# Easements: the essential characteristics and the decision in Regency Villas Titles Ltd and others v Diamond Resorts (Europe) Ltd and others

Lucinda Pattison, Teaching Fellow for Property law

Welcome to your property law blog. My name is Lucinda Pattison and I'm a teaching fellow on the Property Law module. What I'm going to be talking to you about today is easements and in particular, recent case law development as to the type of easement that has been recognized by the courts. As part of this, I'm going to talk to you about the essential characteristics that are needed for an easement just to remind you of what those are.

Before I get into that, a reminder of what an actual easement is. It is a right one landowner enjoys over land adjacent to their own which they don't actually own. For example a right of way over a neighboring piece of land. If the right is recognized as having the characteristics of an easement and that comes from the case of Re Ellenborough Park and is created by one of the ways that it recognized, then you do have an easement. You have this right.

Now before I get into the Re Ellenborough Park criteria, just some reminders on the terminology that is used relating to easements. The first one is "dominant tenement." This just means benefited land. This is the land that has the benefits of the right. So a right to walk over the neighboring land. We then got the "servient tenement" which means burdened land. This is the land that has the burden of the right. It is the land that is actually walked over by the neighbor.

What is an easement then? Well, we don't have a definitive list of easements. Instead, what we look out for, are four characteristics that were set out by the Court of Appeal in the 1956 case of Re Ellenborough Park. I'm going to take you through those now because they are relevant to the recent case of law development.

The first characteristic then is that you need a dominant tenement and a servient tenement. The rights itself has to be actually attached to land and we need those two identifiable pieces of land. We must have a recognizable and identifiable piece of land that benefits from the easement and likewise, we must have a recognizable and identifiable piece of land that is burdened with it. For further case law discussion on this point, see the case of London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd.

Second of all then is that the easement must accommodate the dominant tenement. In other words, the right cannot be a personal advantage for the landowner now, in other words, not connected to the land. Whatever the easement is, it actually has to benefit whoever owns that piece of land now and in the future. In that way, it is not personal. What you're looking for is that the right increases the normal enjoyment of the land. There are contrasting cases on this point but a well-known one and one that is often used to illustrate the point is the case of Hill v Tupper. Part of being able to accommodate the dominant tenement means that the dominant tenement and servient tenement must be sufficiently proximate to each other. In other words, you can't be talking about one of the pieces of land being for example in Newcastle and the other piece of land being in Cornwall, it just doesn't work. A relevant case to consider on that point is the case of Pugh v Savage.

The third criteria then is that the dominant tenement and servient tenement must be owned or occupied by different people. A very simple reason for this, you don't and cannot have an easement over your own land. It is your land, you can walk all over it whenever you want to. You don't need to be given a right to do so. What we need is either completely separate ownership of the two pieces of land at the time the easement is created or separate occupation. For example, you can have a freeholder in one part and a tenant in the other. We do have the concepts of quasi easements for the purposes of creation under the rule of Wheeldon v Burrows. That is not something we're getting into in this particular blog.

Finally, the easements must be capable of forming the subject matter of a grant. Now there's several parts to this actual final point. First one being that we need a capable grantor and a capable grantee. Secondly, the right must be sufficiently definite. The nature and extent of it must be certain. Those are your four Re Ellenborough Park criteria. But to have an easement, there are also some additional criteria that need to be satisfied. First, of, you cannot require the servient tenement owner to actually take any action in relation to this easement. There cannot be a positive obligation on them to actually do anything. Second of all, the rights must be exercisable as of right. In other words, no permission from the servient tenement owner is needed in order to exercise the right. Also, the right that we're talking about cannot give exclusive possession of the servient tenement to the dominant tenement. In other words, we cannot stop the servient tenement owner from actually being able to use their own land. There've been some very interesting cases on this point in relation to parking and also storage as well as actually allowing people to park on land amounts to giving them exclusive possession. The following thing is that the rights must be within the general nature of rights that are capable of existing as easements. In other words, it must be a right that the court is prepared to recognize. It has been said that the list of easements is never closed. However, it's very unlikely that the court would now recognize any new negative easements. In other words, an easement that would prevent a servient tenement owner from being able to use their land in some way. New positive easements, however, will be recognized. This is allowing a dominant tenement the right to do something on the servient tenement land and this is in particular, would have been recognized recently. We've added a new type of easement. There are numerous cases on those final points but as I said, this blog is going to be focusing really on that final point about the fact that the courts will now recognize different types of easements. This has come from The Supreme Court case of Regency Villas Title Ltd v Diamond Resorts Europe Ltd. This was decided by The Supreme Court in November 2018.

