Opening Pandora's box? Recreation pure and simple: easements in the Supreme Court

*Chris Bevan**

Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57; [2018] 3 W.L.R. 1603

Keywords: easements, recreation, sports and leisure facilities, maintenance obligations, validity

Introduction

The recent judgment of the Supreme Court in *Regency Villas*[1] represents the latest instalment in the saga of the status of recreational rights in the law of easements. The extent to which rights of recreation can amount to effective easements is an issue that reaches back to the seminal case of *Re Ellenborough Park*[2] in which, as any good land law student will recall, the court laid down the four essential characteristics or conditions for easements. In that case, Evershed MR in the Court of Appeal, laid down four characteristics[3] for determining whether a right arising is or is not capable of being an easement. The recent *Regency Villas* litigation, culminating in the Supreme Court judgment, was concerned chiefly with the requirement that for a right to be an easement it must 'accommodate the dominant tenement.' This element, widely interpreted as a requirement that the right must benefit the land and not the landowner personally,[4] raises a problem for those rights which relate to recreational or sporting activity. The traditional view was that rights of such recreational flavour would rarely if ever amount to valid easements. This view was explored in *Re Ellenborough Park* itself where Evershed MR affirmed the 'proposition stated in Theobald's The Law of Law, 2nd ed. (1929) … [that] an easement 'must be a right of utility and benefit and not one of mere recreation and amusement.'[5] Called upon to consider whether rights of 'full enjoyment of a pleasure ground' by landowners of surrounding properties could amount to an easement, the Court of Appeal in *Re Ellenborough* held that use of the park included use for enjoyment of air, for exercise and other amenities which added considerable value and enjoyment to the surrounding properties and, therefore, did amount to an easement.[6] Yet, key questions remained unanswered. Beyond a pleasure ground or communal park, for example, what recreational and sporting rights could give rise to effective easements? It is on this legal question that the *Regency Villas* litigation has turned and, most recently, has received the scrutiny of the Supreme Court. As Lord Briggs explained in the Supreme Court in *Regency Villas*, the appeal offered an opportunity for the country's top court to consider, for the very first time, the extent to which rights of a pure sporting and recreational nature amounted to easements or whether such rights would fall foul of the limitations on the scope of easements in English law which the Law Commission in 2011 strongly recommended should not lightly be set aside.

---

* Associate Professor in Property Law, School of Law, The University of Nottingham; my sincere thanks to the anonymous reviewer for the most helpful comments on an earlier draft.

[1] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57.

[2] *Re Ellenborough Park* [1956] Ch. 131.

[3] *Re Ellenborough Park* [1956] Ch. 131, at 140-141; Danckwerts J in the High Court and Evershed MR in the Court of Appeal drew extensively on *Cheshire The Law of Real Property, 7th edn* (Butterworths, 1954). The original characteristics have subsequently been glossed by a number of additional requirements or qualifications; on which see generally J. Bray, 'More than just a walk in the park: a new view on recreational easements' (2017) 81 Conv. 418.

[4] See *Hill v Tupper* (1863) 159 E.R. 51; cf. *Moody v Steggles* (1879) 12 Ch. D. 261.

[5] *Re Ellenborough Park* [1956] Ch. 131, at 142.

[6] *Re Ellenborough Park* [1956] Ch. 131, at 150.

***Regency Villas*: Factual nexus**

The dispute in *Regency Villas* centred on the use of purely recreational facilities at Broome Park, a substantial country estate in Kent comprising the Mansion House, Eltham House and surrounding land. The recreational facilities were wide-ranging including an outdoor swimming pool, three squash courts, two hard-surfaced tennis courts, an 18-hole golf course, a putting green and croquet lawn. In addition, inside the Mansion House, there was a billiard room, TV room, a restaurant, bar, gym, sunbed and sauna which were later converted into an indoor swimming pool. Prior to 1981, the estate had been owned by Gulf Investments Ltd which sought to develop the land into a timeshare and leisure complex. It converted the two upper floors of the Mansion House into 18 timeshare apartments and individual purchasers of the units were granted free use of the communal and leisure facilities in the Mansion House and surrounding grounds. The development proved such a success that in 1980 the company re-acquired Eltham House (which had been sold previously in 1967) for the purposes of conversion and construction of a further 26 apartments in the grounds under a freehold structure to be named Regency Villas. In 1981, Gulf Investments transferred Eltham House to an associated company and part of the 1981 transfer included the grant of rights in the following terms:

> "…the Transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floors of the sporting or recreational facilities … on the Transferor's adjoining estate."[7]

Over time, a number of the facilities began to deteriorate such that by 2000 the outdoor swimming pool had fallen into disuse and had been filled in; the putting green and croquet lawn closed and other facilities demolished. The freehold owner of Eltham House and individual timeshare owners claimed a declaration that the 1981 transfer had created easements in their favour; that they were entitled under the easements to free use of all the sporting and recreational facilities provided within the Park; an injunction to restrain interference with their use of the facilities and return of intermittent sums they had paid for use of the facilities since 2009 along with damages for interference with the easements. The key question to be determined by the court was whether or not the rights to enjoyment of these recreational and sporting facilities could amount, in law, to easements.

