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# More than just a walk in the Park: a new view on recreational easements

Judith Bray

## INTRODUCTION

In a country where interest in recreational sport is so high<sup>1</sup> and can verge on the obsessional it is strange that there have been so few challenges to the principle that enjoyment of another's land for sport or recreation cannot constitute an easement. This issue finally reached the Court of Appeal in 2017 giving the Court a chance to review existing law and the legal status of sporting and recreational rights. In *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*<sup>2</sup> the owners of a number of flats and houses enjoyed as timeshare accommodation sought the right to use facilities in a neighbouring leisure centre and gardens. The rights claimed included the use of a swimming pool, a golf course, squash courts, tennis courts and a range of other facilities. If the Court of Appeal were to decide that such rights constituted easements then a major change would be made in the law.

This article will consider the nature of recreational and sporting rights and the obstacles which have been put forward to the upholding such rights as easements. It will also explore the willingness of the courts to find new easements in the light of changing social conditions. It will look at the term *ius spatiandi* 'the privilege of wandering at will over all and every part of another's land'<sup>3</sup> a right which has not traditionally been regarded as constituting as easement under English law. This rule has a long history which dates back to the Roman law of servitudes<sup>4</sup> and which could have proved a major obstacle to the claimant's case in *Regency Villas*. Finally, the article will

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<sup>1</sup> Figures from Sport England active lives survey 2016-2017 show that 60.7 per cent of adults (or 27 million) do at least 150 minutes of activity [including fitness ,cycling, walking and all sports] per week, <https://www.sportengland.org/news-and-features/news/2017/january/26/active-lives-offers-fresh-insight/>

<sup>2</sup> [2017] EWCA Civ 238.

<sup>3</sup> See Evershed MR in *Re Ellenborough Park* [1956] Ch 131 at 136; See also Farwell J in *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 172.

<sup>4</sup> See *re Ellenborough Park* [1956] Ch 131 at 142 where Evershed MR refers to *Real Property Law* G R Y Radcliffe 2<sup>nd</sup> Ed (Oxford University Press 1938) as follows 'This principle is well illustrated by the Roman jurist Paul when he says that you cannot have a servitude giving you the right to wander about and picnic in another's land'.

reopen the question of whether an easement can be found where a positive obligation is placed on the servient owner.

### **The characteristics of an easement**

As every law student knows the characteristics of an easement can be found in the case of *re Ellenborough Park*<sup>5</sup> although it should be noted that in that case Danckwerts J in the High Court decision and later Evershed MR in the Court of Appeal had relied on the seventh edition of Cheshire *the Law of Real Property* as their primary source for these characteristics. The characteristics are not rules of law but merely starting points laying out the parameters which limit the courts in determining whether a right is an easement. Although there were traditionally four key characteristics of an easement, several sublayers have been added over the years, each trying to clarify the nature of those rights which can constitute an easement. The original characteristics were: the need for a dominant and servient tenement; the requirement that the right must accommodate the dominant land; there must be two different owners and the right must be capable of being the subject matter of a grant. Accommodating the dominant tenement has been widely interpreted as benefiting the land rather than the landowner personally<sup>6</sup>. Examples<sup>7</sup> include a right of way giving a more convenient route<sup>8</sup>, a right to park<sup>9</sup>, a right to light<sup>10</sup>; these will usually be held to benefit or accommodate the land itself and although clearly of benefit to any property owner they do not depend on the particular needs of a single property owner. In *Ellenborough Park*<sup>11</sup> the key issue was whether the use of a park by the landowners in surrounding properties could be said to benefit land rather than the landowners personally. A number of houses had been built around parkland and the owners claimed the right to walk in the park or as Evershed MR more formally put it as 'the right of perambulation'.<sup>12</sup> This was

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<sup>5</sup> *re Ellenborough Park* [1956] Ch 131.

<sup>6</sup> See *Hill v Tupper* (1863) 2 H & C 121; compare *Moody v Steggles* (1879) 12 Ch D 261.

<sup>7</sup> For a much more extensive list of recognised easements see Gaunt and Morgan *Gale on Easements* 20<sup>th</sup> edn (Sweet and Maxwell, 2017) at 1.76.

<sup>8</sup> See *Borman v Griffiths* [1930] 1 Ch 493; *Mills v Silver* [1991] Ch 271.

<sup>9</sup> See *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278.

<sup>10</sup> See *Colls v Home and Colonial Stores Ltd* [1904] AC 187.

<sup>11</sup> *re Ellenborough Park* [1956] Ch 131.

<sup>12</sup> *re Ellenborough Park* [1956] Ch 131 at 140.

controversial. To what extent can a landowner argue that the right to enjoy walking in a park benefits the dominant tenement as opposed to the landowner? Could access to land be regarded as a part of land ownership? Evershed MR concluded that the right to use the grounds was a right known to law and it could be an easement. The claimants could use the land to wander at will and sit in appropriate places and possibly to enjoy a picnic.<sup>13</sup> However the question of whether after your picnic you could play games in the park or hold a football match was not decided. Could you have idly thrown a Frisbee whilst walking about in the park or would this exceed permissive use? The Court of Appeal held that the use of the park could include use for the enjoyment of air and exercise and similar amenities.<sup>14</sup> Evershed MR even went as far as to say in relation to Ellenborough Park that ‘... the enjoyment contemplated was the enjoyment of the vendors’ ornamental garden in its physical state ... that is to say, of walking on or over those parts provided for such purpose that is, pathways and ...lawns; to rest upon the seats or other such 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 provision made for their regulation...’<sup>15</sup>

Baker<sup>16</sup> commented some years later that if Evershed MR was correct and there is a distinction between a *ius spatiandi* and the right enjoyed in *re Ellenborough Park* ‘...it could be said that the notion of objective purpose distinguishes a right to wander around a pleasure ground from a *ius spatiandi*. First, it gives the right a meaning that enables it to accommodate a dominant tenement. Secondly, it defines the scope of the privilege in a way that accords with the servient owner’s right to alter the pleasure ground’s layout...’ However Baker made a strong case for the *ius spatiandi* to be recognised in English law citing a number of other jurisdictions that already recognise it such as Canada<sup>17</sup> and Australia<sup>18</sup> as well as support from members of the judiciary<sup>19</sup>.

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<sup>13</sup> *re Ellenborough Park* [1956] Ch 131 at 141.

<sup>14</sup> *re Ellenborough Park* [1956] Ch 131 at 150

<sup>15</sup> *re Ellenborough Park* [1956] Ch 131 at 169.

<sup>16</sup> Adam Baker “Recreational Privileges as easements: law and policy” [2012] *Conv* 37 at 44.

<sup>17</sup> *Dukart* (1978) 86 DLR.

<sup>18</sup> *City Developments Pty Ltd v Registrar-General* (NT) [2001] NTCA 7.

For Roger Smith the issue is simply one of seeing the right to wander at will as simply a form of 'garden substitute'<sup>20</sup>.

So in 1965 a number of questions were left open about the extent of rights that could be claimed if someone had use of open land of a neighbour. Evershed MR did envisage an extension of the use of land to some limited sporting activity but this reference was *obiter* and there was no extension to the definition of an easement to include the right to play sport.<sup>21</sup>

## THE CHANGING NATURE OF EASEMENTS

For nearly two centuries the courts have notionally embraced the idea that easements should adapt to changes in society at least in spirit.

'...The law of servitude, no doubt, accommodates itself to the changing circumstances of society, and a new process or invention ... may be turned into servitude ...'