Just some background to the case, first of all, here the appellants owned a mansion and an estate. The respondents owned timeshare villas built on land within that estate. There was a transfer in 1981 which granted the timeshare owners the right to use the leisure facilities on the estate and also in the mansion. There was originally an outdoor pool, actually on the estate but that was subsequently filled in a few years later and instead, a new indoor pool was built within the mansion itself.

A bit of further background to this is that the original grantor of the rights actually covenanted to maintain the leisure facilities but this wasn't binding on successes in title so the appellants were not actually obliged to pay for the upkeep and maintenance of those facilities. Subsequently, the facilities fell into disrepair and the respondents made voluntary payments towards their upkeep. The respondents required a declaration from the court that they were entitled by way of an easement to the free use of the facilities. The court of appeal held that they did have an easement in respect to the facilities but not in relation to the pool in the mansion because it would have subsequently been built. The appellants appealed on the basis that it could not be an easement onto grounds. First of all, that the rights did not accommodate the respondents' dominant tenement. Secondly that it was not capable of forming the subject matter of a grant.

The respondent cross-appealed and said that the easement that they had should be extended to the swimming pool in the mansion. They also required compensation for the payments that they've made under protests to be able to use the facilities, in particular, the indoor swimming pool. Hence they actually wanted recognition that they had an easement and could use them for free. Now The Supreme Court held that the appeal was dismissed and allowed the cross-appeal. I'll explain why the court came to that conclusion. The following points I'm going to talk about can all be found within the full judgement of the case which is well worth reading to fully appreciate the detailed discussion of easements by Lord Briggs. I would recommend that you read that.

First of all, it was a finding of fact that the parties in 1981 intended to create an easement rather than a purely personal right. The transfer itself actually expressed the rights to be for the transferee, successes in title, lessees and occupiers of the timeshare development. It was felt that the court should give effect to this common intention. The grant given was to use a complex of facilities within the leisure complex from time to time. In terms of the Re Ellenborough Park criteria, criteria one and three were satisfied. The arguments fell on criteria two and four. Whether the rights actually accommodated the dominant tenement and whether it was capable of forming the subject matter of a grant.

Now with regard to the rights accommodating the dominant tenement, the court said this was a question of fact. Here, the dominant tenement was the timeshare development and the court found that timeshare development itself would be used for holidays by persons seeking recreation. Applying Re Ellenborough Park, the grant of rights to use an immediately adjacent leisure complex was of service, utility and benefit to the timeshare properties so, therefore, this was satisfied.

In respect of the rights being capable of forming the subject matter of a grant, the appellants here relied on the argument of ouster in relation to the maintenance of the facilities. Now ouster relates to the point that by granting the easement, a servient tenement owner would be deprived of their reasonable use of the servient tenement or the lawful possession and control of it and on that basis, the right should not be granted. This is what they were looking for.

Here, what the court actually said was that it would be wrong to test whether a grant of rights amounted to an ouster of the servient tenement owner by reference to what a dominant tenement owner could do by stepping rights if the servient tenement owner stopped carrying out the necessary maintenance of the servient tenement. This was for two reasons. They said that ouster should be addressed by the expectations of the parties at the time of the grant as to who is actually going to be responsible for the maintenance of the servient tenement. Here they found that it was the owners of the leisure complex. Secondly, they said the stepping rights were rights to reasonable access for maintenance and would actually only arise if the owners gave up the maintenance and control of the facilities. What the Supreme Court found was that there was nothing in the grant of the rights here that impinged upon the rights of management and control in any way. Lord Briggs went further and said there's actually nothing incompatible with an easement where the parties share an expectation that the servient tenement owner would maintain the servient tenement and that can actually include structures upon the servient tenement and any chattels on it as well. However, what is essential is that the servient tenement owner doesn't actually undertake any legal obligation of maintenance with the dominant tenement owner. Here there was no such obligation.

The conclusion from this case is that the grant of purely recreational and sporting rights over land which genuinely accommodates adjacent land as is the case here because the dominant tenement itself was used for recreational purposes can be an easement. Now the Supreme Court held this did in fact include the swimming pool in the mansion and they also said that the respondents

were entitled to compensation for the payments made under protest to the appellants to use the facilities. What this case of Regency Villas is, is evidence that the list of easements is not closed. The courts will recognize new easements and in fact the way in which we own land here, it was by way of timeshare development and the way in which we use land here, it was for recreational and sporting purposes, is constantly evolving and thought therefore so too should the types of easements that are recognized by the courts provided of course that they still satisfy the long-established criteria from Re Ellenborough Park. That concludes your blog.