

GATES, GAMES AND GAOL: SOME VERY RECENT EASEMENTS CASES

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i) Gates



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“Can I/they put a gate across a right of way?”

- “it depends.....”
- ...on facts, location, nature of gates and access, degree of interference
- Vehicular right of way: despite oft-cited passages from Gale on Easements, no ‘rule’ that a single unlocked gate is always OK
- It may still be a “substantial interference” if vehicles have to stop in dangerous position

Cases

- *Siggery v. Bell* [2007] EWHC 2167 (Ch.): 2 sets of gates plus lateral fencing was substantial interference (and my West Wales case....)
- Even a single gate may be extremely awkward for e.g. commercial premises (*Dresdner v. Scida* (2003) NSWSC 957 (New South Wales Supreme Court, and my Hereford case..)
- Relevance of motive: *Owers v. Bailey* [2007] 1 P&CR DG 17
- “but I gave them a key/fob/passcode..” – may still be substantially less convenient: see *Page v. Convoy Investments* [2015] EWCA Civ. 1061 (“fobs get lost...codes get forgotten or are periodically changed”)

A recent application of the principles

- *Kingsgate Development Projects Limited v. Jordan* [2017] EWHC 343 (TCC), Jefford J.
- Useful illustration and application of principles
- 3 sets of gates in 100m, but...
- Mere narrowing of first entrance not actionable, if still wider than narrowest point of way
- Push button electric gate at entrance OK (no fobs; and no evidence of danger/inconvenience in road?), but...
- While one more gate further up was OK (to separate 'farm' bit of land from residential), third gate was excessive and unreasonable (and had been recently erected..)



ii) Games



A fresh look at *Re. Ellenborough Park..*

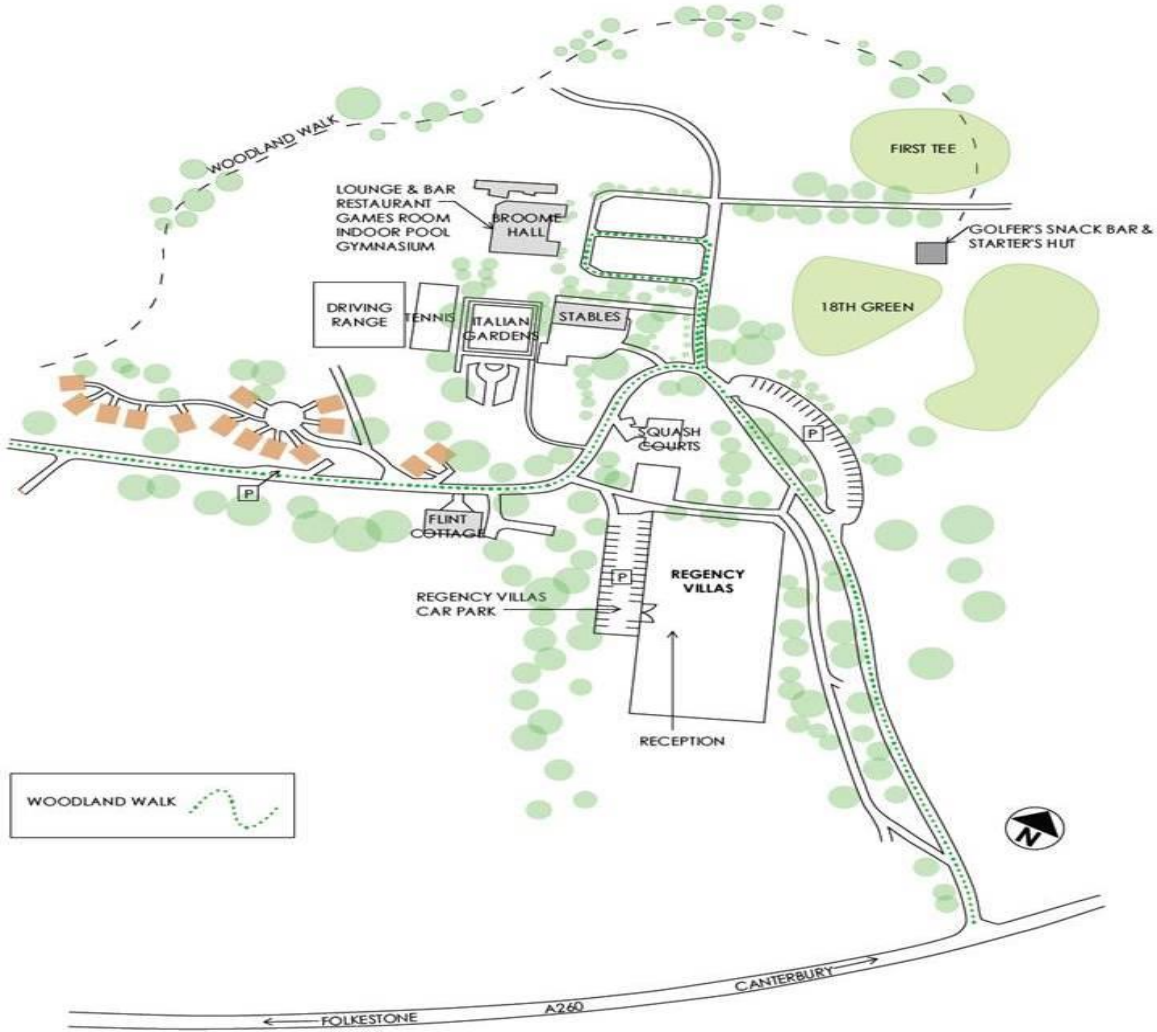


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A battle between 2 timeshare resorts

- *Regency Villas Title Limited and others v. Diamond Resorts (Europe) Limited and others* [2017] EWCA Civ. 238
- Large Kent estate split into two parts in 1981. One house sold off with some land, on which built 2 flats and 24 timeshare villas – became “Regency Villas”
- Mansion house retained, along with tennis courts, squash courts, croquet lawn, Italianate gardens, outdoor swimming pool, restaurant/bar/gym/sunbed/sauna area in basement of mansion house. 18 hole championship golf course was built.
- Became luxury “Diamond Resort”, with 18 apartments in the mansion house, plus 14 timeshare villas of their own.