This principle set down by Lord St Leonards in *Dyce v Lady James Hay*<sup>22</sup> in 1852 is frequently cited to illustrate the flexibility of the law with respect to easements. However it is not easy to find examples of where it was followed in the nineteenth and twentieth centuries. Traditionally, there was reluctance in the courts to recognise new easements even where adaption because of changing conditions and times. Writing in the *Virginia Law Review*<sup>23</sup> in 1942 Russell Reno reflected that although writers on Roman law<sup>24</sup> had pointed out that there was no limit placed on the types of affirmative or negative servitudes that could be created, this attitude was not reflected in the way the English judges approached new servitudes or easements.<sup>25</sup> He wrote

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<sup>19</sup> Baker cites Lord Hope in *DPP v Jones (Margaret)* [1999] 2 AC 340; Lord Patten in *Beech v Kennerley* [2011] EWCA Civ 666.

<sup>20</sup> Roger Smith *Property Law* 9<sup>th</sup> edn (Pearson 2017) p.515.

<sup>21</sup> *re Ellenborough Park* [1956] Ch 131 at 169.

<sup>22</sup> (1852) 15 D. (HL) 14 at 15.

<sup>23</sup> Russell Reno "The Enforcement of Equitable Servitudes in land: Part I" 28 *Virginia Law Review* Vol 28 951 (1942).

<sup>24</sup> He refers to Buckland and McNair *Roman and Common Law* (1936) 109 as examples of writers on Roman Law who had reflected on the fact that Roman Law placed no limit on the types of new servitudes that could be created .

<sup>25</sup> Russell Reno "The enforcement of Equitable Servitudes in Land: Part I" *Virginia Law Review* 1942 Vol 28 No 7 951.

‘...unfortunately the conservatism of the English judges prevented them from taking this attitude in respect of easements and profits...’<sup>26</sup> In the same article Reno refers to the words of Lord Brougham in *Keppell v Bailey*,<sup>27</sup> a case better known perhaps in the context of restrictive covenants ‘...Incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner...’<sup>28</sup>

Sixteen years later Cresswell J voiced a similar view in *Ackroyd v Smith*<sup>29</sup> ‘...It is not in the power of a vendor to create new rights not connected with the use or enjoyment of land, and annex them to it: nor can the owner of land render it to a new species of burthen, so as to bind it in the hands of an assignee...’ Over the years attempts to create new easements such as an easement of protection from the weather<sup>30</sup> and interference with television reception<sup>31</sup> have frequently failed. Gray comments that ‘...the imposition of severely limiting criteria has been rationalised as necessary to prevent the proliferation of undesirable long-term burdens which inhibit the marketability of land ...’<sup>32</sup> Easements can undermine the rights of a landowner who has to concede legal rights of use and enjoyment to others and in this way they encumber the traditional notion that your home is your castle and you are free to enjoy it as and when you wish.<sup>33</sup> However Gray also accepts that extending the range of easements may actually enhance land. ‘...Nowadays, however, it is far from clear that the tight definitional regulation of servitudes has any particularly beneficial effect. A more relaxed categorisation of allowable servitudes may actually enhance the enjoyment of land in a crowded environment, promoting rather than inhibiting the character of a locality and its consequent attractiveness on the open market...’<sup>34</sup>

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<sup>26</sup> See Russell Remo “The Enforcement of Equitable Servitudes in Land” at 958.

<sup>27</sup> 2 My&K 517 (39 ER 1042).

<sup>28</sup> *Keppell v Bailey* 2 My&K at 535.

<sup>29</sup> (1850) 10 CB 164 at 188.

<sup>30</sup> *Phipps v Pears* [1965] 1 QB 76;

<sup>31</sup> *Hunter v Canary Wharf* [1997] AC 655.

<sup>32</sup> K. Gray and S. Gray *Elements of Land Law* 5<sup>th</sup> edn (Oxford: OUP 2009) at p. 616.

<sup>33</sup> “For a man’s house is his castle *et domus sua cuique est tutissimum refugum.*” Sir Edmund Coke. *Institutes of the Laws of England* [1628].

<sup>34</sup> K.Gray and S. Gray *Elements of Land Law* 5<sup>th</sup> edn (Oxford: OUP. 2009) at p. 616.

In more recent years the courts appear to have embraced change more readily. One recent extension to the range of rights has been an easement allowing noise from a race track.<sup>35</sup> In *Coventry v Lawrence*<sup>36</sup> landowners living near a speedway and stock car stadium brought an action challenging the right of the owner of the stadium to make noise during events held there. Reversing the decision in the Court of Appeal where the claim of the neighbouring landowners had been upheld the Supreme Court held that there can be an easement to create noise enforceable against the owners of neighbouring properties and such a right can arise through prescription<sup>37</sup>.

One of the main obstacles to extending the categories of easements has been the need for clarity both the conditions which must be satisfied in order for the right to arise and also the extent of the right granted. Easements must be clearly defined so that both the servient and dominant owners are well aware of the extent of their rights. If these rights are exceeded the servient owner can then challenge the dominant owner in the courts and likewise the dominant owner can challenge if he/she feels that the servient owner has prevented the proper exercise of the easement. It was the vagueness of definition that was seen as the obstacle in *Hunter v Canary Wharf*<sup>38</sup>. The lack of clarity in definition had also prevented a claimant centuries earlier from claiming as an easement a right to a view<sup>39</sup> and likewise in *Browne v Flower*<sup>40</sup> the courts would not recognise a right to privacy. These problems in definition had not deterred the Supreme Court in *Coventry v Lawrence*<sup>41</sup> from finding a prescriptive easement of a right to make noise. Prescriptive easements require proof of use without force, stealth or permission over a period of twenty years. Satisfying the requirements for prescription in this case could have been problematic as noted by Martin Dixon ‘... the noise is likely to vary in intensity over time; it may be intermittent and it must endure for at least twenty years...’<sup>42</sup> These difficulties were recognised by

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<sup>35</sup> *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13.

<sup>36</sup> *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13.

<sup>37</sup> *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13.

<sup>38</sup> *Hunter v Canary Wharf* [1997] AC 655.

<sup>39</sup> *William Aldred’s Case* (1610) 9 Co Rep 57b (77 ER 816).

<sup>40</sup> [1911] 1 Ch 219.

<sup>41</sup> *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13.

<sup>42</sup> Martin Dixon “The Sound of Silence” [2014] 78 *Conv* 79.

Lord Neuberger in his judgment in the Supreme Court but he dismissed them as practical problems which in principle would not prevent a claim for the easement.<sup>43</sup> The approach of the court in this case was one of pragmatism. Once an easement has been found then it is for the court to solve any practical issues although this in itself is problematic. This suggests that the old obstacles of extent of the easement or uncertainty of definition can be met by taking a case by case approach. Emma Lees comments on the attitude of the court in *Coventry* ‘...if imposing constraints on such a right proves difficult in practice (due to uncertainty over permitted levels or time or use), the courts are likely to develop an approach which can impose certainty onto what could potentially be a vague right...’<sup>44</sup> It appears that the courts have somewhat relaxed their attitude to extending the range of recognised easements and it may be that the words of Lord St Leonards in *Dyce*<sup>45</sup> that the range of recognised easements is not fixed has far more truth today. The challenge made by the claimants in *Regency Villas*<sup>46</sup> was to the core of what rights can constitute an easement. Sporting and recreational rights were not recognised as easements<sup>47</sup> in spite of Evershed MR’s brief reference to the right to play tennis and bowls in *Re Ellenborough*<sup>48</sup> and unless there was an extension to include such rights the claim would automatically fail.

## **IUS SPATIANDI OR THE RIGHT TO WALK AT WILL**

For an easement to be found in *re Ellenborough Park* Evershed MR had had to overturn or at least attempt to compromise the principle that an easement cannot encompass a *ius spatiandi* a principle derived from the Roman law of servitudes and which Evershed MR described ‘as the right to wander at will over all and every part of another’s field or park’<sup>49</sup>. Evershed MR questioned the extent to which this principle from Roman law had ever been adopted into English law. ‘...apart from the opinion of Farwell J there has been ...no judicial authority for adopting the Roman view in this respect into the

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<sup>43</sup> *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13 at para 38.

<sup>44</sup> Emma Lees “Lawrence v Fen Tigers: Where now for Nuisance?” [2014] 78 *Conv* 449 at 452.