Judgments of the lower courts

HHJ Purle QC sitting in the High Court[8] began by revisiting the essential characteristics of easements from *Re Ellenborough Park* finding, without difficulty, that there were dominant and servient tenements each owned by different parties.[9] Perhaps somewhat surprisingly, he also found with little hesitation that the recreational and sporting facilities readily 'accommodated' the land; holding that just as use of the communal 'pleasure ground' in *Re Ellenborough Park* had increased the enjoyment of the land, so too did these facilities increase the claimants' enjoyment of their land.[10] Purle HHJ noted that the facilities could not be regarded as a mere right of recreation unconnected with the timeshare land; that the facilities were obviously a major attraction of occupying the land.[11] More problematic was the fourth characteristic from *Re Ellenborough Park*; namely that the right must be capable of forming the subject matter of a grant. Three concerns were identified: (1) whether the language expressing the rights in question was too broadly-drawn and vague; (2) whether the rights

---

[7] See discussion of the transfer in the Supreme Court: *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [8], [9] .

[8] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch).

[9] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [40].

[10] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [41]-[42].

[11] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [41]-[42].

would amount to occupation and thereby deprive the owners of possession; (3) whether the rights amounted to mere rights of recreation with no quality of utility or benefit.[12] HHJ Purle dismissed each concern in holding: (1) that the rights were expressed in sufficiently clear language which was nether too wide nor vague; (2) that the defendant land owners retained a range of rights denied to the claimants and so could not be said to have been deprived of legal possession by the claimants; and (3) although no English (nor Scottish) case had established whether an easement could exist as to use of a golf course, swimming pool or tennis court, there was no legal impediment to granting such easements.[13] Drawing heavily on Canadian and Australian case law[14] (where rights of sporting and recreational activity have been upheld as giving rise to easements), HHJ Purle found the recreational facilities in the instant case did amount to easements.

The determination by the High Court in the claimants' favour would inevitably mean the claimants could enjoy the recreational facilities free of charge, thereby reducing their costs and increasing the amenity of the timeshare properties. Understandably perturbed at the prospect of the substantial cost implications of this position, the Park owners appealed. Three principal grounds were raised in the Court of Appeal: that the rights could not amount to easements due to the considerable expense involved in maintaining the facilities; that the rights granted could not extend to facilities not even contemplated at the time of the transfer in 1982 and, finally, that the rights comprised a bundle of rights that the judge had failed to properly unpack.[15] The Park owners argued that, as they could withdraw the facilities at any time and were not under a positive duty to maintain them, the rights could not amount to easements.[16] The Court of Appeal rejected this holding that the absence of a positive maintenance obligation did not preclude the finding of an easement and neither would the easement lapse if the facilities were not maintained.[17] The court did, however, accept that HHJ Purle had construed the extent of the grant too widely in holding that it extended to all recreational facilities on the land including facilities never present nor contemplated at the time of the grant. The easement that arose was not 'free-ranging… or an easement at will' and did not extend to covering future facilities not contemplated in 1981.[18] There was, said the court, 'no element of futurity in the words used.'[19] It would extend to new or improved facilities only if they amounted to a substitution or a facility moved from one location to another and could be construed as falling within the terms of the original grant.[20] As such, the new indoor swimming pool in the basement of Mansion House fell outside the 1981 grant. Finally, the Court of Appeal held that HHJ Purle should have considered each facility separately and 'unpacked' each easement in turn as opposed to viewing the rights as giving rise to one grant particularly, as Sir Geoffrey Vos explained, that some of the grants 'had never before been specifically recognised by English law…'[21] Whilst the Court of Appeal underscored that 'easements in the modern world must, of course, retain their essential qualities' Vos noted that 'the views of society as to what is mere recreation and amusement may change…'[22] Special emphasis was

---

[12] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [43].
[13] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [44]-[56].
[14] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [57]-[61]; Perle HHJ drew on cases such as *Blankstein, Fages and Fages v Walsh* [1989] 1 W.W.R. 277; *Dukart v District of Surrey* (1978) 86 D.L.R. 609; *Grant v MacDonald* [1992] 5 W.W.R. 577.
[15] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [2]; on which generally see: N. Pratt, 'A proprietary right to recreate' (2017) 81 Conv. 312; see also: J. Bray, 'More than just a walk in the park: a new view on recreational easements' (2017) 81 Conv. 418.
[16] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [25].
[17] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [59], [62].
[18] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [50]-[51].
[19] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [40].
[20] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [37].
[21] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [51].
[22] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [53].

placed on the societal benefits of playing sport and that physical activity is no longer recreation or amusement but seen by many as essential. Easements, whether in 1981 or today, should not be ruled out on the basis of whether the form of physical exercise envisaged was a sport or simply walking in a garden as in Re *Ellenborough*.[23] Notwithstanding, the court repeated the orthodox position that the 'essence of an easement is to give the dominant tenement a benefit or utility' but added that in today's world a right should not fail as an easement simply because the form of physical exercise envisaged was a game or sport.[24]

***Regency Villas* in the Supreme Court**

In the Supreme Court[25] before a panel comprising 5 justices including the President of the Supreme Court, the appellants (the Park owners) sought dismissal of all the claims arguing that the 1981 transfer granted no enduring rights in the nature of easements in relation to any of the facilities in the Park. By way of cross-appeal, the respondents (the owners of Eltham House and several individual timeshare owners) sought restoration of the trial judge's order as to the full extent of their rights to the facilities including the new swimming pool.[26] By a majority of 4 to 1, the Supreme Court dismissed the appeal and allowed the cross-appeal. Lord Briggs, delivering the main judgment (with whom Lady Hale, Lords Kerr and Sumption agreed) began by drawing three central conclusions all of which, he argued, flowed from the 'true construction'[27] of the factual matrix of the 1981 transfer:

