 6 QB 904;
>
> (5) The servient owner (who owns the land over which the way passes) can maintain and repair the way, if he chooses;
>
> (6) The dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way and, if he wants the way to be kept in repair, must himself bear the cost: *Taylor v Whitehead* (1781) 2 Doug KB, per Lord Mansfield. He has a right to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner, see *Liford's Case* (1614) 11 Co Rep 46b, 52a (citing a case in the reign of Edward IV) and *Jones v Pritchard* [1908] 1 Ch 630, 638 per Parker J."

So the decisive question is not whether the servient owners might go out of business and cease to maintain the facilities; even if that happens, there is no reason why any valid easements should thereupon lapse. The servient owners are under no obligation to repair or maintain the facilities, although they may do so if they so choose. If they do not do so for any reason, the owners of the dominant tenement are perfectly entitled to enter the servient tenement to maintain and repair the facilities at their own expense, although again they are not obliged to do so. They can only, however, enter the land to do work that is necessary and only in a reasonable manner. The nature of the works which might be required in such a situation would have a bearing on whether the

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easement is a valid one in the first place, but that would need to be considered on a case by case basis when the rights are unpacked and individually considered.

Restrictions and Charges

There is no objection to the servient owner making regulations for the proper and organised use of the facilities in question. Thus Evershed MR held in ***Re Ellenborough Park*** at p. 168 (with emphasis added) that

> " ... it seems to us, as a matter of construction, that the use contemplated and granted was the use of the park as a garden, the proprietorship of which (and of the produce of which) remained vested in the vendors and their successors. The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such - the right, that is to say, of walking on or over those parts provided for such purpose, that is, pathways and *(subject to restrictions in the ordinary course in the interest of the grass)* the lawns; to rest in or upon the seats or other places provided; and, if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, *subject again, in the ordinary course, to the provisions made for their regulation*; but not to trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park. Such use or enjoyment is, we think, a common and clearly understood conception, analogous to the use and enjoyment conferred upon members of the public, when they are open to the public, of parks or gardens such as St. James's Park, Kew Gardens or the Gardens of Lincoln's Inn Fields. In our judgment, the use of the word "full" does not import some wider, less well understood or less definable privilege. The adjective does not in fact again appear when the enjoyment of the garden is later referred to. It means no more than that to each plot was annexed the right of enjoyment of the park as a whole - notwithstanding that it was divided by Walliscote Road. *Nor does any difficulty arise out of the condition as to contribution, and Mr. Cross did not, indeed, so suggest. The obligation being a condition of the enjoyment, each house would be bound to contribute its due (that is, proportionate) share of the reasonable cost of upkeep."*

Similarly, Vos C confirmed in ***Regency Villas*** at [73] that

> "Once again, as envisaged in *Ellenborough Park*, there would need to be restrictions "in the ordinary course", if only on account of safety considerations. The defendants might also properly be able to make a charge for the use of their chattels and services, but that should not, in our view, prevent the grant of a right to use the pool constructed on their land taking effect as a valid easement."

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If the grant is worded sufficiently explicitly, there would be nothing to stop the servient owner from levying charges for the use of the facilities granted. Whether or not such charges could legitimately be levied was one of the matters in dispute in ***Regency Villas***, as to which Judge Purle QC held that, if the right to use the facilities existed as an easement, they could not be charged for in the absence of references to charges in the parent deed of transfer and no term to that effect could be implied:

> "35 More significant is the apparent absence of any reference to a charge in the 1981 Transfer itself. The absence of any reference to any such charge in the Land Registry entries suggests there was none, as does the marketing material already mentioned. The absence of any provision for a charge was also confirmed to me expressly by Mr Ganney ... He was firm that there was no express provision for charging the persons enjoying the facilities. I accept his evidence on all the points summarised in this paragraph.
>
> 36 In my judgment therefore, the facilities, if the right to use them takes effect as an easement, are available free of charge. If they do not take effect as easements, the Claimants have no right to enjoy the rights and the Defendants can charge whatever they wish, though it is then a matter for the Claimants to decide whether or not to avail themselves of whatever the Defendants are prepared to offer them.
>
> 37 There was also a suggestion that a term needs to be implied requiring payment of a financial contribution by timeshare owners. Leaving aside difficulties of how an imprecise term of that nature might be formulated, any such implied term must be rejected as, although its implication might on one view be reasonable and fair to the owner or operator for the time being of the golf course and other facilities, its implication is not necessary for business efficacy, or obvious. The clause in question works perfectly well without payment and, whilst I take the view that I cannot take into account the actual marketing history directly on any issue of construction or implication (as this post-dated the 1981 Transfer) I can infer that marketing in this way was always intended, or at least seen as an available option, including at the time of the 1981 Transfer, which militates against the implication of a term. It is also now clear that whatever inspired discussion study of Lord Hoffman's speech in *Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988* might engender, it did not change the law. Either necessity for business efficacy, or obviousness, rather than reasonableness, is a required component of implication: *Marks and Spencer v BNP Paribas [2015] UKSC 72*."

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He therefore held that the claimants could use the facilities, without payment of any charge or fee for the exercise of those rights (other than for items of a consumable nature), subject to any reasonable provisions made for their regulation in the ordinary course of events.

The Court of Appeal held that the proviso was slightly wider: the servient owners could not charge generally for the use of the facilities, but could do so for items of a consumable nature (as Judge Purle QC had held) or for services or for the use of any of their defendants' chattels, for example if they provided any on the tennis courts, at the swimming pool or on the golf course.

Personal Rights not amounting to Easements

The Court of Appeal held that the easement granted was to use any sporting or recreational facilities which existed on the ground floor of the Mansion House as at the date of the 1981 transfer. The reception area or its back office clearly could not comprise such a sporting or recreational facility. Moreover, the modern approach to taking physical exercise was not really applicable to recreational indoor games such as snooker or to watching television and those rights were really not in the nature of an easement at all, but rather about the use of facilities or services which might for the time being exist on the land. A tennis court and golf course were both proper uses of the servient land, but a right to use indoor recreational facilities on the ground floor of the Mansion House was no more than a personal right to use chattels and services provided by the servient owners. An empty swimming pool would still be a swimming pool; an empty billiard room or TV room is not a billiard room or a TV room at all. If the servient owners closed their business, there would be nothing there to use and nothing for the dominant owners to maintain without taking full possession of that part of the Mansion House and that would offend against one of the basic principles of an easement. To that extent the decision of the Court of Appeal, with its disinclination to grant easement status to indoor recreations, is narrower than the corresponding decision of the Supreme Court of British Columbia in ***Strata Plan NW 1942 v. Strata Plan NW 2050*** (2008) 69 RPR (4th) 67 (BCSC) where easements to use a pool, a gym and a sauna were upheld. An easement is a right over land, not a right in respect of services, equipment or chattels.

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