<sup>45</sup> *Dyce v Lady James Hay* (1852) 1 Macq 305.

<sup>46</sup> *Regency Villas Title Ltd and other v Diamond Resorts (Europe) Ltd and another* [2017] EWCA Civ 238.

<sup>47</sup> *Mounsay v Ismay* (1865) 3 Hurlstone and Coltman 486.

<sup>48</sup> *Re Ellenborough Park* [1956] Ch 131 at 169.

<sup>49</sup> *Re Ellenborough Park* [1956] Ch 131 at 176.



English law....’<sup>50</sup> He then considered the *ius spatiandi* in the context of a number of earlier cases and sources.<sup>51</sup> Although these cases are useful in shedding light as to how the courts viewed the principle they mainly concern the right of the public in general to enjoy an open space rather than the private right of an individual over a neighbour’s land and so there is a significant material difference in these cases to the facts of *Re Ellenborough Park* and *Regency Villas*.

In *Dyce v Lady James Hay*<sup>52</sup> Robert Dyce claimed that he, along with the other inhabitants of Aberdeen, as well as members of the public generally, had the right to use a footpath along the River Don which flowed through the defendant’s estate. The claim for a right of way was not problematic but he also sought a declaration that he and the other groups had the right to use a strip of land between the footpath and the river for ‘the purpose of recreation and taking air and exercise by walking over and through the same, and resting thereon as they saw proper’. These rights were similar to those claimed in *Ellenborough Park* and by using the word ‘recreation’ could encompass something more than mere ‘perambulation’ and perhaps include sport. On the facts Lord St Leonards was not prepared to find that rights had arisen because of the sheer extent of the rights that could be enjoyed. In his view the court could not restrict in such a way that only part of the land could be enjoyed in this way. In his view ‘...All the servitudes hitherto recognised sanctioned no principle which would entitle a party not merely to walk and recreate over public grounds, but over the enclosed domain of a private gentleman,—a right inconsistent with property’.<sup>53</sup>

Easements have often been denied where it appears that the servient owner is prevented from enjoying his or her land. This can be a temporary deprivation of rights<sup>54</sup> or a more substantial denial such as storage<sup>55</sup>. There is a difference between a claim that is excessive but is recognised as an easement and a claim that fails *ab initio* because it is a right

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<sup>50</sup> *Re Ellenborough Park* [1956] Ch 131 at 163.

<sup>51</sup> *Re Ellenborough Park* [1956] Ch 131 at 180.

<sup>52</sup> *Dyce v Lady James Hay* (1852) 15 D. (HL) 14.

<sup>53</sup> *Dyce v Lady James Hay* (1852) 15 D. (HL) 14 at 15.

<sup>54</sup> E.g. the use of the lavatory *Miller v Emcer Products Ltd* [1956] Ch 304.

<sup>55</sup> E.g. *Wright v Macadam* [1949] 2 KB 744.

that falls outside those rights that can be recognised as easements. *Dyce* appears to fall under the first group. An easement could have been granted but for the extent of use by the claimant group. The judge was concerned at the way the rights claimed would undermine the enjoyment of the landowner. Similar issues had arisen in *Attorney-General v Antrobus*<sup>56</sup> and again public rights to enjoy land were at issue. The claim failed in this case because it fell under the second group namely the court felt that the right could not be recognised as an easement at all. The issue of extent of the rights therefore was not considered in this case. A claim was made by the Attorney-General for members of the public to have the right of access to Stonehenge. The defendant Mr Antrobus who had succeeded to the estate five years earlier argued that he had a right to fence off the land as owner of the monument and he could therefore prevent the public from entering the area by certain roads running up to and through the monument. By contrast the Attorney-General on behalf of the general public argued that there had been access to Stonehenge for centuries for a range of purposes including public worship, the burial of the dead and even for deliberation of public affairs. He was relying on rights that had arisen through long use producing evidence that the public had had access to the monument for many centuries and such rights could not be denied. Farwell J held that the general public cannot acquire by user a right to visit a public monument or other object of interest upon private property. In his view the general public could not claim a right simply to walk about on land of another, in this case Stonehenge stating:

‘...It is impossible for the court, under those circumstances, to make any such presumption as is suggested. The public as such cannot prescribe, nor is the *ius spatiandi* known to our law as a possible subject-matter of grant or prescription’ adding ‘...and for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good...’<sup>57</sup>

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<sup>56</sup> [1905] 2 Ch 188.

<sup>57</sup> *Attorney-General v Antrobus* [1905] 2 Ch 188 at 198.

Stonehenge now has the status of a public monument<sup>58</sup> and the public do have a right of access today but it is not by means of an easement as claimed in *Antrobus*<sup>59</sup>.

Farwell J had previously referred to the status of the *ius spatiandi* in *International Tea Stores v Hobbs*<sup>60</sup>. Here the claim was for a right of way through the defendant's land. It was for a private right of access over the land of another and so the circumstances were much closer to those of *Ellenborough Park* and also to the claimants in *Regency Villas* although limited to a right of way rather than general enjoyment of the land. The claimants had originally leased the property but had later purchased the freehold. The right of way had been a purely permissive use whilst the claimants were tenants. Farwell J differentiated between the right of way which he was prepared to grant and the wider right of general enjoyment which he would not recognise. He illustrated the difference between the two in his dismissal of the case for the defendant '...the instance suggested by Lord Coleridge in his argument illustrates my meaning: he put the case of a man living in a house at his landlord's park gate, and having leave to use ... the drive as a means of access to church or town, and to use ... the gardens and park for his enjoyment, and asked, 'Would such a man on buying his house with the rights given by section 6 of the Conveyancing Act<sup>61</sup> acquire a right of way over the drive, and a right to use the gardens and Park?' My answer is 'Yes' to the first, and 'No' to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere *ius spatiandi* is not known....'<sup>62</sup> Farwell J drew a very clear distinction between the right to pass over a neighbour's land for access and the right to enjoy a neighbour's land for pleasure and enjoyment. In *Attorney-General v Antrobus*<sup>63</sup> the right claimed was not a right of passage from A to B but instead the right to access the area to enjoy

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<sup>58</sup> The last remaining member of the Antrobus family died in the First World War and Stonehenge was purchased at auction by Cecil Chubb in 1915 who then donated it to the nation. <http://www.english-heritage.org.uk/about-us/search-news/StonehengeSold100yearsago>.

<sup>59</sup> *Attorney-General v Antrobus* [1905] 2 Ch 188.

<sup>60</sup> *International Tea Stores v Hobbs* [1903] 2 Ch 165.

<sup>61</sup> Conveyancing Act 1881. Now replaced by s.62 Law of Property Act.

<sup>62</sup> *International Tea Stores v Hobbs* [1903] 2 Ch 165 at 172.

<sup>63</sup> *Attorney-General v Antrobus* [1905] 2 Ch 188.

Stonehenge. By contrast in *International Tea Stores*<sup>64</sup> there was a right to pass over the land which Farwell J had accepted.

In order for the claimants in *Re Ellenborough Park*<sup>65</sup> to succeed the court would have to accept that the claimants had a right to enjoy the land for walking about and so he had either to find that the *ius spatiandi* had no place in English law or that the right claimed was of a different nature. The claimants were not seeking a right of way of access from A to B; their claim was a right to enjoy the grounds and so was much closer to *Attorney-General v Antrobus*<sup>66</sup> than the right in *International Tea Stores*<sup>67</sup>. In distinguishing between the two decisions of Farwell J Evershed MR considered the status of all rights of way and held that enjoyment of such a right is not necessarily restricted to the passage from A to B but could include a right to walk about whilst gaining access. Indeed Coleridge J had commented over a century earlier in ‘...Has not the inhabitant of the square a right to cross the square, included in his right to walk about the square?’<sup>68</sup>

*Duncan v Louch* was heard by no less than three High Court judges as well as Lord Denman LJ the Lord Chief Justice and each used the opportunity to discuss the nature of a right of way. Lord Denman commented ‘...the right as pleaded is unlimited, to walk, pass and repass at his and their free will and pleasure; there is nothing said about the particular occasions of walking; that is an exact description of the use which parties make of such a terrace.’<sup>69</sup> Wightman J. in agreement with the Lord Chief Justice added ‘... I also am of opinion that this rule must be discharged. The right proved in evidence is a right of passage backwards and forwards over every part of the close: the right claimed is less than this, but is included in it, being a right of way from one part of the close to another.’<sup>70</sup> Farwell J did not refer to this decision in either

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<sup>64</sup> *International Tea Stores v Hobbs* [1903] 2 Ch 165.