1. First, it was 'abundantly plain'[28] that the parties intended to confer, through the 1981 transfer, the status of a property right in the nature of an easement rather than a purely personal right. This was apparent from the terms of the transfer which was expressed to confer rights not merely on the transferee but upon its successors in title, lessees and occupiers of what was to become a timeshare development. This, being 'the manifest common intention' of the parties, should be given effect to by the court via application of the validation principle: *ut res magis valeat quam pereat* – it is better to validate a thing than to invalidate it.[29]

2. Secondly, the 1981 transfer, in the view of the majority, should be construed as the grant of 'a single comprehensive right to use a complex of facilities' as those facilities evolved and not as were fixed and in place in 1981.[30] The grant thus extended to cover facilities constructed and in use in 1981 but also those additional and replacement facilities later constructed and put into operation within the Park during the excepted life of the timeshare development. In this way, the majority upheld the trial judge's view that the grant was of a single, composite right to use recreational and sporting facilities within the Park 'from time to time.'[31] The Court of Appeal's approach of unpacking each facility and considering each separately was rejected and ought not

[23] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [54].
[24] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [56].
[25] *Regency Villas Title Ltd and Others v Diamond Resorts (Europe) Ltd and Others* [2018] UKSC 57
[26] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [16]-[17].
[27] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [21].
[28] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [25].
[29] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [25].
[30] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [26] – [29].
[31] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [27].

be followed. The Court of Appeal had placed significant weight on the absence of words of futurity in the 1981 transfer as the basis for construing the rights granted as limited only to those facilities already in existence. For Lord Briggs, this absence of futurity was 'amply compensated' by the inherent nature of the subject matter of the grant; namely the fact that the sporting and recreational facilities would be bound to be subject to significant alterations and changes during its business lifetime.[32] The Supreme Court therefore returned to 'the judge's more coherent analysis.'[33] The court rejected the appellants' argument that this broad construction of the grant to include future facilities would be void for perpetuity. The court held that when the grant was made in 1981, the leisure complex over which the facilities operated was in existence at the time and the fact that the precise nature and location of those facilities might change over time did not bring the grant within the perpetuity rule.[34]

3. Thirdly, there was no express provision requiring the grantee or its successors or timeshare owners to make a contribution to the costs of operating, maintaining, renewing or replacing the facilities. Nor had there been any challenge made to the trial judge's conclusion that no such term should be implied on the basis of necessity.

Turning to the subject matter of the grant, the Supreme Court noted that all parties in the case recognised *Re Ellenborough Park* as constituting the 'sheet anchor' as to whether the 1982 grant gave rise to an easement. Lord Briggs proceeded to engage in a close analysis of *Re Ellenborough Park* and the issue of whether recreational facilities such as those forming the subject of the 1981 grant could amount to an easement.[35] Counsel for the Park owners argued that the rights granted were incapable of amount to an easement on three grounds: (i) the rights (being purely recreational in nature) did not accommodate the dominant tenement; (ii) exercise of the rights by the timeshare owners would amount to an ouster of the appellant owners of the Park and (iii) enjoyment of the rights depended on substantial management and maintenance expenditure by the appellants. Briggs located as the 'main controversy' the issue of whether recreational rights can be seen as accommodating the dominant tenement and noted the origins of this question in the Roman law doctrine that a *ius spatiandi* ('the privilege of wandering at will over all and every part of another's land'[36]) cannot amount to a servitude (and traditionally has not been regarded as creating an easement in English law).[37] Having identified case law on opposite sides of the debate,[38] Briggs clarified that *Re Ellenborough Park* should be taken as dispositive of the issue; namely that it is not fatal to the existence of an easement that the right granted is for recreational and sporting use and that the question of whether the right accommodates the dominant tenement must be considered separately

---

[32] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [26].

[33] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [27].

[34] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [29].

[35] See generally *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [44]-[60]

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

[37] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [44].

[38] *Duncan v Louch* (1845) 6 Q.B 904; *Mounsey v Ismay* (1865) 3 Hurl. & C. 486; *Keith v 20th Century Club Ltd* (1904) 73 LJ Ch. 545; *International Tea Stores Co v Hobbs* [1903] 2 Ch. 165; *Attorney General v Antrobus* [1905] 2 Ch. 188.

on the facts of every case.[39] In the present case, it was, said Briggs, 'plain beyond a doubt' that the grant of rights to use an immediately adjacent leisure complex with all its recreational and sporting facilities was 'of service, utility and benefit' to the timeshare apartments just as the communal garden was of service, utility and benefit to townhouses in *Re Ellenborough Park*.[40]

Counsel for the Park attempted to argue, relying on *Hill v Tupper*,[41] that the recreational and sporting rights were so extensive that they could not be regarded as ancillary to the timeshare apartments and this distinguished these rights from those arising in *Re Ellenborough Park* such that no easement could arise. The court rejected this approach finding that *Hill v Tupper* was not authority for the proposition that only rights subordinate or accessory to the enjoyment of the dominant tenement could be easements. Provided the rights were for the benefit or utility of the dominant tenement, it did not matter if enjoyment of the recreational rights was the primary reason why the timeshare owners acquired rights in the land.[42]

