

Neutral Citation Number: [2015] EWHC 3564 (Ch)

Claim No A30BM219

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY**

Priory Courts
33 Bull Street
Birmingham B4 6DS

7 December 2015

B e f o r e :

HIS HONOUR JUDGE PURLE QC

REGENCY VILLAS TITLE LIMITED

GEORGE EDWARDS

VICTOR ROBERTS

WILLIAM RATCLIFFE

BRIAN ANDREWS

**(CLAIMANTS (2)-(5) SUING ON THEIR OWN
BEHALF AND ON BEHALF OF THE MEMBERS
OF THE REGENCY VILLAS OWNERS' CLUB)** **Claimants**

and

DIAMOND RESORTS (EUROPE) LIMITED

**DIAMOND RESORTS BROOME PARK
GOLF LIMITED** **Defendants**

**Mr John Randall QC and Mr Marc Brown instructed by Shakespeare Martineau LLP
appeared for the Claimants**

**Mr Andrew Latimer instructed by Pannone Corporate LLP appeared on behalf of the
Defendants**

Hearing dates: 6-10 July 2015

Judge Purle:

1. The First Claimant (“the Company”) is the freehold proprietor of land and buildings known as Elham House, Canterbury (“the timeshare land”), which is registered at HM Land Registry under Title No K854001 (formerly K284281). The reason for the change of number is that the Land Certificate bearing the original number was lost, and replaced by HM Land Registry with a new number for security reasons.
2. Twenty six timeshare units known as the Regency Villas have been built on the timeshare land. Strictly, there are two apartments in the former Elham House, and twenty four villas in the grounds. They each accommodate up to six people.
3. This case concerns what are alleged to be easements enjoyed by timeshare owners at Regency Villas. The second to fifth Claimants (“the individual claimants”) bring these proceedings as such owners on their own behalf and on behalf of the members of the Regency Villas Owners’ Club (“RVOC”) an unincorporated association set up to look after and represent the interests of the timeshare owners.
4. Each owner has the exclusive right to occupy a particular unit or units at specified periods each year, usually one or two weeks. The owner is issued with a membership or owners certificate by RVOC, and is obliged to pay charges to RVOC for the upkeep and maintenance of the timeshare land. The owner may transfer his or her right to occupy the unit in his or her place, either by private arrangement or through an exchange scheme which is common within the timeshare industry.
5. The Company holds the land as nominee for John Hughes and Holiday Owners’ Services Limited (“HOSL”) who are in turn trustees for the members of RVOC from time to time. Thus the Company effectively holds the land on trust for (ultimately) the timeshare owners.
6. The trust was established by a Trust Deed of 12 November 1981 (“the 1981 Trust Deed”) made by Barclays Bank Trust Company Limited (“Barclays”) to whom the timeshare land was transferred on the same date, which declared a trust for the members of RVOC.
7. Trustees having been replaced or having retired over time, the current trustees are John Hughes and HOSL (sometimes erroneously referred to in documents as Holiday Ownership Services Limited, an obvious mistake for HOSL).
8. The timeshare land was subsequently transferred to a nominee company, R.V.O.C. Limited, in 1994, and then to the Company, also as nominee, in 2012.
9. A Deed of Retirement and Appointment of 27 June 2012, made between RVOC, the Company, John Hughes, HOSL and two trust companies (defined as “the Retiring Trustees”), recited that the timeshare land was the subject of the trust constituted by the 1981 Trust Deed and was vested in the Company as nominee for the Retiring Trustees. By the body of the Deed, John Hughes and HOSL were appointed as new trustees and the Company declared that it held the timeshare land “as nominee” for John Hughes and HOSL.
10. This was followed by a transfer to the Company of the timeshare land by R.V.O.C. Limited dated 30 June 2012.
11. The point is taken on the Defendants’ side that as the 30 June transfer post-dated the declaration of nomineehip, that declaration is ineffective. There is nothing in this point. The timeshare land was already subject to a trust for (ultimately) the RVOC members and the Company would take subject to that trust, as the antecedent Deed of 27 June recognised. Further, the Company

is estopped from denying the trust or its nominee status. Both are recited in the 27 June Deed, as well as repeated in the body, and the 30 June Transfer fed the estoppel.