<sup>65</sup> *Re Ellenborough Park* [1956] Ch 131.

<sup>66</sup> *Attorney-General v Antrobus* [1905] 2 Ch 188.

<sup>67</sup> *International Tea Stores v Hobbs* [1903] 2 Ch 165.

<sup>68</sup> *Duncan v Louch* (1845) 6 Q.B. 904 at 910.

<sup>69</sup> *Duncan v Louch* (1845) 6 Q.B. 904 at 911.

<sup>70</sup> *Duncan v Louch* (1845) 6 QB 904 at 911.

*Antrobus*<sup>71</sup> or *International Tea Stores v Hobbs*<sup>72</sup>. If he had done so perhaps he may have taken a different view on the status of the *ius spatiandi*.

So one could argue that even in the nineteenth century there had been a real challenge to the principle of *ius spatiandi* and the limits that it placed on the nature of an easement. Evershed MR was able to grant an easement to the claimants in *re Ellenborough Park* by differentiating between their claim and the *ius spatiandi*. He was rather dismissive of the application that Farwell J had made of the *ius spatiandi* in *Antrobus* and *Hobbs*. ‘...Farwell J was a judge of great learning and all his judicial utterances merit and are accorded more than ordinary respect; but in his, as in all judgments, more weight should be attached to that which was necessary for the decision of the case than to that which was merely obiter. It is plain that Farwell J’s reference, in the passage quoted<sup>73</sup>, to the *ius spatiandi* formed no necessary part of his judgment, and it is to be noted that he did not refer to any authority in support of it...’<sup>74</sup> However Evershed MR continued ‘...it must nevertheless be conceded that in the view of the learned judge the right of a man to use, as appurtenant to his own property, the gardens and park of another is a right the existence of which is not known to the law, even though that right be expressly granted...’<sup>75</sup>

In order to find for the claimants Evershed MR had to show that there was a distinction between the *ius spatiandi* and a right to enjoy a garden by walking about. The distinction is subtle and it is questionable whether there is indeed any difference. For Evershed MR there was a difference between wandering at will over an open space as described by the jurist Paul and referred to by Radcliffe in his seminal text on Land Law<sup>76</sup> and enjoying the gardens in *re Ellenborough Park*. Radcliffe had written of easements as follows ‘...the easement must be calculated to benefit the dominant tenement as a tenement, and not merely to confer a personal advantage on the owner of it. This principle is directly derived from the Roman law of servitudes and is well

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<sup>71</sup> *Atorney-General v Antrobus* [1905] 2 Ch 188.

<sup>72</sup> *International Tea Stores Co v Hobbs* [1903] 2 Ch 165.

<sup>73</sup> Evershed MR was referring here to *International Tea Stores Co v Hobbs* [1903] 2 Ch 165.

<sup>74</sup> *Re Ellenborough Park* [1956] 131 at 181.

<sup>75</sup> *Re Ellenborough Park* [1956] 131 at 181.

<sup>76</sup> Radcliffe *Real Property Law* 1st edn (Oxford University Press 1933) at p.131.

illustrated by the Roman jurist Paul<sup>77</sup> when he says you cannot have a servitude giving you the right to wander about and picnic in another man's land...'<sup>78</sup> Although Evershed MR found that there was such a difference he also sought to justify his decision by making the point that life in Rome as observed by Paul and life experienced by those who were part of the urban development of the 1950s in England including the owners of the properties next to Ellenborough Park was very different. Evershed MR saw a distinction in the nature of rights that could be claimed. '...Moreover, the exact characteristics of the *ius spatiandi* mentioned by Roman lawyers has to be considered. It by no means follows that the kind of right which is here in question, arising out of a method of urban development that would not have been known to Roman lawyers, can in any case be said to fall within its scope...'<sup>79</sup>

He continued '...And in any event, its validity must depend in our judgment, upon a consideration of the qualities which must now be attributed to all easements by the law relating to easements as it has now developed in England..'<sup>80</sup> His judgment is often seen as placing limitations on the nature of an easement but it also has references to both the flexibility of easements and the possibility of extending the rights claimed beyond those of merely walking. Above all the clear principle emerges that the right to enjoy the gardens and the parkland was one that falls naturally within property and home ownership.

In emphasising this point he referred to a work by Francis Bacon 'An Essay of Gardens'<sup>81</sup> where Bacon wrote '..no doubt a garden is a pleasure - on high authority, it is the purest of pleasures...' In upholding the rights to enjoy the grounds of Ellenborough Park Evershed MR was upholding the rights of all property owners to have the right to enjoy an open space and a garden. He

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<sup>77</sup> Dig. 8.1.8.

<sup>78</sup> Radcliffe *Real Property Law* 1st edn (Oxford University Press 1933) at p.131 Radcliffe footnotes his reference to the jurist Paul as follows '...Ut spatiari, et ut coenare in alieno possumus, servitus imponi non potest...'

<sup>79</sup> *Re Ellenborough Park* [1956] Ch 131 at 163.

<sup>80</sup> *Re Ellenborough Park* [1956] Ch 131 at 163.

<sup>81</sup> [https://www.gardensite.com/history\\_theory/garden\\_landscape\\_design\\_articles/europe/essay\\_francis\\_bacon\\_1625](https://www.gardensite.com/history_theory/garden_landscape_design_articles/europe/essay_francis_bacon_1625). He continued '...it is the greatest refreshment to the spirits of man; without which buildings and palaces are but gross handy-works: and a man shall ever see, that, when ages grow to civility and elegancy, men come to build stately, sooner than to garden finely; as if gardening were the greater perfection....' Cited by Evershed MR in *Re Ellenborough Park* [1956] Ch 131 at 179.

seemed to suggest that this was as natural an attribute of property as other previously known easements such as storage or rights of way.

‘...The right here ....is.... appurtenant to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such domestic purposes as... for example, for taking out small children in perambulators ...is not fairly to be described as one of mere recreation or amusement and it is clearly beneficial to the premises to which it is attached...’<sup>82</sup>

Of course this conclusion can still be questioned sixty years later because walking about a garden at will with no particular purpose in mind other than enjoying the fresh air and the open space seems to bear an uncanny similarity to the very right criticised by Paul and later Farwell J the *ius spatiandi*. Does wheeling a pram or having a picnic give such a right validity? The better view is to argue that Evershed MR was adhering to the reflection by Lord St Leonards that easements must reflect changes and life in suburban England in the 1950s.

### **CAN RECREATIONAL OR SPORTING EASEMENTS BE GRANTED?**

The decision in *re Ellenborough Park* went some way to extending recognised easements. It allowed the right of enjoyment of another’s land for walking about and not just for getting from point A to point B. The decision overcame the problems previously perceived with the *ius spatiandi* but in spite of obiter comments by Evershed MR on the possibilities of playing sport in the park<sup>83</sup>it did not extend the rights to sporting and recreational easements. He made the point that walking about in a garden was in his view a natural extension of rights for anyone who owns land. For him walking was ‘...a beneficial attribute of residence in a house as ordinarily understood..’ He added ‘...its use for the purposes, not only of exercise and rest but also for such domestic purposes .... For example for taking out small children in perambulators or otherwise – is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to

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<sup>82</sup> *Re Ellenborough Park* [1956] Ch 131 at 179.