Site layout



Grant of easements?

“...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 and recreational facilities....on the Transferor’s adjoining estate.”

The issues

- easements for Regency Villas to use all the leisure facilities (including golf course) on Broome Park free of charge?
- *Re. Ellenborough Park* [1956] Ch. 131 and “mere recreation and amusement”?
- Rights to existing 1981 facilities, and/or replacements and extensions of them, and/or new ones?

Court of Appeal decision (Sir G. Vos, C)

- grant was in relation to then existing facilities; and substitutions/replacements for them on same servient land; and small incremental additions to them (e.g. some extra holes added to the golf course on adjacent land)
- NOT a grant in futurity of easements over all and any recreational facilities which might be built anywhere on Broome Park land
- But as judge held, if easements, they were free of charge; and mere fact that dominant owner couldn't require servient owner to spend money on them didn't mean they lapsed (dominant owners could do it themselves)
- So.....

Item by item

- Judge should have “unpacked” the grant in relation to the different rights
- Italianate gardens: *Ellenborough Park*, no problem
- Tennis, squash, putting and croquet: easements of utility and benefit to dominant land, and users could bring their own nets and equipment
- Even the golf course: what if owners sacked the greens staff and let it grow wild?
- Dominant owners could mow and maintain it themselves, bring their own flags. No different in principle from right of way etc.

But no TV or billiards...

- Ground and basement floor of House: *no* easement to use what had been a reception area, TV room and billiard room on ground floor, or the restaurant, gym and sauna areas in basement, just personal 1981 rights to use whatever services and chattels were then there
- “what we have said about the modern approach to taking physical exercise is not really applicable to recreational indoor games such as snooker or to watching television....A restaurant is not like a toilet.....a TV room is of no benefit without a TV..Unlike the empty swimming pool, an empty billiard room is not a billiard room at all..” (para. 80)
- Convincing? Or a sop/consolation to Broome Park, since...

The swimming pool easement..

- Can definitely be an easement, despite what Lord Scott said in *Moncrieff v. Jamieson* [2007] 1 WLR 2620, 2636E: obvious utility and benefit to dominant tenement
- Can bring/pump your own water?! (water as a ‘chattel’)
- Broome Park had drained and filled in original outdoor pool in 2000. Claim for any damages limitation-barred, but left open whether still an existing easement.. (abandonment/lapse is very difficult to establish)
- New indoor pool in basement: CA held i) having held no easements to use ground and basement floors of house, no right to use this; and ii) this was not a “substitute” pool

Gaol.....

- *Evelyn v. Isis Housing Cooperative* (“which I will call Isis” – para. 2) [2017] EWCA Civ. 130
- Rights of way “..to be exercised only for the purposes of carrying goods to and from the rear of the said premises in the course of the purchaser’s business of a fishmonger and greengrocer and for no other purpose whatsoever.”
- Mr. E couldn’t use it for his house, couldn’t get round it by “contrivance” of selling tins of salmon and peas from his front room
- Repeated committals for breach of injunction, 56 days in prison, then 6 months, then a further 12 months suspended....

And finally....not that I'm bitter

- *Baker v Craggs* [2016] EWHC 3250 (Ch), [2017] 2 WLR 1483
- Sale of farm and barn by Vs in two lots. After completion of sale of farm, Vs granted right of way over it to subsequent purchaser of barn, during “registration gap”
- Would have been no problem, but for unusual loss of official search priority through cancellation of farm’s registration application
- Farm purchaser had moved in and was found to be in “actual occupation” on date of grant of easement, so retained/regained priority over it under s29(2)/Sch. 3 LRA 2002, but.....

Overreached by an easement?

- Newey J. accepted argument that the *grant of a legal easement* by the joint Vs could be an *overreaching* conveyance of a legal estate for the purposes of section 2 Law of Property Act 1925
- So farm purchaser's interest *in his own farm* overreached *pro tanto*/subordinated to grant of easement to barn purchasers...converted to (unspecified) portion of sale proceeds in Vs' hands? And bound by easement
- Newey J. relied on section 1(4) LPA 1925 definition of "legal estate" as including easements: "The estates, interests, and charges which under this section are authorised to subsist or to be conveyed or created at law are (when subsisting or conveyed or created at law) in this Act referred to as 'legal estates' "; so held overreaching applied..

Permission to appeal....

- We have recently been granted permission to appeal by CA...
- Issue on appeal will be whether section 2(1) LPA 1925 overreaching operates only on “a **conveyance of a legal estate in land**”, meaning only a conveyance of one of the two legal “**estates in land**” defined in section 1(1) LPA 1925 of the Act, i.e “(a) an estate in fee simple absolute in possession; and b) a term of years absolute”
- or does overreaching apply to a grant/conveyance of *any* of the “estates interests and charges” in the s1(4) “legal estates” definition, including easements?
- Watch this space.....(Feb/March 2018?)

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