Michaelmas Term
[2018] UKSC 57
On appeals from: [2017] EWCA Civ 238 and [2015] EWHC 3564 (Ch)

JUDGMENT

Regency Villas Title Ltd and others (Respondents/Cross-Appellants) *v* Diamond Resorts (Europe) Ltd and others (Appellants/Cross-Respondents)

before

Lady Hale, President
Lord Kerr
Lord Sumption
Lord Carnwath
Lord Briggs

JUDGMENT GIVEN ON

14 November 2018

Heard on 4 and 5 July 2018

Appellants/Cross Respondents	*Respondents/Cross-Appellants*
Tim Morshead QC Toby Watkin Andrew Latimer (Instructed by Pannone Corporate LLP (Manchester) and Osborne Clarke LLP)	John Randall QC Marc Brown Katie Longstaff (Instructed by Shakespeare Martineau LLP (Birmingham))

Appellants/Cross Respondents:-

(1) Diamond Resorts (Europe) Limited
(2) Diamond Resorts Broome Park Golf Limited
(3) Summit Developments Ltd

Respondents/Cross Appellants:-

(1) Regency Villas Title Limited
(2) George Edwards
(3) Victor Roberts
(4) The Estate of William Malcolm Ratcliffe Deceased
(5) Brian Andrews

LORD BRIGGS: (with whom Lady Hale, Lord Kerr and Lord Sumption agree)

1. This appeal offers an opportunity for this court to consider, for the first time, the extent to which the right to the free use of sporting and recreational facilities provided in a country club environment may be conferred upon the owners and occupiers of an adjacent timeshare complex by the use of freehold easements. In the well-known leading case of *In re Ellenborough Park* [1956] Ch 131 the Court of Appeal decided that the shared recreational use of a communal private garden could be conferred upon the owners of townhouses built around and near it by means of easements. The use of the same conveyancing technique in the present case in relation to a much wider range of activities was, if not misguided, at least a more ambitious undertaking. The essential question, if that case was rightly decided, is whether the same underlying principles work in the present context (as the trial judge and the Court of Appeal both held) or whether the attempt to do so falls foul of the necessary limitations upon the scope of easements in English law, most of which, as recently as 2011, the Law Commission has advised should not lightly be put aside.

2. The essence of an easement is that it is a species of property right, appurtenant to land, which confers rights over neighbouring land. The two parcels of land are traditionally, and helpfully, called the dominant tenement and the servient tenement. The effect of the rights being proprietary in nature is that they "run with the land" both for the benefit of the successive owners of the dominant tenement, and by way of burden upon the successive owners of the servient tenement. By contrast merely personal rights do not generally have those characteristics. Although owing much to the Roman law doctrine of servitudes, easements have in English law acquired an independent jurisprudence of their own, the essentials of which have been settled for many years, even if the uses of land during the same period have not stood still. Since the question whether a particular grant of, or claim to, rights is capable of having the enduring proprietary quality of an easement is usually (as here) fact intensive, it is convenient to begin with a summary of them.

The Facts

3. Broome Park, formerly the home of Field Marshal Lord Kitchener of Khartoum, is a substantial country estate near Canterbury, with a large 17th century Grade I listed house ("the Mansion House") at its heart, and a much smaller house, Elham House, nearby. Prior to 1967 Broome Park had been in common ownership. In early 1967 Elham House together with land around it lying entirely within the Park was conveyed off and its separate title was first registered on 30 March 1967.

I shall call the house and its surrounding land "Elham House". It is the alleged dominant tenement in relation to the disputed easement. I will refer to the rest of Broome Park, retained by the vendor in 1967, including the Mansion House, as "the Park". It is the alleged servient tenement in relation to the disputed easement.

4. In or before 1979 the Park was acquired by Gulf Investments Ltd ("Gulf Investments"), a subsidiary of Gulf Shipping Lines Ltd ("Gulf Shipping"), for the purposes of developing a timeshare and leisure complex. The essential features of the development scheme included, first, the creation of 18 timeshare apartments on the upper two floors of the Mansion House; secondly, the creation of a communal club house for the timeshare owners and other paying members of the public on the ground floor and basement of the Mansion House including restaurant, TV, billiards and gymnasium facilities; and thirdly, the construction and laying out within the surrounding grounds of the Park of sporting and recreational facilities including an 18 hole golf course, an outdoor heated swimming pool, tennis and squash courts, and formal gardens. Individual purchasers of timeshare units within the apartments on the upper floors of the Mansion House formed themselves into the Broome Park Owners Club ("the BPOC").

5. On 13 August 1980, Gulf Investments granted a 35-year lease of the first and second floors of the Mansion House to Gulf Leisure Developments Ltd, which was to hold the residential accommodation within the Mansion House on behalf of the BPOC. I will call it "the BPOC Lease". It was drafted so as to confer upon owners of the timeshare units within the Mansion House the free use of the communal and leisure facilities within the lower part of the Mansion House and its surrounding grounds, including the golf course and other sporting and recreational facilities, for the full 35 year of the term, and Gulf Investments covenanted as landlord "to keep properly maintained repaired constructed and reconstructed" the ground floor and basement of the Mansion House and the sporting and recreational facilities provided within the Park, including the swimming pool, golf course, squash courts, tennis courts and formal gardens. The solicitor responsible for the conveyancing in connection with the development gave evidence at trial that a leasehold structure was chosen for this purpose because of the need to make appropriate provision for what might prove to be the large repairing and maintenance obligations arising from the status of the Mansion House as a Grade I listed building of some antiquity.

6. The early success of this development, centred on the Mansion House timeshare apartments, led Gulf Investments to plan a second timeshare development, this time centred upon Elham House. For that purpose, Elham House was re-acquired so as to be integrated within Broome Park in November 1980, and planning permission was obtained for the conversion of the house into two timeshare apartments, and for the building of 24 further timeshare apartments in its grounds, the whole to be re-named Regency Villas. It is evident from contemporary marketing materials that a main attraction held out to prospective buyers of timeshare units

within the Regency Villas development was the same free use of the sporting and recreational facilities within the ground floor and basement of the Mansion House and within the Park, as had been afforded to the owners of timeshare units on the upper two floors of the Mansion House.

7. On this occasion however, it was decided to use a freehold rather than leasehold structure for Regency Villas, apparently because it was not anticipated that Elham House or the newly-built apartments in its grounds would give rise to the potentially onerous repairing obligations associated with the Mansion House. Thus, by a transfer dated 11 November 1981 ("the 1981 Transfer") Gulf Investments transferred Elham House to Elham House Developments Ltd, another member of the Gulf Group headed by Gulf Shipping. On the following day, and as part of a pre-planned series of transactions, Elham House Developments Ltd transferred Elham House to Barclays Bank Trust Co Ltd, to be held for the benefit in due course of the members of the Regency Villas Owners Club ("RVOC") to be constituted by the purchasers of timeshare units within the Regency Villas development.

8. The 1981 Transfer included the grant of rights which is the subject of the present dispute. I shall refer to that grant of rights as "the Facilities Grant". The transfer itself has been lost, but the relevant terms of the Facilities Grant were duly recorded at HM Land Registry, on the Property Register in respect of the title to Elham House, and on the Charges Register against each of the two registered titles together constituting the Park. The words of the Facilities Grant appear in the last of three paragraphs, all of which it is appropriate to set out in full, so that the last paragraph appears in its context:

> "TOGETHER WITH firstly the right of way for the Transferee its successors in title its lessees and the occupiers from time to time of the property at all times with or without vehicles for all purposes in connection with the use and enjoyment of the property over and along the drive ways and roadways (hereafter called 'the roadways') shown coloured blue on the plan attached hereto.
>
> AND Secondly all the right to the full and free passage of gas water soil electricity and any other services from and to the property in and through any pipes drains wires cables or other conducting media now in under or over the Transferee's adjoining land or constructed within 80 years of the date hereof.
>
> AND 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 the Broome Park Mansion House, gardens and any other sporting or recreational facilities (hereafter called 'the facilities') on the Transferor's adjoining estate."

9. The 1981 Transfer also contained a covenant by Gulf Investments to maintain the sporting and recreational facilities within the Park, but it is common ground that the burden of this covenant, being positive in nature and unsupported by a leasehold structure, did not bind successors in title to the Park, including the appellants.

10. By the time of the 1981 Transfer, there had already been constructed within the Park most of the relevant sporting and recreational facilities, including the golf course, the outdoor heated swimming pool, three squash courts, two tennis courts, a restaurant, billiard/snooker room and TV room on the ground floor of the Mansion House and a gymnasium, including sauna and solarium, in the basement. There were also Italianate gardens, a putting green, a croquet lawn, an outdoor jacuzzi/spa pool, an ice/roller skating rink, platform tennis courts, a soft ball court and riding stables. These facilities did not cover the whole of the Park, as defined. There remained about 90 acres of undeveloped farmland, which remain undeveloped to this day.