12. The First Defendant is the freehold proprietor of Broome Park Estate (“the estate”), which is registered at HM Land Registry under Title Nos K496390 and K496391. The estate is adjacent to the land, and is the servient tenement in respect of the claimed easements. The land and the estate were in the common ownership of Gulf Investments Limited (“Gulf”) between November 1980 and November 1981. The timeshare land was part of Broome Park, often described as the Walled Garden.
13. Gulf purchased the estate, not then including the timeshare land, in November 1979. The timeshare land was purchased by Gulf in November 1980.
14. There are and have at all material times been sporting and leisure facilities on the estate such as a tennis court, swimming pool, gardens, golf course and squash courts. There is (nowadays) an indoor swimming pool with leisure suite (there was formerly an outdoor pool, but this was filled in at a time when the estate became badly run down). There have been many changes and improvements to the facilities over the years. This is hardly surprising, as the estate is run commercially with a view to profit and the recreational facilities are open to members of the public, so might be expected to change with the fluctuating demands and rising expectations of the public.
15. A Mansion House on the estate incorporates some of the leisure facilities. A Kentish Times article from August 1983 suggests that the Mansion House was refurbished initially between January 1980 and April 1981, though it may not have opened until later that year.
16. The Second Defendant is the operator of the golf course and the leasehold proprietor of a 25-year lease (“the 1999 Lease”) expiring in 2024 of the golf course, which is registered at HM Land Registry under Title No K803981. Prior to that lease it held a much longer lease, which it surrendered in 1999, of the whole estate.
17. The Defendants are members of the same group of companies and I shall hereafter refer to them without distinction.
18. Within the Mansion House eighteen residential timeshare units were created and a 35-year lease (“the 1980 Lease”) was granted by Gulf (expiring recently) in August 1980 in favour of the timeshare owners of the eighteen units within the Mansion House. That lease included a grant of the right to use the various indoor and outdoor facilities, backed by a lessor’s covenant to maintain those facilities. This particular development was a commercial success at the time, and was followed by the development of Regency Villas as timeshare units, for which planning permission was granted in June 1981, though the units were not completed until some time between July 1982 and June 1983.
19. For completeness, a further timeshare development took place within the estate in 2003 or thereabouts, resulting in fourteen timeshare lodges. There are thus fifty eight timeshare units in total (formerly forty four) sharing the various facilities, of which I am directly concerned with twenty six.
20. By a transfer (“the 1981 Transfer”) dated 11 November 1981 between Gulf, as owner of both the timeshare land and the estate, and the Company’s predecessor, Elham House Developments Limited (“Elham Developments”) the land was transferred from Gulf to Elham Developments. That transfer can no longer be found but, upon registration of the transfer, the following entry was made in the property register of title K284281 (and remains there in respect of the new title number K854001):

“The land has the benefit of the following rights granted by a Transfer of the land in this title dated 11 November 1981 made between [Gulf] (Transferor) and [Elham Developments] (Transferee):–

“TOGETHER WITH firstly the right of way for the Transferee its successor in title its lessees and the occupiers from time to time of the property at all times with or without vehicles for all purposes in connection with the use and enjoyment of the property over and along the driveways and roadways (hereafter called “the roadways”) shown coloured blue on the plan attached hereto.

AND Secondly all the right to the full and free passage of gas water soil electricity and any other services from and to the property in and through any pipes drains wires cables or other conducting media now in under or over the Transferee’s [sic] adjoining land or constructed within 80 years of the date hereof.

AND thirdly the right for the Transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of Broome Park Mansion House, gardens and any other sporting or recreational facilities (hereafter called “the facilities”) on the Transferor’s adjoining estate”.

21. It is the “thirdly” which matters in this case. Similar entries also appear in the charges registers of titles K496390, K496391 and K803981, noting that those titles (now the Defendants’) are subject to the rights granted by the 1981 Transfer.
22. The Claimants say that they are entitled to use of the sporting and recreational facilities as they now exist free of charge. This is disputed by the Defendants.
23. The Defendants say, probably correctly, that at the time of the 1981 Transfer, construction of the Regency Villas had not begun. Nevertheless, the future development of the Regency Villas was certainly intended. Both Transferor and Transferee were members of the Gulf Group of companies and privy to each other’s intentions. Moreover, the June 1981 planning permission was a matter of record.
24. I doubt whether anything turns on when development began. As Mr Latimer for the Defendants emphasised at the outset, the case turns on the construction of the passage in the 1981 Transfer following the word “Thirdly...”. I cannot see how that construction is affected by whether or not the building of the Regency Villas had, or had not, begun or been completed in November 1981. It is said that, strictly speaking, as at 11 November 1981, the grant was for the benefit of Elham House and its parkland. That is the timeshare land upon which the Regency Villas now stand. Elham House has now become two apartments used as timeshare units, and twenty four villas have been built in the grounds. The fact that none of the villas was there in 1981 is simply immaterial to the construction of a grant of rights for the benefit of amongst others successors and occupiers from time to time. The same is true of the rights of way and of passage for services created by the 1981 Transfer. They continue for the benefit of successors despite any changes to the layout of the dominant tenement which may have occurred. Moreover, as the development of the Regency Villas was clearly intended in 1981, that becomes part of the factual matrix against the background of which the express rights fall to be construed.
25. The rights granted by the 1981 Transfer were in similar terms to the rights granted by the 1980 Lease. However, as there was no lease relating to the Regency Villas, the timeshare owners cannot enforce those rights as leasehold covenants, there being no privity of estate between any Claimant and any Defendant. They must therefore establish that the rights take effect as easements for them to be of any effect against the Defendants. That is clearly the case in respect of the first 2 sets of rights (of way and of services). One would expect the rights to use the

facilities, if capable of being an easement, to be treated in the same way, expressed as it is for the benefit of successors and occupiers from time to time.

