EASY EASEMENTS

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By: Steven D. Cox, Daniel L. Clyne

EASY EASEMENTS - PART 1

This two-part series is about four important cases that have been decided over the past year relating to the acquisition of easements. This Part 1 highlights two cases which explain key principles that can dictate whether or not an easement exists.

Part 2 will highlight two cases that provide guidance on how to obtain (or avoid a neighbour obtaining) easements by prescription, which can result from the continued exercise, by an occupier of land, of a right over neighbouring land for twenty consecutive years.

LE CUONA V BIG APPLE MARKETING LIMITED [2017] CHANCERY DIVISION

As a preliminary point, this case provides a helpful reminder that a fork is a fork even if the manufacturer insists that it is a spade - which is a crude paraphrasing of part of Lord Templeman's famous judgment in the 1985 case of *Street v Mountford*.

Street v Mountford was a case about a Mr Street who granted Mrs Mountford a right to occupy two rooms in his building. Mr Street thought that if he referred to the right to occupy in the document as a "licence" - as opposed to a "tenancy" - and to the sum that Mrs Mountford owed as a "licence fee" - as opposed to "rent" - this would prevent the document from being considered in law to be a "tenancy" and he would therefore not be required to comply with legislation that may have reduced the level of "rent" he would have been able to charge. Lord Templeman's comments shooting down Mr Street's attempt were, *"The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."* In other words, substance prevails over form - even where a right to occupy is referred to as a licence, if it looks like a tenancy, smells like a tenancy and acts like a tenancy, it is a tenancy.

Fast forward 32 years to April this year and a similar principle was at issue in *Le Cuona v Big Apple Marketing Limited*. The issue was whether or not a right to park a car was, on the specific facts of the case, an easement or a lease. Had the right been construed to be a lease, the right would have been void as the deed had not been registered at the Land Registry. The deed was entitled "lease of parking rights", it referred to the landowners as "Landlord" and "Tenant" and it included various other standard lease provisions (such as a service charge and a provision for quiet enjoyment). Nevertheless, the court decided that the right was an easement - not a lease.

The court said that the decisive factors were (i) that the right-holders did not have "exclusive possession" (one of the essential characteristics of a lease stated by Lord Templeman in the *Street v Mountford* case referred to above) and (ii) that the owner of the car parking spaces was still able to make some use of the spaces. The main reasons that the court decided in this way were that the owner of the car parking spaces was entitled to walk and drive a car across the spaces when they were not in use for parking and that the deed referred to leasing "parking rights" rather than leasing "parking spaces".

The "substance over form" approach had prevailed.

REGENCY VILLAS TITLE LIMITED V DIAMOND RESORTS (EUROPE) LIMITED [2017] EWCA CIV 238

If a landowner is able to establish that it has an easement, that easement can normally be passed on to future purchasers. This can obviously have a significantly positive impact on the value of the landowner's land (and often a negative impact on the value of the servient land) so it is unsurprising that situations arise where one party argues that it has an easement over a piece of neighbouring land and the owner of that neighbouring land argues fervently against it.

About a week before the *Le Couna v Big Apple Marketing* case, the Court of Appeal was asked to rule on whether certain rights could be considered easements. Rights of way, rights to enter on to neighbouring land to carry out repairs and rights to park cars are three easements with which most people involved in property are familiar. But what about rights to use tennis courts, squash courts, a golf course, a putting green, a croquet lawn, a gym, a billiard room, a sauna or a swimming pool? Can these rights take effect as easements and pass to successors?

In the *Regency Villas v Diamond Resorts* case, a landowner had transferred part of a plot of land to a timeshare developer and had granted the developer a series of rights including those in the list set out above. Both parcels of this land had subsequently been transferred and the question was whether those rights were easements and continued to exist or had merely been personal rights to use the facilities and so had not passed on to the successors.

The Court of Appeal held that rights over recreational facilities could be and were easements. Therefore, the rights to use the tennis courts, squash courts, putting green, croquet lawn, golf course and swimming pool still subsisted. However, the rights to use the gym, billiard room and sauna were simply personal rights granted to the original owner to use chattels and services and so were not exercisable by the current owner of the neighbouring land.

IMPLICATIONS

It is important to tread carefully when granting rights to, or obtaining rights over, neighbouring land. Landowners should be well-advised in order: (i) to understand the extent to which they may be encumbering their land when granting neighbours certain rights and (ii) to ensure that any rights they receive are of the type and permanence for which they agreed to pay. The same principles apply to purchasers of land who should be well-advised as to the existence (or perhaps the lack) of rights over neighbouring land that they may need in order to use the land for its desired purpose.

The next article will explain two cases that provide helpful guidance on obtaining and preventing the acquisition of an easement by the continued exercise of a right for twenty consecutive years.

KEY CONTACTS

STEVEN D. COX
OF COUNSEL

LONDON
+44.20.7360.8213
STEVEN.COX@KLGATES.COM