11. An officious bystander in 1981 might well have been prompted to ask how it was envisaged by the promoters of these two timeshare schemes that the extensive sporting and recreational facilities of which the timeshare owners were to be afforded the free use were to be managed, maintained and when necessary renewed by the owners of the Park, to the high standards promised in the contemporary promotional materials, without any contribution from them. Although nowhere clearly stated in the evidence, the answer appears to be that the promoters envisaged that the operation of the leisure complex within the Park as a golf course and county club would attract sufficient paying members of the public (other than timeshare owners in either of the two timeshare developments) to fund its ongoing operating costs. If that was the expectation, it does not appear to have been fulfilled.

12. Correspondence in and after 1998 between the RVOC and Broome Park Golf & Country Club, then owning or at least managing the Park, describes a reduction in the number of available facilities, a lack of investment in the Park, and a perception that, without some significant contribution to running costs by the RVOC members, whether or not under legal obligation, the facilities offered at the Park would be likely to deteriorate further.

13. The outdoor swimming pool became disused and was filled in by 2000. The failure to maintain a swimming pool within the Park was a breach of the landlord's

covenants in the BPOC lease and, pursuant to an order of HHJ Pelling QC in proceedings brought by the BPOC, a new pool was constructed in part of the basement of the Mansion House, where the gymnasium had previously been situated. Some other facilities, such as the putting green, croquet lawn, jacuzzi/spa pool and roller skating rink had been closed and the riding stables were demolished. Apart from the major change constituted by the erection of the indoor swimming pool, other minor changes occurred to the facilities within the ground floor and basement of the Mansion House.

14. Meanwhile, a third timeshare development was constructed within the Park in about 2003, bringing the total number of timeshare apartments within the Park (including the Regency Villas development) to some 58. Finally, the BPOC lease expired by effluxion of time, shortly after the trial, in 2015. The Mansion House was then temporarily closed for refurbishment and reopened as an hotel.

15. From time to time, beginning in about 1983, RVOC made voluntary payments on behalf of timeshare owners within the Regency Villas development to the owners and operators of the Park towards the cost, including upkeep, of the facilities. While made under a reservation of rights, these payments were usually in agreed amounts, at least until the end of 2011. Thereafter, and in the absence of any agreement to amounts, individual timeshare owners were charged fees from time to time for the use of specific facilities, which they paid notwithstanding their case that they were entitled to the use of those facilities free of charge.

The Litigation

16. The first claimant (and first respondent in this court) is the freehold owner of Elham House. The remaining claimants are individual timeshare members of the RVOC. They sue upon their own behalf and on behalf of all other members. They claimed a declaration that they were entitled, by way of easement, to the free use of all the sporting or recreational facilities from time to time provided within the Park, and an injunction restraining interference with them by the defendants (and appellants in this court) who are the current freehold and leasehold owners of the Park and parts thereof. In addition the claimants sought the return of sums paid by them or on their behalf by the RVOC for the use of those facilities since 2008, as damages for interference with their easement, or by way of restitution.

17. The defendants denied that the claimants had the benefit of any easement in relation to the facilities, and counterclaimed for a *quantum meruit* in respect of the provision of those facilities in and after 2012, to the extent not paid for, or not paid for in full.

18. At the trial before the late Judge Purle QC sitting as a High Court judge in 2015 the claimants succeeded in all their claims, save only for the recovery of payments made for the use of facilities before 2012, which the judge found had been made by agreement rather than under protest, in circumstances giving rise to no restitutionary claim: [2016] 4 WLR 61. That monetary claim has not been further pursued by the claimants.

19. In the Court of Appeal (Sir Geoffrey Vos C, Kitchin and Floyd LJJ) [2017] Ch 516 the claimants were again successful on the main issue about whether the rights over the facilities granted by the 1981 Transfer constituted an easement or easements, but the judge's decision was reversed on matters of detail. In particular, the claimants were held to have no rights in relation to the new swimming pool constructed in the basement of the Mansion House. The Court of Appeal's declaration confirmed their rights to specific existing facilities, namely the golf course, squash courts, tennis courts, croquet lawn, putting green and Italianate gardens, but excluded rights in relation to anything provided on the ground floor and basement of the Mansion House. The claimants' monetary entitlement in relation to payments in and after 2012 was correspondingly reduced, and the defendants obtained judgment for a *quantum meruit* in respect of those facilities provided in and after 2012 to which the claimants' rights did not extend, of which the most important was the swimming pool.

20. In this court the appellant defendants pursue their contention that the 1981 Transfer granted no enduring rights in the nature of easements in relation to any of the facilities within the Park, while the claimants by respondents cross-appeal seek to restore the judge's conclusion as to the full extent of their rights in relation to the facilities, including the new swimming pool, and accordingly seek to have dismissed the Court of Appeal's order for a *quantum meruit* in favour of the defendants.

The Issues

21. Much the most important group of issues (which have given rise to almost all the oral argument on this appeal) are those which govern the question whether the Facilities Grant is capable in law of amounting to one or more easements. Those are the issues which justified the grant of permission to appeal. The subordinate issues, relating to the claimants' rights if any in relation to the ground floor and basement of the Mansion House, and in particular to use of the new swimming pool, give rise to no general issues of law of public importance, but all the issues turn to a greater or lesser extent upon the true construction of the Facilities Grant, to which I now turn.

Construction of the Facilities Grant

22. The main features of the matrix of fact against which the 1981 Transfer has to be construed are, in my view, as follows. First, the 1981 Transfer was part and parcel of a collaborative exercise undertaken by two associated companies within the same Gulf Group for a common purpose, namely the development of timeshare apartments and the profitable sale of timeshare units on land immediately adjacent to an already up-and-running leisure complex, containing sporting and recreational facilities in a clubhouse and associated parkland adjacent to and entirely surrounding the subject matter of the 1981 Transfer.

23. Secondly, not least because they shared a common conveyancing solicitor, both parties to the 1981 Transfer may be taken to have known about the leasehold structure underpinning the development of the timeshare units within Mansion House itself, including the obligation, binding on Gulf Investments as landlord, and upon its successors in title as owners of the Park, to maintain, repair, construct and (where necessary) reconstruct all the sporting or recreational facilities provided within the Park (including within the Mansion House), for the full period of 35 years provided for in the BPOC Lease, which expressly contemplated that the rights of the BPOC timeshare owners would extend to all those facilities provided within the Park at any time during that term (see Schedule 3, paragraph 8). Gulf Investments had therefore committed both itself and its successors in title to the provision, operation and maintenance of those facilities by binding obligations which, if necessary, could be enforced against them by a large number of timeshare owners, constituting the BPOC.

24. Thirdly both parties also knew, by their common conveyancing solicitor, of the planned structure under which, only one day after the 1981 Transfer, the interest of the grantee was to be transferred on to a successor in title, for the benefit of the future timeshare owners within the Regency Villas scheme whom both parties wished to attract as purchasers.

25. Construed against that contextual background, the following points emerge as aspects of the true construction of the Facilities Grant in the 1981 Transfer. First, it is abundantly plain that, whether successfully or not, the parties intended to confer upon the Facilities Grant the status of a property right in the nature of an easement, rather than a purely personal right. It was expressed to be conferred not merely upon the Transferee, but upon its successors in title, lessees and occupiers of what was to become a timeshare development in multiple occupation. That being the manifest common intention, the court should apply the validation principle ("*ut res magis valeat quam pereat*") to give effect to it, if it properly can.

26. Secondly, and although reference is made to a number of different specific facilities within the Park, the Facilities Grant 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. In that respect I agree with the judge's analysis of this point (at para 44 of his judgment) and disagree with the approach of the Court of Appeal, which treats each facility as the subject of a separate grant of rights, referable only to the separate *locus in quo* of each relevant facility at the time of the grant. I shall explain my full reasoning for this conclusion when dealing with the cross-appeal, below, but the main point is this. The Court of Appeal regarded the absence of words of futurity in the language of the Facilities Grant (in contrast with the grant relating to the passage of services in the immediately preceding paragraph) as a strong pointer to a construction which limited the rights granted only to those facilities already in existence. This was also a main plank in the written submissions of the appellants on this point. In my view the absence of express words of futurity is amply compensated by the inherent nature of the subject matter of the third paragraph, namely the combination of sporting and recreational facilities in a leisure complex which would be bound to be subjected to significant alterations and changes during its business life.

27. It may be that in this respect the Court of Appeal was encouraged to depart from the judge's more coherent analysis because of a fear on the part of those advising the claimants that to construe the Facilities Grant as extending to the provision of additional or different facilities in the future might give rise to a risk of the grant being held to be void for perpetuity. In written submissions delivered at the court's invitation following the hearing, the appellants submit that this would indeed be the consequence of the judge's construction. Although by 1981 the Perpetuities and Accumulations Act 1964 had intervened to provide a period of "wait and see", the new swimming pool was in fact erected more than 21 years after the 1981 Transfer. In my judgment that concern of the claimants and submission of the appellants is misplaced, in relation to what appears to me to be a single grant of rights over a leisure complex comprising sporting and recreational facilities, which may be changed and adjusted from time to time to suit customer demand without giving rise to separate and distinct grants of rights taking effect only in the future.