26. I should mention that there has been other litigation enforcing the covenants in the 1980 Lease, to the details of which both sides have referred me. However, as that litigation was strictly concerned, and concerned only, with leasehold covenants of limited duration, I do not derive any assistance from it in this case and have put it out of my mind when considering the construction and effect of the 1981 Transfer.
27. I mention also that I heard evidence from a solicitor involved at the time with the 1981 Transfer (Mr Ganney) who gave evidence of his clients' instructions and subjective intentions (he was retained by Gulf Group so was on both sides) which seemed to me to be inadmissible on any point of construction. Similarly, his own views as to the effect of the 1981 Transfer cannot be admissible. I have therefore put these parts of his evidence out of my mind, though other factual aspects of his evidence commented upon below are of some relevance.
28. The 1981 Transfer also contained maintenance covenants similar to those set out in the 1980 Lease. The Claimants accept that these covenants, being positive in nature, are personal and do not bind the Defendants as easements, or, as they are the covenantor's successors, in any other way.
29. The Defendants say that the rights to use the facilities were personal rights between the parties to the 1981 Transfer, incapable of running with the land so as to bind Gulf's successors, or to benefit Elham Development's successors. Lesley Sharples, an in-house solicitor for the Defendants, who gave evidence before me, confirmed that the Defendants' position was that the rights fell away after 24 hours, upon the transfer of the timeshare land (on 12 November 1981) to Barclays. As that intended transfer was known about the day before, it is difficult if not impossible to attribute, on any rational basis, any intention on the part of the parties to the 1981 Transfer (members of the same Group) that the rights granted would be so short-lived. That may, however, be the unintended consequence of the actions of the parties to the 1981 Transfer. If, however, the rights take effect as easements, this surprising consequence does not follow.
30. Both parties referred me to a considerable amount of material post-dating the 1981 Transfer. Thus, the Claimants relied upon subsequent marketing material suggesting that the use of the facilities was without charge, whilst the Defendants relied upon the fact that charges were in fact paid from an early stage by RVOC, and then passed on to its members, for the maintenance and provision of the facilities. The Claimants in turn pointed to (much later) correspondence recognising that RVOC members had a right to access the facilities, and that payments were or came to be made from (probably) 1983 onwards by RVOC under a reservation of rights described as "an honorarium". They also point to a document headed "Timeshare Clearance Sale" dating from 1986 for "Regency Villas at Broome Park" stating that free green fees were included for six people during weeks purchased, and to the (much later) terms of the 1999 Lease, which was drafted on the basis that the facilities would be provided to amongst others RVOC members whether or not contributions to the costs were made, though they would be sought.
31. As to the marketing material, Mr Latimer sought to demonstrate (without success) by cross-examination and by reference to the documents that the references to there being no charge could only be understood by any reasonable reader of the material as limited to the Mansion House units and did not apply to Regency Villas. Many of the references were to "Broome Park" which he says is the land upon which the Mansion House stood. That is correct but, geographically, the timeshare land was also part of Broome Park, known as I have said as the Walled Garden. There were different title numbers for various parts of Broome Park, but the marketing material was not about registered title numbers. Despite Mr Latimer's lack of

success in this endeavour, the point does not assist me, even assuming it to be admissible, in the construction of a relatively simple and clearly expressed clause, or in determining whether the rights granted take effect as easements. The point may however be relevant as suggesting that the 1981 Transfer (which, as I say, has been lost) did not in fact contain any charging provision in return for the facilities, for why would the marketing suggest otherwise if there was an express provision saying so? As I also explain below, the point may be of limited relevance to the suggestion that a term needs to be implied requiring payment for the use of the facilities.