Turning to the fourth condition of the *Re Ellenborough Park* test (that the right must be capable of forming the subject-matter of a grant), the 1981 grant was found to be drafted with sufficient clarity and precision and could not be said to be 'precarious.'[43] As to the objection to recognition of any easements on the grounds of ouster, the court noted the Law Commission's recommendation for abolition of the uncertain principle[44] and highlighted that both the trial judge and Court of Appeal had rejected this submission on the basis of concurrent factual analysis.[45] Ouster, said the court, was an essentially factual question and the findings of fact below would not be disturbed. Nothing in the terms of the 1981 grant impinged in any way on the Park owners' rights of management and control.[46] The suggestion that an easement could not arise on the facts because of the alleged positive duties the rights placed on the Park owners was therefore rejected. Whilst it was well-settled that an easement does not require anything more than 'mere passivity' on the part of the servient owner,[47] there was nothing inherently incompatible with the recognition of a grant of rights as an easement that the parties share an expectation that the servient owner will undertake management, maintenance and repair of the servient tenement, any structures, fittings or even chattels located on it. All that matters is that, as on the present facts, the servient owner has undertaken no legal obligation of that kind to the dominant landowners.[48]

---

[39] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [48].
[40] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [53].
[41] *Hill v Tupper* (1863) 159 E.R. 51.
[42] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [54]-[57].
[43] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [60].
[44] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [61] referencing Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com Report No. 327, at [3.207]-[3.211].
[45] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [63].
[46] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [62]-[65].
[47] See *Gale on Easements,* 20th edn (London: Sweet & Maxwell, 2017), at [1-96] and *Jones v Price* [1965] 2 Q.B. 618, at 631 per Willmer LJ: 'an easement requires no more than sufferance on the part of the occupier of the servient tenement' and *Moncrieff v Jamieson [2007]* UKHL 42 at [47] per Lord Scott.
[48] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [69].

In overview, the majority of the Supreme Court was satisfied that the 1981 transfer exhibited all the well-settled essential characteristics of an easement as laid down in *Re Ellenborough Park*. Nevertheless, the court did acknowledge the novelty of the case and, in three key respects, by comparison with *Re Ellenborough Park*, recognised that this particular easement represented the 'breaking [of] new ground'.[49] First, the nature and extent of the recreational and sporting facilities at Broome Park was far greater and the enjoyment of these rights called for far more intensive management than in *Re Ellenborough Park*. Secondly, *Re Ellenborough Park* concerned far fewer dominant owners than Broome Park whose facilities were ultimately available to three separate groups of timeshare owners. Thirdly, the costs of management and maintenance of Ellenborough Park were shared between the dominant owners whereas in Broome Park these were to be undertaken by the servient land owners.[50] In the present case, the right granted by the 1981 transfer was, 'a recreational right pure and simple.'[51] This was quite in contrast to the Court of Appeal's insistence in *Re Ellenborough Park* that the right was not 'merely' recreational but rather the provision of a communal garden for townhouses. In short, 'the grant of purely recreational (including sporting) rights over land which genuinely accommodate adjacent land may be the subject matter of an easement'[52] provided it satisfies the four conditions laid down in *Re Ellenborough Park*. It will, said the court, commonly be the case for timeshare developments that the 'accommodation' requirement will generally be satisfied by a recreational right.[53]

In an important dissenting opinion, Lord Carnwath (who would have allowed the appeal) emphasised that the intended enjoyment of the rights granted (in particular as to the golf course and swimming pool) could not be achieved without the active participation of the Park owners in providing maintenance and management.[54] For Lord Carnwath, 'the doing of something by the servient owner'[55] was therefore an intrinsic part of the right claimed and 'neither principle, nor any of the 70 or so authorities which [were cited in argument] ranging over 350 year … come near to supporting the submission that a right of that kind [claimed] can take effect as an easement.'[56] In effect what was being claimed was not a simple property right at all but permanent membership of a country club. Lord Carnwath would not therefore have extended the *Re Ellenborough Park* principles to recognise what was for him a 'wholly new form of property right.'[57]

Assessing the significance of the Supreme Court judgment

---

[49] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [75].
[50] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [75].
[51] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at at [75].
[52] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [81].
[53] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [81].
[54] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [95] per Lord Carnwath.
[55] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [95].
[56] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [96]
[57] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [96].