28. The main authorities relied upon by the appellants in support of their submission on perpetuity are *Dunn v Blackdown Properties Ltd* [1961] Ch 433 and *Adam v Shrewsbury* [2006] 1 P & CR 27. They show that where (in the case of a pre-2010 instrument) there is a grant of a future easement, or (which is in substance the same thing) a present easement which can only be enjoyed if and when, in the

future, something is done on the servient land to make the easement useable, then the rule against perpetuities applies. In the *Dunn* case the grant was of sewerage rights, but no sewers existed at all at the time of the grant. In the *Adam* case the grant was the use of a garage yet to be constructed, on ground to be excavated by the grantor, accessible only from a roadway which was only partly constructed, at the time of the grant. In both cases the grants failed for perpetuity.

29. In the present case, by contrast, the grant consisted of an immediately effective grant to use the sporting and leisure facilities in a leisure complex which existed as a complex at the time of the grant. The fact that the precise nature and precise location of those facilities within the Park might change thereafter, but the grant still apply to the complex as a whole, does not bring the grant within the rule. If by analogy there had already been a sewerage system on the servient land at the time of the grant in the *Dunn* case, the drainage easement would not have been defeated or rendered subject to perpetuity merely because, thereafter, the dominant owner made a change to the routeing of the pipework.

30. Thirdly, there is no express provision requiring the grantee or its successors or timeshare owners to contribute to the cost of operating, maintaining, renewing and replacing facilities, and there has been no challenge to the judge's conclusion that an attempt to discover them by way of implied term would fall foul of the necessity test. Nor is there, in the Facilities Grant itself, any such obligation imposed upon the grantor, although there is a separate, purely personal, covenant to that effect elsewhere in the 1981 Transfer.

31. Much has been made of this personal covenant by the appellants in their written submissions on the judge's construction. They say that it shows that the Facilities Grant was really intended only to be a grant of personal rights to the free use of a serviced sporting and leisure complex, and that the drafter wrongly assumed that the grantor could impose the servicing obligation on its successors in title as owners of the Park. This meant that the Facilities Grant would in law be of utility for as long (only) as the grantor should remain the owner of the Park, and dependent upon the purely personal covenant of the grantor, the benefit of which could be assigned to successors in title of the grantee as owners of Elham House. If this meant that the Facilities Grant was vulnerable to an early demise (for example on an early sale of the Park or its transfer to an associated company of the grantor) that was just the result of a conveyancing mistake which the court should do nothing to correct, and certainly not by the use of the validating principle of construction.

32. I do not accept that submission. The personal covenant commits the Transferor to the maintenance, repair and cleansing of "the roadways and the facilities". The roadways were plainly the subject of a conventional easement in the first of the three paragraphs (quoted above) the last of which contains the Facilities

Grant. It cannot therefore be said that the existence of the personal covenant somehow reduces the Facilities Grant to a purely personal obligation, if it does not (and cannot) do so in relation to the right of way over the roadways. Although it is not clear, it may be that the conveyancer thought that the burden of a positive maintenance covenant ran with the land, but this does not impact upon the clear intention, manifest in relation to both the roadways and the facilities, that proprietary rights were being granted over them. I have sought to explain above how, in commercial terms, the parties to the 1981 Transfer may have anticipated that the leisure complex would be self-financing (from the contributions of paying members of the public) without need to have recourse to contributions from the two groups of timeshare owners. In my judgment the common intention to be inferred from the absence of any provision in the Facilities Grant itself for such maintenance or funding obligations is that the parties to the 1981 Transfer (both of which were timeshare experts) were content to leave that as a matter of commercial risk, while seeking to maximise the capital receipts expected to be derived from the sale of timeshare units in connection with the Regency Villas apartments shortly thereafter to be constructed. Plainly, the imposition of a payment obligation on the timeshare owners would have had a dampening effect on the purchase prices likely to be obtained.

The Appeal

33. Mr Tim Morshead QC for the appellants described the Facilities Grant as one which conferred the right of free access for the Regency Villas timeshare owners to a high-class leisure complex providing recreational and sporting attractions otherwise being provided by the appellants within the Park for paying members of the public. He submitted that such a grant of rights was incapable of amounting to an easement or easements for three main reasons:

> i) The rights did not accommodate Elham House, the dominant tenement;
>
> ii) Their exercise by the RVOC timeshare owners would amount to an ouster of the appellants as owners of the Park;
>
> iii) The enjoyment of the rights by the RVOC timeshare owners depended upon substantial expenditure by the appellants in managing and maintaining the facilities.

34. Recognising that the decision in *In re Ellenborough Park* would be likely to constitute the sheet anchor in any case for treating the Facilities Grant as an

easement (as it had been in both the courts below), the appellants in their printed case submitted that the decision was contrary to principle, in so far as it suggested that rights conferred for the pure (or mere) enjoyment of their exercise, rather than the better enjoyment of the dominant tenement as such, could satisfy the requirement that they accommodate the dominant tenement. In his oral submissions in this court, Mr Morshead preferred to focus on the private nature of the use of the communal garden in that case as that which, in sharp contrast with the Facilities Grant in this case, made it (just) legitimate to describe the rights conferred as accommodating the townhouses surrounding the garden.

35. Before addressing the *Ellenborough Park* case directly, it is convenient first to summarise what, by the 1950s, were the well-established conditions for the recognition of a right as an easement. Writing in 1954, Dr Cheshire described the four essential characteristics as follows:

i) There must be a dominant and a servient tenement;

ii) The easement must accommodate the dominant tenement;

iii) The dominant and servient owners must be different persons;

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

Aspects of these requirements are better understood when it is appreciated that easements may be created, not only by express grant, but also by implied grant, upon the transfer of part of land formerly in single ownership under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31, under section 62 of the Law of Property Act 1925 and by prescription. In the present case, as in *In re Ellenborough Park*, it is the second and fourth of those requirements with which the court is concerned.

The Second Requirement

36. The requirement that the right, if it is to be an easement, should accommodate the dominant tenement has been explained by judges, textbook writers and others in various ways. In his *Modern Law of Real Property*, 7th ed (1954) at p 457, Dr Cheshire expressed it in this way:

> "One of the fundamental principles concerning easements is that they must be not only appurtenant to a dominant tenement but also connected with the normal enjoyment of the dominant tenement."

Citing from *Bailey v Stephens* (1862) 12 CB(NS) 91, at 115, he continued:

> "It must … have some natural connection with the estate as being for its benefit ..."

37. In its report "Making Land Work: Easements, Covenants and Profits à Prendre" (2011) Law Com No 327 (HC 1067) at para 2.25 the Law Commission advised:

> "The easement must accommodate, or accommodate and serve, the dominant land. The requirement is that the right must be of some practical importance to the benefited land, rather than just to the right-holder as an individual: it must be 'reasonably necessary for the better enjoyment' of that land."

38. In the present case, the Court of Appeal described this requirement, at para 56, as follows:

> "In our view, the requirement that an easement must be a 'right of utility and benefit' is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit or utility as such. Thus, an easement properly so called will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there."

39. Save only for easements of support (which may be said to benefit the land itself), easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. Service easements enable the occupiers of the dominant tenement to receive water, gas and electricity. A drainage easement enables rainwater and sewage to be removed from land, in circumstances where its use would otherwise be inhibited by flooding.

40. The following general points may be noted. First, it is not enough that the right is merely appurtenant or annexed to the dominant tenement, if the enjoyment of it has nothing to do with the normal use of it. Nor is it sufficient that the right in question adds to the value of the dominant tenement. Thus for example, a right granted to the owners and occupiers of a house in Kennington to have free access to the Oval cricket ground on test match days might be annexed to the ownership of that house, and add significantly to its value. But it would have nothing to do with the normal use of the property as a home.

41. Secondly, the "normal use" of the dominant tenement may be a residential use or a business use. Further, since easements are often granted to facilitate a development of the dominant tenement, the relevant use may be not merely an actual use, but a contemplated use: see for example *Moncrieff v Jamieson* [2007] 1 WLR 2620, per Lord Neuberger of Abbotsbury, at paras 132-133.

42. Thirdly, it is not an objection to qualification as an easement that the right consists of or involves the use of some chattel on the servient tenement. Examples include a pump (*Pomfret v Ricroft* (1668) 1 Saund 321), a lock and a sluice gate (*Simpson v Godmanchester Corpn* [1897] AC 696), and even a lavatory (*Miller v Emcer Products Ltd* [1956] Ch 304).

43. Fourthly, although accommodation is in one sense a legal concept, the question whether a particular grant of rights accommodates a dominant tenement is primarily a question of fact: see per Eversheд MR in *In re Ellenborough Park* at p 173.