32. As to the correspondence between RVOC and the Defendants (or their predecessors) concerning payments, both parties took different positions, which remained unresolved. The Defendants took the view that they were entitled to charge for the use of the facilities. RVOC on behalf of its members took the opposite view. I consider some of that correspondence below, because it is relevant to monetary claims that have been made, and possibly to the injunction claim. It is not however relevant to any issue of construction, or to whether or not the rights take effect as easements.
33. Moreover, as the Claimants point out, it is not their case that the Defendants are obliged to spend any money on providing or maintaining the facilities. Any past contribution to costs can therefore be seen as a means of ensuring that the defendants and their predecessors would continue to provide and maintain the facilities to a suitably high standard, not as a concession that the use of the facilities was chargeable.
34. As to the terms of the 1999 Lease, the Claimants can derive no comfort from this as they were not parties to it and have no claim to any rights derived from that Lease. I also fail to see how a Lease post-dating the 1981 Transfer by approximately 18 years can somehow be prayed in aid to the construction of the earlier transfer, or as explaining its effect.
35. More significant is the apparent absence of any reference to a charge in the 1981 Transfer itself. The absence of any reference to any such charge in the Land Registry entries suggests there was none, as does the marketing material already mentioned. The absence of any provision for a charge was also confirmed to me expressly by Mr Ganney. I approached his evidence with some caution, as he could not be expected, though he was obviously doing his best, to recall with precise accuracy the details of over 30 years ago. He was however able to confirm to me, as the person who put the timeshare scheme together, that the 1981 Transfer (now lost) was in fact executed along with other contemporaneous documents, in particular the further transfer to Barclays of the next day, the 1981 Trust Deed, and the original RVOC constitution. Mr Ganney continued to be involved with this land for some years after the 1981 Transfer and would have been familiar with the essential documentation, which he drafted. He was firm that there was no express provision for charging the persons enjoying the facilities. I accept his evidence on all the points summarised in this paragraph.
36. In my judgement therefore, the facilities, if the right to use them takes effect as an easement, are available free of charge. If they do not take effect as easements, the Claimants have no right to enjoy the rights and the Defendants can charge whatever they wish, though it is then a matter for the Claimants to decide whether or not to avail themselves of whatever the Defendants are prepared to offer them.
37. There was also a suggestion that a term needs to be implied requiring payment of a financial contribution by timeshare owners. Leaving aside difficulties of how an imprecise term of that nature might be formulated, any such implied term must be rejected as, although its implication might on one view be reasonable and fair to the owner or operator for the time being of the golf course and other facilities, its implication is not necessary for business efficacy, or obvious. The clause in question works perfectly well without payment and, whilst I take the view that I cannot take into account the actual marketing history directly on any issue of construction or implication (as this post-dated the 1981 Transfer) I can infer that marketing in this way was

always intended, or at least seen as an available option, including at the time of the 1981 Transfer, which militates against the implication of a term. It is also now clear that whatever inspired discussion study of Lord Hoffman's speech in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 might engender, it did not change the law. Either necessity for business efficacy, or obviousness, rather than reasonableness, is a required component of implication: *Marks and Spencer v BNP Paribas* [2015] UKSC 72.

38. I now turn to the central issue: do the rights with which I am concerned take effect as easements?
39. In *re Ellenborough Park* [1956] Ch131, the Court of Appeal adopted the four characteristics of an easement stated in *Cheshire's Modern Law of Real Property* (then the 7th Edn) namely:
 - (i) there must be a dominant tenement and a servient tenement,
 - (ii) an easement must accommodate the dominant tenement,
 - (iii) dominant and servient owners must be different persons, and
 - (iv) a right over land cannot amount to an easement unless it is capable of being the subject-matter of a grant.
40. There is no difficulty with elements (i) and (iii) in this case. The timeshare land is the dominant tenement and the estate is the servient tenement. They have since the 1981 Transfer been owned by different persons.
41. I also have no doubt that the rights in question accommodate the timeshare land in the sense that the enjoyment of that land, which has been developed into timeshare units for recreational use, is enhanced. 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 also have been a significant attraction for the occupiers of Elham House had the intended development of the Regency Villas never gone ahead. However, I am not limited to considering the dominant land in the condition it was at the time of the 1981 Transfer. That transfer was itself part of a series of co-ordinated transactions setting up the timeshare scheme, and the existence of the Regency Villas in the near future was very much intended.
42. 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, even though not all of the plots actually adjoined the pleasure ground.
43. As to the requirement that the right must be capable of forming the subject matter of a grant, *Ellenborough Park* at p 164 identified the following questions which may also be relevant in this case:
 - (i) whether the rights are expressed in language which is too wide and 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.