<sup>83</sup> *Re Ellenborough Park* [1956] Ch 131 at 169.

which it is attached...'<sup>84</sup> However he felt bound by Baron Martin's judgment in *Mounsey v Ismay*<sup>85</sup> where the judge had drawn a clear distinction between rights which were of utility and rights that were mere recreation. In *Mounsey v Ismay*<sup>86</sup> the freemen and citizens of the town of Carlisle claimed the right to enter land in the hamlet of Kingsmoor on Ascension Day every year in order to hold horse races. As in *Attorney-General v Antrobus*<sup>87</sup> the right claimed was a public as opposed to a private right but the principles laid down were applicable to both types of cases. The claim was based on prescriptive use; proof of twenty years long use without permission, secrecy or force. The claim failed on the nature of the right claimed and not on the proof of prescriptive use. Although some issue was taken as to whether a group of individuals can enjoy an easement, the key obstacle to finding an easement was that the right claimed could not constitute an easement because it provided pleasure and was therefore merely recreational. The law was summed up by Martin B who referred in detail to Gale on Easements<sup>88</sup> as follows:

'...to bring the right within the term 'easement' ...it must be one analogous to that of a right of way or a right of watercourse, and must be a right of utility and benefit, and not one of mere recreation and amusement...'<sup>89</sup>

As Gray comments '...there can, in short, be no easement merely to have fun ...'<sup>90</sup> Evershed MR had firmly differentiated between 'having fun' as in watching and taking part in horse racing and merely walking about in a garden. In his view the latter constituted a right of utility and benefit essential to any landowner whereas the former did not enhance the land because it was not essential to home ownership. This was the key issue. One of the questions that any court must examine in considering claims for an easement is whether the right benefits or accommodates the land and the judgement in *Mounsey v*

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<sup>84</sup> *Re Ellenborough Park* [1956] Ch 131 at 179.

<sup>85</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>86</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>87</sup> *Attorney-General v Antrobus* [1905] 2 Ch 188.

<sup>88</sup> Gale on Easements, p. 5, 3rd ed., it is said: "An easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land, for the advantage of the dominant owner."

<sup>89</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>90</sup> K. Gray and S. Gray *Elements of Land Law* 5<sup>th</sup> edn (Oxford: OUP 2009) at p.611.



Ismay<sup>91</sup> clearly holds that enjoying land for pleasure prevents a right from becoming an easement. It fails to accommodate the land as it fails to provide utility or benefit. For the claimants in *Regency Villas*<sup>92</sup> the key issue was whether enjoying land for sport was merely recreational and merely for pleasure or did it provide utility or benefit to them. In order for their claim to succeed the court would need to view the use of the facilities in Broom Park Estate as being akin to the use of the Park in *re Ellenborough Park*<sup>93</sup> by the neighbouring landowners and going beyond mere recreation, otherwise the decision in *Mounsey v Ismay*<sup>94</sup> would have to be overturned. Everything rested in *Regency Villas*<sup>95</sup> on the view taken by the court of an individual's enjoyment of sporting facilities in twenty-first century Canterbury. Was such enjoyment similar to enjoying the facility of a garden, indeed essential to one's very existence or was such enjoyment merely recreational? Even in 1955 not everyone would have relished walking about in a garden,<sup>96</sup> so the fact that the enjoyment was not seen of utility to all would not necessarily defeat the claim. Likewise if the court viewed sport and recreation as of utility and benefit in twenty-first century England it would not defeat the claim to have evidence that there were groups of people who did not regard access to sports facilities as of benefit or utility to ownership of property.

There is useful dicta on the use of land for recreation albeit obiter in the context of the facts from McCullough J in *R v Metropolitan Borough Council*<sup>97</sup> decided some years after *Re Ellenborough Park*.<sup>98</sup> An application was made by way of judicial review for a declaration that an area of land, Doncaster Common, was an open space within the meaning of the Local Government Act 1972<sup>99</sup>, if this were so, a particular procedure had to be adopted by the Council who intended to lease it to a private golf club. The

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<sup>91</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>92</sup> *Regency Villas Title Ltd and Others v Diamond Resorts (Europe) Ltd and Another* [2015] EWHC 3564.

<sup>93</sup> *Re Ellenborough Park* [1956] 1 Ch 131.

<sup>94</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>95</sup> *Re Ellenborough Park* [1956] 1 Ch 131.

<sup>96</sup> Mark Twain's infamous view on exercise is well-known "I have never taken any exercise, except sleeping and resting, and I never intend to take any. Exercise is loathsome. And it cannot be any benefit when you are tired; I was always tired.

<sup>97</sup> *R v Metropolitan Borough Council* (1989) 57 P & CR 1.

<sup>98</sup> *Re Ellenborough Park* [1956] 1 Ch 131.

<sup>99</sup> As amended by the Local Government Planning and Land Act 1980 Act.

claimant Mr Braim had to show that the land was used for recreational purposes. Indeed it had been used for a range of activities in the past. The best known use was as a racecourse in particular as the location for a famous horse race of the flat season, the St Leger; but it was also used as a golf course and for activities such as jogging, kite flying and simply walking. There was no dispute that such activities took place but the Council argued that this was merely a concession by the Council who did not seek to enforce its rights in trespass. McCullough J drew an inference that the public had as 'of right' used Doncaster Common for recreation having reviewed both *Mounsay v Ismay*<sup>100</sup> and *re Ellenborough Park*<sup>101</sup>. He distinguished Baron Martin's comment that a right to hold races cannot be held to be the subject matter of a grant because it was for mere amusement and recreation<sup>102</sup> and was a mere licence and held that such comments were merely *obiter* and would not restrict his own conclusions.<sup>103</sup> He referred instead to two decisions the first *Tyne Improvement Commissioners v Imrie; Att-Gen v Tyne Commissioners*<sup>104</sup> where land had been dedicated to the public for such activities as bathing and fishing and a second case *re Haddon*<sup>105</sup> where land had been dedicated to the public for recreation. He concluded on the first case that '...bathing to say nothing of fishing is pure recreation...'<sup>106</sup> In allowing the application for judicial review McCullough J accepted that land may be dedicated to the public for the purpose of recreation and such a purpose would be recognised by the courts.<sup>107</sup>

It appears that there have been a number of judges over past centuries who have entertained the thought of extending the definition of an easement to include recreational rights and there is a suggestion in the judgments in these cases that the Judiciary were moving to the view that sporting rights were of utility and benefit per se. Perhaps the loyal adherence

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<sup>100</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>101</sup> *Re Ellenborough Park* [1956] 1 Ch 131.

<sup>102</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621. At 498.

<sup>103</sup> *R v Metropolitan Borough Council* (1989) 57 P & CR 1 at 6.

<sup>104</sup> *Tyne Improvement Commissioners v Imrie; Att-Gen v Tyne Commissioners* (1899) 81 LT 174.

<sup>105</sup> *Re Haddon* [1932] 1 Ch 131.

<sup>106</sup> *R v Metropolitan Borough Council* (1989) 57 P & CR 1.

<sup>107</sup> *R v Metropolitan Borough Council* (1989) 57 P & CR 1 at 9.

to the decision in *Mounsey v Ismay*<sup>108</sup> was itself at the very least misguided and quite possibly flawed given the context of the case.