Recreational rights

44. The main controversy in the present case arises because the Facilities Grant conferred recreational and sporting rights, the enjoyment of which may fairly be described as an end in itself, rather than a means to an end (ie to the more enjoyable or full use of the dominant tenement). The origin of the controversy lies in the Roman law doctrine that a *ius spatiandi* cannot constitute a servitude: see per Eversheд MR giving the judgment of the Court of Appeal in *In re Ellenborough Park*, at p 163. For present purposes that Latin phrase may simply be translated as meaning a recreational right to wander over someone else's land. The difficulty arises as an aspect of the requirement that the right must accommodate the dominant tenement precisely because, generally speaking, the sporting or recreational right will be enjoyed for its own sake, on the servient tenement where it is undertaken, rather than as a means to some end consisting directly of the beneficial use of the dominant tenement.

45. Prior to *Ellenborough Park*, there were inconclusive dicta for and against the recognition of recreational rights as easements. *Duncan v Louch* (1845) 6 QB 904 was about the alleged obstruction of a right of way granted in 1675 over a close called the Terrace Walk. Lord Denman CJ said this, at p 913:

> "I think there is no doubt in this case. Taking the right, as Mr Peacock suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure, they paying the necessary rates for keeping it in order, I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction, and a stranger would not be permitted to say that the plaintiff's right was only conditional."

46. By contrast, in *Mounsey v Ismay* (1865) 3 H & C 486, it was decided that a customary public right to hold horse races was not an easement within the meaning of section 2 of the Prescription Act 1832 (2 & 3 Will 4, c 71). Baron Martin, delivering the judgment of the court, said, at p 498:

> "… we are of opinion that to bring the right within the term 'easement' in the second section it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement."

47. On opposite sides of the same debate may be found *Keith v 20th Century Club Ltd* (1904) 73 LJ Ch 545 (in favour); *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 172, and *Attorney General v Antrobus* [1905] 2 Ch 188 at 198 (Farwell J in both cases, against).

48. I consider that *In re Ellenborough Park* should be taken to have been dipositive of this issue for the purposes of English common law, to this extent, namely that it is not fatal to the recognition of a right as an easement that it is granted for recreational (including sporting) use, to be enjoyed for its own sake on the servient tenement. The question in every such case is whether the particular recreational or sporting rights granted accommodate the dominant tenement.

49. In *In re Ellenborough Park* the right was to the full use of a garden square (surrounded on three sides by houses and on the fourth by the sea), and the dominant tenements were all the houses surrounding the garden together with a small number of additional houses nearby which did not front onto the square. The rights granted

did not accommodate those additional houses on the basis that the garden could be seen by persons from the dominant tenement. It was only by the permitted use of the garden that the requisite accommodation could be established. Evershed MR described the enjoyment contemplated by the "full enjoyment" of the pleasure ground as follows, at p 168:

> "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 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."

50. He continued:

> "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."

51. Turning to the question of accommodation, he continued, at p 174, by contrasting the right granted to the purchaser of a house to use the Zoological Gardens free of charge or to attend Lord's cricket ground without payment, with a sale of part of the freehold of a house and garden with a right to the purchaser to use the garden in common with the vendor. He said, at pp 174-175:

> "In such a case, the test of connection, or accommodation, would be amply satisfied; for just as the use of a garden undoubtedly enhances, and is connected with, the normal enjoyment of the house to which it belongs, so also would the right granted, in the case supposed, be closely connected with the use and enjoyment of the part of the premises sold. Such, we think, is in substance the position in the present case. The park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close

> proximity. … It is the collective garden of the neighbouring houses, to whose use it was dedicated by the owners of the estate and as such amply satisfied in our judgment, the requirement of connection with the dominant tenements to which it is appurtenant. The result is not affected by the circumstance that the right to the park is in this case enjoyed by some few houses which are not immediately fronting on the park. The test for present purposes, no doubt, is that the park should constitute in a real and intelligible sense the garden (albeit the communal garden) of the houses to which its enjoyment is annexed."

52. This careful and compelling judgment of the court repays reading in full. I have cited the above passages because they demonstrate the following points. First, and contrary to the main submission for the appellants in the present case, the Court of Appeal's conclusion did not depend upon the rights granted being essentially private in nature. On the contrary, they were described as broadly similar to those enjoyed by the public over well-known parks and gardens in London. Secondly, the rights granted were essentially recreational, although they included limited sporting elements. Thirdly, the reason why the accommodation requirement was satisfied was not because the rights were recreational in nature, but because the package of rights afforded the use of communal gardens to each of the townhouses to which the rights were annexed. They provided those houses with gardens, albeit on a communal basis, and gardens were a typical feature serving and benefiting townhouses as dominant tenements.

53. 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.

54. The appellants submitted that the grant of such extensive recreational and sporting rights (including the use of a fully serviced and maintained 18-hole championship golf course) could not be regarded as accessory to the timeshare apartment, in the same way that a garden is accessory to a house. Rather, Mr Morshead submitted, use of the timeshare apartment was an accessory to the enjoyment of the recreational and sporting rights, so that to treat the rights as an easement for the benefit of the timeshare unit was to allow the tail to wag the dog.

Reliance for that purpose was placed on *Hill v Tupper* (1863) 2 H & C 121, in which the owner of the Basingstoke Canal granted the exclusive right to operate a pleasure-boating business on the whole canal, annexed to a small strip of land on the canal-side near Aldershot, upon which the grantee intended to erect a boathouse. Giving the leading judgment Pollock CB said:

> "I do not think it necessary to assign any other reason for our decision, than that the case of *Ackroyd v Smith* (1850) 10 CB 164 expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee."

55. The case had been argued on the basis that the exclusive right to operate a pleasure-boat business on the canal was in the nature of a profit rather than an easement, by way of analogy with a several fishery or a right of turbary. Unlike easements, there is no invariable requirement that a profit accommodate neighbouring land: see *Gale on Easements*, 20th ed (2017), at para 1-149. It appears from the full report of the submissions of counsel, and the judicial interventions therein, that it was not argued that the right granted accommodated the plaintiff's land on the canal-side. The members of the court appear to have assumed that it did not, although, following *In re Ellenborough Park,* at least one commentator has suggested that the same facts might now give rise to an easement on that basis: see R N Gooderson, writing in the Cambridge Law Journal [1956] CLJ 24, 25.

56. In my view *Hill v Tupper* was decided on the basis that the grant of a monopoly to carry on a pleasure boat business on the whole length of a canal (which ran from Chertsey to Basingstoke) was by its very nature incapable of constituting a proprietary right, merely by being annexed to the lease of a tiny section of the canal bank, regardless whether it did or did not accommodate the supposed dominant tenement. It was held to have been a perfectly valid grant of a personal right, as between the canal owner and the plaintiff lessee. But to sue for an infringement of it by another pleasure boat operator would have required the plaintiff to sue in his landlord's name as the owner of the canal.

57. *Hill v Tupper* is not therefore authority for the proposition that the grant of rights which accommodate land cannot be an easement unless their enjoyment is capable of being described (in proportionate terms) as subordinate or ancillary to the enjoyment of the dominant tenement. Providing that the rights are for the benefit or utility of the dominant tenement as such, it matters not that their enjoyment may be a primary reason why persons are attracted to acquire rights (such as timeshare units) in the dominant tenement.

The Fourth Condition

58. At first sight, the condition that the rights must be capable of forming the subject-matter of a grant appears more apposite for testing the validity, as easements, of rights said to have been acquired otherwise than by grant, for example by prescription. In *In re Ellenborough Park* the exact significance of this fourth condition was described, at p 164, as "at first sight perhaps, not entirely clear". But it has come to be a repository for a series of miscellaneous requirements which have been held to be essential characteristics of an easement. They include the requirements that the right is defined in sufficiently clear terms, that it is not purely precarious, so as liable to be taken away at the whim of the servient owner, that the right is not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement, and that the right should not impose upon the servient owner obligations to expend money or do anything beyond mere passivity.

59. It used to be said that this fourth condition included the proposition that a "mere right of recreation and amusement" which conferred no quality of utility or benefit, could not be an easement. I have dealt with this supposed condition by reference to the question whether the grant accommodates the dominant tenement. If, as here, the accommodation test is satisfied, then the fact that it may be a right to use recreational or sporting facilities does not, as the *Ellenborough Park* case makes clear, disable it from being an easement. Furthermore, the advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the pejorative expression "mere right of recreation and amusement, possessing no quality of utility or benefit" has become a contradiction in terms, viewed separately from the issues as to accommodation of the dominant tenement. Recreation, including sport, and the amusement which comes with it, does confer utility and benefit on those who undertake it.

60. Returning to the other aspects of this fourth condition, there is no doubt in this case that the Facilities Grant was in sufficiently clear and precise terms, and it is not said to have been merely precarious. The appellant's objections have been formulated under the headings of ouster and mere passivity. 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.

61. The precise extent of the ouster principle is a matter of some controversy, which it is unnecessary to resolve on this occasion. The view of the Law Commission, in its 2011 paper "Making Land Work: Easements, Covenants and Profits à Prendre" at paras 3.207-3.211, is that the scope for litigation created by its uncertainties sufficiently outweighs its utility that it should be abolished. The controversy usually causes difficulty in the context of parking rights, and its extent

is sufficiently summarised (for present purposes) in the speech of Lord Scott in *Moncrieff v Jamieson* (supra) at paras 54 to 61 (in which he treated the Scottish law of servitudes as for all relevant purposes the same as the English law of easements). Leaving aside cases where the grant confers exclusive possession, which cannot by definition be an easement, the ouster principle rejects as an easement the grant of rights which, on one view, deprive the servient owner of reasonable beneficial use of the servient tenement or, on the other view, deprive the servient owner of lawful possession and control of it.