44. There is nothing vague or of excessive width in the present rights. They clearly extend to all recreational and sporting facilities on the estate, and to the gardens, and must in my judgement include facilities that were not there or planned in 1981, or which may have been significantly improved since then. To construe the rights as limited to the actual facilities which were on site or planned in 1981 is unrealistic and might inhibit the servient owner from introducing improvements or replacements or adding facilities which would be for everyone's benefit. I say that because any alteration to the facilities, if the rights did not extend to the new or replacement facilities, might amount to a substantial interference with the claimants' existing rights. That cannot have been intended on any sensible construction of the rights. Moreover, such a construction would allow the Defendants to advantage from their own default or that of their predecessors, who filled the outdoor pool in before the Defendants constructed a new one in the basement of the Mansion House. The point is perhaps academic as the rights under the 1981 Transfer expressly extend to the basement, where the pool now happens to be.
45. There is no difficulty in identifying what the facilities are and have been from time to time.
46. In addition, there is no practical difficulty in framing and applying rules and regulations applicable to all users of the facilities, distinguishing between ordinary members of the public and timeshare owners. This was confirmed to me expressly as regards the golf course (the most contentious element of the case) by the Defendants' manager, and the position is no different regarding other facilities. The Defendants are clearly entitled, so long as there is no substantial interference with the Claimants' rights, to regulate the use of the facilities in the interests of good management. They do this using their own staff, who are daily on site. This confirms that the Defendants are in a real sense in possession and control of the estate.
47. The claimants accept that they cannot use all the facilities at the same time and that they have to comply with the rules and regulations governing their use (except as to payment). The rights granted are to be construed as entitling the Claimants to use the facilities and gardens subject to proper restrictions and regulation made in the ordinary course: compare *Ellenborough Park* at p 168. This does not however include payment, even though some payments have in practice been made. Moreover, the fact that an accommodation on payment was reached for many years does not without more mean that the rights have been lost: compare *Ellenborough Park* at 169.
48. There are many examples of easements which cannot be enjoyed by all dominant and servient owners simultaneously, of which perhaps the most prosaic example is use of a toilet: see *Miller v Emcer Products Ltd* [1956] Ch 304. Moreover, a dominant owner can only claim that his rights are infringed if there is substantial interference with those rights, which necessarily carries with it the need for give and take between shared users of the rights and the servient owner.
49. Mr Latimer complains of the intensification of use arising from the fact that there are thousands of potential users given the large number of timeshare owners, who in general only have rights for at most a week or two every year. This is a bad point. There are twenty six timeshare units in the Regency Villas development, and there are different owners for the different weeks. Each unit accommodates six people. Thus in any given week, the maximum users are $(26 \times 6) = 156$ users on a large estate which can readily cope with that number of people in addition to the other timeshare users and members of the public who also use the facilities.
50. Mr Latimer argues that this is really a case of joint possession which is on the wrong side of the line for easements. I do not agree. 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 timeshare owners. They have in no sense been ousted and their ability to exercise ownership rights and to remain in possession remains, though qualified (as in the case of any easement) by the existence of the rights in question.

51. I note that the existence of the rights under the 1981 Transfer did not inhibit the further timeshare development in 2003 for the benefit of the Defendants, which is hardly consistent with ouster or shared possession. In this connection, I should mention that Mr Randall QC referred me to *Jackson and others v Mulvaney* [2003] 1 WLR 360 as an example of a case where (in that case) prescriptive rights to a communal garden arose but this did not prevent the servient owners from creating a gravelled driveway. Likewise in this case, the Defendants are not prevented from altering the lay out of the estate to its best advantage and, as I have said, 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. By contrast, the Claimants could not themselves embark upon the development of new facilities as that would go well beyond the scope of the rights under the 1981 Transfer. Nor could they (for example) dig up plants and trees which they did not like the look of or remove sand from the bunkers on the golf course for a sandpit at home, or at the Villas. They would be acting in excess of their rights and interfering with the Defendants' ownership and possession, which is real.
52. Mr Latimer also says, as is not disputed, that the rights cannot take effect as easements if the existence of the easements requires expenditure of money by the Defendants, or the carrying on of a business by them. Yet the existence of the rights claimed produces no such requirement. The Defendants could (as happened in the past) neglect the maintenance and upkeep of the estate allowing it to fall into disrepair. They could cease carrying on business at the estate for that reason, or on purely economic grounds, whether or not disrepair required the closure. In that case, if the rights take effect as easements, the Claimants could intervene and, at their own expense, maintain and repair the facilities themselves, and tend the gardens: see generally *Carter v Cole* [2006] EWCA Civ 398 at [8]. As it happens, the Defendants have other commercial motives for not allowing that to happen, but they are under no obligation to the Claimants under the 1981 Transfer to keep the estate in good order and repair. Mr Latimer points out that the Defendants would risk liability as occupiers if they neglected to maintain the estate. That however is true of much simpler easements such as a right of way. If the servient owner allows the way to become a danger, he may become liable to third parties, including anyone exercising the right of way, as occupier. That risk does not prevent the right of way from taking effect as an easement.
53. I now consider whether the rights in question do not qualify as easements because they amount to no more than mere rights of recreation.
54. *Ellenborough Park* is authority for the proposition that an easement permitting the dominant owner to walk over all parts of the servient tenement purely for pleasure can exist in law, following *Duncan v Louch* (1845) 6 QB 904. That being so, the use of the pleasure garden took effect as an easement. It is a relatively small step to extend that to the enjoyment of sporting and other recreational facilities.
55. The objection that a mere right of recreation cannot take effect as an easement is therefore apt to mislead, unless the limits of the proposition are understood. The key may lie in the use of the word "mere", which may connote a right which does not benefit dominant land at all because there is none, as in *Mounsey v Ismay* (1865) 3 H & C 486, or which is wholly extraneous to, and independent of, the use of the dominant land as such (*Ellenborough Park* at 174). Outside those examples, rights of recreation can take effect as easements, so long as they accommodate dominant land, are not too wide and vague, do not amount to rights of joint occupation and do not deprive the servient owner of proprietorship or legal possession.
56. There is 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, but in my judgement there is no legal impediment to the grant of such an easement, provided the intention