## THE DECISION IN REGENCY VILLAS

The rights claimed in *Regency Villas* were over recreational facilities at Broome Park Estate, a mansion house near Canterbury with large grounds including Italianate gardens. The facilities were very extensive and included an indoor and outdoor swimming pool, 18-hole golf course, 3 squash courts, two outdoor hard-surfaced tennis courts, a putting green and a croquet lawn. Inside the Mansion House there were further facilities including a reception, a billiard-room and a TV room on the ground floor a restaurant, bar, gym, sunbed and sauna area, later converted into an indoor swimming pool. Before 1981 the entire estate was owned by a company called Gulf Investments but this was later divided and sold. The first claimant in the case was the owner of Eltham House, Canterbury which was part of the original estate and the second to fifth claimants were owners of timeshare apartments which were built in the grounds. Although the actual transfer from Gulf Investments had been lost by the time the case came to court the entry on the register had recorded that the land transferred had the benefit of rights including rights of way; rights of passage for key services such as gas and water and finally rights to enjoy certain facilities including the swimming pool, the golf course, the squash courts, tennis courts and ground and basement rooms on the transferor's adjoining estate. The key question to be decided was whether the rights to enjoy the facilities such as the swimming pool and golf course were property rights passing with the land or merely personal rights to be enjoyed by the owner at the time which could not be passed on to a subsequent transferee.

In the High Court<sup>109</sup>, Judge Purle revisited the four characteristics from *re Ellenborough Park*.<sup>110</sup> He had no difficulty with the first two characteristics: there were clearly two tenements; a dominant and servient tenement and they were each owned by different people. Perhaps somewhat surprisingly he was also satisfied that the rights in question did accommodate

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<sup>108</sup> *Mounsey v Ismay* (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>109</sup> [2015] EWHC 3564(Ch).

<sup>110</sup> *Re Ellenborough Park* [1956] Ch 131.

the land enjoyed by the claimants. He found that the right to enjoy these facilities enhanced the claimants' land in just the same way as enjoyment of the pleasure gardens had enhanced the enjoyment of the claimants in *re Ellenborough Park*. '... The use cannot be regarded as a mere right of recreation unconnected with the timeshare land. The extensive facilities are very obviously a major attraction of the timeshare units themselves and would have been a significant attraction for the occupiers of Eltham House had the intended development of the Regency Villas never gone ahead...'<sup>111</sup> He continued '...In short the adjacent facilities are connected with and part of the normal enjoyment of the timeshare land and must therefore be regarded as accommodating that land, just as, in *Ellenborough Park* the right to the full enjoyment of an ornamental pleasure ground was held to accommodate the surrounding plots...' <sup>112</sup>For him the main problem lay in the fourth characteristic namely that the right must be capable of being the subject matter of a grant. In order to address this he identified three concerns:

- i) Whether the rights were expressed in language which was too wide and too vague;
- ii) Whether such rights would amount to rights of joint occupation or substantially deprive the park owners of proprietorship or legal possession;
- iii) Whether such rights would constitute mere rights of recreation, possessing no quality of utility or benefit.<sup>113</sup>

The Judge found that the rights had been expressed in clear language. There was nothing vague or excessively wide. He found that the rights extended to all recreational and sporting facilities on the estate and to the gardens subject to rules and regulations laid down by the defendants.<sup>114</sup> He also found that the claimants had rights to facilities which had been improved or introduced since the conveyance in 1981. In his view '...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

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<sup>111</sup> [2015] EWHC 3564(Ch) at para 41.

<sup>112</sup> [2015] EWHC 3564(Ch) at para 42.

<sup>113</sup> [2015] EWHC 3564(Ch) at para 43.

<sup>114</sup> [2015] EWHC 3564 (Ch) at para 46.

improvements or replacements or adding facilities which would be for everyone's benefit....'<sup>115</sup> This was a bold assertion since the rights claimed were very wide and there had been number of changes since 1981. Although there were rules and regulations on use there was no specific limit laid down on use.

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Judge Purle also dismissed the possible obstacles of joint user and of deprivation of the owners of enjoyment.<sup>117</sup> This was a point raised in *Moncrieff v Jamieson*<sup>118</sup> and the Supreme Court had addressed this issue by looking at the nature of the landowner's rights. '...The fact that the servient proprietor is excluded from part of his property is not necessarily inimical to the existence of a servitude...'<sup>119</sup> He found that even where joint user had been at issue an easement had still been found.<sup>120</sup> According to Judge Purle the question was whether there had been substantial interference with the rights. For him there must be an element of 'give and take' between the servient and dominant owner.<sup>121</sup> Use of the swimming pool on a hot day could appear to be a similar scenario. The use of the facility by the claimants could amount to joint user with the defendants. Indeed in this case there were potentially a large number of claimants amounting to over one hundred and fifty people but in his view this was not problematic as the estate was large and it could readily cope with the number of people who could potentially enjoy the facilities.<sup>122</sup> In an argument reminiscent of those of Lord Scott in *Moncrieff*<sup>123</sup> Judge Purle pointed out that the defendants still retained a range of rights denied to the claimants. '...The defendants are in possession and control of all the facilities on site. They regulate the use of those facilities and run the estate as a commercial business open to the public as well as to time share owners. They have in no sense been ousted and their ability to exercise ownership rights and

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<sup>115</sup> [2015] EWHC 3564(Ch) at para 44.

<sup>116</sup> [2015] EWHC 3564(Ch) at para 44.

<sup>117</sup> [2015] EWHC 3564(Ch) at para 50.

<sup>118</sup> [2007] UKHL 42.

<sup>119</sup> [2007] UKHL Lord Hope at para 24.

<sup>120</sup> *Miller v Emcer Products Ltd* [1956] Ch 304 is one of the best known cases where an easement was upheld which consisted of a right to use a lavatory on the premises of another. The defendant had claimed that this amounted to joint user because there must be times when the landowner would be prevented from enjoying the facilities himself. This argument was rejected by the court.

<sup>121</sup> [2015] EWHC 3564 (Ch) at para 48.

<sup>122</sup> [2015] EWHC 3564 (Ch) at para 49.

<sup>123</sup> [2007] 1 W.L.R. 2620 at 2636.

to remain in possession remains....'<sup>124</sup> He continued '...the defendants are not prevented from altering the layout of the estate to its best advantage and ... there have in fact been many alterations and additions over the years. They are not sharing joint possession but control the site and manage the various facilities, including the determination of opening and closing times...'<sup>125</sup> He pointed out that by contrast the rights of the claimants were very limited. They could not dig up plants and trees which they did not like or remove sand from the bunkers on the golf course for a sandpit at home. These were rights enjoyed by defendants and so would be denied to the claimants.<sup>126</sup>

He finally considered the issue of the recreational rights. In his view it was just a small step to take the rights enjoyed by the claimants in *re Ellenborough Park*<sup>127</sup> to the enjoyment of sporting or recreational facilities. He found that there was no English (or Scottish) authority authoritatively determining whether or not an easement can exist to use (say) a golf course, swimming pool or tennis court, he concluded '... in my judgment there is no legal impediment to the grant of such an easement, provided the intention to grant the easement, as opposed to a merely personal right, is evident on the proper construction of the grant...'<sup>128</sup> Therefore relying on a wealth of authorities from Canada and Australia,<sup>129</sup> where the courts had upheld easements for sporting and recreational purposes, Judge Purle was able to uphold all the rights as easements. He was concerned that the judgment of Lord Scott in *Moncreiff*<sup>130</sup> might have been fatal to the claim since Lord Scott had stated unequivocally '...I doubt whether the grant of a right to use a neighbour's swimming pool could ever qualify as a servitude...'<sup>131</sup> The key problem for Lord Scott was the obligation to ensure there was water in the pool. '...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

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<sup>124</sup> [2015] EWHC 3564 (Ch) at para 50.

<sup>125</sup> [2015] EWHC 3564 (Ch) at para 50.

<sup>126</sup> [2015] EWHC (Ch) at para 51.

<sup>127</sup> [1956] Ch 131.

<sup>128</sup> [2015] EWHC (Ch) 3564 at para 56.

<sup>129</sup> Cases such as *Blankstein, Fages and Fages v Walsh* [1989] 1 WWR 277; *Dukart v District of Surrey* (1978) 86 DLR 609; *Grant v MacDonald* [1992] 5 WWR 577.

<sup>130</sup> [2007] UKHL 42 at para 45.