62. In the present case the appellants' ouster argument focused upon possession and control rather than reasonable beneficial use. It may be summarised as follows. The grant of the facilities rights, particularly in relation to the golf course, must be assumed to carry with it a "step-in" right of the dominant owner to manage and maintain the relevant recreational and sporting facilities in the event that, being under no obligation to the dominant owner to do so, the appellants as servient owners ceased to do so themselves. A championship golf course requires not merely occasional maintenance but day to day management and supervision, to an extent that would require the dominant owners to take control of the golf course, and other facilities such as tennis and squash courts, if only to regulate their use in accordance with a booking system. Thus, the exercise of those step-in rights would deprive the appellants of possession or control of the Park, or substantial parts of it, thereby amounting to ouster.

63. The judge and the Court of Appeal rejected these submissions, on the basis of a concurrent factual analysis. Even the golf course could have been kept in a playable condition (although not as an immaculate championship course) by the exercise of those step-in rights, without the dominant owners taking possession or control: see in particular paras 77 and 78 of the judgment of the Court of Appeal, and the analogy drawn with *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13, where the right to take-off and land airplanes on an airfield enabled the dominant owners to step in and mow the field sufficient to create and maintain runways when the servient owners discontinued its use as an airfield. This was held not to amount to an ouster.

64. No basis was shown in the appellants' submissions to justify this court taking a different view of that essentially factual question. But I would go further. In my view it is wrong in principle to test the issue whether a grant of rights amounts to an ouster of the servient owner by reference to what the dominant owner may do by way of step-in rights if the servient owner ceases to carry out the necessary management and maintenance of the servient tenement. This is for two reasons. The first is that the ouster question should be addressed by reference to what may be supposed to have been the ordinary expectations of the parties, at the time of the grant, as to who, as between dominant and servient owners, was expected to undertake the management, control and maintenance of the servient tenement. In the

present case, as the judge held, the plain expectation was that the relevant part of the Park would be managed, controlled and maintained as a leisure complex by its owners, rather than by the owners of Elham House or by the timeshare owners as members of the RVOC. The exercise of step-in rights by the dominant owners would arise only in the event that the owners of the Park gave up the management, control and maintenance of the recreational and sporting facilities. Nothing in the terms of the Facilities Grant impinged upon those rights of management and control in any way.

65. The second reason is that step-in rights are, by definition, rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the rights granted to be used: see *Gale on Easements*, 20th ed, at para 1-93 and *Carter v Cole* [2006] EWCA Civ 398; [2006] NPC 46 per Longmore LJ at para 8(6). The dominant owner's right is "to enter the servient owner's land for the purpose, but only to do necessary work in a reasonable manner …". Provided that, as the courts below have held, the recreational and sporting facilities in the Park could be used by the RVOC timeshare owners without taking control of the Park, then no question of ouster arises.

Mere Passivity

66. It is well settled that (subject to irrelevant exceptions) an easement does not require anything more than mere passivity on the part of the servient owner: see *Gale* (op cit) at para 1-96 and *Jones v Price* [1965] 2 QB 618 at 631, per Willmer LJ:

> "… properly speaking, an easement requires no more than sufferance on the part of the occupier of the servient tenement, …"

In *Moncrieff v Jamieson* (supra) at para 47, Lord Scott of Foscote said:

> "the grant of a right that required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee could not, in my opinion, be a servitude."

He then referred to a right to use a neighbour's swimming pool as an example of such a right.

67. This does not mean that easements cannot be granted if they involve the use of structures, fixtures or chattels on the servient tenement, which, in the ordinary course, the parties to the grant expect that the servient owner will manage and maintain. All it means is that the grant of the easement does not impose upon the servient owner an obligation to the dominant owner to carry out any such management or maintenance. The servient owner may do so because he wishes to use the structures, fixtures or chattels for the same purpose as the dominant owner, and has both the possession and control of the servient tenement and more resources than the dominant owner with which to do so. The grantor may or may not choose to make enjoyment of the easement conditional upon the dominant owner making a contribution towards the cost of management and maintenance, but no such contribution obligation will lightly be implied. There may, as in the present case, be a commercial expectation that the servient owner will undertake the cost and other burdens of management and maintenance, but the fact that the shared commercial expectation may have been (as in the present case) built upon sand rather than rock, so that those burdens prove uneconomic for the servient owner, will not affect the question whether the grant of the relevant rights constitutes an easement.

68. I have already mentioned examples of easements calling for the use of fixtures or chattels, such as the lock gates and sluices in *Simpson v Godmanchester Corpn*, the pump in *Pomfret v Ricroft* and the humble lavatory in *Miller v Emcer*. Perhaps the most telling example is the grant of a right of way over a route which includes a substantial bridge: see *Jones v Pritchard* [1908] 1 Ch 630 at 637. This may require significant regular maintenance, and (in connection with a freehold easement) the large expense of occasional reconstruction. If granted by the owners of a substantial landed estate in favour of the owners of a cottage to which the right of way is the only means of access, it may be inconceivable in the real world that the maintenance, repair and replacement of the bridge will in fact be undertaken by anyone other than the servient owners. Nonetheless the grant of the easement carries with it no obligation on the part of the servient owners to carry out maintenance, repair or replacement, even if the bridge were, in the absence of it, to become unusable.

69. There is therefore nothing inherently incompatible with the recognition of a grant of rights over land as an easement that the parties share an expectation that the servient owner will in fact undertake the requisite management, maintenance and repair of the servient tenement, and of any structures, fittings or even chattels located thereon. The only essential requirement (imposed to prevent land being burdened to an extent contrary to the public interest) is that the servient owner has undertaken no legal obligation of that kind to the dominant owner.

70. There plainly was in the present case a common understanding between the respective grantor and grantee of the rights over the recreational and sporting facilities in the Park that the significant cost of the management, maintenance, repair

and replacement of the structures, fixtures and, if necessary, chattels, requisite for the enjoyment of those rights would be undertaken by the successive owners of the Park. That was the express basis upon which the Regency Villas timeshare units were offered for sale to the public in the promotional materials put in evidence at the trial. But the concurrent analysis of the judge and of the Court of Appeal that the Facilities Grant did not of itself impose such obligations on the servient owners of the Park cannot in my view be faulted. True it is that, in the same document, the original grantor undertook a personal maintenance obligation to the original grantee, but this was (or should have been) known at the time of the conveyancing to have a one-day limited life, because of the intention that there should be an immediate further transfer of Elham House. This personal covenant did not form part of the Facilities Grant.

71. The appellants submitted nonetheless that the Facilities Grant was no more than illusory as a grant of rights of practical utility for an unlimited period unless the owners for the time being of the Park undertook responsibility to the dominant owners for the substantial cost of management, maintenance, repair and renewal. They relied on Lord Scott's example of the swimming pool, although it was only an obiter observation in a case about parking rights. The courts below rejected this on the facts, concluding that some meaningful use, even of the golf course and the swimming pool, could be enjoyed by the RVOC timeshare owners, even if the appellants or their successors as owners of the Park were altogether to discontinue the business of operating the relevant part of the Park as a leisure complex. Greens and even fairways on the golf course could be mown. The swimming pool could be kept full of water. Timeshare owners could provide their own nets for the tennis courts, hoops for the croquet lawn and (if necessary with the use of a generator) lighting for the squash courts. The appellants submitted with force that this would be nothing like the proffered use of a high-quality leisure complex held out to prospective timeshare owners in and shortly after 1981, but nothing in their 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. This conclusion, that meaningful use of the rights granted did not depend upon the continued provision of management, maintenance, repair and renewal by the servient owners, is also sufficient to confirm that use of the facilities was granted by way of right, rather than merely by way of temporary offering, revocable by the servient owners at any time, by discontinuing management and maintenance.

72. It is not difficult to imagine 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 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.

73. It is in this context to be borne in mind, as already explained, that the Facilities Grant extended only to such sporting or recreational facilities as existed within the Park from time to time. It did not oblige the servient owner to maintain or operate any particular facilities, or any facilities. It is perfectly possible that, in relation to some of them, the exercise by the dominant owners of step-in rights, after discontinuation of operation and maintenance by the servient owners, would not make them useable by the dominant owners indefinitely. That was an inherent limitation in the value of the Facilities Grant, but it does not deprive it of the character of an easement.

Overview

74. My analysis thus far demonstrates, as it did to the courts below, that the Facilities Grant exhibited all the well-settled essential characteristics of an easement or easements, viewing each of the four characteristics (and the sub-characteristics of the fourth) separately. But it still leaves open the wider question 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. The facilities granted in the present case undoubtedly broke new ground within the context of easements, beyond that established in *In re Ellenborough Park*, and this court is in any event not bound to follow that decision, if it considers it to have been wrong, either on its facts, or in the application of settled principles undertaken by Court of Appeal.