to grant an easement, as opposed to a merely personal right, is evident on the proper construction of the grant construed in the light of the material surrounding circumstances.

57. *Ellenborough Park* has been followed and applied by the Supreme Court of Canada in recognising as easements rights of “free access to the waters of ... the bay to persons purchasing subdivisions”. This was a resort development fronting the beach. Applying the statement in *Ellenborough Park* at p 683 that “wandering at large is of the essence of such a right” the Supreme Court said that these observations applied all the more emphatically in the case of a beach pertinent to a resort development: *Dukart v District of Surrey et al* (1978) 86 DLR 609, 617. That observation is relevant to this case as well.
58. *Ellenborough Park* was also considered by the Manitoba court in *Blankstein, Fages and Fages v Walsh* [1989] 1 WWR 277, in the case of cottages used for summer recreation. The acquisition of an easement by prescription to use adjoining land known as the “playground” as a family recreational area was rejected on the facts, as the use was permissive. Nevertheless, the court recognised that the rights claimed were capable of existing as easements.
59. In *Grant v Macdonald* [1992] 5 WWR 577, the right to build and use a swimming pool and other improvements on part of a neighbour’s land (the pool was never in fact built but a gazebo was) was regarded as capable of being an easement by the British Columbia Court of Appeal, after consideration of *Ellenborough Park*.
60. In Australia, *Ellenborough Park* was applied to recognise as an easement the grant of the right to use a common area known as Outlook Park Reserve in favour of adjoining owners “for the purpose of recreation or a garden or a park”, the court observing at p. 559 at line 45 that enjoyment of a defined area for recreation not given to the public, but given to a limited number of lot holders was just as certain as the rights referred to in other cases, or the right to walk for pleasure referred to in *Duncan v Louch* (above): *Riley v Pentilla* [1974] VR 547.
61. *City Developments v Registrar General of the Northern Territory* (2000) 135 NTR 1 concerned the use of a lake and natural foreshore within a resort complex. Thomas J, sitting in the Supreme Court of the Northern Territory, following *Ellenborough Park*, *Dukert* and *Riley v Pentilla*, held that there was no reason in law why an easement could not be granted for recreational purposes. I agree.
62. Against this line of authorities must be considered a dictum of Lord Scott in the Scottish case of *Moncrieff v Jamieson* [2007] 1 WLR 2620. He doubted at p 2636E whether the grant of a right to use a neighbour’s swimming pool could ever qualify as a servitude (the Scottish equivalent of an easement) as the swimming pool owner would be under no obligation to keep the pool full of water and the grantee would be in no position to fill it if the grantor chose not to do so. The right to use the pool would, he opined, be no more than an in personam contractual right at best. That would with respect depend upon the terms of the grant, though I can see that in the purely domestic context the court might lean towards a construction that the rights were personal. In any event, the example given by Lord Scott has no application to the present case.
63. I reject the suggestion that the rights in this case are as a matter of construction to be construed as merely personal to the parties to the 1981 Transfer. They form part of a group of rights the first two of which (rights of way and of passage) are clearly easements. Further, the rights are expressed to benefit successors and occupiers from time to time: compare *Ellenborough Park* at p 167. Moreover, construing the rights as purely personal would produce the unexpected consequence referred to in paragraph 29 of this judgement.
64. Unlike the example given by Lord Scott in *Moncrieff*, 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 who are able to act (as was contemplated at the time) collectively through RVOC. Thus,

I do not see why the Claimants could not provide their own water supply (adapting Lord Scott's example) if they needed to fill the pool, if necessary from a tanker. I see no compelling reason to construe these rights as personal, and very good reason for construing them as easements.