How then are we to assess the significance of the Supreme Court's decision in *Regency Villas*? On any reading, the decision of the Supreme Court is significant for the majority's recognition that the grant of *merely* or *purely* recreational and sporting rights can amount to an easement which had long been denied in English law unlike, for example, in Australia.[58] The justices themselves (including Lord Carnwath in dissent) were well-aware of the novelty and reach of this conclusion. While Evershed MR in *Re Ellenborough Park* had sought to make clear that rights of a *mere* or *pure* recreational character were not in the nature of easements, the Supreme Court has strongly departed from this position and, in so doing, has recognised a new *species* of easement if perhaps not quite what Lord Carnwath described as a wholly new property right. The Supreme Court in recognising that purely recreational rights can amount to easements has built upon, extended and expanded the approach taken by Evershed MR in *Re Ellenborough Park*. Evershed MR in *Re Ellenborough Park* had already gone some way in extending the categories of recognised easements in accepting that the right of enjoyment of another's land by walking about in a communal garden amounted to an easement and did not conflict with or offend the *ius spatiandi*. Despite obiter comments referencing the playing of tennis and bowls, Evershed MR did not, however, extend the law of easements to broadly-drawn sporting and recreational rights. Rather, he felt bound by Baron Martin's distinction in *Mounsey v Ismay*[59] between rights of mere recreation (which could not amount easements) and rights of utility and benefit (which could amount to easements). As Gray and Gray wrote (prior to the *Regency Villas* litigation), 'there can, in short, be no easement merely to have fun'[60] for this would not, we were told, satisfy the requirement that a right must 'accommodate' the dominant tenement but rather provide pleasure to the right-holder personally. In light of *Regency Villas*, we must revisit this position. We might say that the Supreme Court has indicated that rights to having fun[61] can now amount to easements. Of course, the court's judgment does not reference the language of 'fun' or 'pleasure' directly (it does reference 'amusement') but instead underscores the 'utility and benefit' of recreational and sporting activity to society. As Lord Briggs explained:

> "[T]he 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."[62] [Emphasis added].

Any prospect going forward of raising an argument that a right cannot give rise to an easement because it is purely recreational or sporting in nature has been thoroughly shut down unless and until the matter is revisited in the Supreme Court. Post-*Ellenborough*, commentators, such as Baker,[63] had queried the 'semantic coverage' of the easement identified in that case and, more pointedly, questioned whether the case would be limited to 'parks' and 'gardens' or be applied more broadly. *Regency Villas* has certainly answered these questions; heralding a vast expansion from easements of a 'pleasure ground' to easements extending to an entire leisure complex. As such, those owning

[58] See, for example, *City Developments Pty Ltd v Registrar General of the Northern Territory* (2000) 135 N.T.R. 1; *Riley v Penttila* [1974] V.R. 547.

[59] *Mounsey v Ismay* (1865) 3 Hurl. & C. 486.

[60] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.611.

[61] Recall, the grant of rights in Broome Park extended to swimming pools, golf courses, TV room, billiards, saunas and so on – surely all sources of fun (if in varying measure and according to personal taste).

[62] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [59].

[63] A. Baker, 'Recreational privileges as easements: law and policy' (2012) 76 Conv. 37, 39.

leisure sites including sporting facilities who allow others to make use of these facilities must now proceed with caution (and very careful draftsmanship!) to avoid the potentially costly implications of a finding of a single, composite recreational easement. The result is that qualifiers 'mere' or 'pure' prefixing the very notion of recreation no longer have any place in the law of easements.

Secondly, in locating the significance of *Regency Villas*, we should reflect upon and draw close attention to the court's ready willingness to expand the categories of accepted easements. Whilst recognition of such wide-ranging and purely recreational and sporting rights as constituting an easement is certainly novel, there is strictly nothing novel about the courts (at least notionally) embracing the idea that the categories of easements can and must adapt and expand in response to changes in society. In fact, for over 200 years, the courts have underlined the need for the law of easements to move with the times. As Lord St Leonards noted in *Dyce v Lady James Hay*[64] in 1852 in respect of the law of servitude, 'the law … no doubt, accommodates itself to the changing circumstances of society, and a new process or invention may be turned into servitude.' However, as Bray has explored in this very journal,[65] there has historically been an inherent conservatism in the approach of English judges faced with calls to create new categories of easement.[66] As Bray documents, attempts to create new easements, for example, as to protection from weather[67] and interference with television reception[68] have roundly failed. Gray has argued, reflecting the fact that easements necessarily constrain and encumber the rights of landowners, '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.'[69] Indeed as Cresswell J expounded in *Ackroyd v Smith*, '[i]t is not in the power of a vendor to create new rights not connected with the use or enjoyment of land . . . 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.'[70] This echoed dicta in *Keppell v Bailey* just a few years earlier that, 'incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner.'[71] In this vein, the House of Lords discussed famously in *Hunter v Canary Wharf*[72] how definitional difficulties would mitigate against the creation of new categories of property rights such as easements to TV reception.

Set against the court's historical and hitherto reluctance and disinclination towards creating new species of easements, the judgment of the Supreme Court in *Regency* stands as evidence of an important shift towards a more flexible even enthusiastic approach and acceptance that, as Gray has suggested, 'a 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.'[73] The Supreme Court has seemingly shaken off its conservatism towards recognising new species of easements. In fact, a survey of recent Supreme Court jurisprudence demonstrates a burgeoning willingness on the part of the court to accept that embracing novel forms of easements may not just be desirable but also necessary. *Regency Villas*

---

[64] *Dyce v Lady James Hay* (1852) 1 Macq. 305.
[65] J. Bray, 'More than just a walk in the park: a new view on recreational easements' (2017) Conv. 418, 420-423.
[66] See, for example, comments of R. Reno in R. Remo, 'The Enforcement of Equitable Servitudes in land: Part I' (1942) 28 *Virginia Law Review*, 951.
[67] *Phipps v Pears* [1965] 1 Q.B. 76.
[68] *Hunter v Canary Wharf* [1997] A.C. 655.
[69] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.616.
[70] *Ackroyd v Smith 138 E.R. 68;* (1850) 10 C.B. 164, 188.
[71] *Keppell v Bailey 39* E.R. 1042*;* (1834) 2 My. & K. 517.
[72] *Hunter v Canary Wharf* [1997] A.C. 655.
[73] K. Gray and S. Gray, *Elements of Land Law, 5th edn* (Oxford: OUP, 2009), p.616.