75. The Facilities Grant in the present case may be treated as breaking new ground by comparison with *In re Ellenborough Park*, in three main respects. First, as Lord Carnwath points out, the nature and extent of the recreational and sporting facilities granted at Broome Park was much greater, and their full enjoyment called for much more intensive management, than that afforded in Ellenborough Park. An 18-hole golf course and a heated swimming pool by their nature require more management and maintenance than an ornamental garden, even if Ellenborough Park may also have included tennis courts and a bowling green. Secondly, Ellenborough Park was made available to a limited number of dominant owners, whereas the facilities at Broome Park were available to two, later three, different groups of timeshare owners and to paying members of the public. Thirdly, the cost of managing and maintaining Ellenborough Park was shared among the dominant owners, whereas in Broome Park it was at least expected to be undertaken by the servient owners. Additionally, the grant in this case can only be described as a right of "recreation and amusement". It is a recreational right pure and simple (treating

sport as part of recreation) whereas in *In re Ellenborough Park* the Court of Appeal fought shy of describing it in those terms, preferring to identify its essential feature as the provision of a communal garden for townhouses.

76. Before expressing a conclusion, I must briefly identify factors pointing in favour of, and against, this extension of the law to recognise this new species of easement. In favour of doing so 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.

77. Secondly, recreational easements have become widely recognised in the common law world. Thus in *Riley v Penttila* [1974] VR 547, the Supreme Court of Victoria recognised as an easement the grant of land within a residential development "for the purposes of recreation" over a garden or a park, in favour of residential lots, enthusiastically following the lead given in *In re Ellenborough Park*. In *Dukart v Corpn of the District of Surrey* [1978] 2 SCR 1039 the Supreme Court of Canada recognised as easements the grant in favour of residential lots on a development plan of rights to use "foreshore reserves" separating the lots from a bay, treating the analysis in *In re Ellenborough Park* as applying "all the more emphatically in the case of a beach pertinent to a resort development" (p 1052), and treating it as well settled that a *ius spatiandi* could be the subject matter of an easement. The Supreme Court stated in its declaratory order that "the right so granted includes the right to promenade freely across the whole of the 'Foreshore Reserves' and not merely to cross directly from the edge or front of Lot 38 to the waters of Boundary Bay": pp 1070-1071. Furthermore, the rights were not exclusive to the lot owners but were to be shared with certain more limited rights of public access from roads terminating short of the bay, and therefore across the foreshore reserves.

78. In *Blankstein v Walsh* [1989] 1 WWR 277 the High Court of Manitoba recognised as an easement, acquired by prescription, recreational rights to use a communal playground, in favour of the owners of adjoining holiday cottages. In *City Developments Pty Ltd v Registrar General of the Northern Territory* [2000] NTSC 33, 135 NTR 1 the Supreme Court of the Northern Territory (affirmed by the Court of Appeal of the Northern Territory) recognised as an easement the grant of rights over a lakeside resort near Darwin for "private recreational purposes", treating it as "clearly established that a right of recreation may be the subject of a valid easement" by reference to Halsbury's Laws of Australia: [2001] NTCA 7, para 18.

79. Against the broad recognition of recreational rights over a leisure complex as easements are two main factors. First, if annexed to a freehold, they are

indeterminate in length, whereas a timeshare structure is frequently set up for a limited number of years. Furthermore the rights conferred are likely to burden the servient land long after the leisure complex in question has outlived its natural life. There is at present no statutory basis for the modification or discharge of easements, such as exists in relation to restrictive covenants, although the Law Commission's 2011 report proposes that there should be.

80. Secondly, the use of easements as the conveyancing vehicle for the conferring of recreational rights for timeshare owners upon an adjacent leisure complex is hardly ideal, by comparison for example with a leasehold structure of the type used in this case for the BPOC timeshare owners. Although obligations to share the cost of management, maintenance, repair and renewal may be attached as conditions for the enjoyment of an easement (as they were in *In re Ellenborough Park*) there is no way in which enforceable obligations of that kind may be imposed upon the servient owners so that the burden of them runs with the servient tenement, in the same way that the burden of positive covenants may be made to run with a leasehold reversion. I have described how effective the leasehold scheme was for the BPOC timeshare owners, in enabling them to take proceedings to require the owners of Broome Park to construct a swimming pool, after the original open-air pool had been filled in.

81. In my view this court should affirm the lead given by the principled analysis of the Court of Appeal in *In re Ellenborough Park*, by 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. Where the actual or intended use of the dominant tenement is itself recreational, as will generally be the case for holiday timeshare developments, the accommodation condition will generally be satisfied. Whether the other conditions, and in particular the components of the fourth condition, will be satisfied will be a question of fact in each case. Whatever may have been the attitude in the past to "mere recreation or amusement", recreational and sporting activity of the type exemplified by the facilities at Broome Park is so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit.

82. I would therefore dismiss the appeal.

The Cross-appeal

83. The essence of the disagreement between the judge and the Court of Appeal which has led to the cross-appeal may be summarised as follows. The judge regarded

the Facilities Grant as, in substance, the grant of a single easement to use all such recreational and sporting facilities as might be provided from time to time within the leisure complex (including the Mansion House). At para 44 of his reserved judgment he explained this conclusion in the following way:

> "There is nothing vague or of excessive width in the present rights. They clearly extend to all recreational and sporting facilities on the estate, and to the gardens, and must in my judgment include facilities that were not there or planned in 1981, or which may have been significantly improved since then. To construe the rights as limited to the actual facilities which were on site or planned in 1981 is unrealistic and might inhibit the servient owner from introducing improvements or replacements or adding facilities which would be for everyone's benefit. I say that because any alteration to the facilities, if the rights did not extend to the new or replacement facilities, might amount to a substantial interference with the claimants' existing rights. That cannot have been intended on any sensible construction of the rights. Moreover, such a construction would allow the defendants to advantage from their own default or that of their predecessors, who filled the outdoor pool in before the defendants constructed a new one in the basement of the Mansion House. The point is perhaps academic as the rights under the 1981 Transfer expressly extend to the basement, where the pool now happens to be."

84. The Court of Appeal said that this was the wrong approach. It was held, at para 40 of the judgment of the court, that the most natural meaning of the words of the grant was a grant of rights in the nature of separate easements only over those sporting and recreational facilities already in existence on the Park at the time of the grant. This would therefore exclude new or substitute facilities constructed or laid out in a different part of the complex from the location of the original facilities, and also exclude rights over the ground floor and basement of the Mansion House which were not, viewed separately, recreational or sporting facilities, so as, for example, to exclude the use of the restaurant. The court then went on to look at each facility in turn, treating it as the subject of a separate grant of rights relating to a separate part of the Park. Thus the rights granted over the Italianate gardens, the tennis courts, the squash courts, the putting green and croquet lawn, the outdoor pool and the golf course all qualified as easements. By contrast the rights claimed over the reception area, billiard room and TV room on the ground floor of the Mansion House, and over the restaurant, bar, gymnasium, sun bed and sauna area in the basement, all failed to qualify. This was, because, viewed individually, none of them amounted to a sporting or recreational facility, the court observing in passing that "a restaurant is not like a toilet" and that "the modern approach to taking physical exercise is not

really applicable to recreational indoor games such as snooker or to watching television": para 80. Furthermore, the Court of Appeal concluded that, if the leisure business was closed, and the Park owners' chattels removed, it would be stretching language to describe the bare room occupied in 1981, but no longer occupied, by a billiard table, as a billiard room. The same analysis was applied in relation to the gymnasium. The result was that the court concluded that there had not in 1981 been any valid grant of an easement over the ground floor or basement of the Mansion House. Since the new basement swimming pool replaced the original pool but on a different part of the leisure complex, the dominant owners acquired no rights over it.

85. I have already indicated my clear preference for the judge's simple and common-sense analysis. There is in my view no answer to the judge's pithy observation that to construe the rights as limited to the actual facilities on site or planned in 1981 is unrealistic, and that it would be likely to inhibit the servient owner from introducing improvements or replacements, or adding facilities, for the benefit of all users of the leisure complex in the Park. In my view the Court of Appeal's approach, looking at the facilities grant as if it were a grant of separate rights to each facility, affecting separate and distinct parts of the complex, failed to see the wood for the trees.

86. It is fair comment that counsel for the respondents provided less than full-blooded support during oral argument for the judge's simple analysis, although they did in subsequent written submissions. This reluctance was apparently because of a concern about the effect of the law relating to perpetuities upon what, on one view, might be regarded as the grant of future easements. But this concern was, in my view, misplaced for the reason which I have already given. I have also explained why, in my view, the absence of express words of futurity in the Facilities Grant is more than compensated for by the nature of the subject matter, namely rights to use sporting and recreational facilities in a leisure park on an indefinite basis. The timeshare owners in the Mansion House were plainly granted rights to use all such facilities as might be there from time to time, and it makes no sense at all to think that the parties to the grant of rights to the Regency Villas timeshare owners over the same leisure complex actually intended that they should have a steadily reducing set of rights, as alterations, replacements and improvements were made to the leisure complex over time.