<sup>131</sup> [2007] UKHL 42 at para 47.

the grantor chose...'<sup>132</sup> As a result he found that the right to use a swimming pool would be no more than an *in personam* contractual right at best. Judge Purle dismissed these comments in spite of the partial similarity to the facts holding that the example given by Lord Scott had no application in the present case.<sup>133</sup> The key point for Judge Purle was the context of the case. The grant had been made to timeshare purchasers by developers and so the rights promised were crucial to their enjoyment. This finding suggests that his decision may have been different had the claimants owned an ordinary domestic property albeit promised with the right to use sporting and or recreation facilities of the neighbouring vendor.<sup>134</sup> Indeed he alludes to this point commenting '...I am not concerned with neighbours in the purely domestic context but with a grant made by a developer for a number of timeshare owners....thus I do not see why the claimants could not provide their own water supply...if they needed to fill the pool...'<sup>135</sup> Judge Purle upheld all the claims including rights to use facilities in the Mansion House such as use of the bar, the television room and the snooker and billiard room.

The defendants appealed to the Court of Appeal which not surprising given that the charges for use of these facilities, if they were not declared easements, could be very substantial and would raise considerable. For the claimants a finding in their favour would increase their own enjoyment of the timeshare properties, reduce costs and undoubtedly enhance the value of each property.

The grounds of appeal were based on three main issues. Firstly, that the rights could not amount to easements because the facilities could only be maintained at considerable expense; secondly, that the rights granted could not extend to facilities not even contemplated at the time of the 1981 transfer; and thirdly, that the rights granted comprised at best a bundle of rights which the judge failed to unpack.

The defendants had relied on the first issue arguing that as the claimants had conceded that it was possible for them to withdraw the facilities

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<sup>132</sup> [2007] UKHL 42 at para 47.

<sup>133</sup> [2015] EWHC 3564 (Ch) at para 63.

<sup>134</sup> [2015] EWHC 3564 (Ch) at para 64.

<sup>135</sup> [2015] EWHC 3564 (Ch) at para 64.

and close their business at any time then there could not be an easement. The Court of Appeal dismissed this stating that it had long been held that there is no obligation on the servient owner to construct, maintain or repair a right of way or any other easement over servient land and held that on this basis even if the servient owners went out of business or ceased to maintain the facilities there would be no reason why valid easements would lapse. Further, the dominant owners could enter the land to themselves repair and maintain the facilities at their own expense.<sup>136</sup>

The second ground of appeal was potentially more problematic. The difficult question was whether the grant was only for a right to use recreational facilities that existed at the time of the grant or whether it extended to replacement or substituted facilities. Judge Purle had held that the grant clearly extended to all sporting and recreational facilities on the Broome Park Estate and to the gardens and facilities that were neither there nor planned in 1981 or which may have been significantly improved since then.<sup>137</sup> There was some caution from the Court of Appeal to this approach. The court was only prepared to uphold rights that were in the contemplation of the parties at the time of grant not future rights different in nature from the rights in existence at the time of grant. ‘...Moreover there is no element of futurity in the words used, so we cannot see how they can be construed as including any future sporting or recreational facilities that might later be provided by the defendants on their own land...’<sup>138</sup> The court was prepared to accept that the grant would extend to new or improved facilities<sup>139</sup> and even extensions to existing facilities where there had been a substitution or a facility had been moved from one location to another.<sup>140</sup> On the facts the new indoor swimming pool built in the basement of the Mansion House fell outside the ambit of a substituted facility although the court had upheld the use of the outdoor heated swimming pool as an easement<sup>141</sup> the new indoor pool was outside the terms of the 1981 grant. The court was keen to reject rights that

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<sup>136</sup> [2017] EWCA Civ 238 at para 49.

<sup>137</sup> [2015] EWHC 3564 (Ch) at para 44.

<sup>138</sup> [2017] EWCA Civ 238 at para 40.

<sup>139</sup> [2017] EWCA Civ 238 at para 41.

<sup>140</sup> [2017] EWCA Civ 238 at paras [42—46].

<sup>141</sup> [2017] EWCA Civ at para 71 and para 82.



were too wide in range. As stated by Sir Geoffrey Vos C ‘...we do not think that the grant was a free ranging easement or an easement at will...’<sup>142</sup> This is important as it makes it clear that any claim to new or changed facilities can only take effect by strict construction of the terms of the original grant.

The final grounds of appeal were by far the most far-reaching since this touched on the nature of the rights and the crucial issue of whether recreational and sporting rights can take effect as easements. The Court of Appeal suggested that it would have been better if the Judge had ‘unpacked’ each of the easements in turn rather than to see them as one grant particularly as pointed out by Sir Geoffrey Vos C that ‘...some of the grants had never before been specifically recognised by English law...’<sup>143</sup>

Sir Geoffrey Vos C revisited *re Ellenborough Park*<sup>144</sup> and the principle laid down that an easement can exist allowing the right to use a park as a garden with ancillary rights such as resting on seats. He reflected on the fact that rights which were considered as ‘mere recreation or amusement’ could not constitute easements.<sup>145</sup> He continued ‘...Easements in the modern world must, of course, retain their essential qualities. But the views of society as to what is mere recreation and amusement may change, even if the exclusion of such rights were authoritative...’<sup>146</sup> He placed much weight on the benefits in modern society of playing sport asserting, ‘...physical exercise is now regarded by most people in the United Kingdom as either an essential or at least a desirable part of their daily routines. It is not a mere recreation or amusement. Physical exercise can, moreover, in our modern lives, take many forms, whether it be walking, swimming or playing active games and sports. We cannot see how an easement could either in 1981 or in 2017 be ruled out solely on the grounds that the form of physical exercise it envisaged was a game or sport rather than purely a walk in a garden...’<sup>147</sup>

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<sup>142</sup> [2017] EWCA Civ 238 at para 50.

<sup>143</sup> [2017] EWCA Civ 238 at para 51.

<sup>144</sup> [1956] Ch 131.

<sup>145</sup> [2017] EWCA Civ 238 at para 53.

<sup>146</sup> [2017] EWCA Civ 238 at para 53.

<sup>147</sup> [2017] EWCA Civ 238 at para 54.

He then considered the decision of *Mounsey v Ismay*<sup>148</sup> and Baron Martin's emphasis on the need for an easement to provide 'utility and benefit' rather than 'mere recreation and amusement'. He decided that the crucial question was what constituted 'a right of utility and benefit'.<sup>149</sup> '...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...an easement should not in the modern world be held to be invalid on the ground that it was 'mere recreation or amusement' because the form of physical exercise it envisaged was a game or sport...'<sup>150</sup> In view of the changing nature of what constitutes utility in modern times he felt able to overrule the decision in *Mounsey*<sup>151</sup> '....to be clear, we do not regard Baron Martin's *dictum* as binding on this court, and we would decline to follow it insofar as it suggests that an easement cannot be held to exist in respect of a right to engage in recreational physical activities on servient land...'<sup>152</sup>

The Court then dealt with each claim separately upholding the use of the gardens, the tennis courts, the squash courts, the putting green and croquet lawn and the existing outdoor heated swimming pool as well as the golf course all as easements. The Court rejected the other claims over the ground floor of the Mansion House including the reception, the billiard room and television room and held them to be no more than personal rights to use recreational facilities. The restaurant, gym and bar and sunbed and sauna areas were also rejected as easements as they could not exist without the provision of chattels. Sir Geoffrey Vos C differentiated between the benefits of playing certain sports such as tennis and squash compared to the benefits of playing snooker or watching television. He commented '...What we have said about the modern approach of taking physical exercise is not really applicable to recreational indoor games such as snooker or watching television...'<sup>153</sup> Although his overall view on the value of sport in twentieth-first century life was to be welcomed his views on specific sports seemed to be arbitrary. The

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<sup>148</sup> (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>149</sup> [2017] EWCA Civ 238 at para 56.

<sup>150</sup> [2017] EWCA Civ 238 at para 56.