confirms and bolsters this trajectory. By way of example, in *Coventry v Lawrence*,[74] the Supreme Court held that there can be an easement (arising by prescription) to create noise which is enforceable against owners of neighbouring land. Neuberger justified this approach on the basis of 'both principle and policy,'[75] despite the fact that, as Dixon has explained, an easement to create noise is at best academically 'awkward'[76] particularly in terms of determining the scope of such a right. Nevertheless, the Supreme Court faced with these practical difficulties, adopted an approach founded on 'pragmatism'[77] which, as Bray has argued, indicates that the old obstacles hindering the court's recognition of new easements can be overcome on a case-by-case basis.[78] This more contemporary alacrity in recognising new easements is matched by a slew of recent cases where the court has recognised existing, established easements operating in new and unique contexts for example in *Mulvaney v Gough*;[79] *Moncrieff v Jamieson*;[80] *Magrath v Parkside Hotels Ltd*.[81] *Regency Villas* continues this direction of travel and, moreover, it is suggested that it is precisely the pragmatism seen in *Coventry* that we witness also at play in *Regency Villas* in recognising that the 1981 transfer should be construed as the grant of a single and wide-ranging, composite easement. This is surely the clearest expression of the malleability and capacity of the law of easements to bend to reflect societal change.

Thirdly, in assessing the significance of the Supreme Court's judgment, we should focus on the limits and potential scope of the decision going forward. The wide-reaching nature of the majority's approach may be alarming to some who will interpret the Supreme Court as endorsing an erosion of some of the traditional constraints that existed formerly on the creation of easements. As Lord Carnwath noted in dissent, 'our view of the merits should not allow us to distort the correct understanding of a well-established legal concept.'[82] Baker, in exploring the arguments mounted historically against recognition of purely recreational easements, notes as a key complaint the need to 'keep the floodgates shut.'[83] This 'floodgates' argument is likely to rear its head in light of the judgment of the Supreme Court in *Regency Villas* which, for some, will be seen as sanctioning a troublingly expansive approach to the law of easements; an opening of Pandora's box.

The context in which the case was decided is also crucial here. In *Re Ellenborough Park*, the easement arose in an exclusively residential context. *Regency Villas*, by contrast, sees an easement of purely recreational rights arise vitally in a context which is mixed in nature: both residential (timeshare development) but also commercial (the wider leisure complex development). This is important for it broadens enormously the potential scope of the *Regency Villas* decision and takes it some way from the narrow, communal 'pleasure ground' easement of a park garden as seen in *Re Ellenborough Park*.[84] Yet the scope of *Regency Villas* is broader still as Lord Briggs appears to establish something akin to a

---

[74] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13; on which see M. Dixon, 'The Sound of Silence' (2014) 78 Conv. 79; E. Lees, 'Lawrence v Fen Tigers: Where now for Nuisance?' (2014) 78 Conv. 449, 452.

[75] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13 at [34].

[76] M. Dixon, 'The Sound of Silence' (2014) 78 Conv. 79, 80.

[77] J. Bray, 'More than just a walk in the park: a new view on recreational easements' (2017) 81 Conv. 418, 422.

[78] J. Bray, 'More than just a walk in the park: a new view on recreational easements' (2017) 81 Conv. 418, 422; see also E. Lees, 'Lawrence v Fen Tigers: Where now for Nuisance?' (2014) 78 Conv. 449.

[79] *Mulvaney v Gough* [2002] EWCA Civ 1078.

[80] *Moncrieff v Jamieson* [2007] UKHL 42.

[81] *Magrath v Parkside Hotels Ltd* [2011] EWHC 143 (Ch).

[82] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [94].

[83] A. Baker, 'Recreational privileges as easements: law and policy' (2012) 76 Conv. 37, 52-54

[84] A. Baker, 'Recreational privileges as easements: law and policy' (2012) 76 Conv. 37, 38.

presumption that rights of a recreational and sporting character will 'accommodate' the dominant tenement and give rise to easements (subject to satisfaction of the remaining conditions under *Re Ellenborough Park*). Indeed, at a minimum, Lord Briggs has created a firm precedent for timeshare, holiday leisure complexes specifically in holding that:

> "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."[85]