87. In written submissions after the hearing the appellants advanced additional reasons why the judge's construction could not be correct. First, it was said that the Regency Villas timeshare owners would then benefit from a later decision by the servient owner to construct leisure or sporting facilities within that large part of the Park (as defined) to which the leisure complex did not extend in 1981. Part of it remained farmland, and still does. Secondly it was submitted that if the Transferor (or a successor) sold off parts of the Park for residential development and houses

were built with private gardens or swimming pools, then the Regency Villas timeshare owners would have the free use of them as well.

88. It may be that developments of that kind (none of which appear to have occurred) might throw up issues of construction with which the court might have to grapple. A possible answer might have been that the ambit of the locus in quo to which the Facilities Grant extended was confined to the Mansion House and the curtilage of the rest of the leisure complex as it then stood, but still leaving the servient owner free to substitute and re-locate particular facilities within that curtilage, without either depriving the Regency Villas timeshare owners of their use, or enabling them to veto any such changes. Another answer (to the private gardens and pool point) may be that the facilities grant applied only to facilities constructed for multiple use, as part of the leisure complex. But these considerations do not in my view stand in the way of recognising the good sense and practicality of the judge's interpretation, in preference to that of the Court of Appeal.

89. It also makes no sense to conclude that the Regency Villas timeshare owners were to have no enduring rights to the facilities in the ground floor and basement of the Mansion House, which constituted the heart of what was plainly intended to be a country club. While it may be that a restaurant, viewed on its own, is not a recreational or a sporting facility, it is perfectly capable of being viewed as part of a sporting or recreational complex. There were no doubt communal lavatory facilities in the Mansion House to which the same analysis would apply. The parties to the 1981 Transfer cannot sensibly have intended to exclude the RVOC owners from access to the restaurant, the lavatories, or to any other communal parts of the ground floor and basement of the Mansion House.

90. There is also in my view no real basis for the sharp distinction which the Court of Appeal drew between outdoor and indoor recreational and sporting facilities. A gym, a sauna, a billiard room and a TV room are no less recreational than a formal garden or a golf course. An enclosed squash court is no less sporting than an open-air tennis court.

91. Furthermore, the focus of the Court of Appeal on the importance of the servient owners' chattels to the use of the billiard room, gymnasium and sauna within the Mansion House, while correct as a matter of fact, does not justify their exclusion from the appropriate subject matter of a recreational easement. For the reasons already given, it is no objection to the recognition of a right as an easement that it may be exercised over, or with the use of, chattels or fixtures on land, rather than merely over the land itself.

92. My preference for the judge's construction of the Facilities Grant over that adopted by the Court of Appeal is decisive of the outcome of the cross-appeal. The new indoor swimming pool was, from the moment of its completion, a recreational or sporting facility constructed and made available within the leisure complex in the Park. The dominant owners already enjoyed rights over the communal parts of the ground floor and basement of the Mansion House which, viewed as part of the grant of a recreational easement over the leisure complex as a whole, were perfectly capable of having the enduring quality of an easement, or part of an easement. The result is, that for both of those reasons, but primarily the first of them, the respondents' recreational easement extended to the new indoor swimming pool from the moment of its completion, as the judge held.

93. I would therefore allow the cross-appeal, and restore the judge's consequential orders, including his order for monetary compensation, to be assessed, for the payment under protest by the respondents for the use of the facilities, in particular the swimming pool, in and after 2012.

LORD CARNWATH: (dissenting)

94. Since I am in a minority, I will explain my thinking relatively briefly. I gratefully adopt Lord Briggs' comprehensive account of the factual and legal background. With one important qualification I agree with, or am prepared to accept, his analysis. I would be very happy to go further, since the merits seem all one way. There is no doubt that the respondents were intended to have free access to the recreational facilities on the estate. But for an elementary conveyancing error by the original vendor's solicitors, they should also have had the benefit of a covenant by the owner of the estate to maintain those facilities. Instead they have been faced with years of uncertainty and dispute. However our view of the merits should not allow us to distort the correct understanding of a well-established legal concept. Nor is there any need to do so. Whatever our conclusion on this appeal, no-one suggests that the conveyancing technique used in this case is a suitable model for future time-share arrangements of this kind.

95. The important qualification relates to the nature of the right asserted. 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). The intended enjoyment of the rights granted in this case, most obviously in the case of the golf course and swimming-pool, cannot be achieved without the active participation of the owner of those facilities in their provision, maintenance and management. The same may apply to a greater or lesser degree to other recreational facilities which have been or might be created, such as the skating-rink or the riding stables (who provides and keeps the horses?). Thus the doing of something by the servient owner is an intrinsic part of the right claimed.

96. Neither principle, nor any of the 70 or so authorities which have been cited to us, ranging over 350 years, and from several common law jurisdictions, come near to supporting the submission that a right of that kind can take effect as an easement. This point is if anything underlined by Lord Briggs' use of such expressions as "country club" and "leisure complex" (paras 1, 83) to describe the enterprise. In effect what is claimed is not a simple property right, but permanent membership of a country club. He recognises that it would be a "new species of easement", but sees it as justified by the need to accommodate "new ways of enjoying the use of land" and as a natural development of the "recreational easements … widely recognised in the common law world" (paras 76-77). However, none of the cases which he cites (paras 77-78) involves more than access to land for the purposes of walking and enjoyment as a garden or park in much the same way as in *In re Ellenborough Park* [1956] Ch 131. I agree that those cases lend support to the affirmation at this level of the Court of Appeal's reasoning in that case, but not for extending it to create a wholly new form of property right. Furthermore, as Lord Briggs accepts, there are other and better legal procedures for dealing with this "new way of enjoying land", if that is what it is.

97. This limitation was clearly recognised (albeit obiter, and in the context of the Scottish law of servitudes) by Lord Scott of Foscote in *Moncrieff v Jamieson* [2007] 1 WLR 2620, at para 47. Subject to "a few qualifications" he saw no reason why -

> "any right of limited use of the land of a neighbour that is of its nature of benefit to the dominant land and its owners from time to time should not be capable of being created as a servitudal right in rem appurtenant to the dominant land …"

His second qualification is directly relevant and merits quotation in full:

> "A second necessary qualification to the proposition afore-stated would be that the grant of a right that required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee could not, in my opinion, be a servitude. Thus the grant of a right of way over a driveway cannot place on the servient owner the obligation to keep the driveway in repair: see *Jones v Pritchard* [1908] 1 Ch 630, 637. The dominant owner would be entitled, although not obliged, as a right ancillary to his right of way to do such repairs to the driveway as were necessary or desirable. On the other hand I doubt whether the grant of a right to use a neighbour's swimming pool could ever qualify as a servitude. The grantor, the swimming pool owner, would be under no obligation to keep the pool full of water and the

> grantee would be in no position to fill it if the grantor chose not to do so. The right to use the pool would be no more than an in personam contractual right at best."

98. That passage draws a significant distinction between two situations. The first is where the position of the servient owner is essentially passive, but the dominant owner is able, as a "right ancillary to his right of way", to make good any failure to keep the way in repair. The availability of such a limited, and clearly defined, ancillary right does not detract from the validity of the servitude or easement. The second, by contrast, is where active participation by the servient owner is an intrinsic part of the intended right. Lord Scott referred simply to filling the pool, but he might have added a reference to the active maintenance which is needed to keep a modern pool in safe and useable condition.

99. Sir Geoffrey Vos C [2017] Ch 516 acknowledged the problem but did not see it as insuperable:

> "We accept that modern swimming pools will often have sophisticated filtration, heating, chlorination, and water circulation systems. But such systems are not essential to the benefit and utility of using the pool. Water is obviously essential, but that can, as the judge indicated, be provided by the owner of the dominant tenement if the servient owner closes his business or allows the pool to fall into disrepair. The same applies to any desirable filtration or other plant. Simply providing the necessary water or even one's own filtration plant cannot be regarded as sharing possession of the land on which the pool is constructed ..." (para 72)

100. Similarly in respect of the golf course, he recognised 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.
>
> 76. The difficulty posed by an easement of this modern kind of golf course, which we assume for this purpose was closer to the one that was opened at Broome Park Estate in mid-1981, is the large amount of maintenance required to keep it in what many would regard as a 'playable' condition. We are all

> familiar with the teams of groundsmen and greenkeepers that such courses need to employ to maintain them to the high standard that players frequently desire."