65. The Claimants are accordingly entitled to appropriate declaratory relief confirming that they have the rights they claim and cannot be required to pay for the use of those rights. They accept that they have to pay for consumables such as electricity (where separately charged, as in the snooker room).
66. There is an issue as to who is entitled to declaratory and other relief.
67. It is accepted by the Defendants that the Company has standing to bring this claim as registered proprietor of the timeshare land. It is however disputed that the individual claimants have standing to sue as they are merely beneficiaries who are represented by the Company, which merely holds as nominee for the trustees, who in turn hold as trustees for the timeshare owners.
68. This is a somewhat arid point, given that both the registered proprietor and the ultimate beneficiaries are before the court. Still, it must be decided as it may have some effect on the damages claim to which I shall come.
69. The cause of action for interference with the Claimants' rights is in private nuisance. As that is a tort directed against the enjoyment of rights of land, only the person in possession, or with the right to possession, which may include a licensee with exclusive possession, can sue: see *Hunter v Canary Wharf* [1997] AC 655, especially at 688E-F, 692C-D, 696D-E, 703C-G, and 724C-F. That description fits the individual claimants and those they represent, who are not only beneficiaries having an interest in the timeshare land but, in relation to the weeks they have purchased, entitled to exclusive occupation. The one qualification is that their rights of occupation are only for a week or two each year and may not in the case of any given individual be a right to immediate occupation when this judgement is handed down. That cannot matter when it comes to declaratory relief. The relief will be framed so as to limit the rights of the individuals to the weeks they have purchased.
70. I am also asked to grant injunctive relief and damages. As to injunctive relief, this is based on the fact that the Defendants refuse to allow use of the facilities (especially the golf course) without payment which in my judgement obviously amounts to a substantial interference with the Claimants' rights. Whether I should grant an injunction is a matter of discretion. I did initially consider that declaratory relief alone might serve the Claimants just as well. However, I am in the end persuaded that it is right to grant an injunction to prevent future interference by demanding payment for the use of the rights for two reasons. The first is that the Claimants are complaining of interference with property rights, which are a prime candidate for protection by an injunction. The second is that the Claimants need the protection of an injunction to prevent and discourage unjustified demands in the future. There has been a long history of unease and (sometimes) antagonism between the parties to these proceedings and the Defendants have in the past sought to justify green fees for use of the golf course as "booking" fees, claiming that as an additional service. On the evidence I heard though from the Defendants' manager, the receipt book treated these as no different from green fees, which reflected the reality. In truth, the description of these charges as "booking" fees was a device to evade the appearance of charging green fees as such. The injunction is needed to prevent and discourage this sort of behaviour in the future.
71. I am also asked to deal with a number of monetary claims.
72. The Defendants counterclaim on a quantum meruit for unpaid services they have provided for the Claimant, namely the provision of the various facilities since 2012. This claim is based upon the premise that the Claimants are not entitled to the use of the facilities without payment.

As I have found that they are, the counterclaim in this respect falls away and must be dismissed.

73. There are also claims by the Claimants for amounts paid for services which should have been provided free and by the Defendants on a dishonoured cheque of RVOC for £26,308.26.
74. I should explain the background facts.
75. From around 1983 onwards, RVOC on behalf of timeshare owners made voluntary payments to the Defendants and their predecessors towards costs including upkeep of the facilities. These were described by RVOC's then Chairman, the late Mrs Margaret May, in a letter of 19 November 1999 as "voluntary payments" which were said to be made "without prejudice". In the same letter, Mrs May stated that the rights relied upon by RVOC members were in the Land Register, and that "the absence of any words entitling a charge to be made prevent this being done".
76. The Defendants had previously, in their letter of 20 February 1998, made the point that unless the timeshare owners paid an adequate amount to fund the day-to-day operation of the leisure facilities, they would deteriorate and there would be no further investment in the estate.
77. A further letter dated 7 December 1999 from Mrs May stated that down to April 1999 there had been no separate charge for the use of the golf course. In April 1999, what was described by Mrs May as an "honorary contribution" of £12,000 per annum was negotiated for golf and leisure facilities in exchange for the move from free golf to £5 per round. (The previous charge had been £28,000 per annum.) She referred to a threat to charge Villa owners even higher fees, and relied upon the Land Registry entries recording the terms of the 1981 Transfer as disentitling the Defendants from that course. Not long afterwards, the annual fee was increased to £18,000 per annum, which remained at that level until 2010. The charge for golf per round, initially £5 was increased to £7.50.
78. On 18 September 2009 the Defendants sought an annual fee of £60,000 together with £7.50 per round of golf, which was the existing rate. What in fact happened was that RVOC agreed to increase the £18,000 in line with RPI. This pertained until 2012, and the golf fee remained at £7.50. This arrangement was accepted over those 2 years by the Defendants.
79. Down to the beginning of 2012, therefore, my reading of the correspondence is that RVOC, under a general reservation of rights, made payments and agreed a package consisting of RVOC's payments and a green fee per round of golf, the amount of which RVOC agreed on behalf of its members, as a contribution to the costs of providing the facilities for the year in question. RVOC was not bound to contribute to those costs but nor were the Defendants bound to maintain and provide the facilities. As already explained, the Claimants did not lose their easements by making these payments, but they did draw a line in the sand for all years down to the end of 2011, when payments in the agreed amounts were made.
80. The Claimants claim repayment of these fees either as damages or in restitution. This claim fails down to the end of 2011. The agreed arrangement down to then must be regarded as payments for the continued provision of services, which were paid willingly and supported by consideration in the sense that the Defendants agreed to the continued provision of the services in question in return for the agreed package of charges. This is true of the green fees also, which were part of the package. They were not paid simply for the use of the golf course but in consideration of the facilities continuing to be made available. The Defendants were not unjustly enriched, and there was no failure of consideration.
81. It is said that as the Defendants were bound to allow free use of the facilities, there was no consideration for the payments. This is over-simplistic. The payments, as I have said, were