Yet the decision extends the scope of easements seemingly even further in its discussion of ouster and positive obligations owed by servient land owners. The argument advanced by the appellants that servient land owners should have no positive obligations imposed on them and that the rights claimed could not therefore amount to easements because of the onus placed on the Park owners as to maintenance of the facilities, was surely a compelling one. This traditional orthodoxy in the law of easements has been repeated often, from *Gale on Easements*,[86] to Willmer LJ in *Jones v Price*[87] that '… an easement requires no more than sufferance on the part of … the servient owner.' Equally, Lord Scott in *Moncrieff v Jamieson*[88] confirmed that the grant of a right requiring some positive action to be undertaken by the owner could not amount to a servitude.[89] Lord Scott gave the example of a right to use a neighbour's swimming pool as failing as an easement for precisely this reason. Arguably, the grounds given by the Supreme Court for overcoming this traditional constraint on the law of easements (and with little effort, it must be said) are artificial and strained. The majority held there was 'nothing inherently incompatible' with the recognition of rights over land where the parties share an expectation that the servient land owner will undertake management, maintenance and repair of any structures, fittings or even chattels thereon.[90] There was no difficulty, said the court, so long as there was no legal obligation of that kind owed to the dominant owner. This is a significant judicial sleight of hand, for, as the Park owners argued, the positive obligations of maintenance placed on them was potentially vast. Sir Geoffrey Vos in the Court of Appeal had reached the same conclusion albeit via a somewhat fantastical and, with respect, unconvincing, route in holding that all that was ultimately essential for a swimming pool (by analogy with a natural lake) is the water and that the further systems supporting swimming pools (filtration, heating, chlorination, circulation) were somehow not essential to the benefit and utility of using the pool.[91] Vos held that, should the servient owner cease to provide water, the dominant owners could simply provide it themselves.[92] Equally, dominant owners could mow the lawn to render a golf course playable.[93] The reasoning of the Court of Appeal here lacks credibility and betrays an air of unreality and, so too (though to a lesser degree) does the reasoning in the Supreme Court when, palpably, the Park owners will owe extensive, positive obligations to the dominant land owners in support of the rights granted. It is here that Lord Carnwath's dissent is doubtless at its most potent. An easement, as he recounts with clarity, is a right to do something or to prevent something on another's land and is not a right to have something

---

[85] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [81].

[86] *Gale on Easements*, 20th edn (London: Sweet & Maxwell, 2017) at [1-96].

[87] *Jones v Price* [1965] 2 Q.B. 618, at 631.

[88] *Moncrieff v Jamieson* [2007] UKHL 42.

[89] *Moncrieff v Jamieson* [2007] UKHL 42 at [47] per Lord Scott.

[90] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [69].

[91] See discussion of Sir Geoffrey Vos in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [72].

[92] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [72].

[93] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [77] per Sir Geoffrey Vos.

done.[94] According to the majority's reasoning, it appears the court has abolished or at least engaged in a dramatic re-framing of the classic statement that rights imposing positive obligations cannot amount to easements.

A further issue concerning the extent of the easement recognised by the Supreme Court in *Regency Villas* warrants mention and flows from the class of interested parties. According to the Supreme Court's newly sanctioned, broad factual enquiry, in determining whether an easement exists, account is taken not only of the interests of the owners but also of occupiers and, importantly, regard is also had to the interests and expectations of those visiting or making use of the land as guests. How far this should be seen as representing an extension of the law on easements is open to question. On one view, it is no extension at all but rather a clarification that the court will be guided by the particular context of the case, the nature of the land and those using it when assessing if an easement exists. Given the particular timeshare context of *Regency Villas* and that the recreational rights by their nature related to facilities that would be enjoyed by a wide range parties including visitors/guests to the Park, it is perhaps uncontroversial that all such parties' interests would be considered as part of the court's exercise. Indeed, as the 1981 grant of rights made clear, the property right was to be conferred not just on the transferee but also its successors, lessees and occupiers of what was to become a timeshare development. Unsurprising, one might argue then, that the expectations of a broad array of potentially-interested parties should be examined. However, there is another possible and, it is argued, more persuasive view here; namely that the court is explicitly authorising a far more expansive factual and legal analysis than has hitherto been observed in the case law. In the pre-*Regency Villas* case law, account is not taken of the interests and expectations of the visiting public or guests when examining whether a right is to be recognised as an easement. This was made plain by Lord Briggs who, noting that *Regency Villas* 'broke new ground' set the case apart from *Re Ellenborough Park* in the following terms:

> "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."[95]

If, going forward, in determining the existence of an easement, the court is prepared to take account of the interests not just of land owners but also those of the visiting public or short-term guests, this marks a departure from the orthodox position and an expansive new approach. Such an approach is, surely, eminently defensible in circumstances where the land over which the purported easement is said to operate is used or likely to be used for recreational purposes by visitors or the public and was always intended so to be used. To not take these interests into account in this context would be problematic. In this sense, *Regency Villas* makes explicit the uncontentious point that every case should be judged according to its own particular facts. However, there may be potential problems with delimiting this new expansive approach. Easements are powerful rights that can endure for decades through land owners and successive conveyances of land. Given this enduring nature and the potency of easements as proprietary rights, how far must the court be persuaded that visitors/guests have sufficient connection to the land before they merit having their interests taken into account? Where will and should the line be drawn between land visited by those with only a fleeting or transient connection and attachment and cases such as *Regency Villas* where it was in the inherent nature of the timeshare development and leisure complex that visitors would make use of the recreational facilities. The acceptance in *Regency Villas* that purely recreational rights can amount to easements doubtless makes this question more pressing as recreational easements have the potential to be enjoyed by a far wider group of people when compared to the more traditionally-recognised

[94] Lord Carnwath at [95] citing *Gale on Easements*, 20th edn (London: Sweet & Maxwell, 2017), [1-80].
[95] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [75].

easements; people who may have little or no meaningful connection to the land. We await a test case on this point but there may be legitimate concerns as to the undue burden that recreational easements will impose on the servient land and land owners. Such burdens may be only magnified when the interests and expectations of visitors and guests to the land are, additionally, to be taken into account by the court.