<sup>151</sup> (1865) 3 Hurlstone and Coltman 486; 159 E.R. 621.

<sup>152</sup> [2017] EWCA Civ 238 at para 56.

<sup>153</sup> [2017] EWCA Civ 238 at para 80.

distinction between croquet and bowls and likewise snooker and billiards is very fine and the energy expended in both could be very similar whereas the use of the gym, which was rejected as an easement would normally require far greater expenditure of energy. The significance of this decision must lie in its recognition of recreational and sporting rights as easements which has long been denied in English law unlike other jurisdictions such as Australia<sup>154</sup>. Kevin Gray reflected in 2008 ‘...The judicial animus against recreational easements has undoubtedly receded in recent times. It may be an index of a more hedonistic (or even a more health conscious) age that it no longer seems inappropriate to acknowledge the easement character of certain recreational facilities annexed to dominant land...’<sup>155</sup>

The decision is potentially very wide-reaching. Rights previously denied because they were a right of ‘mere recreation or amusement’ can today take effect as a legal easement and be binding on the current and all subsequent owners of the servient land.

### **WHETHER AN EASEMENT CAN EXIST WHERE THE SERVIENT OWNER HAS A POSITIVE OBLIGATION**

The final question discussed by both courts was the extent to which the issue was affected by positive obligations on the servient owner. Some years earlier Lord Scott had questioned in *Moncrieff*<sup>156</sup> whether use of a swimming pool could constitute an easement because of the obligation of the servient owner to fill and maintain the pool. The servient owner should not have any positive obligation imposed merely permissive use and enjoyment of his land. Kevin Gray describes the limits on the servient owner thus ‘...an easement requires of the servient owner nothing more than an act of sufferance, in that he must either allow the dominant owner to do something on the servient land or abstain from some action of his own on that land which would otherwise be entirely legitimate...’<sup>157</sup> A compelling argument had been made on behalf of the defendants in *Regency Villas* that these rights could not be easements

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<sup>154</sup> See *City Developments Pty Ltd v Registrar General of the Northern Territory* (2000) 135 NTR; *Riley v Penttila* [1974] VR 547.

<sup>155</sup> K. Gray and S, Gray *Elements of Land Law* 5<sup>th</sup> edn (Oxford: OUP 2009) at p.612.

<sup>156</sup> [2007] UKHL 42 at para 47.

<sup>157</sup> K. Gray and S, Gray *Elements of Land Law* 5<sup>th</sup> edn (Oxford: OUP 2009) at p.620.

because of the onus put upon them to maintain the facilities such as the swimming pool as well as the need to provide certain chattels such as tennis nets. Sir Geoffrey Vos C dismissed such points by arguing that the dominant owners could easily bring such chattels as a net for the tennis courts, they could also maintain the surface of the courts themselves. In relation to the swimming pool he concluded as follows ‘...We accept that a modern swimming pool will often have sophisticated filtration, heating, chlorination and water circulation system. But such systems are not essential to the benefit and utility of using the pool. Water is obviously essential, but that can...be provided by the owner of the dominant tenement if the servient owner closes his business or allows the pool to fall into disrepair...’<sup>158</sup>

## **CONCLUSION**

This is a decision consistent with the view of Lord St Leonard in *Dyce*<sup>159</sup> that the categories of easements should not be closed and should expand and develop over time. In reviewing the authorities on recreational easements there is a sense that the refusal to uphold recreational rights had been questioned a number of times by the Judiciary<sup>160</sup> and it is therefore surprising that the principle has remained for so long. *Mounsey v Ismay*<sup>161</sup> was fact specific; the use of land for a horse race by the public was some way from a claim over private land by several private landowners. Of course the decision in *Regency Villas* depended on the generous interpretation given to the claimant’s rights by Evershed MR in *Re Ellenborough Park*<sup>162</sup> which allowed them to walk about and enjoy their neighbour’s land. In reviewing his judgment it is not too fanciful to suggest that even then he was conceding that the claimants potentially had rights that went beyond merely walking in the park.<sup>163</sup> He had already seen that walking in your neighbour’s garden could include enjoying a game of tennis and bowls. It is surprising that it has taken over sixty years for recreational rights to be recognised as legal easements.

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<sup>158</sup> [2017] EWCA Civ at para 72.

<sup>159</sup> (1852) 1 Macq 305.

<sup>160</sup> See comments in *Duncan v Louch* (1845) 6 Q.B. 904.

<sup>161</sup> (1865) 3 Hurlstone and Coltman 486.

<sup>162</sup> [1956] Ch 131.

<sup>163</sup> [1956] Ch 131 para 169.

It remains to be seen how the courts will interpret and develop the principles enunciated by the Court of Appeal in *Regency Villas*. Three key areas may well prove to be crucial in this.

Firstly, how strictly will the terms of the original grant be applied? The Court of Appeal was very careful in its construction of the 1981 grant and the wording used. Will the construction be limited to facilities already in existence or will it be deemed to include extensions or later new facilities? The court considered this but left some unanswered questions such as whether improvements and upgrading which instituted new facilities would be included? Could the rights ever extend beyond those currently enjoyed? An example would be if the tennis courts were resurfaced with an all-weather surface facilitating other sports such as hockey or netball would they too be accepted?

Secondly, will recreational and sporting easements be readily accepted where the dominant owner is an ordinary landowner as opposed to a timeshare owner who has specifically rented property because of the provision of the leisure facilities? Judge Purle highlighted in his judgment that in his words ‘...the extensive facilities are very obviously a major attraction of the timeshare units themselves and would also have been a significant attraction for the occupiers of Eltham House had the intended development of the Regency Villas never gone ahead...’<sup>164</sup> The key question is whether this decision would have been the same had the claimants not been owners of timeshare properties, where sports facilities were very much at the heart of the property being sold. If a claimant had a licence to use a vendor’s swimming pool or tennis court and on purchasing the property no mention was made of such rights would they now pass under s.62 Law of Property Act 1925 even if use of such facilities were not deemed to be at the heart of the purchase?

Finally, how far will the courts allow easements in the future which require maintenance of the recreational facility? The discussion about the outdoor swimming pool suggested that all that is necessary for a swimming pool is water. This cannot be right. A swimming pool is not like an outdoor lake

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<sup>164</sup> [2015] EWHC 3546 (Ch) at para 41.

although an analogy was drawn by Sir Geoffrey Vos C;<sup>165</sup> it requires constant maintenance in order to be enjoyed and the pump, filtration and heating would all require some maintenance. Without maintenance, use of the facility would rapidly become unusable and a potential health hazard.

### **A NOTE OF CAUTION**

This appears to be a logical and sensible extension to the characteristics of *re Ellenborough Park* and is likely to be welcomed by a wide section of the public who enjoy sport and have rights over a neighbour's land for such use. However there is an alternative view to this decision. Should the courts be able to grant the status of a legal easement to a whole new category of easements constituting recreational rights? A question mark has long lain over the breadth of the grant in *re Ellenborough Park*. If rights are now to be extended to the use of facilities such as tennis courts, swimming pools and golf courses it can be argued that this is an unjustifiable extension of the meaning of 'utility and benefit'. Undoubtedly sport has become more important in people's lives in the twenty-first century but so has many other aspects of life. Once the range of recognised legal easements starts to widen then how far can this go? Evershed MR drew a distinction between the right to use the park and the right to use the Zoological Gardens free of charge or to attend Lord's Cricket Ground without payment. Evershed MR argued that '...such a right would undoubtedly increase the value of the property conveyed but could not run with it at law as an easement, because there was no sufficient nexus between the enjoyment of the right and the use of the house...'<sup>166</sup> One can but speculate whether Evershed MR would have considered the right to play croquet on a neighbour's lawn or the right to play squash on his squash court as having sufficient nexus to the use and enjoyment of one's house as a landowner.

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<sup>165</sup> [2017] EWCA Civ 238.

<sup>166</sup> [1956] Ch 131 at para 174.