agreed and made because the continued provision and maintenance of the facilities comes at a cost. As moreover the status of the parties' rights was not clear, the agreement of the parties from one year to another may be seen as a genuine compromise of the parties' differences for the year in question. That is sufficient to defeat both the Claimants' restitutionary claim and the damages claim down to the end of 2011.

82. There was no agreement as to contributions in 2012. RVOC acting by its Chairman Mr Edwards (the second claimant) sent a cheque in the sum of £26,308.26 in early January 2012 which was then stopped once it came to light that the Defendants wished to increase the green fee to £10 per round. It thus became crystal clear very early on that there was no agreement as to the level of contributions for 2012. The cheque for £26,308.26 had been sent by Mr Edwards as he explained it to me to nip the matter in the bud, which I understood him to mean that he hoped an early agreement would be reached to continue as before, keeping the green fee at £7.50 per round. I infer that the cheque was calculated on the same basis as before in line with RPI fluctuations.
83. The cheque cannot in my judgement be said to have been supported by consideration, as there was in fact no agreement (which would be the source of consideration) of the package of fees for 2012. The cheque was not a payment for past services. It was a payment tendered in the hope and expectation that an agreement would materialise. But no agreement did materialise. Accordingly, the counterclaim on the cheque fails.
84. Mr Latimer says there was some consideration for the cheque as concessionary rates (below those charged to the public) continued to apply until July 2012, from which date the same fees as those charged to the public have applied, both for the golf course and for the leisure suite now situated in the basement of the Mansion House. However, that is not the point. The cheque was not tendered in return for supposedly concessionary rates for a limited period, but in the hope and expectation that both the RVOC annual contribution and the green fees for the whole of 2012 would be agreed. They never were. In the absence of any such agreement, the cheque was in my judgement unsupported by any consideration.
85. That leaves the claims of the individual claimants and those they represent to recover what they have paid since 1 January 2012 for the use of the facilities in question. I have already ruled that a line in the sand was drawn down to the end of 2011, precluding any such claim. As, however, nothing was ever agreed for 2012 and onwards, that argument does not apply.
86. Mr Randall QC says that as the refusal to allow use of the facilities without charge amounts to a substantial interference with the individual claimants' easements, they are entitled to damages for nuisance in the amount paid for their use of the facilities in question.
87. This seems correct in principle. Had the individual claimants, having been denied free use of the facilities, gone elsewhere and paid a third party to replace their lost facilities during their weeks of occupation, it seems to me that the cost of doing so would be recoverable as consequential loss. It cannot make any difference in my judgement that the lost facilities were restored by paying the Defendants. The amount paid should also be recoverable as consequential loss.
88. It is not strictly necessary in those circumstance to consider the alternative restitutionary claim. I merely record that there is no evidence that the payments were made under protest and that the timeshare owners in fact had the benefit of a round of golf on each occasion they played, which would seem to be capable of amounting to consideration by analogy with *Williams v Roffey Bros* [1991] 1 QB 1.
89. The calculation of damages, unless the amounts are agreed, will be referred to an inquiry.

90. In summary, the result is:

- (i) The Claimants are entitled to declaratory and injunctive relief to reflect and protect their right to use the facilities without payment;
- (ii) The individual claimants and those they represent are entitled to damages for nuisance in the amount of payments made for use of the facilities since January 1 2012;
- (iii) All other financial claims of the Claimants are dismissed;
- (iv) The Counterclaim is dismissed in its entirety.