There are, however, grounds for resisting an overly hysterical reaction to the apparent scope of the *Regency Villas* decision. Indeed, there are three grounds on which the concern of the 'floodgates' argument might be quelled; each serving as a 'brake' on the potential breadth of the decision. First, whether a recreational right will, in fact, accommodate the dominant tenement still falls to be determined by a close factual analysis. As Lord Briggs demonstrated in *Regency Villas*, the court will engage in a detailed and robust examination of the 'factual matrix' to locate a true construction of the grant of rights. This is not a light-touch exercise and the Supreme Court's rigorous approach can be seen as an assertion of the primacy of a thorough factual enquiry. This requires, as *Regency Villas* exemplifies, a close scrutiny of the parties' intentions, first as to whether a proprietary as opposed to a personal right was intended, secondly, as to whether the *Re Ellenborough Park* conditions are satisfied as well as examination of any potential ouster of the servient land owner. A second 'brake' relates to the methods of creation of easements. It is unlikely that purely recreational easements will arise in any circumstance other than by express grant. Any argument that recreational easements arise by prescriptive user would, in most conceivable cases, fail for user by permission. It seems equally improbable that recreational rights could give rise to implied easements by necessity, inadvertently under s62 LPA 915 or under the rule in *Wheeldon v Burrows*.[96] That said, it remains at least feasible, whether through poor drafting or an ineffective s62 LPA 1925 exclusion clause, that recreational rights may be exercised under a licence and may go on to attract the status of an easement through the statutory magic of s62. More commonly, however, recreational easements will arise expressly with the transparency and scrutiny this offers; the protection of formality requirements, documentary evidence and most probably after the parties have received independent legal advice. This must drastically reduce the chances of parties being bound by far-reaching recreational easements of which they have no knowledge or to which they have not expressly agreed. A final 'brake' would be the provided by the ability to discharge easements under the proposed Law Commission scheme which would see the current regime for discharge of restrictive covenants under s84 of the LPA 1925 extended to the law of easements.[97] If implemented, this jurisdiction to discharge easements would be a powerful weapon in the armoury to prevent and supervise overly-burdensome easements and to ensure a balance between the rights of servient and dominant owners.

Conclusion: Opening Pandora's box?

This article has explored the reasoning employed, the importance and potential reach of the recent Supreme Court decision in *Regency Villas*; a judgment of undoubted significance for the law of easements. The extent to which this case heralds the opening of the 'floodgates' and of Pandora's box depends chiefly on the weight one attaches to the apparent erosion and dilution by the Supreme Court of the traditional constraints on the law of easements (as to positive obligations, for example) and equally the view one adopts as to court's acceptance that rights of recreation and sport 'pure and simple' can amount to easements. Three possible 'brakes' on the effect of *Regency Villas* case have been identified and unpacked. Whatever one's stance, *Regeny Villas* is undoubtedly a controversial

[96] *Wheeldon v Burrows* (1879) LR 12 Ch D 31. There is no reason to think this would not also be true under the Law Commission's proposals for reform of the law on implied easements: see Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com Report No. 327, at [3.52]-[3.64].

[97] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com Report No. 327, at [7.27]-[7.35] and [7.53]-[7.55].

decision. The reasoning of the majority is driven, at its core, by a view that there is a need for the law to reflect changing social attitudes to recreation and sport something that Gray and Gray described (writing prior to *Regency Villas*) as '[perhaps] an index of a more hedonistic (or even a more health conscious) age.'[98] As Lord Briggs explained in *Regency Villas* itself:

> "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."[99]

How far changing social attitudes ought to shape the recognition and operation of proprietary rights forms part of a much larger debate to be grappled outside the pages of this article.[100] Beyond this, however, *Regency Villas* raises several crucial questions to be addressed going forward. In particular, we must wait to see how the newly-liberated landscape created for recreational easements will be picked up and applied by the lower courts. Can we expect the decision to lead to a deluge of claims testing the limits of *Regency Villas* and will the *Regency Villas* principles be recognised as applying in contexts outside timeshare developments? Will, for example, the same approach be taken to recreational rights over smaller scale, non-commercial land? Moreover, could s62 of the LPA 1925 and its statutory magic allow for the conversion of purely recreational rights under a licence into a fully-effective easement on sale of the land? Finally, how strictly will the courts scrutinize the extent of positive obligations placed on servient land owners or, alternatively, will the courts take up the Supreme Court's more relaxed approach? In short, has the Supreme Court in *Regency Villas* re-cast fundamentally the law of easements or might the courts seek to retrench back to established principles. Either way, whether or not one regards the Supreme Court as opening Pandora's box, the message from the court is plain: purely recreational and sporting rights which had hitherto been thought incapable of amounting to easements on the grounds of being 'mere recreation or amusement' can now take effect as easements capable of binding servient land owners and their successors. To those granting recreational and sporting rights, the message is stark: not so much careful what you wish for but careful what you draft for as the consequences could be both wide-ranging and long-lasting.

---

[98] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.612.

[99] *Regency Villas Title Ltd and others* v *Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57 at [81].

[100] For discussion of the relationship between property law and context see, amongst others, N. Hopkins, 'The relevance of context in property law: a case for judicial restraint? (2011) 31 *Legal Studies*, 175.