However again he thought the problem not insuperable:

> "77. As regards the validity of an easement to use a fully maintained golf course, we take the view that it is necessary to consider what would occur if, as was common ground could happen, the servient owner closed or ceased to maintain it. As with providing the water for the swimming pool, the dominant owners could mow the grass and take any other necessary steps to make the course playable. Such mowing was accepted by the Court of Appeal to be appropriate in relation to a grass airfield in *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13." (para 77)

He did however (unlike the judge) accept some limits to this approach, in respect of facilities on the ground floor of the Mansion House (such as the billiard and TV rooms), when rejecting the respondents' submission that this was no more than a right to use the common parts:

> "We think this submission proves too much. It shows that the right granted is really not in the nature of an easement at all. It is not about the use of any land, but the use of facilities or services that may for the time being exist on the land. As with the case of the restaurant which was in the basement in 1981, we cannot see how there can properly be an easement over such a service area. A restaurant is not like a toilet (over which an easement may exist as we have mentioned). It can only be useful and a benefit if someone cooks the food and sells it to the user. Likewise, a TV room is of no benefit without a TV. The tennis court and golf course are both proper uses of the servient land. The grant of the right to use recreational facilities on the ground floor of the Mansion House was really no more than a personal right to use chattels and services provided by the defendants …" (para 80)

This is a false distinction in my view. The essence of the grant, in respect of the golf course and swimming pool, no less than the others, was to use recreational facilities provided by the servient owners.

101. Lord Briggs deals with this issue first in the context of arguments about "ouster" (paras 62-65). I am inclined to agree with him, contrary to the appellants' submissions, that the ouster question should be judged by reference to the ordinary expectations at the time of grant, rather than to possible exercise of step-in rights. However it is with the following passage, under the heading "Mere passivity", that I feel bound to take issue. Having accepted that an easement requires "no more than sufferance" on the part of the servient owner, he dismisses the appellant's reliance on Lord Scott's observations in *Moncrieff*, by reference to what he deems -

> "… the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances." (para 71)

102. I find this difficult to accept. It is not clear to me that the courts below made any true "factual findings" on this question, nor indeed that there was any evidence on which they could properly to do so. There was plenty of evidence about the nature and cost of the maintenance actually carried out by the estate. (See for example the evidence of Mr Robson, Head of Maintenance, para 10, as to the contracts for the maintenance of the pool.) There appears to have been no evidence as to what might realistically have been done by the residents, collectively or individually, in the absence of such central management. What is involved is not simply maintenance or repair, as in the case of a right of way, or even the mowing of a disused airstrip as in *Dowty Boulton* (see below); but taking over the organisation and management of a "leisure complex" (in Lord Briggs' words).

103. The judge dealt with this point very briefly, but by reference to legal theory rather than practical evidence:

> "Mr Latimer also says, as is not disputed, that the rights cannot take effect as easements if the existence of the easements requires expenditure of money by the defendants, or the carrying on of a business by them. Yet the existence of the rights claimed produces no such requirement. The defendants could (as happened in the past) neglect the maintenance and upkeep of the estate allowing it to fall into disrepair. They could cease carrying on business at the estate for that reason, or on purely economic grounds, whether or not disrepair required the closure. In that case, if the rights take effect as easements, the claimants could intervene and, at their own expense, maintain and repair the facilities themselves, and tend the gardens: see generally *Carter v Cole* [2006] EWCA Civ 398 at para 8 ..." (para 52)

Carter v Cole does indeed contain an authoritative summary by Longmore LJ of the ancillary rights of the dominant owner, but that was in the context of rights of way. The case tells one nothing about the practicalities of running and maintaining a modern golf-course or swimming-pool. The judge did, it is true, say that he saw no reason why the claimants could not provide their own water supply "if necessary from a tanker" (para 64); but this appears to have been his own suggestion rather than one based on any evidence of what would be required in practice to maintain the pool in safe condition.

104. The only case relied on by Sir Geoffrey Vos C in this context, *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1976] Ch 13, is of no assistance. The actual decision turned on other issues, so that anything said about the claimed easement was obiter. It seems to have been assumed that the disused airfield could be made suitable for the limited use to be made of it by the appellants by no more than mowing. On that basis Russell LJ was prepared to proceed on the assumption (p 24C-D) that the right to use the airfield was capable of existing as an easement with the ancillary right to mow to make it useable. The case tells one nothing about the view that would have been reached if the right had been claimed over an operational, commercial airfield.

105. The appellants raise a related problem concerning the element of choice. In respect of a right of way over a strip of land, or even over a bridge, there is no doubt about what is required by way of step-in rights. Here there is no such clarity. As submitted in their case:

> "A right to enjoy facilities being run by the servient owner is defined by the active choice and implementation of the servient owner. It chooses the location of the bunkers, the layout of the gardens from time to time, the temperature and depth of the water in the pool - no less than it chooses the menu in the restaurant, the range of equipment in the gym and the loudness of the music within it. There is no right in the dominant owner to exercise its right in any different, or any particular way. The scope of the right is defined by the active choices and implementation of the servient owner from time to time."

This perhaps is a less strong point in respect of the swimming-pool, the physical characteristics of which are clearly defined, and unlikely to change. However, in respect of the golf-course it seems to me unanswerable.

106. It is true that in *Ellenborough Park* the use was to some extent subject to decisions made by the servient owner as to the layout of the garden, and included the possibility of some sporting activity. The use was described by Evershed MR:

> "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 …" (p 168)

However, these matters seem to have been treated as no more than incidental to the enjoyment of the garden as a place for walking, rather than as here essential to the purpose of the grant. Further, the enjoyment was subject to the dominant owners' obligation to contribute to the cost of maintenance, and there was no discussion of what might happen in the event of failure to maintain. The court was not faced, as in this case, with the commercially incoherent position that the dominant owner is under no obligation to operate and maintain the recreational facilities which are essential to the grant, but has no right to recover the costs if he does so.

107. I also find it difficult to see the limits of the majority's approach. One could imagine, for example, similar time-share apartments built on a theme-park, and offering free access to the various rides on the park. 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.

108. I accept that are some elements of the recreational facilities, notably the Italianate gardens, which lend themselves much more readily to a traditional understanding of an easement. However, like the majority, and in disagreement with the Court of Appeal, I would be inclined to regard this as a composite package of rights which stands or falls as a whole. Since I am in a minority it is unnecessary to pursue that issue further. It is also unnecessary to consider further the issues relating to the claimed quantum meruit.

109. Finally, I comment briefly on the issues raised by the post-hearing exchanges in connection with the rule against perpetuities (Lord Briggs paras 27ff). These arose from the interest shown by some members of this court in the question of future facilities.

110. The background as I understand it is as follows. The judge held that the rights extended not only to recreational facilities existing at the date of grant, but to future replacements or additions. He said:

> "There is nothing vague or of excessive width in the present rights. They clearly extend to all recreational and sporting facilities on the estate, and to the gardens, and must in my judgment include facilities that were not there or planned in 1981, or which may have been significantly improved since then. To construe the rights as limited to the actual facilities which were on site or planned in 1981 is unrealistic and might inhibit the servient owner from introducing improvements or replacements or adding facilities which would be for everyone's benefit …" (para 44)

111. In this passage he seems to have gone beyond the case as advanced at trial by the present respondents. Although their pleadings had asserted rights over any sporting or recreational facilities "which may from time to time be provided on the Broome Park Estate", their case at trial was more limited. The right was said to extend to facilities existing at the date of grant, and to later facilities constructed either in direct substitution for existing facilities, or as extensions of them.

112. In the Court of Appeal the present respondents supported the judge's view, but there seems to have been some doubt as to how far it went. In their submission, as understood by the court, the grant would not extend to wholly new facilities on a part of the estate where none had previously existed, but would include, for example, an extension onto new land of the golf-course (para 36). The court took a more limited view:

> "The question of whether a minor or de minimis extension to the land used by the existing or replacement facilities does not arise on the facts of this case. But we would be inclined to accept that such an incremental increase in the land used by the golf course or, say, a small extension to the existing land used by the swimming pool or to the run back used by the tennis courts, would be covered on the proper construction of the grant. A completely new facility on new ground would not be

> covered, but a replacement facility, even one that had been slightly extended beyond the ground used by the original facility, would be." (para 44)

113. The appellants' submissions support this limited view. I note three points in particular. Firstly, they rely on the ordinary construction of the words of the grant which are expressed in the present tense, and say nothing about future facilities. They contrast para 2 which refers in terms to pipes and drains now in the land "or constructed within 80 years of the date hereof". Secondly, they point out that the "Transferor's adjoining estate" (the expression used in the grant) extends to a large area (some 90 acres) of mainly agricultural land. It cannot sensibly have been intended that this large area would be burdened for ever with rights to future recreational facilities created anywhere at any time in the future. Thirdly, such a construction would come into direct conflict with the rule against perpetuities. As they point out, there is authority for the proposition that the rule is not offended by a right which may allow for future substitutions (see eg *Dunn v Blackdown Properties Ltd* [1961] Ch 433, 440 per Cross J), but none for a right over wholly new facilities which may be created anywhere over an area of this size.

114. I see considerable force in all these points. Although it is not necessary for the purposes of this appeal to reach a definitive view on the future extent of the grant, the Court of Appeal were right in my view to construe it narrowly. Lord Briggs seeks to avoid the problem by treating the grant as limited to the "leisure complex". However, that is not what the document says, nor indeed is it clear precisely what physical area would be so defined.

115. For these reasons, in respectful disagreement with the majority, I would have allowed the appeal.